

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

State Report Citation of Cases in the PACIFIC REPORTER, VOL. 190.

The left-hand column shows the page of this volume on which a case begins, and opposite at the right is shown ere same case is to be found in the State Report.

Illustration: The case of *Ruby* v. *Baker*, is in Pac. Rep., vol. 190, p. 6. This table shows that the same case reported in "107 Kan. 186."

Repr. Page	State Report
.....106	Kan. 762
.....106	Kan. 855
.....107	Kan. 186
.....106	Kan. 717
.....106	Kan. 775
.....106	Kan. 808
.....182	Cal. 752
.....182	Cal. 728
.....182	Cal. 709
.....182	Cal. 369
.....182	Cal. 748
.....182	Cal. 740
....46	Cal. App. 792
....47	Cal. App. 44
....47	Cal. App. 29
....47	Cal. App. 793
....47	Cal. App. 38
....47	Cal. App. 86
.....56	Utah, 218
.....33	Idaho, 103
.....33	Idaho, 56
.....44	Nev. 94
.....21	Ariz. 465
.....21	Ariz. 460
.....21	Ariz. 490
.....21	Ariz. 497
.....21	Ariz. 470
.....21	Ariz. 480
.....78	Okl. 216
.....78	Okl. 238
.....57	Mont. 563
.....58	Mont. 13
.....57	Mont. 591
.....58	Mont. 64
.....58	Mont. 26
.....58	Mont. 1
.....58	Mont. 50
.....58	Mont. 60
.....58	Mont. 44
.....58	Mont. 54
.....96	Or. 357
.....96	Or. 408
.....96	Or. 390
.....96	Or. 623
.....182	Cal. 781
.....183	Cal. 11
.....183	Cal. 29
.....182	Cal. 777
.....182	Cal. 771
.....182	Cal. 778
.....183	Cal. 1
.....182	Cal. 765
....46	Cal. App. 649
....46	Cal. App. 678
....47	Cal. App. 63
....46	Cal. App. 665
....47	Cal. App. 131
....47	Cal. App. 103
....47	Cal. App. 90
....47	Cal. App. 112
....47	Cal. App. 128
....47	Cal. App. 124
....46	Cal. App. 661
....47	Cal. App. 118
....47	Cal. App. 59
....47	Cal. App. 107
....47	Cal. App. 139
....47	Cal. App. 72
....47	Cal. App. 54
....47	Cal. App. 95
....47	Cal. App. 79
....47	Cal. App. 66
.....111	Wash. 232
.....111	Wash. 224
.....111	Wash. 259
.....111	Wash. 213
.....111	Wash. 205
.....111	Wash. 218
.....111	Wash. 287
.....111	Wash. 227
.....111	Wash. 262
.....33	Idaho, 124
248[1]	33 Idaho, 96
248[2]	33 Idaho, 128
251	33 Idaho, 135
252	33 Idaho, 115
255	33 Idaho, 1
262	33 Idaho, 95
263[1]	78 Okl. 251
263[2]	78 Okl. 250
264	78 Okl. 224
266	78 Okl. 259
268[1]	17 Okl. Cr. 722
268[2]	17 Okl. Cr. 513
269	17 Okl. Cr. 720
270[1]	17 Okl. Cr. 722
270[2]	17 Okl. Cr. 511
271[1]	17 Okl. Cr. 515
271[2]	17 Okl. Cr. 495
274	17 Okl. Cr. 680
275	17 Okl. Cr. 723
276	17 Okl. Cr. 503
278	17 Okl. Cr. 517
280	17 Okl. Cr. 521
281	17 Okl. Cr. 443
284	44 Nev. 102
287	58 Mont. 110
288	58 Mont. 77
291	58 Mont. 102
294	58 Mont. 87
295	58 Mont. 90
299	97 Or. 125
301	96 Or. 413
304*	Or.
306	98 Or. 481
309	96 Or. 468
311	96 Or. 474
315	96 Or. 486
319	96 Or. 499
321	111 Wash. 281
323	111 Wash. 276
324	111 Wash. 241
329	111 Wash. 254
330[1]	108 Wash. 656
330[2]	109 Wash. 601
331	99 Or. 58
338	96 Or. 529
339	96 Or. 503
340	97 Or. 129
342	98 Or. 556
346	96 Or. 538
349	100 Or. 731
351	56 Utah, 136
352	44 Nev. 98
353[1]	26 N. M. 170
353[2]	26 N. M. 171
354	26 N. M. 174
355	33 Idaho, 101
356[1]	33 Idaho, 99
356[2]	33 Idaho, 86
359	186 Cal. 39
362	183 Cal. 51
363	183 Cal. 49
364	183 Cal. 61
366	183 Cal. 65
368	47 Cal. App. 142
370	47 Cal. App. 162
372	47 Cal. App. 166
373	47 Cal. App. 190
374	47 Cal. App. 150
377	47 Cal. App. 147
378	47 Cal. App. 184
381	47 Cal. App. 135
383	47 Cal. App. 168
385	78 Okl. 204
387	78 Okl. 206
388	78 Okl. 254
391	78 Okl. 208
393	78 Okl. 235
396	78 Okl. 268
399	79 Okl. 82
402	80 Okl. 115
404	78 Okl. 221
407	78 Okl. 256
409	78 Okl. 251
412	78 Okl. 261
416	78 Okl. 227
420	17 Okl. Cr. 728
421[1]	17 Okl. Cr. 734
421[2]	17 Okl. Cr. 733
422	21 Ariz. 501
425[1]	68 Colo. 420
425[2]	68 Colo. 457
427	68 Colo. 322
428	68 Colo. 544
429	68 Colo. 316
430[1]	107 Kan. 187
430[2]	107 Kan. 6
432	107 Kan. 107
433	183 Cal. 71
441	183 Cal. 47
442	183 Cal. 53
445	183 Cal. 99
451	183 Cal. 113
455	183 Cal. 91
458	47 Cal. App. 173
460	47 Cal. App. 176
464[1]	47 Cal. App. 319
464[2]	47 Cal. App. 208
466	47 Cal. App. 205
467	47 Cal. App. 231
468	47 Cal. App. 228
469	47 Cal. App. 235
472	47 Cal. App. 270
473	47 Cal. App. 224
475	47 Cal. App. 255
476	47 Cal. App. 312
478	47 Cal. App. 242
480	47 Cal. App. 380
481	47 Cal. App. 316
482	47 Cal. App. 232
483	47 Cal. App. 362
486	47 Cal. App. 346
489	47 Cal. App. 211
491	47 Cal. App. 321
493	47 Cal. App. 247
496	47 Cal. App. 355
499	47 Cal. App. 258
500	47 Cal. App. 216
503	47 Cal. App. 47
506	68 Colo. 395
508	68 Colo. 318
510	68 Colo. 323
513	68 Colo. 487
525	69 Colo. 430
526[1]	68 Colo. 542
526[2]	68 Colo. 527
528	68 Colo. 432
530	68 Colo. 480
532	68 Colo. 564
533	68 Colo. 461
536	68 Colo. 524
538	68 Colo. 484
539	68 Colo. 475
541	26 N. M. 196
544	56 Utah, 252
552	78 Okl. 302
555	78 Okl. 297
558	78 Okl. 271
564	21 Ariz. 509
568	21 Ariz. 523
571	21 Ariz. 542
573	21 Ariz. 532
577	96 Or. 554
578	96 Or. 549
580	97 Or. 427
584	96 Or. 579
588	107 Kan. 90
592	107 Kan. 109
594	107 Kan. 144
596	107 Kan. 104
597	107 Kan. 143
598	107 Kan. 101
599	107 Kan. 136
601	107 Kan. 153
606	107 Kan. 86
608	107 Kan. 167
609	107 Kan. 164
610	107 Kan. 98
611	107 Kan. 9
613	107 Kan. 148
616	107 Kan. 63
618	107 Kan. 55
619	107 Kan. 71
620	107 Kan. 57
623	107 Kan. 122
625	183 Cal. 121
626	183 Cal. 126
628	183 Cal. 131
630	183 Cal. 137
634	183 Cal. 124
635	183 Cal. 149
636	47 Cal. App. 374
638	47 Cal. App. 267
639	47 Cal. App. 156
641	47 Cal. App. 383
643[1]	47 Cal. App. 326
643[2]	47 Cal. App. 284
645	47 Cal. App. 309
646	47 Cal. App. 377
647	47 Cal. App. 368
649	47 Cal. App. 260
650	47 Cal. App. 372
651[1]	47 Cal. App. 353
651[2]	47 Cal. App. 334
656	46 Cal. App. 764
662	47 Cal. App. 327
665	27 Wyo. 29
666	68 Colo. 428
667	68 Colo. 521
668	79 Okl. 1
670	78 Okl. 319
672	78 Okl. 313
678	78 Okl. 305
679	78 Okl. 300
681	78 Okl. 277
701	17 Okl. Cr. 524
706	17 Okl. Cr. 729
707	17 Okl. Cr. 542
710	17 Okl. Cr. 728
711	17 Okl. Cr. 550
713	33 Idaho, 138
714	33 Idaho, 77
715	96 Or. 629
716	96 Or. 630
717	96 Or. 635
720	96 Or. 645
722	97 Or. 600
725	97 Or. 572
726[1]	97 Or. 610
726[2]	96 Or. 610
726[3]	26 N. M. 231
728	26 N. M. 216
730	26 N. M. 223
732	26 N. M. 208
733	26 N. M. 210
736	26 N. M. 221
737	107 Kan. 14
739	107 Kan. 25
741	107 Kan. 113
742	107 Kan. 79
745	107 Kan. 41
747	107 Kan. 169
754	107 Kan. 140
755	107 Kan. 126
757	107 Kan. 17
761	107 Kan. 188
763	107 Kan. 75
765	107 Kan. 115
768	107 Kan. 31
773	107 Kan. 130
775	56 Utah, 287
776	56 Utah, 289
777	56 Utah, 272
778	56 Utah, 294
779	56 Utah, 282
781	56 Utah, 276
783	56 Utah, 291
785	107 Kan. 1
787	107 Kan. 68
788	107 Kan. 45
793	183 Cal. 171
795	183 Cal. 145
797	183 Cal. 186
799	183 Cal. 182
801	183 Cal. 199
804	183 Cal. 177
806	183 Cal. 167
808	183 Cal. 206
815	47 Cal. App. 290
819	47 Cal. App. 445
821	47 Cal. App. 490
822	47 Cal. App. 435
824	47 Cal. App. 395
825	47 Cal. App. 404
827[1]	47 Cal. App. 438
827[2]	47 Cal. App. 457
829	47 Cal. App. 397
830	47 Cal. App. 448
831	47 Cal. App. 450
832	47 Cal. App. 416
834	47 Cal. App. 390
836	47 Cal. App. 549
839	47 Cal. App. 426
843	47 Cal. App. 454
844	47 Cal. App. 408
846	47 Cal. App. 440
848	47 Cal. App. 494
849	47 Cal. App. 387
850	47 Cal. App. 421
852	47 Cal. App. 465
854	47 Cal. App. 515
855	47 Cal. App. 413
857	79 Okl. 36
859	79 Okl. 6
861	79 Okl. 34
863[1]	79 Okl. 35
863[2]	79 Okl. 36
864	79 Okl. 3
866	78 Okl. 232
869	78 Okl. 265
872	78 Okl. 307
878	79 Okl. 8
887	17 Okl. Cr. 561
892	17 Okl. Cr. 452
894	17 Okl. Cr. 434
897	17 Okl. Cr. 558
898	17 Okl. Cr. 615
899	44 Nev. 208
900	111 Wash. 302
901	111 Wash. 278
902	111 Wash. 222
904	111 Wash. 291
906	111 Wash. 240
908	111 Wash. 273
909	111 Wash. 304
914	44 Nev. 113
916	44 Nev. 128
919	33 Idaho, 46
922[1]	33 Idaho, 133
922[2]	33 Idaho, 140
924[1]	58 Mont. 229
924[2]	58 Mont. 203
927	58 Mont. 153
930	56 Utah, 346
932	56 Utah, 304
934	56 Utah, 319
937	56 Utah, 332
941	56 Utah, 310
943	56 Utah, 394
946	56 Utah, 327
962	56 Utah, 315
957	96 Or. 649
962	97 Or. 19
969[1]	100 Or. 387
969[2]	97 Or. 238
971	97 Or. 441
977	44 Nev. 140
979	44 Nev. 118
982[1]	58 Mont. 114

*Not reported in State Reports.

(CONTINUED OPP. PAGE.)

Digitized by Google

Repr. Page	State Report
[illegible].....	58 Mont. 177
[illegible].....	58 Mont. 193
[illegible].....	58 Mont. 231
[illegible].....	58 Mont. 188
[illegible].....	58 Mont. 214
[illegible].....	58 Mont. 116
[illegible].....	58 Mont. 121
[illegible].....	27 Wyo. 31
[illegible].....	27 Wyo. 44
[illegible].....	111 Wash. 354
[illegible].....	111 Wash. 367
[illegible].....	111 Wash. 351
[illegible].....	111 Wash. 313
10.....	111 Wash. 329
11.....	111 Wash. 348
12.....	111 Wash. 294
15.....	111 Wash. 361
17.....	111 Wash. 345
19.....	111 Wash. 696
1018[2].....	111 Wash. 696
1018[3].....	26 N. M. 203
1020.....	26 N. M. 181
1026.....	26 N. M. 176
1028.....	33 Idaho, 110
1029.....	33 Idaho, 165
1030.....	183 Cal. 223
1033....47	Cal. App. 538
1034....47	Cal. App. 517
1036....47	Cal. App. 568
1037....47	Cal. App. 594
1038....47	Cal. App. 496
1041....47	Cal. App. 485
1043[1]...47	Cal. App. 541
1043[2]...47	Cal. App. 620
1045[1]...47	Cal. App. 749
1045[2]...47	Cal. App. 558
1046....47	Cal. App. 503
1048....47	Cal. App. 676
1049....47	Cal. App. 490
1050....47	Cal. App. 474
1052....47	Cal. App. 543
1055....47	Cal. App. 252
1056....47	Cal. App. 713
1058....47	Cal. App. 480
1060....47	Cal. App. 728
1061.....97	Or. 497
1064....47	Cal. App. 508
1065....47	Cal. App. 461
1067....47	Cal. App. 704
1069....47	Cal. App. 654
1072....47	Cal. App. 710
1073....47	Cal. App. 700
1075....47	Cal. App. 512
1076....47	Cal. App. 470
1078....47	Cal. App. 521
1083.....79	Okl. 103
1086.....79	Okl. 23
1087.....79	Okl. 29
1088.....79	Okl. 30
1090.....79	Okl. 32
1091.....17	Okl. Cr. 576
1092[1].....17	Okl. Cr. 578
1092[2].....107	Kan. 325
1094.....107	Kan. 332
1097†.....99	Or. 191
1103.....97	Or. 232
1105.....96	Or. 667
1109.....96	Or. 679
1113.....56	Utah, 525
1116.....68	Colo. 560
1117[1].....68	Colo. 546
1117[2].....56	Mont. 615
1117[3].....56	Mont. 620
1117[4].....56	Mont. 621
1117[5].....56	Mont. 619
1117[6].....56	Mont. 616
1117[7].....56	Mont. 618
1117[8].....56	Mont. 613
1117[9].....56	Mont. 615
1117[10].....56	Mont. 621
1118[1].....56	Mont. 613
1118[2].....56	Mont. 617
1118[3].....56	Mont. 618
1118[4].....56	Mont. 616
1118[5].....56	Mont. 619
1118[6].....56	Mont. 620
1118[7].....56	Mont. 614
1118[8].....56	Mont. 617
1118[9].....56	Mont. 614
1118[10]....17	Okl. Cr. 721
1119.....17	Okl. Cr. 721

†Majority opinion set aside and dissenting opinion adopted as opinion of the majority on rehea ing. See 195 P. 358.

[End of Table.]

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google



This is a Key-Numbered Volume

Each syllabus paragraph in this volume is marked with the topic and Key-Number section ⇐ under which the point will eventually appear in the American Digest System.

The lawyer is thus led from that syllabus to the exact place in the Digests where we, as digest makers, have placed the other cases on the same point---*This is the Key-Number Annotation.*

Digitized by Google

NATIONAL REPORTER SYSTEM — STATE SERIES

THE PACIFIC REPORTER

VOLUME 190

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA

AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS HAVE BEEN DENIED

JULY 5 — AUGUST 30, 1920

ST. PAUL
WEST PUBLISHING CO.
1920

Digitized by Google

COPYRIGHT, 1920
BY
WEST PUBLISHING COMPANY

(190 PAC.)

271720

Digitized by Google

JUDGES

OF THE COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

ARIZONA

Supreme Court

CHIEF JUSTICE
D. L. CUNNINGHAM

JUDGES
HENRY D. ROSS
ALBERT C. BAKER

CALIFORNIA

Supreme Court

CHIEF JUSTICE
FRANK M. ANGELLOTTI

ASSOCIATE JUSTICES
LUCIEN SHAW
HENRY A. MELVIN [1]
WILLIAM P. LAWLOR
CURTIS D. WILBUR
THOMAS J. LENNON
WARREN OLNEY, JR.
WILLIAM A. SLOANE [2]

District Courts of Appeal

First District

Division 1

PRESIDING JUSTICE
WILLIAM H. WASTE

FRANK H. KERRIGAN
JOHN E. RICHARDS

Division 2

PRESIDING JUSTICE
WILLIAM H. LANGDON

FRANK S. BRITTAIN
JOHN T. NOURSE

Second District

Division 1

PRESIDING JUSTICE
NATHANIEL P. CONREY

VICTOR E. SHAW
WILLIAM P. JAMES

Division 2

PRESIDING JUSTICE
FRANK G. FINLAYSON

WILLIAM A. SLOANE [3]
WILLIAM H. THOMAS

Third District

PRESIDING JUSTICE
NORTON P. CHIPMAN

ELIJAH C. HART
ALBERT G. BURNETT

COLORADO

Supreme Court

CHIEF JUSTICE
JAMES E. GARRIGUES

ASSOCIATE JUSTICES
TULLY SCOTT
JAMES H. TELLER
MORTON S. BAILEY
GEORGE W. ALLEN
HASLETT P. BURKE
JOHN H. DENISON

IDAHO

Supreme Court

CHIEF JUSTICE
WILLIAM M. MORGAN

JUSTICES
JOHN C. RICE
ALFRED BUDGE

KANSAS

Supreme Court

CHIEF JUSTICE
WILLIAM A. JOHNSTON

JUSTICES
ROUSSEAU A. BURCH
HENRY F. MASON
SILAS PORTER
JUDSON S. WEST
JOHN MARSHALL
JOHN S. DAWSON

MONTANA

Supreme Court

CHIEF JUSTICE
THEO. BRANTLY

ASSOCIATE JUSTICES
WILLIAM L. HOLLOWAY
CHARLES H. COOPER
JOHN HURLY
JOHN A. MATTHEWS

NEVADA

Supreme Court

CHIEF JUSTICE
BEN W. COLEMAN

ASSOCIATE JUSTICES
JOHN A. SANDERS
EDWARD A. DUCKER

NEW MEXICO

Supreme Court

CHIEF JUSTICE
FRANK W. PARKER

JUSTICES
CLARENCE J. ROBERTS
HERBERT F. RAYNOLDS

OKLAHOMA

Supreme Court

CHIEF JUSTICE
THOMAS H. OWEN [3]
ROBERT M. RAINEY [4]

VICE CHIEF JUSTICE
ROBERT M. RAINEY [4]
JOHN B. HARRISON [5]

ASSOCIATE JUSTICES
MATTHEW J. KANE
JOHN H. PITCHFORD
JOHN T. JOHNSON
NEAL E. McNEILL
JOHN B. HARRISON [5]
ROBERT W. HIGGINS
FRANK M. BAILEY
GEORGE S. RAMSEY [6]

OKLAHOMA (Continued)

Criminal Court of Appeals

PRESIDING JUDGE
THOMAS H. DOYLE

ASSOCIATE JUDGES
JAS. R. ARMSTRONG
SMITH C. MATSON

OREGON

Supreme Court

CHIEF JUSTICE
THOMAS A. McBRIDE

Department 1

PRESIDING JUDGE
HENRY L. BENSON

ASSOCIATE JUDGES
LAWRENCE T. HARRIS
GEORGE H. BURNETT

Department 2

PRESIDING JUDGE
HENRY J. BEAN

ASSOCIATE JUDGES
CHARLES A. JOHNS
ALFRED S. BENNETT

UTAH

Supreme Court

CHIEF JUSTICE
ELMER E. CORFMAN

JUSTICES
JOSEPH E. FRICK
ALBERT J. WEBER
VALENTINE GIDEON
SAMUEL R. THURMAN

WASHINGTON

Supreme Court

CHIEF JUSTICE
OSCAR R. HOLCOMB

Department 1

ASSOCIATE JUSTICES
EMMETT N. PARKER
JOHN F. MAIN
KENNETH MACKINTOSH
JOHN R. MITCHELL

Department 2

ASSOCIATE JUSTICES
MARK A. FULLERTON
WALLACE MOUNT
WARREN W. TOLMAN
J. B. BRIDGES

WYOMING

Supreme Court

CHIEF JUSTICE
CYRUS BEARD

ASSOCIATE JUSTICES
CHARLES N. POTTER
CHARLES E. BLYDENBURGH

[1] Died April 24, 1920.
[2] Succeeds Henry A. Melvin.
[3] Resigned May 1, 1920.
[4] Elected Chief Justice May 1, 1920.
[5] Elected Vice Chief Justice May 1, 1920.
[6] Appointed May 1, 1920.

Digitized by Google

Digitized by Google

CASES REPORTED

	Page
Acme Harvesting Mach. Co. v. Benedict (Mont.)	287
Adams, Central Trust Co. v. (Kan.)	755
Adams, Staheli v. (Utah)	781
Ætna Building & Loan Ass'n, Holt v. (Okl.)	872
Alamo Nat. Bank v. Dawson Produce Co. (Okl.)	393
Allaire v. Laurel Canyon Mining Co. (Ariz.)	79
Allen v. Magill (Or.)	726
Amend, Wilsey State Bank v. (Kan.)	739
American Bond & Mortgage Co. v. Lindsay (Cal. App.)	192
Ames v. Duff & Youk (Wash.)	230
Anderson, Bedford v. (Utah)	775
Anderson, Hawley v. (Or.)	1097
Anderson v. Piper (Kan.)	597
Anderson-Cottonwood Irr. Dist., Brown v. (Cal.)	797
Apex Mining Co., Dugan v. (Mont.)	1117
Apostolos, Darius v. (Colo.)	510
Apple v. Smith (Kan.)	8
A. R. G. Bus Co., Williams v. (Cal. App.)	1036
Arizona Hercules Copper Co. v. Protestant Episcopal Church Corporation of Arizona (Ariz.)	85
Armstrong, Dale v. (Kan.)	598
Armstrong v. State (Okl. Cr. App.)	898
Arnold v. La Belle Oil Co. (Cal. App.)	815
Astoria Const Co., School Dist. No. 1 of Clatsop County v. (Or.)	969
Atchison, T. & S. F. R. Co., Waymire v. (Kan.)	588
Atherton v. Topeka R. Co. (Kan.)	430
Aufder Heide v. Kiskaddon (Okl.)	859
Baca v. Padilla (N. M.)	730
Baker, Hogue-Kellogg Co. v. (Cal. App.)	493
Baker, Ruby v. (Kan.)	6
Balboa Land & Water Co., Furlow Pressed Brick Co. v. (Cal. App.)	1061
Baldwin, Wright v. (Cal. App.)	377
Balliet, Herring-Hall-Marvin Safe Co. v. (Nev.)	76
Bancroft v. Woodward (Cal.)	445
Bank of Bakersfield, Conner v., two cases (Cal.)	801
Bank of Pleasanton, Chamberlin Metal Weatherstrip Co. v. (Kan.)	742
Bankers' Trust Co. v. Riter (Utah)	1113
Bar Due v. Cox (Cal. App.)	1056
Barian, Franklin v. (Colo.)	1116
Barlin, De Bairos v. (Cal. App.)	188
Barlin v. E. B. & A. L. Stone Co. (Cal. App.)	188
Barr, Hutchison v. (Cal.)	799
Barr Lumber Co. v. Joy Const. Co. (Cal. App.)	844
Bartsch, Beyerle v. (Wash.)	239
Barzee, Herrick v. (Or.)	141
Bassett Lumber Co., Stolaroff v. (Ariz.)	81
Bayer's Estate, In re (Wash.)	323
Bayles, Ex parte (Cal. App.)	1034
Bayless v. Reed (Cal. App.)	211
Bean, In re (Okl. Cr. App.)	1091
Bean, Citizens' Nat. Bank v. (N. M.)	1018
Beard, Oakdale Irr. Dist. v. (Cal. App.)	224
Bedford v. Anderson (Utah)	775
Beebe, Treadwell v. (Kan.)	768
Belden, Seaboard Nat. Bank v. (Cal. App.)	1045
Bell, Laramie Grocery Co. v. (Wyo.)	665
Benedict, Acme Harvesting Mach. Co. v. (Mont.)	287
Benish v. Jones (Colo.)	538
Bennett, Citizens' Sav. Bank v. (Cal.)	44
Bennett v. Dickinson (Kan.)	757
Bennett v. First Nat. Bank (Cal. App.)	831
Beyerle v. Bartsch (Wash.)	239
Bhumgara v. Gazvini (Cal. App.)	854
Bibee, State v. (Mont.)	1118
Bickerstaff, People v. (Cal. App.)	656
Big Four Land Co. v. Daracunas (Wash.)	229
Bilboa, State v. (Idaho)	248
Blanchard, Wallace v. (N. M.)	1020
Bledsoe, Peters v. (Okl.)	407
Bledsoe v. Stuckey (Cal. App.)	217
Bliss, People v. (Cal. App.)	1046
Bliss-Town-Site Co. v. Morris-Roberts Co. (Idaho)	1028
Board of Com'rs of Guadalupe County, State v. (N. M.)	353
Board of Com'rs of McPherson County, State v. (Kan.)	594
Board of Com'rs of Ouray County v. Board of Com'rs of San Juan County (Colo.)	666
Board of Com'rs of San Juan County, Board of Com'rs of Ouray County v. (Colo.)	666
Board of Directors of Medford Irr. Dist. v. Hill (Or.)	957
Board of Police Com'rs Sheehan v. (Cal. App.)	51
Board of Police Com'rs, Sheehan v. (Cal. App.)	55
Boatman v. Miles (Wyo.)	1002
Bohle, Schwarz v. (Cal. App.)	819
Boland v. Smith (Cal. App.)	825
Bollen v. Woodhams (Colo.)	427
Boost v. Capen (Wash.)	240
Borgmeyer v. Solomon (Cal. App.)	1043
Bortenstein, Los Angeles Trust & Savings Bank v. (Cal. App.)	850
Bostwick v. Hosier (Or.)	299
Boucher, Sterling v. (Okl.)	1090
Boulin, Lind v. (Or.)	1103
Bower v. Pound (Colo.)	425
Boyd, Simmers v. (N. M.)	732
Boyle, State v. (Nev.)	914
Brackville v. Southwestern Bell Tel. Co. (Kan.)	773
Bradley v. Smith (Okl.)	1087
Bradner Co., Di Luck v. (Wash.)	904
Brewster, Flack v. (Kan.)	616
Broadwater, Pepin v., two cases (Mont.)	1117
Brookens v. Brookens (Kan.)	754
Brotherhood of American Yeomen, Teed v. (Wash.)	1005
Brown v. Anderson-Cottonwood Irr. Dist. (Cal.)	797
Brown v. Hallett (Colo.)	429
Brown v. McCloud (Or.)	578
Brown v. Portland (Or.)	722
Brown v. Silverton (Or.)	971
Brown, State v. (Wash.)	1018
Brush v. Southern Pac. Co. (Cal. App.)	216
Bryan, Edge v. (Cal. App.)	476
Bryan, Okmulgee County Business Men's Ass'n v. (Okl.)	1086
Burkhard, Michels v. (Cal. App.)	370
Burrows, Tukwila School Dist. v. (Wash.)	1010
Burt, Harris v. (Cal. App.)	1058
Burt v. Stuart (Idaho)	713

Digitized by Google

	Page
Burton, Johnson v. (Mont.)	1117
Buschman v. Turlock Irr. Dist. (Cal. App.)	491
Butts, Sells v. (Okl.)	863
California Growers & Shippers, Jones v. (Cal.)	172
California Nat. Supply Co. v. Flack (Cal.)	634
Capen, Boost v. (Wash.)	240
Carpenter, Madsen v. (Colo.)	528
Carter, Champlin v. (Okl.)	679
Casaus, De Graftenreid v. (N. M.)	728
Casey v. Williams (Wash.)	1011
Cassity, Crawford v. (Okl.)	412
Central Trust Co. v. Adams (Kan.)	755
Chamberlin Metal Weatherstrip Co. v. Bank of Pleasanton (Kan.)	742
Champlin v. Carter (Okl.)	679
Chance v. Weston (Or.)	155
Chas. K. Spaulding Logging Co., Logan v. (Or.)	349
Chase, Kinkel v. (Kan.)	618
Chester State Bank v. Great Northern R. Co. (Mont.)	136
Chezik, Greenlees v. (Colo.)	C67
Chicago, B. & Q. R. Co. v. Public Utilities Commission (Colo.)	539
Chicago, B. & Q. R. Co., Wallace v. (Wyo.)	999
Chicago, M & St. P. R. Co., Kinzell v. (Idaho)	255
Chicago, M. & St. P. R. Co. of Montana, R. M. Cobban Realty Co. v. (Mont.)	988
Chicago, R. I. & P. R. Co. v. Gist (Okl.)	878
Chipman v. Swasey (Cal.)	17
Chittenden, State v. (Wash.)	232
Choctaw Lumber Co. v. Waldock (Okl.)	866
Chortney v. Curry (Okl.)	387
Church v. Zywert (Mont.)	291
Citizens' Lumber Co., Roberson v. (N. M.)	353
Citizens' Nat. Bank v. Bean (N. M.)	1018
Citizens' Sav. Bank v. Bennett (Cal.)	44
City and County of Denver, Interstate Business Exch. Corporation v. (Colo.)	508
City of Butte, State v. (Mont.)	991
City of Pendleton, Hartman v. (Or.)	339
City of Portland, Brown v. (Or.)	722
City of Portland, Cole v. (Or.)	720
City of Portland, Cook v. (Or.)	726
City of Portland, Hochfeld v. (Or.)	725
City of San Bernardino, People v. (Cal. App.)	482
City of Seattle, State v. (Wash.)	906
City of Silverton, Brown v. (Or.)	971
Clark Lloyd Lumber Co. v. Puget Sound & C. R. Co. (Wash.)	226
Clausen, State v. (Wash.)	324
Clausen, State v. (Wash.)	329
Clay County Co-op. Tel. Ass'n v. Southwestern Bell Tel. Co. (Kan.)	747
Clemons, Robinson v. (Cal. App.)	203
Clifford v. Lake (Idaho)	714
Cline, Tennant v. (Cal. App.)	1065
Cobban Realty Co. v. Chicago, M. & St. P. R. Co. of Montana (Mont.)	988
Coffman v. Hall (Kan.)	761
Cogburn, Quapaw Mining Co. v. (Okl.)	416
Coghlan, Walsh v. (Idaho)	252
Cohn v. Thompson (Cal. App.)	381
Cole v. Portland (Or.)	720
Collins v. Industrial Sav. Soc. (Okl.)	670
Conley, In re (Okl. Cr. App.)	421
Conley, Miller v. (Or.)	301
Conner v. Bank of Bakersfield, two cases (Cal.)	801
Conrad v. La Plante (Cal. App.)	1073
Consolidated Wagon & Machine Co. v. Wright (Utah)	937
Continental Casualty Co. v. Industrial Accident Commission (Cal. App.)	849
Continental Oil Co., Perini v. (Colo.)	532
Conwell, Inspiration Consol. Copper Co. v. (Ariz.)	88
Cook v. Portland (Or.)	726
Corey v. Matot (Cal. App.)	378
Costen, Gerard v. (Colo.)	526
Cota, People v. (Cal. App.)	473
County Court of City and County of Denver, People v. (Colo.)	425
Cowell Lime & Cement Co. v. J. I. Metrovich Bldg. Co. (Cal. App.)	208
Cox, Bar Due v. (Cal. App.)	1056
Crabtree v. State (Okl. Cr. App.)	271
Craig v. Gomes (Cal. App.)	1060
Craig & Osborn, Rock v. (Okl.)	388
Crawford v. Cassity (Okl.)	412
Crawford, State v. (Ariz.)	422
Credit Guide Co. v. Fidelity Storage & Moving Co. (Cal. App.)	827
Crisp v. State (Okl. Cr. App.)	1118
Crosson, State v. (Idaho)	922
Cruickshank, In re (Cal. App.)	1038
Cuddy v. Sturtevant (Wash.)	909
Cummins, Union Sav. Ass'n v. (Okl.)	869
Currant v. Lenger (Kan.)	432
Curry, Chortney v. (Okl.)	387
Cutting Packing Co., Downing v. (Cal.)	455
Dale v. Armstrong (Kan.)	598
Dana v. Kansas Natural Gas Co. (Kan.)	610
Daniel v. Moncure (Mont.)	983
Daracunas, Big Four Land Co. v. (Wash.)	229
Darius v. Apostolos (Colo.)	510
Darter v. Schuyler (Cal. App.)	827
Davidson, Pioneer Mining & Ditch Co. v. (Wash.)	242
Davie, Rumetsch v. (Cal. App.)	1075
Dawson Produce Co., Alamo Nat. Bank v. (Okl.)	393
Day, Manning v. (Utah)	779
De Bairos v. Barlin (Cal. App.)	188
Decker v. Decker (Mont.)	1117
De Graftenreid v. Casaus (N. M.)	728
Delacour, Hincksman v. (Cal. App.)	832
Delap v. Lawson (Idaho)	262
De Martini, Ex parte (Cal. App.)	468
De Mendoza, Smillie v. (Colo.)	533
Dey v. Laurel Canon Mining Co. (Ariz.)	83
Dibble v. San Joaquin Light & Power Corporation (Cal. App.)	198
Dickinson, Bennett v. (Kan.)	757
Dickson, McLean v. (Mont.)	924
Diedtman, State v. (Mont.)	117
Di Luck v. Bradner Co. (Wash.)	904
District Court, State v., six cases (Mont.)	1118
District Court of Fourth Judicial Dist., Ravalli County, State v. (Mont.)	133
District Court of Musselshell County, State v. (Mont.)	982
District Court of Second Judicial Dist. in and for Silver Bow County, State v. (Mont.)	295
Dixon v. Second Judicial Dist. Court of Nevada in and for Washoe County (Nev.)	352
Dolan v. Superior Court of California in and for City and County of San Francisco (Cal. App.)	469
Downing v. Cutting Packing Co. (Cal.)	455
Drew v. Superior Court of California in and for Mendocino County (Cal. App.)	374
Duff & Youk, Ames v. (Wash.)	230
Dugan v. Apex Mining Co. (Mont.)	1117
Duncan, Swan v. (Okl.)	678
Dunlavy v. Moffett (Kan.)	741
Dunn, State v. (Mont.)	121
Dunning Bros. Co. v. Johnson (Cal. App.)	829
Dunsmore Canyon Water Co., Woodstone Marble & Tile Co. v. (Cal. App.)	213
Dunton v. Tanigoshi (Cal. App.)	467
Durham v. Wilson (Colo.)	525
Eaton, Straus v. (Cal. App.)	1033
E. B. & A. L. Stone Co., Barlin v. (Cal. App.)	188
Edge v. Bryan (Cal. App.)	476
Edwards v. Guaranty Trust & Savings Bank (Cal. App.)	57
E. E. Overholtzer Sons' Co., Newman v. (Cal.)	175

Digitized by Google

Page

E. H. Stanton Co., Mowbray Pearson Co. v. (Wash.) 330
Eikelberger v. Insurance Co. of North America (Kan.) 611
Elgin Warehouse Co., Horn v. (Or.) 151
Ellison v. Henion (Cal.) 793
Endicott, Johnson & Co. v. Multnomah County (Or.) 1109
Ennis-Brown Co. v. Richvale Land Co. (Cal. App.) 1064
Erickson v. Erickson (Cal. App.) 464
Espinosa v. Gould (Cal. App.) 481
Everidge v. State (Okl. Cr. App.) 701
Ewing v. State (Okl. Cr. App.) 274

Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co. (Cal. App.) 194
Farmers' Union & Milling Co., Humphry v. (Cal. App.) 489
Fehr v. Haworth (Idaho) 248
Fenn, Tulare County v. (Cal. App.) 855
Ferris v. Holiman (Okl.) 409
Fey, Vaughn v. (Cal. App.) 1041
Fick's Estate, In re (Wash.) 1008
Fidelity Storage & Moving Co., Credit Guide Co. v. (Cal. App.) 827
First Nat. Bank Bennett v. (Cal. App.) 831
First Nat. Bank v. George (N. M.) 1026
Fishburn, Munson v. (Cal.) 808
Fitch, Smyth v. (Cal. App.) 1049
Fitzmauriee, Oakland St. Imp. Bond Co. v. (Cal. App.) 499
Flack v. Brewster (Kan.) 616
Flack, California Nat. Supply Co. v. (Cal.) 634
Fontanel, Guaranty Loan Co. v. (Cal.) 177
Fowler v. Park (Okl.) 668
Franklin v. Barian (Colo.) 1116
French v. State (Okl. Cr. App.) 707
Furey, Rabido v. (Idaho) 73
Furlow Pressed Brick Co. v. Balboa Land & Water Co. (Cal. App.) 1061

Gauld Co., Martin v. (Or.) 717
Gaut's Estate, McConnell v. (Cal. App.) 843
Gazvini, Bhumgara v. (Cal. App.) 854
Genardini v. Kline (Ariz.) 568
George, First Nat. Bank v. (N. M.) 1026
George v. Stensland (Cal. App.) 1069
Geo. A. Lowe Co. v. Industrial Commission of Utah (Utah) 934
Georgia Casualty Co., Kansas Free Fair Ass'n v. (Kan.) 592
Gerard v. Costen (Colo.) 526
Gigoux v. Henderson (Kan.) 1092
Gilbert, Appeal of (Cal.) 804
Gilchrist Drilling Co., Tulsa Fuel & Mfg. Co. v. (Okl.) 399
Gillett, Ex parte (Cal. App.) 209
Gillons v. Turner Oil Co. (Cal. App.) 183
Gillons v. Turner Oil Co. (Cal. App.) 185
Gilman, People v. (Cal. App.) 205
Gilmore v. Wingate (Ariz.) 571
Gist, Chicago, R. I. & P. R. Co. v. (Okl.) 878
Goddard, Ex parte (Nev.) 916
Golden v. Mitchell (Kan.) 785
Goldschmidt, Kelley v. (Cal. App.) 55
Gomes, Craig v. (Cal. App.) 1060
Gomez, State v. (Mont.) 982
Gottschalk, Ex parte (Cal. App.) 649
Gould, Espinosa v. (Cal. App.) 481
Grace, Knoff v. (Colo.) 526
Great Northern R. Co., Chester State Bank v. (Mont.) 136
Great Northern Ry., Skagit Mill Co. v. (Wash.) 901
Greenlees v. Chezik (Colo.) 667
Greer-Robbins Co. v. Insurance Co. of State of Pennsylvania (Cal. App.) 187
Grimes, Starr v. (Cal.) 625
Groefsema v. Mountain Home Co-op. Irr. Co., three cases (Idaho) 356
Gross, Slattery v. (Or.) 577
Grover v. Morrison (Cal. App.) 1078
Grunbaum, McKenna v. (Idaho) 919
Guaranty Loan Co. v. Fontanel (Cal.) 177

Page

Guaranty Trust & Savings Bank, Edwards v. (Cal. App.) 57
Gutierrez, People v. (Cal. App.) 200
Guy v. Leech (Cal. App.) 1067

Haggart v. King (Kan.) 763
Hall, Coffman v. (Kan.) 761
Hall, State v. (Idaho) 251
Hall, State v. (Or.) 304
Hall's Estate, In re (Cal.) 364
Hallett, Brown v. (Colo.) 429
Hamilton, Miles v. (Kan.) 430
Hardy, Williamson v. (Cal. App.) 646
Harris v. Burt (Cal. App.) 1058
Harris, Noble v. (Idaho) 922
Harrold, Pratt v. (Cal. App.) 372
Hartman v. Pendleton (Or.) 339
Harvey, Woodburn v. (Kan.) 620
Hatfield v. Jordan (Cal.) 1030
Hatfield, Waters v. (Kan.) 599
Haun, Thornburgh v. (Okl.) 1083
Hawley v. Anderson (Or.) 1097
Hawley, Pioneer Truck Co. v. (Cal. App.) 1037
Haworth, Fehr v. (Idaho) 248
Hay, Johnson v. (Kan.) 613
Heal, Rawlings v. (Wash.) 237
Heath v. Judson Freight Forwarding Co. (Cal. App.) 839
Helfrich, Raisch v. (Cal. App.) 848
Helmer, Willits v. (Cal. App.) 645
Henderson, Gigoux v. (Kan.) 1092
Hendrickson, West Cache Sugar Co. v. (Utah) 946
Henion, Ellison v. (Cal.) 793
Henry Cowell Lime & Cement Co. v. J. I. Metrovich Bldg. Co. (Cal. App.) 208
Herald v. Smith (Utah) 932
Herrick v. Barzee (Or.) 141
Herring-Hall-Marvin Safe Co. v. Balliet (Nev.) 76
Hill, Board of Directors of Medford Irr. Dist. v. (Or.) 957
Hill v. Moore (Cal. App.) 651
Hincksman v. Delacour (Cal. App.) 832
Hine, Simon v. (Okl.) 264
Hines v. Olsen (Okl.) 266
Hochfeld v. Portland (Or.) 725
Hogue-Kellogg Co. v. Baker (Cal. App.) 493
Holbert, San Luis Valley Building & Loan Ass'n v. (Colo.) 428
Holden v. State (Okl. Cr. App.) 1119
Holiman, Ferris v. (Okl.) 409
Holland, Hutchison v. (Cal. App.) 1072
Holt v. Ætna Building & Loan Ass'n (Okl.) 872
Home Lumber Co. v. Hopkins (Kan.) 601
Hopkins, Home Lumber Co. v. (Kan.) 601
Horn v. Elgin Warehouse Co. (Or.) 151
Hosford, In re (Kan.) 765
Hosier, Bostwick v. (Or.) 299
Howard v. Marshall Motor Co. (Kan.) 11
Howard, Silvers v. (Kan.) 1
Hubbard v. Jurian (Cal. App.) 1052
Hueners, McFarland v. (Or.) 584
Huffaker, State v. (Mont.) 1118
Hughes v. Scott (Cal. App.) 643
Humphry v. Farmers' Union & Milling Co. (Cal. App.) 489
Hurst, Roberson v. (Okl.) 402
Hutchison v. Barr (Cal.) 799
Hutchison v. Holland (Cal. App.) 1072
Hynes v. White (Cal. App.) 836

Imperial Valley Auto Co. v. Toney (Cal. App.) 1043
Independent Torpedo Co., McArthur v. (Kan.) 787
Industrial Accident Commission, Continental Casualty Co. v. (Cal. App.) 849
Industrial Accident Commission, Western Indemnity Co. v. (Cal.) 27
Industrial Accident Commission of California, Schilling v. (Cal. App.) 373
Industrial Commission of Utah, Geo. A. Lowe Co. v. (Utah) 934

Digitized by Google

Page

Industrial Commission of Utah, State Road Commission v. (Utah) 544
Industrial Sav. Soc., Collins v. (Okl.) 670
Inglis v. Morton (Wash.) 908
Inspiration Consol. Copper Co. v. Conwell (Ariz.) 88
Insurance Co. of North America, Eikelberger v. (Kan.) 611
Insurance Co. of State of Pennsylvania, Greer-Robbins Co. v. (Cal. App.) 187
Intermountain State Bank, Lisenby v. Idaho 355
Interstate Business Exch. Corporation v. Denver (Colo.) 508

Jackson, Ex parte (Kan.) 608
Jacobsen, South San Francisco Packing & Provision Co. v. (Cal.) 628
James, Ex parte (Cal. App.) 466
James v. State (Okl. Cr. App.) 421
James v. Ward (Or.) 1105
Jamison v. McMillen (N. M.) 726
Janson v. Pacific Diking Co. (Or.) 340
Jarbalo State Bank, Stone v. (Kan.) 1094
J. I. Metrovich Bldg. Co., Henry Cowell Lime & Cement Co. v. (Cal.App.) 208
J. I. Metrovich Bldg. Co., Sunset Lumber Co. v. (Cal. App.) 208
J. I. Metrovich Bldg. Co., Tyler v. (Cal. App.) 208
Johnson, Ex parte (Cal. App.) 852
Johnson v. Burton (Mont.) 1117
Johnson, Dunning Bros. Co. v. (Cal. App.) 829
Johnson v. Hay (Kan.) 613
Johnson, Matthews v. (Kan.) 609
Johnson v. Monson (Cal.) 635
Johnson v. State (Okl.) 263
Johnson v. State (Okl. Cr. App.) 897
Johnson, Tillamook County v. (Or.) 159
Johnston, Pettis v. (Okl.) 681
Jones, Benish v. (Colo.) 538
Jones v. California Growers & Shippers (Cal.) 172
Jones, Page v. (N. M.) 541
Jones, St. Louis-San Francisco R. Co. v. (Okl.) 385
Jones, Shill v. (Ariz.) 77
Jones v. State (Okl. Cr. App.) 887
Jones' Estate, In re (Utah) 783
Jordan, Hatfield v. (Cal.) 1030
Joy Const. Co., Barr Lumber Co. v. (Cal. App.) 844
J. R. Watkins Medical Co. v. Lizar (Okl.) 552
Judnick v. Judnick (Cal. App.) 480
Judson Freight Forwarding Co., Heath v. (Cal. App.) 839
Jurian, Hubbard v. (Cal. App.) 1052
Justice's Court of Elko Tp., State v. (Nev.) 977

Kansas Free Fair Ass'n v. Georgia Casualty Co. (Kan.) 592
Kansas Natural Gas Co., Dana v. (Kan.) 610
Katterhenry v. Williamson (Okl.) 404
Kay, Searcy v. (Cal. App.) 49
Keechi Oil & Gas Co., Wagner v. (Okl.) 864
Keith v. Schuck (Colo.) 530
Kelleher, Winf v. (Mont.) 294
Kelley v. Goldschmidt (Cal. App.) 55
Kennery v. Northwestern Junk Co. (Wash.) 330
Kenwood Land Co., Smyth v. (Or.) 962
Kerrigan, Universal Film Mfg. Co. v. (Cal. App.) 475
Ketchen, Udelavitz v. (Idaho) 1029
Kinderman v. Shipley (Cal. App.) 472
King Haggart v. (Kan.) 763
King, Kinney v. (Cal. App.) 834
King v. Randall (Nev.) 979
Kinkel v. Chase (Kan.) 618
Kinney v. King (Cal. App.) 834
Kinzell v. Chicago, M. & St. P. R. Co. (Idaho) 255
Kipp v. Reed (Cal.) 363
Kiskaddon, Aufder Heide v. (Okl.) 859

Page

Kline, Genardini v. (Ariz.) 568
Knapp v. Knapp (Cal.) 362
Knoff v. Grace (Colo.) 526
Krauter v. Krauter (Okl.) 1088
Kunkle v. Soule (Colo.) 536

La Belle Oil Co., Arnold v. (Cal. App.) 815
Ladd & Tilton Bank v. Lepper (Mont.) .. 1117
Lake, Clifford v. (Idaho) 714
Lake County Water Dist., People v. (Cal.) 630
Lambrix, Lyons v. (Idaho) 356
Landers, Tipps v. (Cal.) 173
Lang v. Lang (Cal.) 181
La Plante, Conrad v. (Cal. App.) 1073
Laramie Grocery Co. v. Bell (Wyo.) 665
Larned Oil & Gas Co.. Laverty v. (Kan.) .. 596
Larrimore, Southern Pac. Co. v. (Ariz.) .. 564
Laurel Canon Mining Co., Dey v. (Ariz.) .. 83
Laurel Canyon Mining Co., Allaire v. (Ariz.) 79
Laverty v. Larned Oil & Gas Co. (Kan.) 596
Lawson, Delap v. (Idaho) 262
Lawson v. Turlock Union High School Dist. (Cal. App.) 1055
Leaver v. Smith (Cal. App.) 1050
Leech, Guy v. (Cal. App.) 1067
Leiter, Simonton v. (Cal.) 442
Lenger, Currant v. (Kan.) 432
Lenox Hall v. Seelye (Kan.) 737
Lepper, Ladd & Tilton Bank v. (Mont.) ... 1117
Lesueur, Mesa City v. (Ariz.) 573
Lind v. Boulin (Or.) 1103
Lindsay, American Bond & Mortgage Co. v. (Cal. App.) 192
Lisenby v. Intermountain State Bank (Idaho) 355
Little v. State (Okl. Cr. App.) 706
Lizar, J. R. Watkins Medical Co. v. (Okl.) 552
Lloyd Lumber Co. v. Puget Sound & C. R. Co. (Wash.) 226
Logan v. Chas. K. Spaulding Logging Co. (Or.) 349
Long Beach Imp. Co., Mutch v. (Cal. App.) 638
Los Angeles Ice & Cold Storage Co., Fairmont Creamery Co. v. (Cal. App.) .. 194
Los Angeles R. Corporation, Massachusetts Bonding & Insurance Co. v. (Cal.) 161
Los Angeles Trust & Savings Bank v. Bortenstein (Cal. App.) 850
Lowe Co. v. Industrial Commission of Utah (Utah) 934
Lynch, Roberts v. (Utah) 930
Lyon & Hoag v. Railroad Commission (Cal.) 795
Lyons v. Lambrix (Idaho) 356

McArthur v. Independent Torpedo Co. (Kan.) 787
McBride, State v. (Idaho) 247
McCahan v. McCahan (Cal. App.) 458
McCahan v. McCahan (Cal. App.) 460
McCloud, Brown v. (Or.) 578
McConnell v. Gaut's Estate (Cal. App.) ... 843
McCoy, W. T. Rawleigh Co. v. (Or.) 311
McDonald, Stern v. (Cal. App.) 221
McDonald v. Strawn (Okl.) 558
McDonald v. Supple (Or.) 315
McFarland v. Hueners (Or.) 584
McGrew, In re (Cal.) 804
McIlroy, In re (Or.) 309
McIlroy v. McIlroy (Or.) 309
McKenna v. Grunbaum (Idaho) 919
McLean v. Dickson (Mont.) 924
McMillen, Jamison v. (N. M.) 726
McMurray v. McMurray (Mont.) 924
Maddock v. Riggs (Kan.) 12
Madsen v. Carpenter (Colo.) 528
Magill, Allen v. (Or.) 720
Majors, People v. (Cal. App.) 636
Manning v. Day (Utah) 779
Manross v. Uncle Sam Oil Co. (Kan.) 619
Mardorf v. Norment (N. M.) 736

Digitized by Google

Page

Mardorf, Norment v., two cases (N. M.).. 733
Marlow, Southwestern Surety Ins. Co. v. (Okl.) 672
Marshall Motor Co., Howard v. (Kan.).... 11
Martin v. Gauld Co. (Or.)..... 717
Martin v. State (Okl. Cr. App.)..... 268
Massachusetts Bonding & Insurance Co. v. Los Angeles R. Corporation (Cal.).. 161
Matot, Corey v. (Cal. App.)..... 378
Matson v. Matson (Utah)..... 943
Matthews v. Johnson (Kan.)..... 609
Mayfield v. State (Okl. Cr. App.)..... 276
Mayr v. Reynolds (Cal. App.)..... 383
Mesa City v. Lesueur (Ariz.)..... 573
Metrovich Bldg. Co., Henry Cowell Lime & Cement Co. v. (Cal. App.)..... 208
Metrovich Bldg. Co., Sunset Lumber Co. v. (Cal. App.)..... 208
Metrovich Bldg. Co., Tyler v. (Cal. App.).. 208
Michels v. Burkhard (Cal. App.)..... 370
Miles, Boatman v. (Wyo.).....1002
Miles v. Hamilton (Kan.)..... 430
Miller v. Conley (Or.)..... 301
Miller & Lux, Title Insurance & Trust Co. v., two cases (Cal.)..... 433
Mills' Estate, In re (Kan.)..... 755
Mitchell, Golden v. (Kan.)..... 785
Mitchell v. State (Okl. Cr. App.)..... 268
Modern School of Business and Correspondence, Thompson v. (Cal.)..... 451
Moffett, Dunlavy v. (Kan.).....741
Mohn, Sumner v. (Cal. App.)..... 368
Moise Bros. Co., Roberson v. (N. M.)..... 354
Moncure, Daniel v. (Mont.)..... 983
Monson, Johnson v. (Cal.)..... 635
Montana Live Stock & Loan Co. v. Stewart (Mont.)..... 985
Moody, Wilmot v. (Cal. App.)..... 639
Mooney, Sells v. (Okl.)..... 861
Mooney, Sells v. (Okl.)..... 863
Moore, Hill v. (Cal. App.)..... 651
Morigeau, Worden v. (Mont.)..... 122
Moro's Estate, In re (Cal.)..... 168
Morrison, Grover v. (Cal. App.).....1078
Morris-Roberts Co., Bliss Town-Site Co. v. (Idaho) 1028
Mortgage Securities Co. of California v. Pfaffman (Cal. App.)..... 641
Morton, Inglis v. (Wash.)..... 908
Mott, Schlesener v. (Kan.)..... 745
Mountain Home Co-op. Irr. Co., Groefsema v., three cases (Idaho)..... 356
Mountain States Telephone & Telegraph Co. v. People (Colo.)..... 513
Mowbray Pearson Co. v. E. H. Stanton Co. (Wash.) 330
Mullendore, State v. (Mont.).....1118
Multnomah County, Endicott, Johnson & Co. v. (Or.).....1109
Munson v. Fishburn (Cal.)..... 808
Murphy's Estate, In re (Cal.)..... 46
Mutch v. Long Beach Imp. Co. (Cal. App.) 638
Mutual Life Ins. Co. of New York, Nelson v. (Mont.)..... 927

National Cash Register Co. v. Wall (Mont.) 135
Nault v. Palmer (Or.)..... 346
Nelson v. Mutual Life Ins. Co. of New York (Mont.)..... 927
Newell-Murdoch Realty Co. v. Wickham (Cal.) 359
Newman v. E. E. Overholtzer Sons' Co. (Cal.) 175
Newman, Wilcox v. (Mont.)..... 138
Niino, People v. (Cal.)..... 626
Noble v. Harris (Idaho)..... 922
Nolen, Tiger v. (Okl.)..... 263
Norment v. Mardorf, two cases (N. M.).. 733
Norment, Mardorf v. (N. M.)..... 736
North Pac. Lumber Co., Rorvik v. (Or.).. 331
Northwestern Junk Co., Kennery v. (Wash.) 330
Nudd v. Rowe (Wash.)..... 902

Page

Nunes, People v. (Cal. App.)..... 486

Oakdale Irr. Dist. v. Beard (Cal. App.).. 224
Oakland St. Imp. Bond Co. v. Fitzmaurice (Cal. App.)..... 499
O'Brien, Appeal of (Cal.)..... 364
Odekirk, State v. (Utah)..... 777
Okmulgee County Business Men's Ass'n v. Bryan (Okl.).....1086
Olds v. Thorington (Cal. App.)..... 496
Oliver, State v. (Mont.).....1117
Olsen, Hines v. (Okl.)..... 266
O'Neil v. Twohy Bros. Co. (Or.)..... 306
Overholtzer Sons' Co., Newman v. (Cal.).. 175

Pacific Diking Co., Janson v. (Or.)..... 340
Pacific Mut. Life Ins. Co., Tuttle v. (Mont.) 993
Padilla, Baca v. (N. M.)..... 730
Page v. Jones (N. M.)..... 541
Palmer, Nault v. (Or.)..... 346
Palvutzian v. Terkanian (Cal. App.)..... 503
Park, Fowler v. (Okl.)..... 668
Parkey, State v. (Or.)..... 319
Patterson v. Patterson (Cal. App.)..... 483
Patterson v. State (Okl. Cr. App.)..... 271
Penny, Vose v. (Okl.)..... 97
People v. Bickerstaff (Cal. App.)..... 656
People v. Bliss (Cal. App.).....1046
People v. Cota (Cal. App.)..... 473
People v. County Court of City and County of Denver (Colo.)..... 425
People v. Gilman (Cal. App.)..... 205
People v. Gutierrez (Cal. App.)..... 200
People v. Lake County Water Dist. (Cal.) 630
People v. Majors (Cal. App.)..... 636
People, Mountain States Telephone & Telegraph Co. v. (Colo.)..... 513
People v. Niino (Cal.)..... 626
People v. Nunes (Cal. App.)..... 486
People v. Riccomini (Cal. App.).....1045
People v. San Bernardino (Cal. App.)..... 482
People v. T. Wah Hing (Cal. App.)..... 662
People, United Cigar Stores Co. of America v. (Colo.).....1117
People v. White (Cal. App.)..... 821
People v. Wolff (Cal.)..... 22
People v. Won Lee Wing (Cal. App.)..... 643
Pepin v. Broadwater, two cases (Mont.)...1117
Perini v. Continental Oil Co. (Colo.).... 532
Peters v. Bledsoe (Okl.)..... 407
Pettis v. Johnston (Okl.)..... 681
Pfaffman, Mortgage Securities Co. of California v. (Cal. App.) 641
Phelps' Estate, In re (Cal.)..... 17
Phœnix Refining Co., Pierce Oil Corporation v. (Okl.) 857
Pidgeon v. San Diego Consol. Brewing Co. (Cal. App.).....1048
Pierce Oil Corporation v. Phœnix Refining Co. (Okl.)..... 857
Pilot Butte Mining Co., Willis v. (Mont.).. 124
Pioneer Fruit Co. v. Southern Pac. Co. (Cal. App.) 50
Pioneer Mining & Ditch Co. v. Davidson (Wash.) 242
Pioneer Truck Co. v. Hawley (Cal. App.)..1037
Piper, Anderson v. (Kan.)..... 597
Pollykoff v. State (Okl. Cr. App.)..... 420
Porter-Burnham Co., Stone v. (Cal. App.).. 830
Pound, Bower v. (Colo.)..... 425
Powers, Sanborn Co. v. (Mont.)..... 990
Powers, Shelton v. (Wash.)..... 900
Pratt v. Harrold (Cal. App.)..... 372
Protestant Episcopal Church Corporation of Arizona, Arizona Hercules Copper Co. v. (Ariz.) 85
Pruitt v. State (Okl. Cr. App.)..... 894
Public Service Commission, State v. (Wash.) 1012
Public Service Commission of Nevada, State v. (Nev.) 284
Public Utilities Commission, Chicago, B. & Q. R. Co. v. (Colo.)..... 539

Digitized by Google

	Page
Puget Sound & C. R. Co., Clark Lloyd Lumber Co. v. (Wash.)	226
Pursell, Schmidt v. (Cal. App.)	846
Quapaw Mining Co. v. Cogburn (Okl.)	416
Rabido v. Furey (Idaho)	73
Railroad Commission, Lyon & Hoag v. (Cal.)	795
Raisch v. Helfrich (Cal. App.)	848
Ramish v. Reichenbach (Cal. App.)	824
Randall, King v. (Nev.)	979
Rawleigh Co. v. McCoy (Or.)	311
Rawlings v. Heal (Wash.)	237
Red Star Oil Co., Rennie v. (Okl.)	391
Reed, Bayless v. (Cal. App.)	211
Reed, Kipp v. (Cal.)	363
Reichenbach, Ramish v. (Cal. App.)	824
Rennie v. Red Star Oil Co. (Okl.)	391
Reynolds, Mayr v. (Cal. App.)	383
Reynolds, State v. (Wash.)	321
Riccomini, People v. (Cal. App.)	1045
Richvale Land Co., Ennis-Brown Co. v. (Cal. App.)	1064
Riggs, Maddock v. (Kan.)	12
Ripley v. State (Okl. Cr. App.)	710
Ririe, State Board of Land Com'rs v. (Utah)	59
Riter, Bankers' Trust Co. v. (Utah)	1113
R. M. Cobban Realty Co. v. Chicago, M. & St. P. R. Co. of Montana (Mont.)	988
Roberson v. Citizens' Lumber Co. (N. M.)	353
Roberson v. Hurst (Okl.)	402
Roberson v. Moise Bros. Co. (N. M.)	354
Roberts v. Lynch (Utah)	930
Roberts, State v. (Utah)	351
Robertson v. Shelton (Wash.)	900
Robertson v. Wangler (Kan.)	788
Robinson v. Clemons (Cal. App.)	203
Rock v. Craig & Osborn (Okl.)	388
Rohrer, Wilkinson v. (Cal. App.)	650
Rooker, Ukon Water Co. v. (Utah)	778
Rorvik v. North Pac. Lumber Co. (Or.)	331
Rose v. Stalcup (Okl.)	396
Rowe, Nudd v. (Wash.)	902
Ruby v. Baker (Kan.)	6
Rumetsch v. Davie (Cal. App.)	1075
Russell v. Smith (Or.)	715
St. Louis-San Francisco R. Co. v. Jones (Okl.)	385
Sanborn Co. v. Powers (Mont.)	990
Sanders, Ex parte (Cal. App.)	647
San Diego Consol. Brewing Co., Pidgeon v. (Cal. App.)	1048
San Joaquin Light & Power Corporation, Dibble v. (Cal. App.)	198
San Luis Valley Building & Loan Ass'n v. Holbert (Colo.)	428
Saunders v. Simms (Cal.)	806
Schilling v. Industrial Accident Commission of California (Cal. App.)	373
Schlesener v. Mott (Kan.)	745
Schmidt v. Pursell (Cal. App.)	846
School Dist. No. 1 of Clatsop County v. Astoria Const. Co. (Or.)	969
Schroeder v. Swasey (Cal.)	17
Schuck, Keith v. (Colo.)	530
Schultz v. Western Farm Tractor Co. (Wash.)	1007
Schuyler, Darter v. (Cal. App.)	827
Schwarz v. Bohle (Cal. App.)	819
Scott, Hughes v. (Cal. App.)	643
Scoular, Washoe County Bar Ass'n v. (Nev.)	899
Seaboard Nat. Bank v. Belden (Cal. App.)	1045
Seaman v. Superior Court of Marin County (Cal.)	441
Searcy v. Kay (Cal. App.)	49
Searcy v. Superior Court of Humboldt County (Cal. App.)	202
Second Judicial Dist. Court of Nevada in and for Washoe County, Dixon v. (Nev.)	352
Security Trust Co., Stoner v. (Cal. App.)	500
Seelye, Lenox Hall v. (Kan.)	737
Sells v. Butts (Okl.)	863
Sells v. Mooney (Okl.)	861
Sells v. Mooney (Okl.)	863
Sheehan v. Board of Police Com'rs (Cal. App.)	51
Sheehan v. Board of Police Com'rs (Cal. App.)	55
Sheehan, State v. (Idaho)	71
Shelton v. Powers (Wash.)	900
Shelton, Robertson v. (Wash.)	900
Sherman v. Sherman (Cal. App.)	464
Sherwood v. State (Okl. Cr. App.)	270
Shill v. Jones (Ariz.)	77
Shipley, Kinderman v. (Cal. App.)	472
Siddoway v. Utah County (Utah)	941
Silvers v. Howard (Kan.)	1
Simmers v. Boyd (N. M.)	732
Simms, Saunders v. (Cal.)	806
Simon v. Hine (Okl.)	264
Simonton v. Leiter (Cal.)	442
Simonton's Estate, In re (Cal.)	442
Skagit Mill Co. v. Great Northern Ry. (Wash.)	901
Skewes, Sugar Loaf Orange Growers' Ass'n v. (Cal. App.)	1076
Slattery v. Gross (Or.)	577
Sloan Shipyards Corporation v. Thurston County (Wash.)	1015
Small v. Small (Kan.)	623
Smart v. State (Okl. Cr. App.)	269
Smillie v. De Mendoza (Colo.)	533
Smith, Ex parte (Okl. Cr. App.)	1092
Smith, Apple v. (Kan.)	8
Smith, Boland v. (Cal. App.)	825
Smith, Bradley v. (Okl.)	1087
Smith, Herald v. (Utah)	932
Smith, Leaver v. (Cal. App.)	1050
Smith, Russell v. (Or.)	715
Smith, State v. (Mont.)	107
Smith v. Sullivan (Mont.)	288
Smith v. Williams (Okl.)	555
Smyth v. Fitch (Cal. App.)	1049
Smyth v. Kenwood Land Co. (Or.)	962
Solomon, Borgmeyer v. (Cal. App.)	1043
Soule, Kunkle v. (Colo.)	536
Southern Pac. Co., Brush v. (Cal. App.)	216
Southern Pac. Co. v. Larrimore (Ariz.)	564
Southern Pac. Co., Pioneer Fruit Co. v. (Cal. App.)	50
Southern Pac. Co., Young v. (Cal.)	36
Southern Sierras Power Co., Stott v. (Cal. App.)	478
South San Francisco Packing & Provision Co. v. Jacobsen (Cal.)	628
Southwestern Bell Tel. Co., Brackville v. (Kan.)	773
Southwestern Bell Tel. Co., Clay County Co-op. Tel. Ass'n v. (Kan.)	747
Southwestern Surety Ins. Co. v. Marlow (Okl.)	672
Spaulding Logging Co., Logan v. (Or.)	349
Staheli v. Adams (Utah)	781
Stainbrook v. Wilson (Kan.)	606
Stalcup, Rose v (Okl.)	396
Stanton Co., Mowbray Pearson Co. v. (Wash.)	330
Starr v. Grimes (Cal.)	625
Starr's Estate, In re (Cal.)	625
State, Armstrong v. (Okl. Cr. App.)	898
State v. Bibee (Mont.)	1118
State v. Bilboa (Idaho)	248
State v. Board of Com'rs of Guadalupe County (N. M.)	353
State v. Board of Com'rs of McPherson County (Kan.)	594
State v. Boyle (Nev.)	914
State v. Brown (Wash.)	1018
State v. Butte (Mont.)	991
State v. Chittenden (Wash.)	232
State v. Clausen (Wash.)	324
State v. Clausen (Wash.)	329
State, Crabtree v. (Okl. Cr. App.)	271
State v. Crawford (Ariz.)	422

Digitized by Google

	Page
State, Crisp v. (Okl. Cr. App.)	1118
State v. Crosson (Idaho)	922
State v. Diedtman (Mont.)	117
State v. District Court, six cases (Mont.)	1118
State v. District Court of Fourth Judicial Dist., Ravalli County (Mont.)	133
State v. District Court of Musselshell County (Mont.)	982
State v. District Court of Second Judicial Dist. in and for Silver Bow County (Mont.)	295
State v. Dunn (Mont.)	121
State, Everidge v. (Okl. Cr. App.)	701
State, Ewing v. (Okl. Cr. App.)	274
State, French v. (Okl. Cr. App.)	707
State v. Gomez (Mont.)	982
State v. Hall (Idaho)	251
State v. Hall (Or.)	304
State, Holden v. (Okl. Cr. App.)	1119
State v. Huffaker (Mont.)	1118
State, James v. (Okl. Cr. App.)	421
State, Johnson v. (Okl.)	263
State, Johnson v. (Okl. Cr. App.)	897
State, Jones v. (Okl. Cr. App.)	887
State v. Justice's Court of Elko Tp. (Nev.)	977
State, Little v. (Okl. Cr. App.)	706
State v. McBride (Idaho)	247
State, Martin v. (Okl. Cr. App.)	268
State, Mayfield v. (Okl. Cr. App.)	276
State, Mitchell v. (Okl. Cr. App.)	268
State v. Mullendore (Mont.)	1118
State v. Odekirk (Utah)	777
State v. Oliver (Mont.)	1117
State v. Parkey (Or.)	319
State, Patterson v. (Okl. Cr. App.)	271
State, Pollykoff v. (Okl. Cr. App.)	420
State, Pruitt v. (Okl. Cr. App.)	894
State v. Public Service Commission (Wash.)	1012
State v. Public Service Commission of Nevada (Nev.)	284
State v. Reynolds (Wash.)	321
State, Ripley v. (Okl. Cr. App.)	710
State v. Roberts (Utah)	351
State v. Seattle (Wash.)	906
State v. Sheehan (Idaho)	71
State, Sherwood v. (Okl. Cr. App.)	270
State, Smart v. (Okl. Cr. App.)	269
State v. Smith (Mont.)	107
State v. State Board of Dental Examiners (Or.)	338
State v. State Board of Examiners (Mont.)	1117
State v. Stewart (Mont.)	129
State v. Superior Court (Wash.)	234
State v. Suttle (Wash.)	1018
State v. Terrien (Wash.)	1017
State, Thomas v. (Okl. Cr. App.)	711
State, Thompson v. (Okl. Cr. App.)	275
State v. Toy Dou (Mont.)	1117
State v. Underwood (Okl. Cr. App.)	281
State, Whitmore v. (Okl. Cr. App.)	278
State, Williams v. (Okl. Cr. App.)	892
State, Wood v. (Okl. Cr. App.)	280
State, Young v. (Okl. Cr. App.)	270
State v. Zullig (Or.)	580
State Board of Dental Examiners, State v. (Or.)	338
State Board of Examiners, State v. (Mont.)	1117
State Board of Land Com'rs v. Ririe (Utah)	59
State Industrial Commission, Willis v. (Okl.)	92
State Road Commission v. Industrial Commission of Utah (Utah)	544
Steele v. Steele (Or.)	716
Stensland, George v. (Cal. App.)	1069
Sterling v. Boucher (Okl.)	1090
Stern v. McDonald (Cal. App.)	221
Stern v. Sunset Road Oil Co. (Cal. App.)	651
Stevenson v. Stevenson (Utah)	776
Stewart, Montana Live Stock & Loan Co. v. (Mont.)	985
Stewart, State v. (Mont.)	129
Stoddard, Zall Jewelry Co. v. (Colo.)	506
Stolaroff v. Bassett Lumber Co. (Ariz.)	81
Stone v. Jarbalo State Bank (Kan.)	1094
Stone v. Porter-Burnham Co. (Cal. App.)	830
Stone Co., Barlin v. (Cal. App.)	188
Stoner v. Security Trust Co. (Cal. App.)	500
Stott v. Southern Sierras Power Co. (Cal. App.)	478
Straus v. Eaton (Cal. App.)	1033
Strawn, McDonald v. (Okl.)	558
Stuart, Burt v. (Idaho)	713
Stuckey, Bledsoe v. (Cal. App.)	217
Sturtevant, Cuddy v. (Wash.)	909
Sugar Loaf Orange Growers' Ass'n v. Skewes (Cal. App.)	1076
Sullivan, Smith v. (Mont.)	288
Sumner v. Mohn (Cal. App.)	368
Sunset Lumber Co. v. J. I. Metrovich Bldg. Co. (Cal. App.)	208
Sunset Road Oil Co., Stern v. (Cal. App.)	651
Superior Court, State v. (Wash.)	234
Superior Court of California in and for City and County of San Francisco, Dolan v. (Cal. App.)	469
Superior Court of California in and for Mendocino County, Drew v. (Cal. App.)	374
Superior Court of Humbolt County, Searcy v. (Cal. App.)	202
Superior Court of Marin County, Seaman v. (Cal.)	441
Supple, McDonald v. (Or.)	315
Suttle, State v. (Wash.)	1018
Swan v. Duncan (Okl.)	678
Swasey, Chipman v. (Cal.)	17
Swasey, Schroeder v. (Cal.)	17
Tanigoshi, Dunton v. (Cal. App.)	467
Taylor, Winn v. (Or.)	342
Teed v. Brotherhood of American Yeomen (Wash.)	1005
Tennant v. Cline (Cal. App.)	1065
Terkanian, Palvutzian v. (Cal. App.)	503
Terrien, State v. (Wash.)	1017
Thomas, In re (Utah)	952
Thomas v. State (Okl. Cr. App.)	711
Thompson, Cohn v. (Cal. App.)	381
Thompson v. Modern School of Business and Correspondence (Cal.)	451
Thompson v. State (Okl. Cr. App.)	275
Thorington, Olds v. (Cal. App.)	496
Thornburgh v. Haun (Okl.)	1083
Thurston County, Sloan Shipyards Corporation v. (Wash.)	1015
Tiger v. Nolen (Okl.)	263
Tillamook County v. Johnson (Or.)	159
Tipps v. Landers (Cal.)	173
Title Insurance & Trust Co. v. Miller & Lux, two cases (Cal.)	433
Toney, Imperial Valley Auto Co. v. (Cal. App.)	1043
Topeka R. Co., Atherton v. (Kan.)	430
Toy Dou, State v. (Mont.)	1117
Travelers' Ins. Co., Wilson v. (Cal.)	366
Treadwell v. Beebe (Kan.)	768
Tukwila School Dist v. Burrows (Wash.)	1010
Tulare County v. Fenn (Cal. App.)	855
Tulsa Fuel & Mfg. Co. v. Gilchrist Drilling Co. (Okl.)	399
Turlock Irr. Dist., Buschman v. (Cal. App.)	491
Turlock Union High School Dist., Lawson v. (Cal. App.)	1055
Turner Oil Co., Gillons v. (Cal. App.)	183
Turner Oil Co., Gillons v. (Cal. App.)	185
Tuttle v. Pacific Mut. Life Ins. Co. (Mont.)	993
T. Wah Hing, People v. (Cal. App.)	662
Twohy Bros. Co., O'Neil v. (Or.)	306
Tyler v. J. I. Metrovich Bldg. Co. (Cal. App.)	208
Udelavitz v. Ketchen (Idaho)	1029
Ukon Water Co. v. Rooker (Utah)	778
Uncle Sam Oil Co., Manross v. (Kan.)	619

Digitized by Google

	Page
Underwood, State v. (Okl. Cr. App.)	281
Union Sav. Ass'n v. Cummins (Okl.)	869
United Cigar Stores Co. of America v. People (Colo.)	1117
Universal Film Mfg. Co. v. Kerrigan (Cal. App.)	475
Uplinger v. Yonkin (Cal. App.)	822
Utah County, Siddowoy v. (Utah)	941
Vaughn v. Fey (Cal. App.)	1041
Vose v. Penny (Okl.)	97
Wagner v. Keechi Oil & Gas Co. (Okl.)	864
Waldock, Choctaw Lumber Co. v. (Okl.)	866
Wall, National Cash Register Co. v. (Mont.)	135
Wallace, Ex parte (N. M.)	1020
Wallace v. Blanchard (N. M.)	1020
Wallace v. Chicago, B. & Q. R. Co. (Wyo.)	999
Walsh v. Coghlan (Idaho)	252
Wangler, Robertson v. (Kan.)	788
Ward, James v. (Or.)	1105
Washoe County Bar Ass'n v. Scoular (Nev.)	899
Waters v. Hatfield (Kan.)	599
Watkins Medical Co. v. Lizar (Okl.)	552
Waymire v. Atchison, T. & S. F. R. Co. (Kan.)	588
West Cache Sugar Co. v. Hendrickson (Utah)	946
Western Farm Tractor Co., Schultz v. (Wash.)	1007
Western Indemnity Co. v. Industrial Accident Commission (Cal.)	37
Weston, Chance v. (Or.)	155
White, Hynes v. (Cal. App.)	836
White, People v. (Cal. App.)	821
White v. White (Or.)	969
White v. White (Wash.)	1003
Whitmore v. State (Okl. Cr. App.)	278
Wickham, Newell-Murdoch Realty Co. v. (Cal.)	359
Wilcox v. Newman (Mont.)	138
Wilkinson v. Rohrer (Cal. App.)	650
Williams, Ex parte (Cal.)	163
Williams v. A. R. G. Bus Co. (Cal. App.)	1036
Williams, Casey v. (Wash.)	1011
Williams, Smith v. (Okl.)	555
Williams v. State (Okl. Cr. App.)	892
Williamson v. Hardy (Cal. App.)	646
Williamson, Katterhenry v. (Okl.)	404
Willis v. Pilot Butte Mining Co. (Mont.)	124
Willis v. State Industrial Commission (Okl.)	92
Willits v. Helmer (Cal. App.)	645
Wilmot v. Moody (Cal. App.)	639
Wilsey State Bank v. Amend (Kan.)	739
Wilson, Durham v. (Colo.)	525
Wilson, Stainbrook v. (Kan.)	606
Wilson v. Traveler's Ins. Co. (Cal.)	366
Wingate, Gilmore v. (Ariz.)	571
Winn v. Taylor (Or.)	342
Wipf v. Kelleher (Mont.)	294
Wolff, People v. (Cal.)	22
Won Lee Wing, People v. (Cal. App.)	643
Wood v. State (Okl. Cr. App.)	280
Woodburn v. Harvey (Kan.)	620
Woodbams, Bollen v. (Colo.)	427
Woodstone Marble & Tile Co. v. Dunsmore Canyon Water Co. (Cal. App.)	213
Woodward v. Bancroft (Cal.)	445
Worden v. Morigeau (Mont.)	122
Wright v. Baldwin (Cal. App.)	377
Wright, Consolidated Wagon & Machine Co. v. (Utah)	937
W. T. Rawleigh Co. v. McCoy (Or.)	311
Yonkin, Uplinger v. (Cal. App.)	822
Young v. Southern Pac. Co. (Cal.)	36
Young v. State (Okl. Cr. App.)	270
Zall Jewelry Co. v. Stoddard (Colo.)	506
Zartarian v. Zartarian (Cal. App.)	196
Zullig, State v. (Or.)	580
Zywert, Church v. (Mont.)	201

REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

IDAHO.

Greene v. Rice, 186 P. 249.
Harper v. Dotson, 187 P. 270.
Weather v. Cooney, 180 P. 760.

NEVADA.

Dixon v. Miller, 184 P. 926.
Dixon v. Reno, 187 P. 308.
Keyworth v. Nevada Packard Mines Co., 186 P. 1110.
Mooney v. Newton, 187 P. 721.
Ramezzano v. Aransino, 189 P. 681.
State v. McFadden, 182 P. 745.

OKLAHOMA.

Jumper v. Lyles, 185 P. 1084.
Ledigar v. Bockhoven, 185 P. 1097.

OREGON.

Gardner v. Portland, 187 P. 306.

See End of Index for Tables of Pacific Cases in State Reports

Digitized by Google

THE

PACIFIC REPORTER

VOLUME 190

SILVERS v. HOWARD et al. (No. 22616.)

(Supreme Court of Kansas. May 8, 1920. Rehearing Denied June 15, 1920.)

(Syllabus by the Court.)

1. Trusts ⇐17, 18(5)—Parol agreement by mother to reconvey to son held insufficient to create trust under statute.

A mother and son owned undivided interests in a tract of land. The son conveyed to his mother, to enable her to mortgage the land as security for borrowed money, by a deed absolute in terms, but accompanied by an oral agreement on the part of the mother to reconvey. The relations between mother and son were in fact confidential and fiduciary. After the son's death, the mother sold the land as her own, and denied that his widow, his sole heir, had any interest in it. *Held*, the parol agreement was insufficient to create a trust, because of section 1 of the trust statute, which provides that no trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing (Gen. St. 1915, § 11674).

2. Trusts ⇐43(2)—Grantor may not show parol agreement, in absence of fraud, etc., except in cases involving purchase money.

In the absence of fraud, accident, or mistake, the grantor in a deed absolute in terms may not show a parol agreement of the grantee to hold the land in trust for the grantor, except in cases involving payment of purchase money by one person and title taken in another, under section 8 of the trust statute (Gen. St. 1915, § 11681).

3. Trusts ⇐96—Mere repudiation of trust under oral agreement does not constitute fraud.

Mere repudiation of the trust contemplated by an oral agreement, ineffectual for the purpose because of the trust statute, does not constitute fraud, either actual or constructive.

4. Trusts ⇐102(1)—Breach of confidence may amount to constructive fraud giving rise to a trust by implication.

If a fiduciary relation exist between the grantor and grantee in a deed absolute, and the deed be induced by the relation for a trust purpose, breach of the confidence reposed may amount to constructive fraud, from which a trust may arise by implication of law.

5. Trusts ⇐109, 110—Oral agreement between fiduciaries insufficient, standing alone, to raise implication of trust.

If such a conveyance be accompanied by an oral trust agreement, the agreement may be considered as one of the circumstances of the case. It may aid implication of a trust, but it is not sufficient, standing alone, to raise the implication.

6. Trusts ⇐110—Evidence held to sustain trust arising by implication on conveyance by a son to mother.

Findings of fact concerning the subject of paragraph 1 of this syllabus considered, and *held* sufficient to sustain a trust arising by implication of law.

7. Findings construed.

Findings of fact considered, and *held* to show the action was not barred by the statute of limitations.

Appeal from District Court, Shawnee County.

Suit by Fannie L. Silvers against E. J. Howard and others. Decree for plaintiff, and defendant Ellen Silvers appeals. Affirmed.

J. J. Schenck and A. E. Crane, both of Topeka, for appellant.

J. B. Larimer and Waters & Waters, all of Topeka, for appellee.

BURCH, J. The action was one to enforce a trust relating to land. The plaintiff prevailed, and the principal defendant, Ellen Silvers, appeals.

The story of the case is told by the findings of fact, which follow:

"(1) On the 25th day of March, 1909, Emanuel Silvers departed this life, intestate, being at the time of his death the owner in fee simple of the east one-half of the southeast quarter and all that part of the east one-half of the northeast quarter lying south of the Union Pacific Railroad right of way, all in section two (2), township eleven (11), range thirteen (13), Shawnee county, Kansas.

"(2) That the said Emanuel Silvers left surviving him as his sole and only heirs at law Ellen Silvers, defendant herein, his widow, and four children, Clarence Silvers, Emmett Silvers, Frank Silvers, and Anna Silvers; that at the death of the said Emanuel Silvers the said

Digitized by Google

Clarence Silvers inherited and became the owner and entitled to the possession of an undivided one-eighth interest in and to all of the real estate hereinbefore described.

"(3) At the request of his father and mother, Clarence Silvers remained on the premises above described during the last few years of his father's life, and at the request of his mother he remained upon the premises until the time of his death, which occurred September 19, 1914.

"(4) Prior to the death of Emanuel Silvers, his son Frank went to the state of Idaho and engaged in the sheep-raising business, and after the death of Emanuel Silvers, another son, Emmett, also went to the state of Idaho, and there joined his brother Frank in the sheep-raising business. Frank Silvers and Emmett Silvers desired to use some money in their business, and Ellen Silvers, their mother, defendant herein, agreed to make them a loan for the sum desired. I. B. Alter, a banker of Rossville and a friend of the family, was consulted by Ellen Silvers in regard to loaning her the sum she desired to furnish her sons in Idaho. Said Alter informed Ellen Silvers that a lower rate of interest could be procured on a real estate loan, and suggested to her and to Clarence Silvers that all of the children join in a deed to their mother and place the title in her, so that she could execute a mortgage on the land in question, and that when the mortgage was paid off the mother could then reconvey to her children their respective interests. This arrangement was adopted, and Clarence Silvers and the other children executed deeds to Ellen Silvers, their mother, for the land in controversy. On October 12, 1909, Ellen Silvers thereupon placed a mortgage upon said land, and sent the proceeds to her sons in Idaho. No consideration passed from the said Ellen Silvers to the said Clarence Silvers, at the time of the execution of said deed or at any other time, and said deed was made for the purpose of enabling Ellen Silvers to place a mortgage thereon, as suggested by I. B. Alter, and for no other purpose.

"(5) At the time of the execution of said deed the relations between the said Clarence Silvers and Ellen Silvers were confidential and fiduciary.

"(6) After the execution of said deed, said Clarence Silvers remained upon said premises, farming and managing the same in all respects the same as before the execution of said deed. In 1912 Clarence Silvers was married to Fannie L. Silvers, the plaintiff herein, and took her to his home on said land, where they lived until the time of his death. While residing on said premises, and after the execution of said deed, Clarence Silvers made extensive and valuable improvements upon said premises, expending therefor in the neighborhood of $4,000, and also paid the taxes annually up to the time of his death.

"(7) It does not appear from the evidence that any demand was ever made by Clarence Silvers for a reconveyance of said premises from his mother, nor that his mother ever denied the equitable interest of her son in said premises prior to his death.

"(8) Clarence Silvers died on the 19th day of September, 1914, intestate, leaving as his sole and only heir at law the plaintiff herein, Fannie L. Silvers, his widow.

"(9) That on or about the ——— day of October, 1917, said Ellen Silvers repudiated the arrangement made at the suggestion of I. B. Alter, as hereinbefore found, and sold said premises to L. F. Page for the sum of $19,000, and the said Ellen Silvers thereupon immediately divided the proceeds of said sale between herself and her surviving children in the shares to which they would have been entitled as heirs of Emanuel Silvers.

"(10) The premises in controversy were of the reasonable value of $19,000 at the time of the sale in October, 1917.

"(11) Clarence Silvers never parted with the equitable title to his undivided one-eighth interest in the premises in controversy, and the deed from him to his mother was for the purpose of enabling her to place a mortgage on said premises and to loan the proceeds from said mortgage to Frank and Emmett Silvers, and for no other purpose.

"(12) During all the time that Clarence Silvers was farming the land in controversy, after the death of his father, he received all the income therefrom, and made no accounting to any one therefor.

"(13) The defendant Ellen Silvers did not procure the deed from Clarence Silvers, heretofore found, by means of any fraud practiced upon said Clarence Silvers, at or before the execution of said deed, as claimed in the amended petition.

"(14) In the fall of 1914, after the death of Clarence Silvers, plaintiff was duly notified by Emmett Silvers that she had no right, title, or interest in or to said real estate, and plaintiff made no claim to an interest in said real estate other than for her personal money expended in building a silo, which claim was allowed, and she was permitted to remove and sell the same.

"(15) This suit was not brought by the plaintiff until July 22, 1918, more than three years after plaintiff was notified that she had no right, title, or interest in the aforesaid real estate.

"(16) Immediately after the death of Clarence Silvers, Emmett Silvers, acting as the agent of Ellen Silvers, took charge of the land in controversy and rented the same, and excluded the plaintiff, Fannie Silvers, from the possession thereof."

The defendant requested 15 findings of fact, all of which were adopted in substance by the court, excepting these:

"(6) That on the 12th day of October, 1909, Clarence Silvers, by a quitclaim deed, duly conveyed all his right, title, and interest in and to the defendant Ellen Silvers, upon the consideration of ten dollars ($10) expressed in said deed.

"(7) That at the time of the execution of said deed there was no contract between Ellen Silvers and Clarence Silvers that she was to reconvey the property to him at any time thereafter."

"(14) That Ellen Silvers, at the time of making the deed to the defendant L. F. Page, just prior to bringing this action, was the owner of all of the property described in finding No. 2, and entitled to all of the proceeds thereof."

Digitized by Google

Requested finding No. 6 differs from the court's finding that Clarence deeded to his mother, merely in the respect that the requested finding in effect denies that any equitable title remained in Clarence. That was the substance of the lawsuit. Requested finding No. 14 was likewise more of a decision of the controversy than a finding of fact. Requested finding No. 7 was rejected because the court believed the testimony on which its own finding No. 4 was based.

It is argued that finding No. 4 does not state that an agreement to reconvey was in fact made; the language being, "the mother could then reconvey," etc. The finding, however, is interpreted by the first conclusion of law stated by the court, which is argumentative in form, and refers to "the parol agreement entered into on the suggestion of I. B. Alter." The fact that reconveyance was part of the arrangement was elicited from the witness Alter by a leading question by the court itself, calling attention to the specific matter.

Finding No. 5, that at the time Clarence deeded to his mother the relations between there were confidential and fiduciary, is assailed as contrary to the evidence. The farm was situated near Rossville. During the last few years of his father's life Clarence remained on the farm, at the request of his father and mother. After his father's death he continued to stay there, at the request of his mother, who then owned an undivided half, while he had but one-eighth. After making the deed to his mother, and without any contract fixing his rights or accountability, Clarence managed the farm, paid taxes, made many lasting and valuable improvements, and appropriated the proceeds, except that he gave his mother and sister enough to live on. They lived in Rossville, and frequently went to the farm to visit, and to get butter and eggs and other supplies. Clarence purchased a horse and buggy for them to use. At the time of his death, Clarence had 31 head of horses and mules, 20 or 30 head of cattle, and a number of hogs, all acquired while he was working the farm. It was necessary for him to borrow considerable money, and his mother said she was willing her interest in the farm should stand good for Clarence, because he had always provided for the family. Sometimes the plaintiff became discouraged at the outlook. On one occasion her mother-in-law said to her:

"You know, Fannie, Clarence has been a good boy, and worked all his life and kept us. We aren't going to let you want. Clarence expects some day to get that home; the boys don't want the farm, and Annie don't want the home; everything will come out all right."

The plaintiff herself furnished the money to build the silo on the farm. When she wrote the check for it, she said to Clarence, "Maybe we had better have mother O. K. this." Clarence laughed and said, "My mother won't go against me." During his lifetime the occasion never arose when it seemed necessary that Clarence and his mother should have writings between them in reference to their property and business. While it may not be proper to read all of this evidence into the relations of mother and son in October, 1909, it is significant that while he lived there was no break or change in the trustful relationship which, for the purposes of this suit, commenced in the son's yielding to his mother's request to stay on the farm after his father's death. The result is, finding No. 4 is well sustained by the evidence, and the court regards all the facts as settled by the findings of fact.

[1] Sections 1, 6, and 8 of the statute relating to trusts read as follows:

"Sec. 1. No trust concerning lands except such as may arise by implication of law shall be created, unless in writing signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

"Sec. 6. When a conveyance for a valuable consideration is made to one person and the consideration therefor paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections."

"Sec. 8. The provisions of the section next before the last [section 6] shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid; or where such alienee in violation of some trust shall have purchased the land with moneys not his own; or where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof."

Gen. Stat. 1915, §§ 11674, 11679, 11681.

[2] Sections 6 and 8 relate to those purchases of land which involve consideration paid or furnished by one person and title taken in another, and have no application to the present controversy. Therefore section 1 alone is to be considered.

The defendants say the trust in this case, if any, was an express trust, and the agreement by which it was created was not in writing. The plaintiff says the trust arose by implication of law.

In the case of Morrall v. Waterson, 7 Kan 199, the syllabus reads:

"In the absence of fraud, mistake or accident, the grantor, in an absolute conveyance reciting a valuable consideration and acknowledging its receipt, and where it is admitted a valuable consideration was actually received, cannot show a parol agreement that the grantee was to hold the land conveyed in trust for his benefit."

Digitized by Google

The clause, "and where it is admitted a valuable consideration was actually received," was inserted to conform the decision to the facts of the case. It may be eliminated without affecting the rule of law, because absence of consideration does not supply the writing which the statute requires.

"The plaintiff, as the holder of the school land certificate, was practically the owner of the land, subject to the claim of the state for the unpaid purchase price. He assigned the certificate to his father for a recited money consideration. This amounted to a conveyance of the title, and in the absence of fraud or mistake is regarded as conclusive evidence of the transfer of the beneficial interest, precluding a showing of want of consideration for the purpose of establishing an implied trust." Goff v. Goff, 98 Kan. 201, 204, 158 Pac. 26, 27.

Unless, therefore, there were fraud, accident, or mistake in the transaction under analysis, the deed was not impeachable by parol evidence which would contradict its legal effect as an absolute conveyance. Ingham v. Burnell, 31 Kan. 333, 2 Pac. 804; Gee v. Thrailkill, 45 Kan. 173, 25 Pac. 588; Rogers v. Richards, 67 Kan. 706, 74 Pac. 255; Blackwell v. Blackwell, 88 Kan. 495, 129 Pac. 173; Clester v. Clester, 90 Kan. 638, 135 Pac. 996, L. R. A. 1915E, 648.

The conveyance was not the result of accident or mistake, and the plaintiff must obtain relief, if at all, on the ground of fraud. The petition charged actual fraud. It was alleged the mother procured the deed on a false promise, which, at the time it was made, she had no intention of keeping. The court found otherwise (finding No. 13).

[3, 4] The statement may be found in opinions of the courts that trusts may be raised in equity with respect to property acquired without fraud, when it would be against equity that it should be retained. In that form the statement furnishes no rule for the decision of controversies. Going further, it is sometimes said that a constructive trust will arise whenever it would be inequitable for the person holding the legal title to retain the property. The statement is too broad, and, if applied literally, would nullify the first and sixth sections of the trust statute. However inequitable and morally reprehensible it may be that property conveyed upon an express oral trust should be retained in violation of the agreement, a trust may not, under those circumstances, be ingrafted upon a deed absolute in its terms, because if that were the rule deeds would no longer be valuable as muniments of title. In the opinion of the Legislature, it is better for the social order and general welfare that a few persons, who might not observe the statute, should suffer hardship, than that the security of all titles should be destroyed. Therefore it is held that mere repudiation of the oral agreement creating the trust does not constitute fraud, either actual or constructive. Goff v. Goff, 98 Kan. 201, 158 Pac. 26. This being true, how did fraud enter into the transaction under consideration, and if there were fraud, what was its nature? The answer is: Constructive fraud, arising from abuse of the confidential relation existing between grantor and grantee.

The mere fact that a conveyance is made by a child to a parent, or by a parent to a child, without consideration, is not enough to raise a trust by implication. Clester v. Clester, 90 Kan. 638, 135 Pac. 996, L. R. A. 1915E, 648. There must a confidential relation, a transaction induced by the relation, and a breach of the confidence reposed. When those conditions are satisfied, the law implies a trust. The principle is illustrated by the decision in the case of Bartholomew v. Guthrie, 71 Kan. 705, 81 Pac. 491. In that case the grantors conveyed land in litigation to their attorney, to enable him to deal with it advantageously, under an oral agreement that he would account for the fruits of the litigation. The attorney was employed to protect the interests of the grantors. The law declares the relation of attorney and client to be fiduciary. The deed was a step in furtherance of the purposes of the employment, and refusal to account for the fruits of the litigation constituted constructive fraud, raising a trust outside the statute, by implication of law. The opinion of the court did not dilate on the fiduciary character of the relation between attorney and client. To have done so would have been to pad the opinion. When the fact of the relation was stated, the quality which the law attaches to it was stated, and it was sufficient for the court to say:

"The facts stated are such that a trust arises by implication of law." 71 Kan. 710, 81 Pac. 492.

The principle under consideration is further illustrated by the decision in the case of Lehrling v. Lehrling, 84 Kan. 766, 115 Pac. 556, in which a father made a deed to his children, to enable them to raise money upon it for his benefit. In that case the confidential relation between the parties to the deed was the fact which controlled the decision:

"The father was in Germany, and the children were at home, where the business must be done. The plan did not seem unreasonable. Expenses would necessarily accumulate, if there should be delay in executing the mortgage and procuring the loan. The father was in trouble, far from home, and naturally desired to save as much of his property as possible after satisfying the proper claims of his wife; the necessity of speedy action was apparent and was emphasized in the letter. He acted promptly, as his children requested, and in the confidence that a father may be presumed to have in his children." 84 Kan. 769, 115 Pac. 557.

Digitized by Google

To these facts the law as expounded in the case of Wood v. Rabe et al., 96 N. Y. 414, 48 Am. Rep. 640, was applied; citation of further authority being regarded as unnecessary. The statute of frauds and the statute of trusts of the state of New York, referred to in the opinion of the court, are essentially the same as the statutes of this state relating to the same subjects. The facts of the case and the conclusion of the court are summarized in the headnote, which reads as follows:

"The interest of plaintiff in certain real estate, which interest was of the value of about $10,000, was sold on execution issued upon a judgment against him, and the time for redemption by him expired before he learned of the sale. At the request of his mother and upon the advice of her attorney, his former guardian, he having a short time before arrived of age, and for the purpose of enabling her to redeem for his benefit, and upon her oral promise to hold the interest acquired and reconvey to him upon being paid her loans and advances, he confessed a judgment to her for $2,000, which sum she claimed she had loaned to him, but which he insisted was a gift. By virtue of this judgment the mother redeemed and received the sheriff's deed, but refused to convey to plaintiff on demand and tender of the amount of her judgment and of the advances made by her with interest. In an action to enforce the oral agreement, held, that it was upon a good and sufficient consideration; and, as it appeared that plaintiff was induced to acquiesce, not by the promise alone, but by it and the confidential relation conjoined, it could be enforced in equity, and the statute of frauds could not be invoked as a bar to relief." 96 N. Y. 414, 48 Am. Rep. 640.

In the opinion it was said:

"It was on the part of the son the case of a confidence induced, not by the bare promise of another, but by the promise and the confidential relation conjoined. The confidence, in fact, had its spring and origin in the relation, and that relation was a controlling ingredient moving his action." 96 N. Y. 425, 48 Am. Rep. 640.

A criticism of the Bartholomew and Lehrling Cases, contained in an address before the Kansas State Bar Association, on the subject "Trust Estates in Kansas" (Proceedings 1916, page 69), fails to take note of the fact which controlled the decision in each instance—the confidential relation between the parties to the conveyance. Both decisions are well supported by authority. Note, 39 L. R. A. (N. S.) 923, 926.

In the case under decision it is clear that the filial and the business relations of Clarence Silvers to his mother were of the most trustful and confiding kind. To his mind his deed to his mother did not affect his interest in the land, and he proceeded to stock it and farm it and improve it, to marry and make it his homestead, all on what seemed to him good security. There was, to be sure, a promise that his interest would be reconveyed to him, but the essence of the security consisted in the fact that he was dealing with his mother.

[5, 6] In order to clarify the subject a little more, a word may be added relating to the place of the oral agreement to reconvey in cases of this character. A conveyance made with an accompanying oral agreement to reconvey is disclosed. The statute not having been observed, no trust was created by virtue of the conveyance and the oral agreement. That, however, is not necessarily the end of the matter. The circumstances may have been such that a trust arises by implication of law, according to the rules which have been laid down. In considering that subject, the oral agreement is simply one of the circumstances of the case. It must be accompanied by other circumstances, which, either by themselves or in connection with the oral agreement, establish fraud, actual or constructive, or other equitable basis for raising a trust by implication. The trust by implication may have the same ultimate effect on the rights of the parties as would result from enforcement of the oral agreement. In that event the oral agreement may be said to aid the implication; but it is not sufficient, standing alone, to raise the implication. Franklin v. Colley, 10 Kan. 260; Bartholomew v. Guthrie, 71 Kan. 705, 710, 81 Pac. 491. In this instance the proof was that under the influence of the confidential relation the conveyance was made for a specific purpose. When the purpose was accomplished, the grantee held the legal title for the benefit of the grantor, whether there were an agreement to reconvey or not.

[7] The defendant pleaded the statute of limitations, and insists that findings 14, 15, and 16 show that the action was barred. The court found that repudiation of the trust occurred in October, 1917 (finding No. 9), and, if so, the action was commenced in due time. Finding No. 14 does not state that Emmett Silvers, acting as the agent of Ellen Silvers, notified the plaintiff that she had no interest in the farm, and he could not commit Ellen Silvers to a renunciation of trust without her authority. Finding No. 16 relates to the subject of possession. Ellen Silvers was entitled to be admitted to possession as a co-owner. Emmett Silvers, acting as her agent, took full possession, and excluded the plaintiff, thereby trespassing upon the plaintiff's right of possession; but the finding does not extend the agency to include authority to deny equitable title to a share of the land. The result is that findings 14 and 16 fall short of showing repudiation of the trust by Ellen Silvers, which occurred as a result of the conduct described in finding No. 9.

The judgment of the district court is affirmed.

All the Justices concurring.

Digitized by Google

RUBY v. BAKER et al. (No. 22778.)

(Supreme Court of Kansas. May 8, 1920. On Motion for Rehearing, June 14, 1920.)

(Syllabus by the Court.)

Set-off and counterclaim ⟹44(1)—In action against several for assault, a claim for alienating affections of wife of one defendant may be set off.

Where several defendants are sued by the plaintiff upon the charge of having committed an assault upon him, a claim against him for having alienated the affections of the wife of one of the defendants may be interposed as a set-off, where the answer shows a waiver of all right to affirmative relief.

Appeal from District Court, Osborne County.

Action by T. B. Ruby against John Baker and six others with plea of set-off by defendant Baker. From the overruling of his motion to strike out the plea of set-off and the overruling of a demurrer thereto, plaintiff appeals. Affirmed.

Turner & Stanley, of Mankato, and Lutz & Jordan, of Beloit, for appellant.

A. E. Crane, of Topeka, and N. C. Else, of Osborne, for appellees.

MASON, J. T. B. Ruby sued John Baker and six others, charging them with assault and battery, including the administering of a coat of tar and feathers. The defendants in addition to a general denial pleaded as a set-off a claim of Baker for damages for the plaintiff having debauched his wife and alienated her affections. This portion of the answer was attacked by a motion to strike out and a demurrer, both of which were overruled; the plaintiff appealing from the rulings.

The sole question presented is whether such set-off is admissible. Formerly in this state a set-off could be pleaded only in an action on contract, and was required to be founded on a contract or judgment. Gen. Stat. 1901, § 4532. For this provision the following was substituted in 1909:

"A set-off can only be pleaded in an action in which a recovery of money is sought, and must be a cause of action for the recovery of money." Gen. Stat. 1915, § 6992 (Code Civ. Proc. § 100.)

A tort may therefore be pleaded as a set-off in an action on a tort. Cooper v. Seaverns, 97 Kan. 159, 155 Pac. 11. The plaintiff contends, however, that the cause of action sought to be used here as a set-off is not available because of want of mutuality; his claim being against all the defendants, while the cross-demand against him exists in favor of but one of them. In support of this contention, he relies upon the recent case of Crockery Co. v. Cleaver, 104 Kan. 642, 180 Pac. 273. Language is used in that opinion seemingly tending to sustain his view, but it must be interpreted in the light of the facts to which it is applied. There an action was brought against two partners on a firm account. One of the defendants pleaded as a set-off a claim in a larger sum for damages on account of an injury inflicted upon her by the wrongful act of the plaintiff. She was found to have a valid demand for $114.30 more than the partners owed the plaintiff, and was given a judgment for that excess. If the plaintiff's own claim had been reduced or defeated altogether, the judgment would have been correspondingly increased. That judgment was reversed on the ground of a want of mutuality in the opposing demands which had been litigated. Obviously, one partner had (in the legal sense) no interest whatever in any demand of the other for an affirmative judgment against the plaintiff, and could not have been affected by it. The cause of action upon the tort was not used for merely defensive purposes, but as the foundation for affirmative relief. To a claim asserted in that manner by a defendant the term "set-off" is properly applied (Gen. Stat. 1915, § 7314 [Code Civ. Proc. § 410]; 34 Cyc. 644; 25 A. & E. Encyc. of L. 489), although etymologically it may not seem entirely appropriate.

In the present case the answer does not ask that, if the plaintiff shall fail to establish the assault and battery, the defendant Baker shall be allowed damages against him for alienating his wife's affections, or that, if both injuries are proved and the damages for the assault are found to be less than for the alienation, Baker shall have judgment for the difference. Its prayer is merely that, if the plaintiff be found to have been injured by the wrongful act of the defendants, the sum fixed as the measure of his compensation therefor shall have credited upon it the amount of damage sustained by Baker by reason of his injury; the language clearly indicating a waiver of any claim to affirmative relief in any event. Nothing whatever is asked in behalf of Baker if the plaintiff's claim is not upheld, and no judgment for the difference is sought if the plaintiff should be adjudged to have been damaged, but in a less amount than Baker. In that situation the other defendants have an interest in Baker's cross-demand. So far as the amount decided to be due to him for his injury may by its application thereto reduce or wipe out any award made to the plaintiff on account of the wrong inflicted upon him, they are affected by it, because their obligation to make payment to the plaintiff is by that use of it diminished or extinguished, and no other force is sought to be given it.

Digitized by Google

The spirit of the Code favors the settlement in one action of different controversies where the circumstances interpose no obstacle, but recognizes the principle upon which the requirement of mutuality in cross-demands is based by providing that except in action to enforce liens the causes of action united must affect all the parties. Gen. Stat. 1915, § 6979 (Code Civ. Proc. § 88).

Where, in a suit against a number of defendants for collectively inflicting an injury upon the plaintiff, a cross-demand existing in favor of one of them is set up purely in a defensive way, his codefendants have the same interest as himself in its establishment. Its application to the reduction or cancellation of the obligation to the plaintiff inures to the benefit of all the defendants alike, since that is the effect of any payment or part payment. Westbrook v. Mize, 35 Kan. 299, 10 Pac. 881. No reason is apparent why its use in that manner should not be allowed.

It is true that the precise point presented seems not to have received much discussion by the courts, but the reason doubtless is that a defendant rarely uses for purely defensive purposes a cross-demand capable of being made the basis of affirmative relief. It has been held, however, that a claim of one of several defendants against the plaintiff for a sum greater than that sued for may be used by way of set-off as a defense, but that no judgment for the surplus could be rendered; the court saying:

"If, as the verdict tends to show, the set-off was due to only one of the defendants, this would constitute a good defense to plaintiff's action, but would not authorize a recovery for the excess, for the reason that such recovery would require a change, to that extent, of the parties to the judgment. In fact, it would, in effect, require two judgments; one in favor of one defendant for the certified balance, and the other in favor of all the defendants for the costs of the suit. This cannot be done in legal proceedings. But it furnishes no reason why such demand should not be a complete answer to the plaintiff's right of recovery." Locke v. Locke, 57 Ala. 473, 475.

Moreover, the want of mutuality which is held to prevent the use as a set-off or counterclaim of a demand in favor of one of a number of defendants does not appear to have been recognized with respect to common-law recoupment. That remedy was available only as a defense, no judgment being allowed for any surplus, either in the action in which it was used defensively (25 A. & E. Encyc. of L. 549; 34 Cyc. 642), or in a separate later proceeding (Bouvier's Law Dictionary, title "Recoupment"). "It seems that, in the absence of any statute requiring it, a claim to recoup need not exist solely in favor of the defendant and against the plaintiff in the action, since it goes merely to the abatement of the plaintiff's recovery, and does not call for a judgment for any balance against him." 24 R. C. L. 868, quoting note, Riegler v. Tribune Association, 40 App. Div. 327, 57 N. Y. Supp. 989. The right to plead by way of recoupment a cross-demand existing in favor of but one of two defendants has been justified by an argument, the whole of which is here reproduced:

"The note upon which the plaintiff sought to recover was made by the two defendants jointly; and it is insisted that the two defendants were not entitled to recoup the damages arising on the breach of a warranty, on the sale which constituted the consideration of the note, because that sale was made to one of the defendants only.

"If recoupment were allowed on the same principle of a set-off merely, this objection would be insurmountable. A set-off is in the nature of a cross-action to the full extent; it does not deny the validity of any part of the plaintiff's claim or cause of action, but sets up a separate and independent claim against the plaintiff; and the defendant is entitled to judgment upon any surplus of his claims beyond those of the plaintiff.

"A defense by way of recoupment denies the validity of the plaintiff's cause of action to so large an amount as he claims. It is not an independent cross-claim, like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of or connected with the contract or transaction which forms the basis of the plaintiff's action. It goes only in abatement or reduction of the plaintiff's claim, and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand. No judgment can be obtained by the defendant for any balance in his favor. See Ward v. Fellers, 3 Mich. 282, where the distinctions between these two classes of defenses are very fully discussed.

"It is not denied that the defense, by way of recoupment, would have been available to the defendant who purchased the cattle, if the note had been given by, and the suit brought against, him alone.

"Now the only consideration given for the note was received by Findley McHardy. Donald McHardy, though a joint maker in form, would seem to have been, as between himself and the other defendant, but a surety; and it is difficult to discover any good reason why he should not be entitled to any defense, connected with the consideration, which would be available to the real principal in the transaction had he made the note and been sued alone. If the consideration paid to the former inures to bind the latter, can there by any good reason why a want or failure of that consideration should not inure to his benefit? We can discover no more reason why the defense, in the present case, should not inure to the benefit of both defendants, than if it had been a defense by way of payment, want or failure of consideration for the note, or fraud in the sale for which the note was given. It prevents circuity of action, and accomplishes full justice to all the parties without the violation of any rule of law.

"If, instead of setting this up in defense, a cross-action had been brought, such cross-action probably could not have been maintained by the two defendants jointly. But we cannot see

Digitized by Google

why this consideration should affect the question when set up in defense only in abatement of the amount of the plaintiff's recovery."

McHardy v. Wadsworth, 8 Mich. 349, 353–355.

If one of several defendants voluntarily elects to renounce his privilege of demanding affirmative relief upon a claim existing in his favor against the plaintiff, his right to make such renunciation can hardly be questioned, and we discover no reason why, having chosen that course, he should not be permitted, upon the grounds indicated in the foregoing quotation, to interpose his set-off as a mere defense for the benefit of himself and his co-defendants; the objection of a want of mutuality being thereby met.

In Austin v. Feland, 8 Mo. 309, the action was brought against the three makers of a note, by one who had obtained it from the payee by assignment. Two of the defendants were permitted to plead as set-offs indebtedness due them individually from the assignor —a situation in which they could, of course, have no affirmative relief in that action. No comment was made upon this feature of the matter, and the opinion perhaps indicates that the practice would have been approved even had affirmative relief been obtainable and asked for. The court, however, used this language, which we regard as countenancing the distinction under discussion:

"A fourth objection is that the defendants being sued jointly, they were permitted to set off demands due them separately, from the assignor of the plaintiff. * * * If there is any objection to this, it must be technical. It is because it is a matter not between the plaintiff and all the defendants. If a plaintiff sues two in debt, one of them may plead payment, or a tender with his own money, and thereby defeat a recovery. Why, then, if he will take his own debt, and set it off against the plaintiff, and thus defeat his action, may it not be done? There is no solid distinction between the case of a payment with his own money by one defendant, and pleading a set-off due him alone." Page 312.

It being the policy of the Kansas law to permit one tort to be pleaded as a set-off to another (a policy in harmony with the modern tendency to avoid circuity of action and multiplicity of suits), we see no obstacle to the controversies here involved being tried out in one action under the pleadings as now drawn, the objection of want of mutuality (of the possibility of the rendition of a judgment not affecting all the parties) being disposed of by the defendant Baker's waiver of his right to ask an affirmative judgment against the plaintiff.

The judgment is affirmed.

All the Justices concurring.

On Motion for a Rehearing.

In a motion for a rehearing stress is laid upon the fact that at common law the remedy of recoupment was allowed only with respect to matters connected with the transaction out of which the plaintiff's cause of action arose. The decision was not based upon the theory that the cross-demand of the defendant Baker could be litigated in this action, because it fell within the definition of common-law recoupment. The reference to recoupment was for the purpose of illustrating that, where no affirmative relief is sought under it, a cross-demand in favor of one of several defendants is not rendered unavailable as a defense on the ground of want of mutuality.

The motion for a rehearing is denied.

All the Justices concurring.

APPLE v. SMITH. (No. 22362.)

(Supreme Court of Kansas. May 8, 1920.)

(Syllabus by the Court.)

1. Equity ⊂⊃36—Court in partnership accounting may make orders affecting real estate in another state.

A court of equity which has obtained jurisdiction of the parties in a proceeding to dissolve a partnership and make an accounting of partnership affairs may make an order that consequentially affects real estate in another state, where it is enforceable against the person of the party within its jurisdiction, and to that end may compel a partner holding partnership property in his own name in another state to convey it to the firm.

2. Partnership ⊂⊃330—Personal judgment at end of accounting may be rendered, though further accounting necessary.

At the end of an accounting, a personal judgment may be rendered, although the exigencies of the partnership business will require a further accounting of profits that will accrue before a sale of the partnership business and property can be made.

3. Partnership ⊂⊃325(1)—In winding up partnership, court may direct conveyance of land in another state without receiver.

It is competent for a court of equity to appoint a receiver in winding up a partnership and in making a disposition of partnership assets, but it is the better practice to require a partner holding partnership property in his own name in another state to transfer the same directly to the partnership instead of to the receiver.

4. Partnership ⊂⊃319—Where party fails to convey land in other state as decreed, court may order accounting.

In case a defendant partner refuses to assign and transfer property in another state in accordance with the decree of the court, it is

Digitized by Google

competent for the court to order an accounting of the value of the property not assigned and transferred as the decree directed, and to render a personal judgment against the defendant for that value.

(Additional Syllabus by Editorial Staff.)

5. Account ⟸1—"Accounting" imports an adjustment of accounts.

An accounting imports an adjustment of the accounts of the parties and a rendition of a judgment for the balance ascertained to be due.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accounting.]

Appeal from District Court, Cherokee County.

On rehearing. Modified and affirmed.

For former opinion, see 105 Kan. 732, 185 Pac. 903.

A. S. Thompson, of Miami, Okl., J. S. Dean, of Topeka, H. W. Currey, of Joplin, Mo., S. C. Westcott, of Galena, and Ferry & Doran, of Topeka, for appellant.

Edward E. Sapp and E. B. Morgan, both of Galena, for appellee.

JOHNSTON, C. J. [1] The judgment in this case was affirmed on December 6, 1919, 105 Kan. 732, 185 Pac. 903, and on the 11th day of February, 1920, defendant's motion for a rehearing was denied. Upon application, permission to file a second motion for rehearing on certain propositions was allowed. The existence of a partnership between the parties and the extent of the business and property included in the partnership were fully considered and determined in the first hearing, and require no further attention. In his second motion for rehearing defendant urges again that the district court was without jurisdiction to adjudicate the title to leasehold interests in mines situated in Oklahoma. The answer to this proposition is that the action we have is one in personam. It is contended that a court of equity never decrees the performance of something which it cannot compel, but the district court entered a judgment which it may enforce as against the person of the defendant. The judgment rendered acts upon the defendant, and only consequentially upon real estate in another state. Having obtained jurisdiction of the defendant, the court had authority to determine the partnership relation between him and the plaintiff, and finding that such a relation existed, it could determine their partnership rights in property in and out of the state, and make a decree enforceable against the defendant, who is within the jurisdiction of the court. Authorities to that effect were cited in the original opinion, and many others might have been cited. In Meador v. Manlove, 97 Kan. 706, 156 Pac. 731, where a court of this state rendered a decree declaring a trust in lands in Illinois, it was contended that the court was without jurisdiction to declare a trust and compel a conveyance of land situate in another state, but it was held:

"Where a court of general jurisdiction has secured jurisdiction of the parties who hold the legal title to land in another state, it may render a judgment to impress a trust as to such land, and order the trustees to execute a conveyance thereof; and the possible difficulties which may attend the enforcement of its judgment do not in any wise abridge its jurisdiction." (Syl. 1.)

In the early case of Penn v. Lord Baltimore, 1 Vesey, 444, a court of chancery of England had before it the enforcement of a contract relating to land in America, and the chancellor decreed specific performance, conceding that it could not be enforced in rem, but holding that the decree, being one in personam, could be enforced in all cases where the party is within the jurisdiction of the court. In Northern Indiana Railroad Co. v. Michigan Central Railroad Co., 15 How. (U. S.) 233, 14 L. Ed. 674, the court cited Judge Story's work on the Conflict of Laws, and approved the rule stated by him that:

"A court of chancery, 'having authority to act in personam, will act indirectly, and under qualifications, upon real estate situate in a foreign country by reason of this authority over the person, and it will compel him to give effect to its decree, by a conveyance, release, or otherwise, respecting such property.'" 15 How. 243, 14 L. Ed. 674.

In Massie v. Watts, 6 Cranch (U. S.) 148, 3 L. Ed. 181, Chief Justice Marshall, after citing a number of the authorities, said:

"Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." 6 Cranch, p. 160, 3 L. Ed. 181.

In another case the same court has said:

"A court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person. Whatever it may do through the party it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to effect it with liens or burdens." Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853, p. 8.

See, also, Cherokee Nation v. Georgia, 5 Pet. (U. S.) 178, 8 L. Ed. 25; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673,

Digitized by Google

106 Am. St. Rep. 168, 2 Ann. Cas. 819; Burton-Lingo Co. v. Patton, 15 N. M. 304, 107 Pac. 679, 27 L. R. A. (N. S.) 420; 10 R. C. L. 365. The court, having the defendant before it, had jurisdiction to render a judgment and apply any equitable remedy that could be enforced against the defendant.

[2, 5] There is a further contention that the court erred in the rendition of a personal judgment against the defendant for the amount found to be due to plaintiff on the accounting that was had. The claim is that the judgment was prematurely rendered, since there were assets of the firm undisposed of. This question was not brought to the attention of the court on the original hearing, but, assuming that it is raised in the record, we find no good ground for the complaint. The defendant joined with the plaintiff in an agreement for the appointment of a referee, who was to find, first, whether or not a partnership existed, and, if an affirmative finding was made, an accounting was to be taken by the referee, but that, if a contrary finding was made, then no accounting was to be taken. The accounting having been taken by agreement of both parties, defendant is hardly in a position at this time to challenge the propriety of taking an accounting, or the power of a court to render a judgment upon the accounting. An accounting imports an adjustment of the accounts of the parties and the rendition of a judgment for the balance ascertained to be due. Apart from this consideration, this was an equitable action, and the court exercising equitable jurisdiction had power to apply any remedy that was equitable and appropriate. The accounting was taken up to the time the report was made. The mines owned by the partners were in operation, and in the possession of the defendant. He was wrongfully excluding the plaintiff from the possession of the property and appropriating the products of the mines, one-half of which belonged to the plaintiff. It was necessary to obtain action of the court upon the report of the referee, and an appeal was taken from the judgment rendered on the report, which has been pending for months. When the appeal is finally determined the proceeding will still be before the district court for any action that equity may require. A further accounting will be necessary in order to ascertain the amount due to the plaintiff for the product of the mines and the profits of the business belonging to the firm from the time the report was made until the partnership affairs are finally closed. There is no lack of power in the court to provide for periodical accountings and to render personal judgment on each accounting that is made. The court will have the opportunity in the further accounting and in the final disposition of the case to fully protect the rights of each party, and, after making proper allowances, to make a proper division and distribution of the assets of the partnership, taking into consideration the amount awarded to the plaintiff on the first accounting.

[3] The remaining question raised on this motion for a rehearing is that there was error in that part of the judgment appointing a receiver and requiring the plaintiff and defendant to assign to the receiver the leases held in the name of each partner. The receiver was directed to sell the property and divide the proceeds of it equally between the partners, after first deducting from the share of the defendant any sum that remained due on the personal judgment then rendered. It is not an uncommon practice in a court of equity to appoint a receiver in winding up a partnership, and especially where one partner wrongfully excludes another from participating in the possession and control, as well as the benefits, of the business or property of the firm. Parnell v. Thompson, 81 Kan. 119–137, 105 Pac. 502, 33 L. R. A. (N. S.) 658; 20 R. C. L. 962. In view, however, of the character of the litigation and the peculiar circumstances of the case, we think a better practice, and a more equitable and appropriate judgment will be to require that the parties shall each assign and transfer directly to the firm the leases mentioned, and all other partnership property held in the name of each individual partner. When that is done the court can make such further orders and judgment for the disposition of the partnership property and the division of the proceeds as equity and the circumstances may warrant.

Under the facts found in the case relating to the wrongs practiced by the defendant in denying the plaintiff his rights in the partnership property and in misappropriating plaintiff's share of the output of the mines and the profits of the partnership business in another state, the court is warranted in having recourse to any equitable and effective remedy. Very broad powers are vested in a court of equity, and they are generally held to be coextensive with the rights of persons to relief. In 1 Pomeroy's Equity Jurisprudence, § 170, it is said:

"It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations."

[4] It is within the power of the court to order and adjudge that, if either party does not assign and transfer the interests and property ordered to be transferred to the firm within a reasonable time to be fixed by the court, a further accounting be had, not

Digitized by Google

only of the products and profits of the mines and other property of the firm withheld from a copartner, but also for the value of the share of the partnership property which either party fails to assign and transfer in compliance with the decree of the court. A personal judgment may be rendered on that accounting for the value of the property which is not transferred as the decree directs, as well as for a proper share of any profits or moneys derived from the partnership property since the last accounting and judgment was made and rendered. A refusal to make a transfer of property of the firm held by the defendant in accordance with the decree of the court is in a sense a conversion of the share of the other partner, but in any event a court of equity has power to make a complete settlement of the partnership affairs, and if the defendant does not comply with the decree of the court to assign and transfer the leases and other partnership property held in his own name, the court, having the defendant before it, has authority, after an accounting of values, to render a personal judgment for the value of the property not so transferred, property which the defendant has in effect wrongfully converted and appropriated to his own use.

The judgment will be modified so as to require the partners to transfer the property held in their individual names to the firm of Apple & Smith, and to make such further orders for the enforcement of the judgment as will be in accordance with the views expressed herein.

So modified, the judgment is affirmed.

All the Justices concurring.

HOWARD v. MARSHALL MOTOR CO. et al.
(No. 22643.)

(Supreme Court of Kansas. May 8, 1920.)

(Syllabus by the Court.)

1. Master and servant ⇐302(1)—Chauffeur's negligence held imputable to employer.

Where an employé is sent in an automobile upon an errand and during the return trip by a direct route inflicts injury in consequence of his reckless driving, the liability of his employer to the injured person is not affected by the fact that he had taken a friend in the car with him and was speeding for their common enjoyment.

2. Appeal and error ⇐1024(3)—Decision as to good faith of questions asked juror on his voir dire final.

The decision of the trial court as to the good faith of questions asked of a juror on his voir dire *held* to be final.

Appeal from District Court, Sedgwick County.

Action by Fannie Howard against the Marshall Motor Company and another for personal injuries. Judgment for plaintiff, and defendants appeal. Affirmed.

Stanley, Stanley & Hegler and George Siefkin, all of Wichita, for appellants.

Robert C. Foulston, of Wichita, and George H. Beach, of Lawrence, for appellee.

MASON, J. Lemuel Miller, a porter in the employ of two motor companies at their garage and sales room, was driving an automobile along the street at a speed estimated at from 35 to 50 miles an hour, when he ran into another car on a cross street with such violence as to drive it upon the sidewalk, injuring Fannie Howard, who was standing there. She brought action against the companies and obtained a judgment against them from which they appeal.

1. They contend that the evidence did not warrant a finding that at the time of the injury Miller was engaged in the service of his employers, but, on the other hand, showed conclusively that he was driving for his own pleasure. Miller as a witness for the plaintiff gave evidence tending to show these facts:

He was called the head porter. His duties included washing and cleaning cars, delivering them, and demonstrating cars—doing the driving. When the general manager of the companies wanted a man for work around the garage, Miller would bring one to him. On the day of the accident Miller backed a car out of the garage to let another one through, and while he was still in the car (which belonged to a customer) the manager told him to go and find a suitable porter and put him to work washing a car which was then on the rack. Without getting out of the car he drove several blocks to a barber shop, where he thought he could find two men that he had in view for the purpose.

He was not asked whether he found either of the men for whom he was looking, and his testimony did not specifically cover that point. It might be inferred, however, that they were not there, for he testified that after going to the barber shop he started back to the garage and was on the way there when the collision took place.

Much of this evidence was contradicted, but that, of course, is not now material. If the jury credited it, and that must be assumed, the conclusion was justified that Miller at the time of the accident was driving the car while upon an errand for his employers—while returning to the garage after having made the trip upon which he had gone in their behalf. In that situation there can be no doubt of the liability of the defendants

Digitized by Google

for the consequences of his negligent driving.

The defendants introduced evidence, which the jury by their special findings showed that they believed, that as Miller turned his car near the barber shop he saw a friend who, at his invitation to go on a spin with him, got into the car and accompanied him on the remainder of the trip; the accident occurring on a direct route to the defendant's place of business.

[1] In returning with the car to the garage, Miller was as much in his employer's service as while he was on the outbound part of the journey. Thompson v. Machinery Co., 96 Kan. 259, 150 Pac. 587. And the fact that he took a friend on board to enjoy with him the pleasure of a run in violation of the speed limit does not affect the legal aspect of the matter. He was, of course, disregarding his duty to his employer in the way he managed the car; but his misconduct was in doing in a wrongful manner what he was employed to do properly—he was acting within the scope of his employment. The case is well within the rule illustrated by Roberts v. Kinley, 89 Kan. 885, 132 Pac. 1180, 45 L. R. A. (N. S.) 938, and the facts are obviously quite different from those on which the decision was based in Toadvine v. Sinnett, 104 Kan. 111, 178 Pac. 401. If there had been a deviation from the direct line of travel on a return to the garage, the defendants' liability might have been affected according to the particular circumstances (note, 17 N. C. C. A. 659; 4 N. C. C. A. 27); but under the evidence and the findings there was none. Miller's asking and allowing a friend to ride with him, such conduct not having been forbidden and not having been the cause of the accident, could obviously not affect the liability of the defendants. Even where an agent sent in an automobile on an errand for his principal takes in a guest for whose accommodation he deviates from the direct route, it has been held that his employer may be liable for the results of his negligent driving. Note, 17 N. C. C. A. 663-665.

[2] 2. The plaintiff's attorney was permitted over objection to ask a juror on his voir dire whether he was a stockholder in any corporation and whether he was a policy holder in any mutual insurance company which had for its purpose the insuring of persons against actions for damages arising by virtue of accident. The defendants complain of this on the ground that the questions were not asked for the purpose of developing any information concerning the juror that might tend to suggest a bias on his part, but solely to lead the jury to infer that if a judgment were rendered for the plaintiff the loss would ultimately fall, not upon the defendants, but upon some insurance company. The trial court must be deemed to have decided that the questions were asked in good faith, and as its opportunity for forming a judgment on that matter was better than ours its determination must control; there being nothing in the record that compels a contrary conclusion. Swift v. Platte, 68 Kan. 10, 72 Pac. 271, 74 Pac. 635.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, PORTER, MARSHALL, and DAWSON, JJ., concurring.

WEST, J. (specially concurring). While I agree with the foregoing, I am unable to see why the courts, in respect to a defendant's indemnity, should ever feel called upon to "walk softly like the gods whose feet are shod with wool," or why any impenetrable obscuration should envelope so simple and so common a situation.

Why should not the jury know who the real party in interest is, the same as they may know who is putting up the security for costs or who is paying the expenses of a witness?

To invest the fact of the defendant's insurance with the sanctimonious camouflage of a manufactured reverence is to my mind the superlative quintessence of judicial ineptitude.

MADDOCK v. RIGGS. (No. 22672.)

(Supreme Court of Kansas. May 8, 1920.)

(Syllabus by the Court.)

1. Insurance ⟸695—One failing in his undertaking to remit dues was liable to beneficiary for resulting injury.

By a series of transactions covering several years, the appellant accepted from the holder of a fraternal insurance policy his monthly dues and undertook to remit the same to the fraternal association, but failed to remit the dues for one month by which the policy lapsed and the assured was suspended. Upon the death of the assured, the appellee, who was the beneficiary named in the policy, brought suit against the appellant to recover the amount that would have been due on the policy if it had not lapsed. *Held*, that appellant, having entered upon the performance of the duty to remit the monthly assessments, became liable for any injury resulting from his misfeasance.

2. Insurance ⟸695—Beneficiary of insured may sue for resulting injury from defendant's failure to remit dues.

Upon the facts stated in the preceding paragraph, the rule is applied that a third party not privy to a contract nor privy to the consideration thereof may sue to enforce any part of it made for his especial benefit and interest; that the promise is to be deemed made to the plaintiff if adopted by him, though he was not a

Digitized by Google

party nor cognizant of it when made. Anthony v. Herman, 14 Kan. 494; Floyd v. Ort, 20 Kan. 162; Life Insurance Society v. Welch, as Sup't, etc., 26 Kan. 632.

3. Bailment ⇐12, 33—Liability for gross negligence only; gross negligence question for jury.

The general rule is that a gratuitous bailee is liable for gross negligence only. Whether, in a particular case, this liability exists, is a question of fact for the jury.

4. Bailment ⇐12—Bailee may be liable though exercising same care as with his own goods.

The arbitrary rule adopted by some courts that a gratuitous bailee may absolve himself from liability for loss occasioned by his misfeasance merely by proof that he has been likewise negligent with his own goods is disapproved, on the ground that it leaves out of consideration the fact that the bailee may have been in the particular instance guilty of gross negligence in the conduct of his own affairs.

5. Bailment ⇐12—Mandatary must exercise same care as he should in his own affairs.

In the case of a mandatary, good faith requires him to exercise the same diligence that he might reasonably be expected to exercise in his own affairs, in view of the nature, value, and character of the thing, the circumstances under which it is deposited, and depending sometimes upon the character and confidence and particular dealings of the parties.

6. Insurance ⇐695—Evidence held to sustain verdict for beneficiary for neglecting to remit dues.

A general verdict and judgment against the appellant is *held* to be sustained by sufficient evidence.

(Additional Syllabus by Editorial Staff.)

7. Bailment ⇐2—"Mandate" defined.

A "mandate" is the bailment of something for some service upon it by the bailee gratuitously.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mandate.]

8. Bailment ⇐12—"Reasonable care" required of gratuitous bailee, defined.

The "reasonable care" required of a gratuitous bailee is the exercise of the same diligence he might reasonably be expected to exercise in his own affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Care.]

Appeal from District Court, Lyon County.

Action by Betsy Maddock against Charles N. Riggs. Judgment for plaintiff, and defendant appeals. Affirmed.

Hamer & Ganse, of Emporia, for appellant.

W. L. Huggins, O. T. Atherton, Gilbert H. Frith, R. E. Boynton, and J. Harvey Frith, all of Emporia, for appellee.

PORTER, J. J. R. Maddock held a life insurance policy in a fraternal insurance association. The appellee, Betsey Maddock, was the beneficiary. Riggs, the appellant, held a policy in the same association and for some years had acted as the agent of the association and its predecessors in collecting monthly dues from members. For several years Maddock had paid his dues each month to appellant, who promptly remitted them. In February, 1917, appellant ceased to be the authorized collector for the association, but Maddock continued to pay his dues to him, and without objection he continued to remit them. The rules of the association provided that such dues had to reach it before the end of the month for which they were assessed. Maddock always paid his dues to the appellant a few days before or a few days after the first of the month for which they were due, so that appellant always had from three to five weeks in which to remit them. On August 29, 1917, Maddock paid his dues to appellant for September. Appellant, however, remitted them together with his own dues on October 2d. This was two days after they were due. The company notified him that both he and Maddock had been suspended. There was some evidence tending to show that appellant never communicated to Maddock the fact that he had been suspended, but led him to believe that his insurance was still in force; that an application blank for Maddock's reinstatement was filled out and Maddock's name signed by appellant; that, upon receipt of the application for reinstatement of Maddock, the company notified appellant that Maddock would have to take a physical examination; and that appellant never notified Maddock of the fact that he had been suspended and that his policy had lapsed. In ignorance of the facts, Maddock continued until his death in February, 1918, to pay his dues each month to the appellant, who deposited them in a trust account at the bank. The beneficiary brought this action against Riggs to recover the amount that would have been due on the policy if the premiums had been properly remitted. Two of Maddock's sons testified that appellant told them he had not notified their father of the lapsing of the policy because he "didn't have the heart" to tell him. All the correspondence with the company was through appellant. The negligence charged in the petition was his failure to properly remit the premiums paid to him by Maddock and his wrongful concealment of the fact that the policy had lapsed, thus preventing Maddock from taking the necessary steps to be reinstated. The judgment appealed from was a general one in favor of the plaintiff for the value of the policy.

[1, 2] The appellant's contention is that

Digitized by Google

the petition did not state, and the facts did not prove, a cause of action; that his only duty was to Maddock and not to the beneficiary. The appellee relies upon the doctrine that, when two parties make an agreement for the benefit of a third, the latter can maintain an action directly thereon, although not a party to the agreement. In Life Insurance Society v. Welch, as Supt., etc., 26 Kan. 632, it is said:

"Now whatever may be the rule in other states, it is well settled in this state that third parties not privy to a contract, nor privy to the consideration thereof, may sue upon the contract to enforce any stipulations made for their especial benefit and interest. Anthony v. Herman, 14 Kan. 494; Floyd v. Ort, 20 Kan. 162, 164, and cases there cited." 26 Kan. 641.

See, also, Norman v. Rullman, 93 Kan. 791, 145 Pac. 818; Manufacturing Co. v. Deposit Co., 100 Kan. 28, 163 Pac. 1076, L. R. A. 1917D, 722.

A leading case upon the doctrine that, when two parties make an agreement for the benefit of a third, the latter can maintain an action directly thereon, although not a party to the agreement, is Lawrence v. Fox, 20 N. Y. 268. In a separate opinion, Johnson, C. J., and Denio, J., held that—

"Such promise is to be deemed made to the plaintiff, if adopted by him, though he was not a party nor cognisant of it when made." (Syl. 2.)

The opinion approved the following statement from Brewer v. Dyer, 7 Cush. (Mass.) 337:

"Upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."

Lawrence v. Fox and Brewer v. Dyer, supra, were cited in the opinion in Anthony v. Herman, 14 Kan. 494.

When the appellant accepted the premiums and undertook to remit them, he knew there was some beneficiary named in the policy and also knew that it was not Maddock, the assured. It might have been Maddock's estate or some member of his family. In every insurance policy there are three parties—the assured, the beneficiary, and the insurer. The insurance was not so much for the benefit of the assured as it was for the person designated in the policy as the beneficiary, and the payments of the premium were primarily for her benefit.

The appellant seems to admit in his brief that the agent is liable to third parties for misfeasance in performance of duties, but he contends that he was guilty of nonfeasance only. The question turns upon the distinction between misfeasance and nonfeasance of an agent or bailee.

[3, 5, 7] It is a principle of bailments that both custody and service of some sort are involved in each bailment. In deposits, it is said that custody is the chief purpose; in mandates it is incidental. In mandates service is primary and custody the incident, and a "mandate" is defined as the bailment of something for some service upon it by the bailee gratuitously. The consideration in gratuitous bailments is the detriment to the promisee. The promisor by his undertaking prevents the promisee from securing the desired benefit at the hands of another. Until the moment the promisor has entered upon the undertaking the promisee is still at liberty to secure another to do the service. Accordingly, it has been said that a gratuitous bailee cannot be held liable for any injury arising from nonfeasance, that is, from his entire failure to perform, but may become liable for malfeasance or misfeasance by his defective performance. It is clear that, if the appellant had declined to undertake the acceptance and remittance of the premiums, that would have been nonfeasance and he would not be liable for any injury arising therefrom. But it is apparent that by a series of the same kind of transactions, as well as by the acceptance from Maddock of the particular dues which he neglected to remit, he actually entered upon and undertook the performance of the mandate, and the action is to recover for his misfeasance.

A case in point cited by appellee is Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437, which not only recognizes the distinction between misfeasance and nonfeasance, but supports the doctrine that the third party, who suffers injury for misfeasance, may maintain his action to recover the damages. It is said in the opinion:

"It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance." 130 Mass. 103, 39 Am. Rep. 437.

"Nonfeasance does not extend to the omission or failure to do some act, whereby a third person is injured, after he has once entered upon the performance of his contractual obligations. For example, if an agent undertakes to perform certain acts for another and he refuses or fails to enter upon such performance, it is nonfeasance; but if he once begins the performance of

Digitized by Google

such acts, and, in doing so, fails or omits to do certain acts whereby a third person is injured, it is not a nonfeasance, but a misfeasance." Clark & Skyles, Law of Agency, § 596; Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929.

It is well settled that the ordinary rules governing gratuitous bailees "are equally applicable to a mandatory or gratuitous bailee who has actually entered upon the execution of some work or service that he has undertaken to perform respecting the subject-matter of the bailment." 6 C. J. Bailments, § 56.

From the earliest cases on the subject, the general rule has been that a gratuitous bailee is liable only for gross negligence, and appellant contends that his failure to send in the premiums was not gross negligence because he exercised exactly the same diligence and care with respect to Maddock's assessments that he did with his own. While many respectable authorities may be found which regard such a showing as the true test in determining whether there has been gross negligence, the better rule is that taking such care of the property or thing as of one's own repels a presumption of gross negligence; but this may be overcome and liability fastened upon the bailee, nevertheless, by showing the failure to exercise the care that under all the circumstances was required of him, because, manifestly, one may take risks with his own property that he has no right to take with another's, and because it is not a question of the care exercised by him as an individual, but as a class. The rule as to the degree of care required of the appellant in this case is thus stated in 6 C. J. Bailments, § 56:

"The true measure of liability is that the bailee is bound to that degree of diligence which the manner and the nature of his employment makes it reasonable to expect of him, and that anything less than this is culpable in him"—citing Briggs v. Taylor, 28 Vt. 180.

Many of the decisions laying down what constitutes gross negligence in a particular case state that a gratuitous bailee is bound to slight diligence only and have stated that the measure is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. In reference to this statement of the measure of diligence, it is said in Ruling Case Law:

"The measure, abstractly considered, has no reference to the particular character of an individual, but looks to the conduct and character of a whole class of persons. *Hence, a gratuitous bailee will not, under this interpretation, be permitted to absolve himself from all responsibility for the care of an article bailed merely by proving that he has been likewise grossly negligent with his own goods.*" 3 R. C. L. Bailments, § 26. (Italic ours.)

In the old case of Doorman v. Jenkins (1834), the plaintiff proved the delivery of the money to the defendant for the purpose of taking up a bill. The defendant was the proprietor of a coffee house, and the account he gave of the loss was that he unfortunately placed the money in his cash box which was kept in the taproom, and that the cash box with the plaintiff's money in it, and also a larger sum belonging to the defendant, was stolen from the taproom on a Sunday. Lord Chief Justice Denman told the jury that it did not follow, from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own. The case is reported in 2 Ad. & Ellis, 256, 29 E. C. L. 80, where the action of the court, in leaving the question whether there had been gross negligence, to the jury, was approved. See, also, Coggs v. Bernard, 1 Smith's Leading Cases, 199.

In Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172, which has been regarded as a leading case, the court, while recognizing the general rule in such cases approved the doctrine that each case must be judged by its own complexion, and that in the main "gross negligence is a question of fact upon all the evidence for the jury; and that what constitutes slight diligence, or gross negligence, will depend in each case upon a variety of circumstances, such as the occupation, habits, skill and general character of the bailee."

We quote further from the opinion of Judge Magruder in that case, as follows:

"Story, after stating the rule that, when the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, subsequently adds that, in every case, good faith requires a bailee, without reward to take reasonable care of the deposit; 'and what is reasonable care must materially depend upon the nature, value and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties.' Story on Bailments, §§ 23 and 62."

To the same effect, see 3 R. C. L. Bailments, § 27.

In Skelley v. Kahn, 17 Ill. 170, the general rule recognized by an abundance of authority is stated to be that—

"A mandatary or bailee, who undertakes, without reward, to take care of the pledge, or perform any duty or labor, is required to use in its performance such care as men of common sense and common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith, or gross negligence, which is an omission of that degree of care." 17 Ill. 171.

In 4 A. L. R. 1196–1229, will be found a very comprehensive note upon the liability

Digitized by Google

of gratuitous bailees with a citation to many quite recent cases. Referring to the general rule that a gratuitous bailee is liable only for gross negligence, the author of the note states in his summary that the expression "gross negligence" "has received so varied a content of meaning that it has ceased to be a satisfactory formula of decision," because it leaves out of consideration every circumstance other than the bare fact of bailment and diverts "attention from the inquiry on which it properly should be centered, namely, what is the undertaking of the bailee in the particular case, as implied from the concomitant circumstances and defined by the express understanding between the parties? The author says:

"The first article of his implied undertaking is, in the case of a depositary, that he will take the same care of the property intrusted to him as he might reasonably be expected to take of his own property of the same character; in the case of a mandatary that he will exercise the same diligence that he might reasonably be expected to exercise in his own affairs."

In this state it has been declared in a number of cases that—

"The classification of negligence into three degrees is no longer recognized." Railway Co. v. Walters, 78 Kan. 39, 96 Pac. 346.

In Jones v. Railway Co., 98 Kan. 133–136, 157 Pac. 399, 400, it was said:

"In the absence of statutory standards of negligence the courts of Kansas have generally ignored the classification of negligence into the degrees of slight, ordinary and gross, and have held that in each case the true measure is due care; that is, the care and diligence proportionate to the risk and which the peculiar circumstances of the case demand"—citing Railway Co. v. Walters, supra.

To the same effect, see Logan v. Electric Co., 99 Kan. 381–388, 161 Pac. 659, L. R. A. 1917E, 258; Kennedy v. Railway Co., 104 Kan. 129–134, 179 Pac. 314.

In determining whether the defendant should be held responsible for the damages resulting from his failure to remit the premiums, in other words, whether he exercised due care in view of all the circumstances, it is apparent that the so-called distinction between slight, ordinary, and gross negligence over which courts have quibbled for a hundred years can furnish no assistance. Of course, the law did not impose upon him the responsibility of an insurer, nor require of him the exercise of anything unreasonable. It is equally true, however, that it required him to exercise the same care that he might reasonably have been expected to employ with reference to the remittance of his own insurance premiums; and in this connection it cannot be said that he could make a partial, halfway performance of his duty; he must either have remitted or failed altogether to remit the premiums within the time they could be accepted. He forgot all about the matter and failed to forward the money until after the time had expired. Failing in his duty to forward them in time, he failed to exercise any care whatever. He was required to do something and did nothing; the net result was gross negligence. As said in Railway Co. v. Walters, supra:

"The question always is: Has the care, diligence or skill demanded by the peculiar circumstances of the particular case been exercised? If so, there is no negligence. If not, there is negligence."

The language there used was with reference to negligence in a railway case, but the same principle applies to the present case.

[4, 5] The arbitrary rule adopted by some courts, that a gratuitous bailee may absolve himself from liability for loss occasioned by his misfeasance merely by proof that he has been likewise negligent with his own goods, is one to which we cannot assent. It leaves out of consideration the fact that he may have been in the particular instance guilty of gross negligence in the conduct of his own affairs. The question whether he has failed to exercise slight diligence in respect to the goods left with him by the appellant, in other words, has been guilty of gross negligence, is a question for the jury. Undoubtedly, the gratuitous bailee must exercise what many courts have termed (and not inaccurately) reasonable care, which means, in this class of bailments, the exercise of the same diligence he might reasonably be expected to exercise in its own affairs.

[6] The appellant raised his contentions by a demurrer to the evidence and a request for an instructed verdict. No errors are pointed out in the instructions. It must be held that the appellee is entitled to maintain the action, although she was not a party to nor cognizant of the contract or arrangement between Maddock and the appellant; the law operates upon the acts of the original parties so as to establish a privity and to imply a promise and obligation on the part of the appellant in favor of the appellee. The general verdict which includes a finding of gross negligence is abundantly sustained by the evidence.

The judgment is affirmed.

All the Justices concurring.

Digitized by Google

In re PHELPS' ESTATE. CHIPMAN et al. v. SWASEY et al. SCHROEDER v. SAME. (S. F. 9177, 9210.)

(Supreme Court of California. May 13, 1920. Rehearing Denied June 10, 1920.)

1. Wills ⟸440—Construed according to testator's intent as found in language.

A will must be given effect in accordance with testator's intention as found from the language of the will, where it is clear, and, if it is ambiguous, from the language aided by such extrinsic facts as may be admissible.

2. Wills ⟸448—To be given an interpretation which makes it operative.

A will must be given an interpretation which will make it operative, rather than one which will render it inoperative, and an interpretation by which it disposes of the property dealt with is to be preferred to one which creates an intestacy.

3. Conversion ⟸15(1)—Land, directed to be converted into money, deemed personal property from testator's death.

Where will directs that testator's realty be converted into money and directs how proceeds are to be disposed of, the property must be deemed personal property from the time of testator's death under Civ. Code, § 1338.

4. Perpetuities ⟸6(11)—Devise to trustees with directions to sell held not unlawfully to suspend power of alienation.

A devise to trustees, with directions to sell for purpose of converting the estate into money to be applied in carrying out further trusts created in the proceeds and with power to sell immediately, or at a future date with discretion to sell in the meantime, does not unlawfully suspend the power of alienation under Civ. Code, §§ 715, 716, 749; there being persons in being who can convey absolutely.

5. Perpetuities ⟸6(10) — Devise creating trust for payment of specific and residuary legacies held not to suspend power of alienation.

Devise directing trustees to sell land to create fund for payment of specific legacies of residue to specified persons *held* not to unlawfully suspend the power of alienation, the right to the legacies both specific and residuary vesting immediately upon death of testatrix and being subject at any time thereafter to alienation by legatees.

6. Perpetuities ⟸9(1)—Will creating trust in fund to be accumulated held not to suspend power of alienation.

Will providing for accumulation by trustees of certain fund by sale of testator's land, and giving certain person a specified proportion of the income during her life, after accumulation, with the direction that, "upon death of" such person either before or after accumulation, such proportion of the fund should be paid to her children then living, did not unlawfully suspend power of alienation in violation of Civ. Code, §§ 715, 716; the children's interest being vested at time of such person's death and being thereafter subject to alienation, in view of sections 694, 695, 1039, and 1044.

7. Wills ⟸447—Construction causing gifts to vest favored.

In a case of ambiguity or inconsistency, the law favors a construction that will cause the gifts to vest, if the opposite construction will render it void, under Civil Code, §§ 1317, 1326.

8. Perpetuities ⟸6(1)—Question as to separate trusts in certain fund to be considered with reference to each share separately.

Where the several trusts created by will in fund to be accumulated are separable, the question of whether the power of alienation is suspended is to be considered with reference to each share separately.

9. Perpetuities ⟸9(7)—Invalidity of one trust created by will held not to affect validity of another trust.

Where will directed trustees to sell property, accumulate certain fund out of proceeds, and pay specified proportion of income therefrom to certain persons with remainder to her children upon her death either before or after accumulation of fund, the validity of such trust was not affected because of an invalid suspension of power of alienation of trust providing for payment of annuity to such person pending accumulation of such fund, in which such person's children had no vested interest owing to interest therein of other annuitants.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of Josephine A. Phelps, deceased. From order on petition for distribution holding trust to be void and that deceased died intestate as to residue, W. F. Chipman and another, and Eugenie H. Schroeder separately appeal. Reversed, with directions.

See, also, 179 Cal. 816, 178 Pac. 849.

W. C. Sharpstein, Emilio Lastreto, and Walter H. Linforth, all of San Francisco, for appellants.

John L. McNab, Byron Coleman, and Henry L. Corson, all of San Francisco, for respondents.

SHAW, J. The fifth clause of the will of the testatrix devised the residue of her property, consisting wholly of real estate and embracing nearly the entire estate, to the executors as trustees in trust for certain purposes specified therein. Upon a former appeal in the matter of this estate this court held that the devise in trust was to be performed by the executors in their capacity as trustees and not in the course of their administration of the estate as executors. Estate of Phelps, 178 Pac. 846. As a consequence, the performance of the trust could not effectually begin until after the distribution of the estate. The present appeals result from the order of the court made upon a petition for such distribution. The court below held

Digitized by Google

that the trust was void and that the decedent died intestate as to the residue, and thereupon distributed the estate to her legal heirs. From this order the persons named as trustees appeal in case numbered 9177, and Eugenie H. Schroeder, a sister of decedent and a beneficiary of the trust, appeals separately upon the record presented in case numbered 9210.

The general plan of the trust is that the trustees shall sell the property devised to them and pay the proceeds to certain beneficiaries. The first sales are to be applied to create a fund of $240,000, the income of which is to be paid to beneficiaries named, during their lives, and, upon death, to other persons designated. Out of the remainder is to be paid certain sums to designated beneficiaries in the order named, amounting in all to $280,600. Any of the fund remaining after the payment of these sums was to be paid to two sisters and a nephew of the testatrix.

The respondents' claim is that the will creates an unlawful restraint of alienation, a restraint forbidden by sections 715 and 716 of the Civil Code. Section 715 forbids the suspension of the absolute power of alienation by any limitation or condition, for a period longer than the continuation of the lives of persons in being at the creation of the limitation or condition. Section 716 provides that, if any future interest created operates to suspend the power of alienation as provided in section 715, it is void in its creation, and that such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. The date of the death of the testatrix is deemed to be the time of the creation of the limitation upon alienation, if any was created. Civ. Code, § 749. The testatrix died in 1916, so the amendment of 1917 (St. 1917, p. 699) to section 715 does not apply. We have stated its effect as it stood before that amendment.

[1, 2] In considering the effect of the will it is necessary to bear in mind certain well-established rules of construction. The will must be given effect in accordance with the intention of the testator, as found from the language of the will, where it is clear, and, if it is ambiguous, from the language of the will aided by such extrinsic facts as may be admissible for that purpose. A will must be given an interpretation which will make it operative, rather than one which will render it inoperative, and an interpretation by which it disposes of the property dealt with is to be preferred to one which creates an intestacy. In order to explain the questions presented, it is necessary to set forth at some length the provisions of the trust clause of the will.

The trust clause first directed that the trustees should "lease until sold as hereinafter provided all of my real estate upon such terms as to them may seem best, and until the accumulation of the fund hereinafter provided." The rentals and the income from all other sources were to be used to pay annuities, monthly, as follows: To Mrs. Lord and Mrs. Schroeder, her sisters, each the sum of $300; to Edward T. McLean, a brother, and his wife, jointly, $100; to her sister, Mrs. Swasey, and her brother Alfred, each $100. These annuities were to be continued only until the $240,000 fund should be accumulated from the proceeds of sales. With regard to this accumulation the clause then provides as follows:

"I direct my executors and trustees from time to time as sales of my estate may in their judgment be profitably made, to sell sufficient estate to yield a fund of two hundred and forty thousand dollars, and pending the accumulation of said fund, I direct my said executors and trustees to invest and keep invested such sums as may be derived from such sales, and to use the income in the payment of the above annuities. As soon as a fund of two hundred and forty thousand dollars has been accumulated, the same shall be invested and kept invested, and out of the net income derived therefrom there shall be paid to said annuitants monthly during their respective lives, in lieu of the annuities above provided, portions of said income as follows:

"(1) To my sister Virginia A. Lord three-eighths thereof. (2) To my sister Eugenie H. Schroeder three-eighths thereof. (3) To my brother Edward T. McLean and to his wife Mattie McLean jointly and to the survivor of them one-twelfth thereof. (4) To my sister Amanda A. Swasey one-twelfth thereof. (5) To my brother Alfred A. McLean one-twelfth thereof.

"In the event that any of my said sisters and brothers shall not be living at the time that said fund has been accumulated, or if then living shall afterward die, I direct my executors and trustees to pay out of said fund as follows."

It then directed that upon the death of Mrs. Lord three-eighths of the fund, or $90,000, should be paid to her heirs, and that upon the death of Mrs. Schroeder a like amount should be paid to her heirs. Upon the death of the survivor of Edward T. and Mattie McLean, $20,000 was to go in equal shares to the children then living, of said persons. Upon the death of Mrs. Swasey $20,000 was to go to the children of said sister then living. Upon the death of Alfred A. McLean, $20,000 was to go as follows: Five thousand dollars to Minnie McLean, his wife, if she were living, otherwise to the children of said Alfred A. McLean and his wife, then living, and $15,000 in equal shares to said children then living.

With respect to the excess above $240,000 the clause provided:

"From time to time as sales of my estate may in the judgment of my executors and trustees be profitably made, I direct my executors

Digitized by Google

and trustees to convert my estate into cash, and after devoting sufficient of the proceeds thereof to the purposes specified in paragraph A of this article, to pay in the order named to the persons hereinafter named or to their heirs, in case of their death, except where otherwise provided, the sums set opposite their respective names."

Then follows a list of the beneficiaries and the amounts of the gifts amounting to the sum of $280,600, above mentioned. With respect to the remainder the provision is as follows:

"The remainder of my estate, exclusive of that described in the sixth and seventh articles hereof, shall be divided into three equal parts. One part thereof shall be paid to my sister Virginia A. Lord, if living, or to her heirs if dead; one part thereof to my sister Eugenie H. Schroeder, if living, or to her heirs if dead, and one part thereof to my nephew W. F. Chipman, if living, or to his heirs if dead."

The final paragraph of the trust clause is as follows:

"Although it is my intention to have all of my estate, with the exceptions already stated, converted into cash, I desire that my executors and trustees shall make sales with the sole object that my two sisters and my nephew above mentioned shall receive substantial sums out of the remainder of my estate. My estate at present valuations is ample for that purpose, and I do not wish it sacrificed to satisfy the importunities of those who, while dear to me, are not the first in my affections."

The part of the fifth clause relating to the annuities and the $240,000 fund is designated therein by the letter "A." The succeeding part is designated by the letter "B."

The fifth clause of the will creates five separate and distinct trusts: (1) The trust to convert the entire estate into money. (2) The provisional trust for the payment of the temporary annuities to the brothers and sisters until such time as the fund of $240,000 shall have been accumulated. (3) The trust in the fund consisting of the first $240,000 received from sales of the property, of which the income is to be divided between the brothers and sisters during their respective lives and upon their deaths, respectively, the remainder is to be given absolutely, in the same proportions, to their respective heirs or children. (4) The trust to pay the specific legacies amounting to $280,600. (5) The trust in the ultimate residue, if any, of the proceeds, which is to go to Mrs. Lord, Mrs. Schroeder, and W. F. Chipman. We will defer the discussion of the trust for the payment of the annuities until after our consideration of the other four trusts.

[3] The direction at the beginning of part B of the fifth clause applies to the whole of the trust property and is a direction for its conversion into money and the application of the proceeds to the three main objects of the testatrix, namely, the disposition of the $240,000 fund, the payment of the specific legacies, and the payment of any residue to the residuary legatees. It includes and provides for the sales to accumulate the first fund as well as the other funds necessary to carry out the desires of the testatrix, as expressed in the succeeding provisions. In such a case the "property and all its proceeds must be deemed personal property from the time of the testator's death." Civ. Code, § 1338.

[4] A devise to trustees, with directions to sell for the purpose of converting the estate into money to be applied in carrying out further trusts created in the proceeds and with power to sell immediately, does not occasion an unlawful suspension of the power of alienation, and "this is equally true where a future date is fixed for the exercise of the power if the donees are permitted to sell in the meantime in their discretion." Chaplin on Suspension, § 287. This was said by the learned author in discussing the effect of "powers in trust" authorized by the New York law on the subject. These provisions, in part at least, were originally carried into our Civil Code as section 860 and as sections 878 to 940, and they were all repealed in 1874. But the rule above stated does not depend on statutory provisions allowing the creation of "powers in trust to convey" and the like, but is founded on the fact stated by the author in the same section that, by the very terms of such a power, "there are persons in being who can convey absolutely." The rule is well settled in New York. Stewart v. Hamilton, 37 Hun, 19; Roberts v. Corning, 89 N. Y. 236; Van Veghten v. Van Veghten, 8 Paige, Ch. 104, 122; Underwood v. Curtiss, 52 Hun, 613, 5 N. Y. Supp. 478. In this state the same rule prevails. Estate of Heberle, 155 Cal. 723, 102 Pac. 735. In Stewart v. Hamilton the trustees were given power to sell, with the proviso:

"I enjoin my executors not to sell any of the real estate under three years, unless sold to advantage; sold on time to advantage."

It was held that, since the power to sell could be exercised at any time and was entirely in the discretion of the trustees, there was no unlawful suspension of the power of alienation. A similar cautionary injunction was given in Estate of Heberle, supra, and the conclusion was the same. See, also, Hagen v. Sacrison, 19 N. D. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724, and note. It is therefore clear that the terms of the directions for the sale of the property are valid and that they do not transgress the sections of the Code on the subject of suspension of the power of alienation.

[5] Concerning the fourth and fifth trusts above enumerated, those relating to the specific legacies and the ultimate residue after payment thereof, little need be said. Neither

Digitized by Google

the payment of the specific legacies nor of the ultimate residue is dependent upon any event except the making of sales for sums sufficient to realize the necessary amount of money. The right to the legacies, both specific and residuary, vested immediately upon the death of the testatrix and were subject to alienation by the legatees at any time thereafter. They are not different in that respect from any other legacy that is dependent upon the amount of the estate from which they are to come. The terms of the will regarding them do not suspend the power of alienation.

[6] We are also of the opinion that the provisions of part A relating to the third trust do not unlawfully suspend the power. To illustrate this, the share of Mrs. Swasey and her children in the fund may be considered alone. The testatrix died on December 5, 1916. Mrs. Swasey died on December 7, 1918. The $240,000 fund is not yet accumulated. By this part of the trust clause she was to have, during her life, one-twelfth of the income to be derived from said fund after it was accumulated. The direction as to the remainder in said one-twelfth is that if she should die prior to the accumulation, or if then living should afterwards die, then, upon her death, the trustees, "out of said fund," should pay one-twelfth thereof to her children "who are then living," meaning those of her children who should be living at her death. The twelfth was to be paid to them out of the fund to be accumulated. There is no express direction that they should have anything until after the accumulation was complete. If their interest in said shares does not vest until the fund is accumulated and in the meantime they cannot alienate it absolutely, there would then be a suspension of the power of alienation of that share for a period beyond her life, and this is forbidden by section 715. But their interest vested upon her death.

"A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." Civ. Code § 694.

"A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." Civ. Code, § 695.

The persons who were to receive the share upon her death became fixed upon that event. They consisted of her children then living. The event upon which they were to take was the accumulation of the fund. As an event, this was certain to take place, but the time of its occurrence remains uncertain. The uncertainty of the time of the occurrence of an event, however, does not make an interest contingent; consequently, their interest is not contingent under section 695, but is vested as provided in section 694.

[7] This is also indicated by the language of the gift of the remainder to the children, in connection with the context. The payment to them, it is true, is to be made "out of the fund," and it might be contended that this indicates an intent that no title to the remainder was to vest until the fund should be on hand. But the terms of the gift also declare that the payment is to be made "upon the death of my sister Amanda A. Swasey," and the provision for the payment of the income from the fund states that the respective shares thereof are to be paid to the recipients named "during their respective lives." These phrases indicate very strongly an intent that the remainder in the respective shares were to vest in the children at the death of their respective parents. In a case of ambiguity or inconsistency the law favors a construction that will cause the gifts to vest, if the opposite construction will render it void. Chaplin on Suspension, §§ 178, 223, 515; Gray on Perpetuities, § 633; Civil Code, §§ 1317, 1326. We think these phrases when taken together show that the testatrix intended the respective sets of children to take a vested interest in the remainder immediately upon the death of the parent.

The effect of this part of the clause is that these children stand in the same position as the persons who are to take the specific legacies and the ultimate residue. They do not receive the interest until sufficient property is sold to accumulate the fund but their interest therein is now a vested interest and may be alienated as in the case of any other property. Civ. Code, §§ 1039, 1044. The enjoyment thereof is, of course, postponed until the fund is accumulated; but the postponement of the time of enjoyment of an interest does not suspend the power of alienation thereof, where no other person has in the meantime any interest in the property. Gray on Perpetuities, § 120; Chaplin on Suspension, § 394. The same conditions will arise upon the death of any of the other beneficiaries of the income of this fund, should they die prior to the accumulation. If they die subsequent thereto, the persons to take become fixed at that time and the power of alienation immediately arises at the end of the period allowed by law; that is, the termination of the life of a person in being at the death of the testatrix. Taking this part of the trust clause alone without qualification from the preceding provisions concerning annuities, it is clear that there is no unlawful suspension of the power of alienation.

[8] It is to be observed that the several trusts in the $240,000 fund are separable, and the question whether the power of alienation is suspended is to be considered with refer-

Digitized by Google

ence to each share separately. Gray on Perpetuities, §§ 389, 391.

[9] The remaining question is whether or not the provisions disposing of the remainders of the $240,000 fund are affected by the preceding directions for the payment of annuities to the brothers and sisters pending the accumulation of the fund. The preceding direction is that the entire net income of the estate, from whatever source accruing, including interest received on invested proceeds prior to the complete accumulation of the fund, is to be devoted to the payment of these annuities, amounting in all to $900 a month, and that, should the income of any month be insufficient to pay them in full, the annuities to Mrs. Lord and Mrs. Schroeder should be paid in full and the balance prorated among the others, but that, if afterwards the income became more than sufficient, those who had not received the full amount were to have the deficit made up to them out of the surplus. It would seem to follow, therefore, that during the period preceding the accumulation of the fund the other annuitants have an interest in the share of Mrs. Swasey's children, which, under the rules above stated, would prevent the vesting of said children's interest upon the death of their mother. The net income from the entire estate is by these provisions, in effect, sequestered for application to the payment of annuities to the survivors. Having the effect to prevent the vesting of the interests in the remainders, it would involve the suspension of the power of alienation of that share for the period between the death of Mrs. Swasey and the final accumulation of the fund. The two trusts are to that extent inconsistent. It is a typical case for the application of the rule stated in Nellis v. Rickard, 133 Cal. 622, 66 Pac. 32, 85 Am. St. Rep. 227, to the effect that where there are "several independent trusts, some of which are legal, while others are in contravention of the statute regulating uses and trusts or the statutes against perpetuities, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts, and will only be void as to the illegal or invalid trusts." It is an application of rule stated in section 1317 of the Civil Code that where the intention of the testator cannot have effect to its full extent it must have effect as far as possible. The rule is also stated as follows:

"Where there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator." Estate of Pichoir, 139 Cal. 685, 73 Pac. 606, quoting from Estate of Fair, 136 Cal. 81, 68 Pac. 306.

See, also, Sacramento Bank v. Montgomery, 146 Cal. 747, 81 Pac. 138.

A perusal of the trust clause shows that the preliminary portion providing for the annuities to the brothers and sisters temporarily until the accumulation of the fund was but a minor part of the main scheme of the testatrix. It is temporary in character, in the nature of a family allowance. It was intended merely to provide an income for them during the period of the settlement of the trust. The principal parts of the plan were to provide the fund of $240,000, to divide the income thereof among the brothers and sisters during their respective lives, and give the remainder to their children or heirs as specified; to pay the specific legacies mentioned in the succeeding clause and to the residuary legatees the ultimate residue. The preliminary scheme is not essential to the main plan, nor so interwoven with it that the two must stand or fall together. In such a case the part of the will which conflicts with the main scheme must give way so far as may be necessary to carry out the main scheme. The result is that the interest of the children of Mrs. Swasey in the sum of $20,000 must be deemed to have vested from her death, that they will be entitled to receive interest on that sum from that time until its final payment, and that the annuities to the surviving brothers and sisters must be paid out of the remaining part of the income after providing for interest on the sum due to the children of Mrs. Swasey. Similar results will follow upon the death of any other of the brothers and sisters prior to the accumulation of the fund.

Our conclusion is that the trusts created by the will are valid and enforceable, except as above stated; that the invalid part does not destroy the devise of the residue to the trustees; and that the court below should have made distribution thereof to said trustees. The trustees will have power after such distribution to make any adjustment rendered necessary to make up to the children of Mrs. Swasey, or to the children or heirs of any other brother or sister who may die before the accumulation of the fund, the amount of interest that may accrue upon their respective vested interests in the fund. The views we have expressed will be sufficient to guide them on this point in the administration of the trust. There is no disputed question of fact involved in the case. More than four years have passed since the death of the testatrix, and further delay is not necessary. It is a proper case for this court to exercise its power to direct the action of the court below.

The order of distribution is reversed, and it is ordered by this court that upon the going down of the remittitur herein the court below shall forthwith enter an order dis-

Digitized by Google

tributing to the several specific devisees and legatees the specific property devised and bequeathed to them by the will, and distributing the entire residue to the trustees named in the will to be held by them upon the trusts in said will declared.

We concur: LAWLOR, J.; OLNEY, J.

PEOPLE v. WOLFF. (Cr. 2284.)

(Supreme Court of California. May 12, 1920.)

1. Infants ⟸68—Defendant under 18 may be prosecuted under general laws for offense of murder.

Under the Juvenile Court Law (Deering's Gen. Laws 1915, Act 1770a, § 6), providing that magistrates shall suspend proceedings against defendants under 18 years of age, and in view of sections 1, 3, and 13, the juvenile court or the superior court acting as the same may remand such a defendant to the custody of the magistrate, sections 4c, 4d, respectively, providing that if upon the hearing of a petition the court shall determine that the person is not a fit subject to be dealt with according to the provisions of the act, and that no person under 18 shall be prosecuted until the matter has been submitted to the juvenile court seeming to contemplate prosecution of defendants under 18 according to general law, and hence the fact that defendant charged with murder, being under 18, was sent to the juvenile court will not prevent subsequent prosecution under the general laws.

2. Infants ⟸16—Attachment by magistrate of copy of complaint, etc., to certificate defendant is under 18 directory.

Requirement of Juvenile Court Law, § 6, that the committing magistrate, on finding defendant to be under 18, shall attach to the certificate, etc., a certified copy of the original deposition or complaint filed before him is merely directory, and failure to comply is not jurisdictional.

3. Criminal law ⟸1104(4)—Objection that copy of complaint was not attached to magistrate's certificate of defendant's age held not shown by record.

Where the record did not show that the court made any order requiring the phonographic reporter to include in the transcript of his notes the certificate of the magistrate and proceedings remanding defendant, who was under 18, to the juvenile court, and by the juvenile court back to the magistrate, the reporter would not be authorized under Penal Code, § 1246, to include such papers, and the record is insufficient to present the objection that the magistrate did not attach to the certificate a certified copy of the original deposition or complaint when defendant did not make it a part of the record by bill of exceptions or special order of court.

4. Criminal law ⟸1031(5)—Objection that copy of complaint was not attached to magistrate's certificate of defendant's age, not properly raised, will not be considered on appeal.

Objection that the committing magistrate, who certified defendant to the juvenile court as under 18, did not attach certified copy of original complaint can be made only by attack on the information or by motion in juvenile court to suspend proceedings, and, where not so raised, will not be considered on appeal by defendant from a conviction.

5. Jury ⟸103(14) — Juror's opinion from newspaper reports, which will yield to evidence, does not disqualify.

Under Penal Code, § 1076, a challenge for bias under section 1073, subd. 2, on the ground that jurors had formed opinions from newspaper articles, was properly overruled, where the jurors stated that they could disregard their opinions and render a verdict solely on the evidence.

6. Jury ⟸131(15)—Question by district attorney as to whether a juror would follow instructions not objectionable.

Where on voir dire examination, the district attorney asked a juror whether he would follow an instruction that the killing was done in an attempt to perpetrate a felony, there would be no option but to convict of murder in the first degree, was not objectionable as failing to inform the juror that guilt must be shown beyond all reasonable doubt, the purported instruction practically following the definition contained in Penal Code, §§ 187, 189, except for the omission of reasonable doubt, and it appearing that the district attorney repeatedly assured jurors the court would instruct that they could not convict unless satisfied of guilt beyond a reasonable doubt, and that the court did so instruct at considerable length.

7. Witnesses ⟸286(4)—Redirect examination of witness, who saw deceased after he had been assaulted and before death, held warranted.

Where defendant hired an automobile and then struck the driver on the head, robbed him, and appropriated the car, and a witness who testified to seeing the driver on a train after injury, but before death, was cross-examined, as to whether the driver could talk and what was said, redirect examination, wherein the witness' memory as to conversations with the decedent was refreshed by transcript of his testimony at the preliminary hearing, *held* warranted.

8. Criminal law ⟸419, 420(6)—Statements by decedent while on a train after the attack incompetent as hearsay.

In prosecution for homicide, testimony as to statements made by decedent after he had been assaulted and while he was riding on a train, should be excluded, obviously being hearsay and incompetent.

9. Criminal law ⟸1186(4)—Erroneous admission of evidence not prejudicial, where no miscarriage of justice.

In a homicide case, the erroneous admission of hearsay testimony as to statements by de-

Digitized by Google

ceased concerning the assault was not prejudicial, where the same facts were abundantly established by other evidence, including defendant's own confession, so, as the admission of such evidence did not result in a miscarriage of justice, it did not warrant reversal under Const. art. 6, § 4½.

10. Criminal law ⟸404(4)—Locks of hair found in automobile driven by murdered man properly admitted.

Where defendant engaged deceased's automobile and struck deceased on the head with a hammer, robbed him, and appropriated the car, locks of matted hair, adhering to what appeared to be parts of the human scalp, were properly admitted, where it was testified that they were found in the automobile where defendant had abandoned it, and that they were the same as the color of decedent's hair, without further testimony that they were in the same condition as when taken from the automobile.

11. Criminal law ⟸318—No presumption of change in locks of decedent's hair between time of discovery at scene of murder and trial.

There is no presumption that locks of hair taken from an automobile in which deceased was riding at the time the fatal injuries were inflicted on his head with a hammer were changed between the time they were discovered and the trial.

12. Criminal law ⟸404(4)—Admission of locks of decedent's hair not erroneous, as tending to arouse passion.

Where defendant engaged deceased's automobile, and then struck him on the head with a hammer, robbed him and took the car, the admission of locks of human hair with pieces of scalp found in the car cannot be deemed erroneous, on the ground that it was calculated to arouse the passion and prejudice of the jury; there being nothing to show that such articles were introduced for an improper purpose.

13. Criminal law ⟸822(1)—Instructions construed as whole.

Instructions, and particularly a single instruction, must be construed as a whole.

14. Criminal law ⟸822(4)—Instructions in homicide case as to duty of jury not objectionable when construed as a whole.

Instructions in a homicide case that unless the jury did their duty laws might as well be stricken from the statute books cannot be deemed erroneous as a direction that the jury would be neglectful of their duty if defendant was not convicted, in view of the many statements of the rights of defendant, which were a part of the same instruction.

In Bank.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Roy Wolff was convicted of murder in the first degree, and he appeals. Affirmed.

Jackson Mahon and W. W. Laidley, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan and J. R. Dorsey, Deputy Attys. Gen., for the People.

SHAW, J. Upon a charge by information the defendant was convicted of the crime of murder of the first degree, and thereupon sentence of death was imposed upon him. The appeal is from the judgment of conviction.

In support of his appeal he urges seven grounds. We will consider them in the order in which they are presented.

[1] 1. At the time the defendant was brought before the magistrate for the preliminary examination upon the charge it was suggested in his behalf that he was under the age of 18 years at the time the crime was alleged to have been committed. The magistrate examined into the matter, and determined that he was less than 18 years of age at that time. Thereupon he suspended the proceedings and ordered the constable to take the defendant before the juvenile court of the county for its consideration under the Juvenile Court Law. In the superior court, by direction of the court a petition was filed by the probation officer to bring the defendant within the terms of the probation law. Section 3. Thereupon the court took evidence relating to the character of the defendant and the nature of the crime charged against him, and made an order finding that he was under the age of 21 years, but that he was not a fit subject for further consideration under the terms of the Juvenile Court Law, and adjudged that he be remanded to the justice's court in which the charge of murder was pending for further proceedings on said charge, and that the proceedings under the probation act be dismissed. All these proceedings were taken under the provisions of the Juvenile Court Law. General Laws, p. 750, Act 1770a, § 6. Thereafter the magistrate proceeded with the preliminary examination, the defendant was duly committed, and the information upon which he was tried and convicted was then filed.

The claim is now made that under the provisions of the Juvenile Court Law, after the magistrate had determined that the defendant was less than 18 years of age and the matter then came before the superior court for proceedings under that law, the superior court was without power to remand him to the magistrate for further proceedings on the criminal charge. The claim is, in effect, that a person under 18 years of age cannot be prosecuted or punished for the crime of murder, and that he can be dealt with only as a ward of the juvenile court.

We do not think this proposition is sustained by the law. Section 6 provides that when, upon a charge of crime against a per-

Digitized by Google

son, it shall appear to the magistrate that the defendant was under 18 years of age at the time the alleged crime was committed, he shall suspend the proceedings upon the charge and inquire into the age of the defendant, and if he finds that the defendant was under 18 he shall thereupon certify to the juvenile court the fact of such finding, and that proceedings have been suspended by reason thereof, and that thereupon all proceedings against the person on the charge shall be suspended until the juvenile court shall issue its mandate directing the magistrate to proceed with the examination or trial. It then provides that in the superior court, acting as a juvenile court, a petition shall be filed to bring the defendant within the provisions of the law, and "that if said judge of the juvenile court shall after such investigation decide that the person was at the time said offense was alleged to have been committed of the age of eighteen years or more, such determination shall be conclusive and he shall immediately issue his mandate directing the court before which such charge is pending to proceed therewith, and upon receipt of such mandate said court shall proceed with the examination or trial of said charge as though no suspension thereof had taken place; except that if said judge of the juvenile court shall find that the person so charged is under the age of twenty-one years, and a fit subject for consideration under the provisions of this act, he may make such order or orders hereunder as he may deem best in relation to such person; but if such judge shall at any time conclude that such person is not a fit subject for further consideration under this act, he may sit as a committing magistrate and hold a preliminary examination if such person is charged with a felony, or he may remand such person to the court in which said person is charged with said offense for further proceedings on said charge, and upon receipt of the mandate of said juvenile court, or the judge thereof, the court before which said charge is then pending shall be vested with full authority to proceed with the examination or trial thereof." The precise claim of the defendant is that under these provisions the magistrate of the juvenile court cannot remand the defendant to the magistrate for examination or trial unless he shall find that the defendant is over 18 years of age, and that it prohibits further proceedings by the magistrate upon the original charge, where the juvenile court shall find that he was under that age. To this we do not agree. The quoted passage must be read in connection with some of the preceding provisions of the act. Section 1 declares that—

"This act shall be known as the 'juvenile court law' and shall apply to any person under the age of twenty-one years."

It then describes 14 classes of persons who shall be subject to the provisions of the act, if under the age of 21 years. Class 13 includes any person "who violates any law of this state or any ordinance of any town, city, county, or city and county of this state defining crime." Section 4c of the act provides that if, upon the hearing of a petition for proceedings under the Juvenile Court Law as provided in section 3, the court shall determine "that any person alleged to come within the provisions of subdivision 13 of section 1 of this act, is not a fit and proper subject to be dealt with under the provisions of this act, said court may dismiss the petition therein, and direct that said person be prosecuted under the general law." Section 4d provides that no person under the age of 18 years at the time of the commission of a crime shall be prosecuted for the crime until the matter has first been submitted to the juvenile court as in the act provided. These provisions clearly imply that a person under the age of 18 years may nevertheless be prosecuted for a crime, notwithstanding the fact that he has invoked the application of the Juvenile Court Law to his case. The provision of section 6, above quoted, taken in connection with the other provisions, can only mean that upon the hearing of a case which had been under examination before a magistrate upon a charge of crime and has been certified to the juvenile court because of the age of the defendant, if the juvenile court shall conclude that such person "is not a fit subject for further consideration under the act," it may remand him to the magistrate for examination or trial, regardless of the question whether he is over or under 18 years of age. This being the case, the magistrate would have jurisdiction as provided in the part of section 6 which we have quoted, to proceed with the examination and upon finding sufficient cause therefor to commit him upon the charge.

[2-4] 2. In certifying the cause to the juvenile court after finding that the defendant was under 18 years of age, the magistrate, it is claimed, failed to attach to the certificate a certified copy of the original deposition or complaint filed before him. Section 6 of the Juvenile Court Act provides that he shall do this. It is contended that this omission deprived the court of jurisdiction. We do not think the requirement was intended to be jurisdictional. The clause requiring such copy to be attached is obviously merely directory in character and effect, the object being to apprise the juvenile court of the nature of the charge. Furthermore, the objection is not properly in the record before us. The defendant should have made it a part of the record, either by a bill of exceptions or by some special order of the court. Section 1246 of the Penal Code enumerates minutely the papers which shall constitute the

Digitized by Google

transcript on appeal. The certificate of the magistrate and proceedings remanding the defendant to the juvenile court, and by the juvenile court back to the magistrate for further action, are not thereby required or authorized to be made a part thereof. The record does not show that the court made any order requiring the phonographic reporter to include the same in the transcript of his notes. Without such order the phonographic reporter would not be authorized to include these papers in his transcript, and he has not done so. Moreover, there was no foundation upon which the objection can be raised on appeal. This objection would not, at most, constitute a ground of objection, except upon motion in the superior court to set aside the information or in the juvenile court to arrest the proceedings there upon that ground. It does not appear that any such motion was ever made. We do not intend to say that it would, even on such motion, be ground for setting aside the information. As the case stands, the defendant has waived the objection, even if it had any merit.

[5] 3. The defendant claims prejudicial error in rulings of the court overruling his challenges for cause to two of the jurors. The challenges were made on the ground of actual bias as defined in subdivision 2 of section 1073 of the Penal Code. Section 1076 provides that under such a challenge a person shall not be disqualified as a juror by reason of having formed or expressed an opinion upon the guilt or innocence of the defendant founded upon public rumor, statements in public journals, or common notoriety, if it appear to the court, upon his examination that he can and will, notwithstanding such opinion, act impartially and fairly upon the matter. Juror Heimforth, upon his examination, testified that he had read the newspaper accounts of the crime, and had therefrom formed an opinion as to the guilt or innocence of the defendant, which it would take evidence to remove. Upon further examination, however, he stated that his opinion was formed entirely upon what he had read in the newspapers, that he had no other knowledge or information about the matter, and that, notwithstanding that opinion, he could, and would, if sworn as a juror, lay it aside, consider the case entirely upon the evidence produced in court, and act impartially and fairly in the case. Juror Blaisdell testified that he knew nothing of the case except what he had read in the newspapers, that he had formed an opinion therefrom which the evidence might remove, but that, notwithstanding the opinion, he could, and would, act fairly and impartially upon the charge against the defendant, and be guided solely by the evidence produced in court in arriving at a verdict. He further stated that he would retain the opinion until he heard the evidence, that after it had once gotten into his mind he could not put it out until something occurred to change it, but that he could go into the trial of the case presuming the defendant innocent, and depend entirely upon the evidence introduced and the instructions of the court in finding a verdict, and would not in any way permit the matter that he had read in the newspapers to influence his decision. The court, upon this testimony, was justified in holding that the jurors were qualified. A juror who has formed a tentative opinion in that manner will usually say that it will require evidence to change the opinion. That fact is not incompatible with ability to disregard such opinion entirely in weighing the evidence and to render a verdict solely upon that evidence. This psychological fact was recognized by the Legislature, and section 1076 was enacted to avoid the necessity of sustaining challenges for actual bias in such cases. Its effect is that this state of mind does not disqualify the juror, if, notwithstanding such mental condition, he can and will act impartially and fairly in the case.

[6] 4. During the examination of the jurors the district attorney put the following question:

"Well, supposing the court should further instruct you that if you find from the evidence that the killing was done, and that it was done by the defendant in an attempt to perpetrate or in the perpetration and commission of the felonies that I have mentioned, one of which was robbery, that you would have no option in the matter, but that you should find the defendant guilty of murder in the first degree, would you follow that instruction? A. Yes, sir."

Questions of somewhat similar purport were put to 11 other jurors who were examined.

Defendant claims that these questions were unfair because they did not advise the jury that the guilt must be shown to a moral certainty and beyond all reasonable doubt, and that the many repetitions of similar questions would leave the impression with the jury that the court would instruct them that the killing was done by the defendant in the perpetration of a felony. He assigns the putting of the questions as misconduct on the part of the district attorney. A reading of the entire examination shows that there was no misconduct. The district attorney in his questions to the jurors repeatedly stated that the court would instruct them that they could not convict the defendant of the charge unless they should be satisfied of his guilt beyond a reasonable doubt from the evidence produced before them. The court did so instruct them at considerable length, and they must have clearly understood the rule. The question itself was plainly conditional, and did not assert that

Digitized by Google

the court would so instruct them. The principle embodied in the question, aside from the proposition that the guilt must be proven beyond a reasonable doubt, is but a restatement of the definition of murder contained in the Penal Code. Pen. Code, §§ 187, 189. It is substantially a repetition of the law as laid down in People v. Milton, 145 Cal. 169, 78 Pac. 549, and People v. Witt, 170 Cal. 107, 148 Pac. 928. It was not intended as a complete definition, and we need not say that it may be so considered, but in connection with the other questions put to the jurors we do not think that it constitutes misconduct, or that it could have prejudiced the defendant, especially in view of the fact that the court very fully instructed the jury with regard to the elements of the crime of murder. The question itself merely amounted to an inquiry whether or not the juror would follow the instructions of the court.

[7-9] 5. The defendant was charged with the murder of one Elmer Greer. The evidence showed that Greer was operating an automobile for hire; that on May 26, 1919, the defendant hired Greer and his automobile for a trip, and that while on the trip the defendant stealthily hit Greer on the head three times with a hammer. Each blow made a round indentation in the skull, forcing the bone into the tissue of the interior of the skull. From these wounds Greer died on May 29, 1919. On the trial one Delbert E. Bellus, on behalf of the prosecution, testified on direct examination that on May 26, 1919, he helped Greer aboard a train running from Maricopa to Bakersfield; that Greer then had wounds on the head; that he bathed Greer's head and face several times during the journey to Bakersfield, and there left him at the station. On cross-examination the witness was asked many questions as to the details of the journey to Bakersfield and the condition of Greer. The following is a part of the cross-examination:

"Did you talk with him at that time? A. Oh, some. Q. How was he as to his speech; was he rational or not? A. At first he was so weak he couldn't say much. All he could say was, 'I got an awful beating.' Q. He was able to talk? A. Yes; he could talk. Q. And you talked to him on the way in? A. Oh, some; I was in and out all the time."

In answer to other questions he said that Greer looked better by the time he got to Bakersfield and "talked better." On redirect examination the district attorney showed the witness a transcript of his testimony at the preliminary examination, to refresh his memory of the conversations with Greer, and asked:

"Would your memory be any better than it is now what Mr. Greer said at that time?"

To this the defendant's attorney objected on the ground that it was not proper redirect examination, and that it was cross-examination of the people's own witness. The objection was overruled. Thereupon the district attorney elicited testimony to the effect that Greer said that he had been hit on the head, referring to the beating. The witness was again asked to examine his previous testimony to refresh his recollection on the subject. To this the defendant repeated the previous objection, and added the objection that the testimony was irrelevant, incompetent, and immaterial. The objection was overruled, and thereupon the witness, after reading his previous testimony, stated that Greer had informed him that he was hit on the head with a hammer, and that his money and automobile were taken away from him. On recross-examination he further testified that Greer told him that he did not know who had hit him. No other objection was made to this testimony, and no motion was made to strike it out.

The defendant claims that this was error, and that it was very prejudicial to his case. In view of the testimony on the cross-examination, it cannot be said that it was not within the scope of a fair redirect examination. But the statement of the witness on the cross-examination as to what Greer said was not technically responsive to the question, but was a voluntary statement. This point was not embraced in the objection. The evidence was obviously hearsay and incompetent, however, and the redirect examination should not have been allowed, if the proper objection had been made. But, however this may be, the evidence was not prejudicial. The truth of the statements by Greer to the witness was fully established by other uncontradicted evidence. After his arrest the defendant made a full and voluntary confession to the chief of police at Bakersfield, in which he stated the same facts that were elicited on the redirect examination objected to. They were also clearly proven by other satisfactory evidence circumstantial in nature, but not contradicted. The defendant did not testify in his own behalf and introduced no evidence tending to disprove his guilt. The other evidence of the defendant's guilt leaves it in no reasonable doubt. It is plain from the entire case that it did not result in a miscarriage of justice, and consequently, under section 4½, article 6, of the Constitution, it would not be sufficient cause for reversal.

[10-12] 6. The court admitted in evidence two locks of matted hair adhering to something which appeared to be parts of a human scalp, together with testimony that they were found in Greer's automobile at Livingston Station near Merced, where defendant had abandoned it and had boarded the train for Oakland, the morning after the homicide.

Digitized by Google

Testimony was given to the effect that this hair was of the same color as the hair of Greer. The witness Corbett testified that he found the hair in the automobile soon after the defendant abandoned it, and that he gave the hair to Officer Pyles. Pyles produced the hair, and testified that Corbett had given it to him, that he had known Greer for a number of years, and that this hair was the same color as that of Greer. The locks of hair were then offered in evidence, and admitted over the defendant's objection that "no proper foundation had been laid." It is now claimed that it was error to admit this evidence without further evidence showing that its condition was the same at the time of its admission as it was when it was taken from the automobile, and that it was introduced in order to arouse the passion and prejudice of the jury. The defendant made no attempt to show that the hair was in a different condition at the time of its introduction in evidence from its condition at the time it was found, and it is not claimed that its natural color had been changed. There is no presumption that these articles had been changed in any way for any purpose, and we find nothing in the record to indicate that the district attorney introduced the evidence for any improper purpose. They were properly admitted.

[13, 14] 7. The court gave the following instruction:

"You are here, gentlemen, for the purpose of trying the issues of fact that are presented by the allegations in the information filed by the district attorney and the defendant's plea thereto. This duty you should perform, uninfluenced by pity for the defendant, or by passion or prejudice on account of the nature of the charge against him. You are to be governed therefore solely by the evidence introduced in this trial and the law as given by the court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion, or prejudice. A verdict founded upon sentiments of pity for the accused, or upon public opinion or public feeling, or upon passion or prejudice, or upon conjectures, would be a false verdict. You will not take counsel of them in deliberating upon your verdict. The importance of your duties requires that you consider the right of the people of the state of California to have the laws properly executed, and that it is with you, citizens selected from the county, that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty, laws may as well be stricken from statute books."

The defendant argues that the last sentence of the instruction, in effect, directed the jury that they should find the defendant guilty, and if they did not do so they would have neglected their duty. As a part of the same instruction and immediately following the above extract, the court said:

"You should also ever keep in mind the importance to the accused of the result of your deliberations and be just to him, as well as to the people of the state of California. Both the public and the defendant have a right to demand, and they do so demand, and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be."

The instructions, and particularly a single instruction, must be considered as a whole. We cannot perceive wherein the court in this instruction in any respect misdirected the jury as to their duty, and we do not think that it could have been understood by the jury as a direction that they would have been neglectful of their duty if the defendant was not convicted.

The defendant does not claim that the evidence is not sufficient to support the verdict, and it is therefore unnecessary to consider the same. We have examined it, however, and find that it clearly establishes his guilt of a cold-blooded, mercenary, deliberate, and willful murder.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; LENNON, J.; OLNEY, J.

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8796.)

(Supreme Court of California. May 12, 1920.)

1. Insurance ⟸130(7)—Counter offer of general agent upon receipt of application called for acceptance or rejection.

Where an employer of labor applied to a local agent of an indemnity company for a renewal of an expiring policy of insurance, covering liability for injury to employés, stating that he wanted the insurance even though the premium might be more than $15, and local agent in the application sent to the general agent inserted the premium as $10 the amount of the premium the preceding year, and the general agent wrote employer that a $15 minimum premium was required, and that employer should advise by return mail if such premium would be satisfactory, there was no contract of insurance until the employer accepted the counter offer of the general agent; there being no meeting of minds.

2. Master and servant ⟸417(7)—Finding of facts in compensation case conclusive.

Findings of the Industrial Accident Commission under Workmen's Compensation Act upon questions of fact are conclusive, where there is any substantial evidence to support the award.

Digitized by Google

3. Master and servant ⟸405(1)—Evidence insufficient to show contract of insurance prior to accident.

Evidence of employer in a proceeding under Workmen's Compensation Act as to acceptance of counter offer of the indemnity company on receiving employer's application stating a certain minimum premium *held* not sufficiently definite upon which to base a finding that the employer accepted the counter offer prior to the accident.

4. Insurance ⟸130(7)—Acceptance of terms granted by company completes contract before local agent communicates same to principal.

If an employer of labor accepts terms granted by indemnity company, the contract of insurance is complete, although the local agent has not communicated the acceptance to the company.

5. Master and servant ⟸405(1)—Finding of authority of agent to bind indemnity company by parol held not sustained by evidence.

In a compensation proceeding involving liability of an indemnity company to an employer of an injured servant, evidence *held* insufficient to support a finding that a local agent of the indemnity company had authority to bind the company by parol from application.

6. Master and servant ⟸405(1)—Finding of custom that assured was covered from date of application not sustained by evidence.

In a proceeding under Workmen's Compensation Act, a finding that it was the custom and the practice that an employer was covered by insurance from the date of his application, where the terms of the application were not unconditionally accepted by the company, *held* not supported by the evidence.

7. Insurance ⟸129—General agent without authority to issue policy to cover known loss.

The general rule is that whenever the parties have entered into a contract before loss occurs or the policy has been issued, unless the authority of a general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application and is dated accordingly, the policy being thereafter merely evidence of the contract, but such general rule has no application where the parties were not under contract at the time of loss, and the general agent is without special authority to issue a policy to cover the loss.

Wilbur, J., dissenting.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding by Ethel Lamb, under the Workmen's Compensation Act, to obtain compensation for the death of her husband, John Lamb, opposed by M. B. Pond, the employer, and the Western Indemnity Company. There was an award of compensation, and the Indemnity Company brings certiorari. Award annulled.

E. F. Conlin, of San Francisco, for petitioner.

Clarence N. Riggins, of Napa, appearing specially and not otherwise, for respondent Ethel Lamb.

Christopher M. Bradley and A. E. Graupner, both of San Francisco, for respondents.

LAWLOR, J. This is a writ of review issued upon the application of petitioner, the Western Indemnity Company, a corporation. The Industrial Accident Commission, on April 23, 1918, made an award in the sum of $2,596.14 against the petitioner and in favor of Ethel Lamb, for the accidental death of her husband, John Lamb, an employé of Dr. Pond, of Napa county, it having been found by the commission that petitioner was the insurance carrier of Dr. Pond at the time of the injury. It appears that Dr. Pond had been engaged in operating a small farm and fruit orchard some 10 or 12 miles from the city of Napa. John Lamb was employed on the place as a man of all work, and, although that kind of occupation does not fall within the Workmen's Compensation Act, both Dr. Pond and Lamb nevertheless elected to come under its provisions.

On October 2, 1917, Lamb took a team of horses used on the place to a blacksmith shop in the city of Napa to be shod. About noon, as he was taking the horses out of the shop, they became unmanageable and trampled upon him, inflicting injuries from which he died on October 6.

The principal contention of petitioner is that it was not the insurance carrier of Dr. Pond when the accident occurred, and in this connection petitioner makes the claim that the following findings of the commission are without support in the evidence:

"(6) That prior to the said 2d day of October, 1917, and on or about the 24th day of September, 1917, the defendant M. B. Pond had applied to Arthur H. Smith of Napa, the duly accredited and authorized agent of the defendant Western Indemnity Company, for a renewal of a then expiring policy of insurance covering his liability for injury to his employés, and had requested said agent to procure for him such policy, to take effect upon the expiration of his then existing policy, which would expire on September 25, 1917. That at that time it was the custom and the practice that an assured was covered by the insurance subsequently provided in the policy, from the date of his application. That after the application by said defendant Pond, and before the said 2d day of October, 1917, said defendant Pond was notified by said agent Smith that the premium or rate of said insurance had increased, the exact amount of such increase being at that time not known to said agent. That thereupon said defendant Pond stated his willingness and consent to pay the increased rate, and again requested that the policy be issued. That thereafter, and on or about the 10th day of October, 1917, the gen-

Digitized by Google

eral agents of said Western Indemnity Company duly issued their policy of insurance dated the 25th day of September, 1917, to the said defendant Pond, insuring him against his liability for injuries to his employés, and that on the 10th day of October, 1917, said defendant duly paid to said agent Smith the full premium for said insurance, which premium was duly received and accepted by said agent. (7) That by reason of the facts as set forth in paragraph 6 hereof, the defendant Western Indemnity Company was the insurance carrier of said defendant employer at the time of said injury, and had insured said employer against liability for full compensation for said injury, and said employer is entitled to be relieved from such liability under the provisions of subdivision (e) (2) of section 30 of the Workmen's Compensation, Insurance and Safety Act of 1917."

The evidence will sufficiently appear in the discussion.

Arthur H. Smith, doing business under the name of "Arthur H. Smith & Co." in the city of Napa, was engaged in placing insurance for various companies, including the Western Indemnity Company. Upon the filing by petitioner with the state insurance commissioner of "a duplicate power of attorney" on July 1, 1917, a license was issued to Smith for the term of one year in compliance with the provisions of section 633 of the Political Code. The license gave Smith authority "to solicit applications for insurance or surety bonds or to effect insurance or surety bonds in the name of said company." This power of attorney was not introduced in evidence, but we shall assume that it corresponded with the license.

In September, 1916, Smith secured for Dr. Pond a policy of compensation insurance in "the Massachusetts Company." That policy expired on September 25, 1917. On September 24, 1917, Dr. Pond went to the office of Smith, and "verbally" requested that such policy be "renewed." There is a dispute in the testimony of Dr. Pond and Smith as to whether on this occasion Dr. Pond saw Smith personally or dealt with an employé in Smith's office. Dr. Pond testified that—

"Some time in September, I think after the 15th, I received a letter from Mr. Smith stating that my policy terminated, * * * asking me * * * if I wanted a renewal. I gave the letter to Mr. Smith when I went, and ordered a renewal of insurance. I left it as a reminder. * * * He says, 'The premium will be raised.' I was informed that the last premium would be $10 for farmers, and it would be probably $15. * * * Any discussion we had was simply his statement to me that it would be probably not less than $15, and I told him to go ahead. I wanted to be insured even if it was more. He told me right on the start it would probably be that much, 'possibly more,' is the way he put it."

Smith was asked:

"At the time you took that application from Dr. Pond, was there any question about the issuance of a policy on account of the premium—minimum premium?"

And he answered:

"You will have to ask the young lady in the office. She did that work that day. I was not in. * * *"

Smith also testified that the general agent had informed him in a letter of June 29, 1917, that the premium rate for compensation insurance would be $10 "at least temporarily," and that—

"The first notice I had that the minimum premium on farm labor policies had been raised by petitioner was when this application was referred to in this case as being $15."

Smith stated further that, as the Massachusetts Company had discontinued writing compensation insurance, on September 24 he forwarded to the general agent a written application for coverage for Dr. Pond to begin on September 25, 1917, the application being signed by Smith alone, and in item 14 thereof, opposite the printed words "the minimum premium for this policy," appearing the figures "$10.00." This application was received on September 25 in the office of the general agent, Arthur G. Nason, who conducted the agency as "Arthur G. Nason & Co." In due course Smith received an answer to the application under date of September 26 to the effect that the minimum premium on farm labor policies was $15, and stating:

"We shall hold the application pending receipt of your advices as to whether or not we may write at this rate."

On September 29 Smith wrote to Dr. Pond:

"We are in receipt of a letter from the company stating that the least they can write a compensation policy on farm labor is $15 minimum premium. Kindly advise us by return mail if this is satisfactory to you."

There is a further lack of agreement in the testimony of Dr. Pond and Smith as to what occurred after September 24. Smith testified as follows:

"Q. Did you not see him between September 24 and October 2? A. Me? No. * * * Q. Do you know whether he came to your office during that interval? A. I couldn't say. Q. Was it reported to you that he had been in there? A. No. I don't recall it if it was. * * * Q. Then he didn't answer your letter of September 29 until after the accident on October 2? A. That is right. * * * Q. Did you see him on the afternoon of October 2? A. I did. * * * In my office. * * * He said it would be all right at the $15 premium. * * * Q. When Dr. Pond did call on you on October 2 did you then know that this accident had occurred? A. I did."

Dr. Pond's testimony is less definite as to when, after September 24, he talked with Smith about the matter:

Digitized by Google

"Q. And did you return afterwards to Mr. Smith's office for your insurance policy, * * * and on what date? A. I can't say as to the first time—the date—but I went and had a talk with Mr. Smith, and he said it was all right. * * * Q. When did you go back to Mr. Smith after requesting that he have the policy renewed? Was it before or after October 2d? A. Well, my memory is this: that I had another talk with Mr. Smith after ordering a renewal, when he told me that it would be at least $15. 'Well, it might be more,' he said. 'Well,' I said, 'I will draw you a check for $15, it doesn't make any difference. If it is more, I will give you more, and if it is less you can refund it.' He said, 'It would not be less.' On October 2d I called again on Mr. Smith and again tendered money which he refused because he did not know exactly what it would be. He had written me a letter, and I think it was dated the 29th of September, that it would be $15. Whether I called between the 29th and the 2d day of October, the date of the accident, I don't remember positively. Q. But on October 2d, was it after the accident that you called at Mr. Smith's office? A. It was. * * * Q. When did you receive that letter, Doctor? A. I can't tell you exactly. I don't know. Q. But after you received that letter, you called on Mr. Smith, did you not? A. Yes, sir. Q. And that was after the accident had occurred? A. I think I called on Mr. Smith before. I am not positive. I called immediately on receiving the letter. * * * Q. Did you get it before or after the accident? A. I am not positive. I went immediately when I did receive it to Mr. Smith, but I can't say positively whether it was before the accident or after. Q. Then, immediately upon receiving the letter—you received it before the accident—you went to Mr. Smith? A. Yes, sir. My impression is that I did. Q. Did what? A. That I did go to Mr. Smith before the accident to tell him it was all right, verbally. My impression is that, but I wouldn't say positively. * * * Q. You are not sure before the accident or after? A. I am not sure. * * * I think so, but I am not positive. Q. You have testified very clearly that you went to Mr. Smith's office after the accident on October 2? A. Yes. Q. But it is not clear in your mind whether you had the conversation at that time with Mr. Smith about the minimum premium of $15 or not? A. No, I am not, but mind you, before that Mr. Smith had told me that would probably be $15 and probably more—before that time."

On the afternoon of October 2, after Dr. Pond had called on Smith and they were both aware of the injury to Lamb, Smith wrote the following letter to the general agent:

"In answer to your favor of the 26th of September in regard to application of Milo B. Pond, would ask that you kindly issue policy at the $15.00 minimum."

No mention of the accident was made in this letter. On October 3 Smith wrote again to the general agent:

"We herewith inclose you report of accident to John Lamb, employed by Dr. M. B. Pond. Kindly give this your attention."

Before the receipt of this letter, and in response to that of October 2, the office of the general agent issued a policy at the $15 rate and dated it October 3. This was received by Smith on October 4. On October 5 he sent the following letter to the general agent:

"We herewith return you policy No. CC-14425, Milo B. Pond, as you have made an error in dating same. Under date of September 24, 1917, we sent you application asking you to issue the policy, and under date of September 26th you wrote us advising us of the increase in the minimum charge and also stating that you would hold the application pending receipt of our advices. Kindly issue this policy from date of application."

No written reply was made to this letter, but Smith testified that the date of the policy was changed from October 3 to September 25, while he was in the office of the general agent on October 8 or 9. From the testimony that follows it would appear that the actual date of this meeting and the alteration of the policy was October 9. A report of the results of the post mortem examination was forwarded from Smith's office to the general agent on the last-mentioned date. On October 10 Dr. Pond paid the $15 premium to Smith, who issued a receipt therefor and delivered the policy to him.

Charles M. Wilson, manager of Nason's office, and head of the indemnity insurance department thereof, testified that Smith himself called at the office in San Francisco about October 9, and claimed that Dr. Pond's policy had been incorrectly dated; that on this last-mentioned occasion the witness examined the records of the office, and found that Russell B. Adams, an "underwriter and clerk" in the office, had changed the date of the original application to October 3; that, "as a matter of custom" he, without consulting the general agent or any of his staff, then changed the date of the policy to conform to the time of the receipt of the application—September 25—and delivered the policy with the altered date to Smith. Wilson then knew that "Dr. Pond had an accident to one of his employés."

Nason himself testified that he did not learn of the accident until "after October 3. * * * The first that came to my attention was that I was informed that the claim adjuster was called upon by Mr. Wilson to go to Napa to attend the coroner's inquest. * * * That was the first that I knew. * * * Q. As a matter of fact, you are not familiar with the details of your office? A. Absolutely not. Q. You left it to your manager, did you not? A. Yes; unless some trouble arose over a matter I wouldn't interfere at all."

The following testimony was given by Russell B. Adams:

"Q. State whether or not on behalf of Arthur G. Nason & Co. you accepted said application

Digitized by Google

* * * from * * * Dr. Milo B. Pond. A. The application was not accepted. Q. Please state what action you took upon the said application. * * * A. On receipt of the application I noted the premium specified was not up to our charge. A letter was written by me to Smith advising of this, and saying the application would be held pending his advices. Q. In acknowledging the said letter from * * * Smith * * * state whether or not it was your intention as representative of * * * Nason * * * to hold * * * Dr. Pond covered under a policy. A. It was not my intention to cover the risk. Q. Please state what your intentions were as to the said application. A. To hold it until advised by our agent as to whether the insurance was desired at the higher rate. Q. Was it at any time subsequently to the receipt of the application your intention to bind or consider said application of any force or effect, or as constituting any insurance covering Dr. Pond? A. No. * * * No instructions were ever given me to bind this risk or to write a policy. Q. In issuing a binder for such policy * * * what has been your custom while employed by Nason? A. A record of risks bound was kept by Nason. The name, date covered, and nature of covering was always kept. Q. Please state fully what course you would have taken had you intended * * * to hold Dr. Pond covered under a policy. * * * A. A binder would have been issued and recorded as above; in any case there would have been a record of any covering granted."

The respondents in their reply to petitioner's supplemental brief take a different position with regard to the evidence as to when Dr. Pond expressed his willingness to accept the $15 rate from that stated in their first brief. It is insisted in their last position that—

"At the time of the application for a renewal Dr. Pond was told by Mr. Smith that the premium would be raised, and that it would be probably $15 as a minimum. Dr. Pond thereupon informed Mr. Smith that the amount of the premium was immaterial—that he wanted a policy. * * * Respondents contend that this made a complete meeting of minds on the only issue—the premium."

From this it is argued that *the letter of September 29 "was superfluous, and should not in any way be considered* in this cause, for the reason that Smith had already been told by Dr. Pond that he wanted the policy regardless of the amount of the premium." (Italics ours.) In their first brief respondents state that—

"On September 24, 1917, Pond applied to Smith at Napa for a policy. * * * *There may or may not have been some discussion between Smith and Pond * * * concerning the premium * * * at the time the application was made. It is immaterial.* * * The offer of Dr. Pond when it reached the office of the general agent * * * was refused. * * * The petitioner made a new offer to extend coverage to Dr. Pond * * * at an increased price. * * * This offer of petitioner is contained in the letter to Smith * * * under date of September 26 * * * and in the letter from Smith to Dr. Pond under date of September 29. The offer thus made by petitioner was never at any time withdrawn. Indisputably it was accepted by Dr. Pond. * * * *What happened in the interim is of no consequence.*" (Italics ours.)

We do not agree with respondents, as will appear from our discussion, that the letter of September 29 was "superfluous," or that "it is immaterial" what discussion was had on September 24. One reason for setting forth at length the variant positions of respondents is that our interpretation of the findings on this point may appear more clearly. The use of the relative terms "before" and "after" in the sentence relating to the notification to Dr. Pond of the increased rate precludes the idea that the commission meant to find that there was a meeting of minds on September 24. As already shown, Smith's testimony was that he personally had only one interview with Dr. Pond about the rate—after the accident on October 2. We shall assume, for the purposes of this discussion, that the commission found that Smith did discuss the rate with Dr. Pond on September 24. Dr. Pond is less definite as to the number of times he canvassed the premium rate with Smith, but we think his testimony indicates that he meant to convey the impression that he saw Smith three times: (1) on September 24; (2) on a later date before Smith had received the letter of September 26; and (3) after Dr. Pond had received the letter of September 29—but as to this he would not say definitely whether it was before or after the accident. Indeed, Dr. Pond did not testify definitely to any date except October 2, when he called at Smith's office after Lamb was injured. There is further disagreement in the testimony in that Smith stated that he did not know of the increased rate until he received the letter of September 26, while Dr. Pond claims that the higher premium was discussed when he ordered the "renewal."

[1] We have said that the finding cannot be interpreted to mean that the contract was concluded on September 24, nor do we think it can be ascertained therefrom when, according to the commission, Dr. Pond consented to the rate. And, unless the conjunctive "thereupon" connotates an interval between the notification and the consent, it cannot be determined whether the commission found that the rate was agreed upon before or after the injury. Do the findings refer to the second occasion mentioned in Dr. Pond's testimony? The plausible theory is that they do. The word "thereupon" could properly have reference only to an occasion where there was at once a proposal and an acceptance. The term would not describe either of the other occasions. Considered in connection with the statement that he "again" requested that the policy be issued,

Digitized by Google

"thereupon" indicates that he accepted the rate immediately, and "again" connects up with the original request for a "renewal." And, as further supporting this theory, is the circumstance that, according to the same finding, Smith did not then know what the amount of the premium would be. We think it clear that the finding does not refer either to the first or to the third occasion mentioned in the testimony of Dr. Pond. The word "thereupon" could not allude to the interval—however brief it may have been—between the receipt by Dr. Pond of the letter of September 29 and the interview which followed in Smith's office. Moreover, it is shown by the letter of September 29 that when Smith sent it he did know "the exact amount of such increase." It is also to be noted that in the sentence we are discussing the phrase found in the preceding sentence—"and before the 2d day of October"—is significantly missing. In our opinion it was important for the commission to find whether Dr. Pond accepted the rate on the first, the second, or the third of these occasions, for if it was upon the first or second occasion we should be obliged to declare that the findings are not supported by the evidence. Upon the receipt of the application, whatever the scope or extent of Smith's authority may have been—and we shall consider this later—the matter of the rate was taken out of his hands by the letter from the general agent of September 26, which constituted a counter offer. So that, up to the time Dr. Pond accepted the counter offer, there was no meeting of minds on one of the elements of the contract. This would be true even if the testimony of Dr. Pond was accepted by the commission that he stated on the first occasion he wanted the insurance, though the premium might be more than $15, or when he was in Smith's office on the second occasion, for upon the counter offer he was called upon either to accept it or to reject it definitely. We must conclude, therefore, that the commission based its findings on the first or second occasion, or both, and not upon the period following the receipt by Dr. Pond of the letter of September 29, although if the findings did relate to the last occasion we are not to be understood to say that the evidence would be sufficient. We are fortified in this conclusion by the testimony of Dr. Pond himself. He admits that he went to Smith's office *after* the injury. He does not say that he called at any other time on October 2, or that he was in the office more than once after he got the letter. Nor is his testimony definite as to whether he received the letter before or after the accident. We are not losing sight of his testimony that he reported to Smith "immediately" on receipt of the letter; that he thought he received it and saw Smith before Lamb was hurt; that on the second occasion he offered and Smith refused his check; that his purpose in going to Smith's office on October 2 was again to tender the the premium and receive the policy; and that "I did go to Mr. Smith before the accident to tell him it was all right verbally." But, in any event, in our opinion the evidence would not support a finding that Dr. Pond accepted the rate at any time prior to the afternoon of October 2.

[2, 3] It is well settled that the findings of the commission upon questions of fact are conclusive where there is any substantial evidence to support the award. Western Indemnity Co. v. Pillsbury et al., 172 Cal. 807, 159 Pac. 721; Mass. B. & I. Co. v. Industrial Accident Commission, 176 Cal. 488, 168 Pac. 1050. Upon the question of fact we have been discussing, however, taking into account all the pertinent evidence bearing on the point, the apparently consistent and convincing testimony of Smith—supported as it is by the correspondence and the sequence and import of events concerning which there is no dispute, the uncertain testimony of Dr. Pond in most particulars—especially in respect to the time when he acted upon the letter of September 29, and the lack of clearness and definiteness in the findings on the conflict in the evidence—if it can be said that the evidence is really involved in conflict as to the time of his acceptance, we are constrained to declare that, even if the findings are to be interpreted as meaning that Dr. Pond had accepted the counter offer prior to the accident, they are, nevertheless, without support in the evidence. We are not prepared to say, however, that if Dr. Pond had, with some regard for certainty and precision, fixed his acceptance as of a time prior to the casualty we would set aside the finding. We do not think that his testimony can be said to contradict that of his own witness, Smith, on the point that it was sufficiently definite to raise a conflict, or, if there was a conflict, that the findings in any true sense resolved it.

[4] Having reached the conclusion that a contract was not concluded prior to the injury, we shall now dispose of petitioner's objection to the finding that Smith was the agent of the company in the transaction. It is claimed in the brief of petitioner that—

"Smith had not been given, and did not have, and never attempted to exercise any power or authority over the policies of the company, except to receive and deliver the same, * * * and at no time did he have or claim that he had the right to fix the rate or to execute, issue, sign, countersign, or modify a policy issued by this company. * * *"

Smith testified that he was the agent of petitioner, and not of Dr. Pond. If this be true it might be held that if Dr. Pond had, prior to the accident, notified Smith of

Digitized by Google

his acceptance of the counter offer the contract would thereupon have been completed, notwithstanding that Smith did not communicate such acceptance to his principal before the loss occurred. "If the applicant accepts the terms granted by the company the contract is considered complete, without waiting for the local agent to communicate the acceptance to the company." Cooley, Briefs on Insurance, vol. 1, p. 424. See, also, Tayloe v. Merchants', etc., Co., 50 U. S. (9 How.) 390, 13 L. Ed. 187; Carter v. Bankers' L. I. Co., 83 Neb. 810, 120 N. W. 455; Joyce on Insurance, vol. 1, p. 230. But on this question it must be kept in view, as tending to show that in the mind of at least one of the parties the contract was not complete, that Smith waited until he heard from Dr. Pond concerning the counter offer before ordering the policy, and that when he did hear from him he promptly notified the general agent.

[5] It is to be noted, however, that the commission did not in its findings determine the character and scope of Smith's authority as agent for petitioner, and this renders it necessary next to consider whether he could bind petitioner by a parol contract of insurance. Smith testified that "binders" were used in San Francisco, but not in Napa; that he issued none in this instance, but that he had been "advised by Mr. Nason and Mr. Wilson * * * that before the policy is issued the applicant is covered * * * from the date of the application." Smith's own position—erroneously assumed, as we shall see—was that coverage was effected from the date of the application, notwithstanding the contract was not completed before the loss. Wilson, when he was asked whether Smith was "authorized to bind the company from the date of the application, * * *" answered, "I don't know." Nason's position was stated as follows:

"Q. Is it your custom during that interim [between the original application and the final acceptance or rejection thereof] to consider the man or the assured covered? A. Not unless a binder is given."

Dr. Pond testified:

"Q. But on October 2d, was it after the accident you called again at Mr. Smith's office? A. It was. Q. And did Mr. Smith at that time tell you that the policy had been applied for or had been issued? A. He told me it had not only been applied for, but I was perfectly secured. * * * Q. Did he tell you positively that he had made application to the insurance company for you to have a policy issued in your favor? A. Showed me a copy of the application. Read it to me to show that I was secured. * * * Q. Doctor, did Mr. Smith tell you you were wholly covered? A. Yes. Q. And you never considered that you did not have any insurance? A. I never questioned it for a moment."

From this testimony it would appear that Smith did not give assurances of coverage to Dr. Pond until after the accident. This is in accord with the former's testimony, for, as already shown, he said he saw Dr. Pond only once—on the afternoon of October 2. Smith also testified that he had not been in the habit of issuing policies for petitioner, and that the invariable custom was to send the applications to the general agency, where the policies were issued and forwarded to him for delivery. We shall assume that Smith was, for certain purposes at least, petitioner's agent; but neither in the testimony we have just quoted, nor elsewhere in the record, is there a particle of evidence to indicate that he had authority to bind petitioner by parol. Hence, even if the commission had meant so to convey by its finding that Smith was "the duly accredited and authorized agent of * * * Western Indemnity Company," and if Smith had given assurances of coverage to Dr. Pond before the injury—and not afterwards—as the fact seems to be, still such a finding would be without support in the evidence.

[6] We turn now to the question whether the finding "that it was the custom and the practice that an assured was covered by the insurance, subsequently provided in the policy, from the date of his application," may be sustained. We cannot determine from the record whether the commission intended to find that such "custom and practice" was followed as well when the contract of insurance was not concluded before a loss as when it was. If the former, from the conclusion we have already reached as to when the contract was completed, we must hold that the finding is not supported by the evidence. In addition to Smith's testimony that he was advised by the general agent and Wilson that an applicant was covered from the date of his application, he stated that in all the policies he had received from the company the date corresponded with that of the application, but he admitted that he had never, except in this instance, sent in an application to petitioner whose terms were not acceptable. Wilson's testimony corroborates that of Smith on the point that the policies sent to him had always borne the date of the application, so as to provide coverage from the beginning, but he does not state that such custom and practice were observed where the terms of an application were not unconditionally accepted by the company. The testimony of Nason and Adams, which we have quoted, tends to show positively that this custom and practice did not prevail in such circumstances. It seems to us that this finding is without support in the evidence.

It only remains to consider whether, where the loss has occurred before the parties had come to an understanding upon the terms of the contract, the general agent has authority to issue a policy so as to cover the

Digitized by Google

uncovered loss. The cause was argued before this court and submitted for decision. The submission was subsequently vacated, and the cause set for further argument upon the questions:

"(1) As to the authority of the general agent of a foreign insurance company after a loss not amounting to a total loss has occurred to the knowledge of the agent, to deliver a policy of insurance antedated so as to cover the loss, there being at the time no binding agreement for the insurance between the insured and the company; and (2) as to the authority in the particular case of Wilson, the employé of the general agent, to make such delivery on behalf of the general agent, assuming that the general agent had himself such authority."

After the above order of resubmission the respondent commission filed a supplemental brief in which, among other points, it is urged that "the actions of the employés of Nason Company were the actions of Nason Company," and in support of the contention the following authorities are cited: International Trust Co. v. Insurance Co., 71 Fed. 81, 17 C. C. A. 608; Mound City Ins. Co. v. Huth, 49 Ala. 529; Electric Ins. Co. v. Fahrenkrug, 68 Ill. 463; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Mayer v. Ins. Co., 88 Iowa, 304, 18 Am. Rep. 34; Bodine v. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566. But we do not deem it necessary to discuss this point, and we shall, therefore, proceed on the assumption that the acts of Wilson and Adams stand as the acts of the general agent just as if Smith had dealt directly with him.

The policy was introduced in evidence, and contained the following provisions:

"K. No assignment or change of interest and no change, waiver, or extension of any of the terms or conditions of this policy shall be valid, unless indorsed hereon and signed by an officer of the company, nor shall notice to any agent or any other person be held to effect a waiver or change in any part of the policy. * * * M. The term of this policy shall be twelve months from October 3, 1917, beginning and ending at twelve o'clock noon, standard time, at the assured's business address stated herein."

It is contended by petitioner that as Nason, according to his own testimony, was not an officer of the company, the alteration of the date of the policy was not binding on petitioner, the policy did not cover liability prior to October 3, and therefore petitioner was not the insurance carrier of Dr. Pond at the time of the accident. But, as the decisive question here is whether the general agent had authority to issue a policy covering a known loss, rather than whether he was authorized to alter a policy properly issued in the first place, we are not called upon to discuss the provision in clause K.

[7] The general rule covering this question is thus stated in Cooley's Briefs on Insurance, vol. 1, at page 354:

"It may * * * be regarded as elementary that an agent has no authority to insure goods which he knows to have already been destroyed by fire."

And this rule finds support in the following cases: Mead v. Phenix Ins. Co., 158 Mass. 124 [32 N. E. 945]; Clark v. Ins. Co., 89 Me. 26 [35 Atl. 1008, 35 L. R. A. 276]; Stebbins v. Ins. Co., 60 N. H. 65. And in Waterloo Lumber Co. v. Ins. Co., 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. (N. S.) 539, the court said:

"It has frequently been held that an agent has no authority to insure property already destroyed. * * *"

See, also, Bentley v. Columbia Ins. Co., 17 N. Y. 421; 28 Cent. Dig. p. 703; 11 Dec. Dig. Ins. § 127. The principle laid down in these authorities is equally applicable to compensation insurance.

Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury. One was written on the day following the loss, but was never "issued" until it was delivered to Smith on October 9. Before that time the date of the application had been changed from September 25 to October 3, and the policy from October 3 to September 25.

The following cases are cited in the brief filed by the respondent commission in support of the proposition that a general agent has authority to issue a policy covering a known loss and binding on his principal: New York Ins. Co. v. Russell, 77 Fed. 103, 23 C. C. A. 43; Insurance Co. v. Colt, 87 U. S. (20 Wall.) 560, 567, 22 L. Ed. 423; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298; Schultz v. Phœnix Ins. Co. (C. C.) 77 Fed. 374, 392; Kennebec v. Insurance Co., 6 Gray (Mass.) 204; Warner v. Insurance Co., 14 Wis. 345; Komula v. Gen. Assurance Co., 165 Wis. 520, 162 N. W. 919. These authorities are distinguishable from the case here in that in each of them, prior to the loss, the insured had signified his acceptance of the terms offered by the insurance company, and thus a contract of insurance had been concluded. No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss, where the terms of the contract of insurance had not already been settled upon.

The general rule is that whenever the par-

Digitized by Google

ties have entered into a contract before the loss occurs or the policy has been issued, unless the authority of the general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application, and is dated accordingly—the policy being thereafter merely evidence of the contract; but this general rule has no application where the parties were not under contract at the time of the injury, and the general agent is without special authority to issue a policy to cover the loss.

Since it appears, then, that no contract of insurance was concluded prior to the accident, that Smith had no authority to bind petitioner by a parol contract of insurance, that the "custom and the practice" found by the commission to have been followed did not extend to a case where, at the time of the loss, the parties had not agreed upon the terms of the contract, and that the general agent was, in such circumstances without authority to issue a policy it follows that the findings cannot be sustained.

The award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.

WILBUR, J. I dissent. The evidence shows that the Workmen's Compensation Law did not apply to Dr. Pond until, at the solicitation of the agent Smith, he elected to be bound by its terms. The effect of his election was to charge him with responsibility for the injury to his employés under the terms of that law, even if he was wholly without fault, as in this case. Because of such election Dr. Pond evidently intended to keep covered by insurance. Accordingly he notified Smith, petitioner's agent, that he desired an indemnity policy, dating from the expiration of his existing insurance, and that he was willing to pay whatever premium was charged by the company. The petitioner offered its insurance policies for sale to the public generally at a fixed and uniform rate. The terms and provisions of the policy being thus fixed, the question of insurance turned upon the willingness of the prospective policy holder to pay the premium demanded therefor by the company. At the time Dr. Pond applied to Smith for the policy he stated that he was willing to pay the premium, whatever it might be. Instead of communicating this fact to the general agent, Smith inserted in the written application the amount of the premium as $10. This resulted in the complications detailed in the main opinion. The evidence discloses that the company was willing to write the policy, and that Pond was willing to pay the amount of the insurance, and this willingness had been communicated by the one to the other. The whole difficulty arose from the failure of Smith to state in the written application for insurance the fact that Dr. Pond was willing to pay the increased premium. This was not the fault of Dr. Pond. The policy applied for was one dated September 25, 1917, and the policy finally issued and paid for was so dated. Wilson, to all intents and purposes, was the general agent of the company. He conducted the entire business of the general agent, in the name of the general agent, without consultation with him. Upon the insistence of Smith that Dr. Pond was entitled to a policy dated September 25, 1917, in accordance with the custom of the office he issued such a policy so dated, after knowledge of the accident, which policy covered the liability here sought to be enforced. In view of the delay caused by the failure of its agent Smith to communicate to the general agent the facts, namely, the willingness of Dr. Pond to pay the premium asked, which would have resulted in the prompt issuance of the policy, it would seem that common honesty demanded of the defendant that it accept the responsibility due to the delay of its own agent in communicating a correct statement of the actual terms of the application. The finding of the ultimate fact by the commission was that the written policy which by its terms covered the accident was binding by reason of a previous oral negotiation between the parties. I think the evidence is sufficient to justify this finding. Under somewhat similar facts, in Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298, it was held under the circumstances there stated that the acceptance of the rate by the insured in a communication to the local agent was sufficient to bind the company where the rate had been previously fixed by the general agent, and that, although no policy was ever issued, the insurance company was bound. The only difference in the two cases in principle is that in the case at bar the information that the applicant was willing to pay the premium demanded was communicated to the local agent before the premium was fixed by the general agent, and in Eames v. Home Ins. Co. it was communicated afterward. In neither case did the information that the applicant was willing to pay the premium demanded reach the general agent in time for the issuance of the policy before the loss, while in Eames v. Home Ins. Co. the policy was never issued, and in the case at bar it was issued with full knowledge of the fact. I think that Dr. Pond had signified his acceptance of the terms offered by the insurance company and thus a contract of insurance had been concluded.

Digitized by Google

YOUNG et al. v. SOUTHERN PAC. CO. et al. (Sac. 2501.)

(Supreme Court of California. March 9, 1920. On Rehearing, April 7, 1920.)

1. Railroads ⇐348(9)—Evidence held to show contributory negligence of motorcyclist crossing track.

In an action for the death of a motorcycle driver struck after passing standing cars obstructing his view of a track on which a car was being pushed by an engine, evidence *held* to justify a finding of contributory negligence in failing to stop, look, and listen.

2. Railroads ⇐328(1)—Motorcyclist held contributorily negligent as matter of law.

A motorcycle rider who failed to stop and look, though his view was obstructed by standing cars, and attempted to cross, heedless of warning bells and whistle, and gesticulations and cries of bystanders and warning shouted by brakeman a few feet away, *held* contributorily negligent as a matter of law.

3. Trial ⇐193(3)—Instruction as to burden of proving contributory negligence held erroneous as indicating court's opinion as to evidence.

In a negligence action, where plaintiff in opening case put before the jury all the elements that went to disclose contributory negligence so that defendant's evidence did not materially add thereto in establishment of contributory negligence, and where plaintiff's evidence showed contributory negligence as a matter of law, an instruction that contributory negligence is not to be inferred from plaintiff's testimony, and is to be affirmatively shown by defendant, would have been error, in that it would have led jury to believe that in court's opinion such evidence was insufficient to establish contributory negligence.

4. Railroads ⇐351(17) — Instruction as to duty of traveler to look after passing obstruction to view held error.

In action for death of motorcyclist struck at railroad crossing after having passed standing box cars extending into street and obstructing his view of other track, where after passing the standing cars he had an unobstructed view of other track for nearly three miles, instruction that, if box cars excluded view of track "when about to go upon such track, the traveler is excused from looking" *held* error, in leading jury to think that deceased had been under no obligation to look after passing standing cars, whereas he was required to look if by looking after passing standing cars he could have seen car approach on other track.

5. Railroads ⇐328(10) — Motorcyclist approaching obstructed crossing required to stop, look, and listen.

A motorcyclist, approaching a crossing with standing cars obstructing his view of cars approaching on another track while bell is ringing and whistle blowing, is negligent in attempting to cross without looking, listening, and, if necessary, stopping; his obligation to so do being increased by knowledge that a train is approaching.

6. Railroads ⇐351(17)—Instruction as to duty to look after passing obstruction created by defendant held error.

In action for death of motorcyclist struck by cars on main track of crossing after having passed standing cars on passing track obstructing his view of main track, instruction that failure to stop, look, and listen is not negligence where railroad has created conditions causing ordinarily prudent person to refrain from exercising such precautions *held* error, where motorcyclist, after passing standing car, had three-mile view of main track; he being under obligations to look and listen notwithstanding obstruction.

7. Negligence ⇐83—Contributory negligence no bar to recovery under last clear chance doctrine.

Contributory negligence does not preclude recovery under the last clear chance doctrine, which is founded upon the theory that the injured person was guilty of negligence.

8. Trial ⇐252(9)—Instruction on last clear chance doctrine held improper as without support in evidence.

In action for death of motorcyclist at crossing, instruction on last clear chance doctrine, authorizing recovery for plaintiffs on railroad's failure to stop train if circumstances were such as to have led an ordinarily prudent person, situated as the trainmen, to believe that motorcyclist was in the act of crossing the track, and through fear, excitement, or loss of self-control could not stop, *held* improper, where there was no evidence that driver was acting under fear or excitement, or had lost self-control until accident was unavoidable.

9. Railroads ⇐338—Last clear chance doctrine defined.

Under the last clear chance doctrine, the traveler's peril, which calls upon the trainmen to act, must be an actual one from which he cannot escape by the exercise of ordinary care; and, until he has reached the point from which he cannot escape by the exercise of such care, the doctrine does not apply.

10. Trial ⇐219—Instruction requiring "proper warning," without specifying any standard, improper.

In an action for death at crossing, instruction that railroad is required to give "proper warning," without defining any standard as to what constituted proper warning, *held* improper.

11. Trial ⇐251(8)—Instruction as to negligence not pleaded improper.

In an action for death at crossing, instruction that railroad was required to have some one stationed at the crossing to give proper warning *held* improper, where complaint did not allege railroad's failure to have brakeman at crossing as the basis of the claim of negligence.

Digitized by Google

12. Evidence ⟸588—Credibility of witness for jury.

The jury can disbelieve the testimony of any witness.

13. Appeal and error ⟸1002—Verdict on conflicting evidence not disturbed.

Where evidence was conflicting, verdict supported by substantial evidence will not be disturbed, as the jury is the exclusive judge of the facts.

14. Appeal and error ⟸1170(9)—Erroneous instructions held prejudicial.

In action for death at crossing, erroneous instructions as to contributory negligence and the last clear chance doctrine, *held* ground for reversal on appeal from judgment for plaintiff, notwithstanding Const. art. 6, § 4½, in view of insufficiency of evidence to prove defendants liable under last clear chance doctrine, and verdict against train employés against whom last clear chance doctrine was not available, as well as against those who would have been liable thereunder, indicating that the verdict was not rendered under such doctrine.

Olney and Lawlor, JJ., dissenting.

On Rehearing.

15. Negligence ⟸122(2)—Contributory negligence must be proved by defendants unless shown by plaintiff's evidence.

Unless it may be inferred from the evidence offered by the plaintiff, contributory negligence is a matter of defense, to be proved affirmatively by the defendant.

16. Death ⟸103(3) — Where deceased was contributorily negligent as matter of law case is not for jury.

In action for death, where deceased was clearly guilty of contributory negligence as a matter of law, the question of contributory negligence should not have been submitted to the jury.

In Bank.

Appeal from Superior Court, Yolo County; H. D. Burroughs, Judge.

Action by Roy J. Young, as special administrator of the estate of Jacob Bluhm, deceased, and another against the Southern Pacific Company and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Devlin & Devlin, of Sacramento, Hudson Grant, of Woodland, and A. L. Clark, of San Francisco, for appellants.

Clark, Black & Clark, of Berkeley, for respondents.

WILBUR, J. This action was brought by the father and mother of Fred C. Bluhm to recover damages for the death of their son. The father has died, and the special administrator of his estate has been substituted.

Fred C. Bluhm, while riding a motorcycle along Main street in the city of Woodland across the railway track of the defendant company, was struck by a caboose, which was being pushed by an engine, and killed. Joined with the defendant company were G. E. Waite, conductor, W. H. Jones, engineer, and G. C. Conley and B. C. Neibling, brakemen, of the train. The case was tried by a jury, and a verdict rendered against all of the defendants. As a part of the plaintiffs' case a diagram of the scene of the accident was introduced in evidence. From this it appears that crossing Main street at and near the place of the accident were two tracks of the railway company, one the main line track and another a passing track. In approaching the point of collision the deceased first crossed the passing track and then the main track. At the time of the accident the train involved in the accident was being broken up and a part thereof was standing on the passing track. The engine and caboose were on the main track. The complaint alleges that the defendants were negligent in allowing a portion of the train to stand upon the passing track in such manner that a portion thereof projected into and partially crossed Main street, "so that the northerly end of said train of cars extended from the south side of said Main street into the said Main street a distance of about 15 feet," thereby obscuring the view of a person traveling westerly on Main street and preventing such person from observing the approach of cars "being propelled in front of an engine, in the event an engine shoving cars was being run on said main line track in a northerly direction towards such railroad crossing, and would be misled and deceived into believing that no cars were being propelled by or shoved by said engine." That immediately prior to the collision the engine of the defendant company was pushing a caboose northward along the track, the engine being fronted north and the caboose in front thereof; that the deceased had no knowledge or notice of the fact that the defendants were engaged in running an engine propelling or shoving a caboose in front of it in a northerly direction along said main line track, and that by reason of the location of said portions of said train of cars on said passing track he was misled and deceived into believing that he could go safely over said crossing. Immediately before the trial began plaintiffs amended their complaint to add a count charging negligence under the last clear chance doctrine, in which they alleged the same situation with reference to the cars and tracks. It was alleged:

"That as he passed the northerly end of said portion of said train of cars so placed and allowed so to remain on said passing track, he for the first time discovered that the defendants were engaged in running an engine propelling and shoving a caboose in front of it in a northerly direction along said main line track, towards the point where he was about to pass

Digitized by Google

over said main line track, and that he then for the first time discovered the peril in which he would be by reason of proceeding across said main line track; that Fred C. Bluhm so discovered said engine and caboose immediately upon his passing the said northerly end of said cars so placed and allowed to remain on said passing track, but that at the time of becoming aware of the approach of said engine and caboose it was then impossible for him to avoid continuing westerly over said main line track, and that he did continue westerly to the said main line track upon his said motorcycle; * * * that the individual defendants herein who were engaged in the management of said engine and caboose * * * knew that the said Fred C. Bluhm was about to go upon said main line track * * * and could not avoid so doing; that they then became aware of the peril in which he was situated, and that if he went upon the said main line track he would be killed or suffer great bodily injury, if the engine or caboose were not stopped or the speed thereof slackened immediately; that the defendants herein negligently and carelessly, after they so became aware of the said danger * * * failed to stop said engine and caboose, or to slacken the speed thereof immediately," and as the result thereof deceased was killed.

The distance between the passing track and the main track at the point of collision was between 13 and 14 feet.

[1, 2] Plaintiffs in their main case called as witnesses the engineer and brakeman riding on the right-hand side of the engine and caboose, respectively, at the time of the accident, a witness who was following immediately behind the deceased and saw the collision, and other witnesses, concerning the various details regarding the circumstances of the accident. These witnesses testified, among other things, that the deceased stopped for a moment's conversation at a point about 150 feet east of the main line of the defendant railway company; that at the time he stopped and conversed with one of the witnesses a stationary electric bell at the crossing was ringing continuously because of the fact that the engine and caboose were on the track south of the crossing at a point sufficiently near to cause the automatic electric crossing bell to ring; that during all of this time the automatic bell on the engine was ringing; that the engine stopped at points 500 feet south of the crossing and 200 feet south of the crossing, and that on starting forward each time two blasts of the whistle were blown; that the engine and caboose were approaching the crossing at a speed of from four to eight miles an hour, and that the deceased upon starting his machine to the point of crossing moved slowly to the point of the accident at a speed of from four to six miles an hour; that the view of the main line track upon which the caboose and engine were approaching was obscured by a line of cars on the passing track which projected into the street to a point variously estimated at 8 or 10 feet north of the south curb line of the street to a point within 8 or 10 feet of the Northern Electric track which ran along Main street in an easterly and westerly direction a few feet north of the center line of said Main street; that, although the view of the main track was thus obscured, a witness 50 feet in the rear of the deceased saw the smoke from the approaching locomotive, and shouted twice to the deceased, warning him of his danger, telling him that he would be killed if he did not look out; that in addition to this warning two men standing near the stationary electric bell on the easterly side of the main line track in Main street, and within a few feet of the deceased, waved frantically, and shouted at the deceased to warn him of his danger; that a witness, Conley, a brakeman, riding on the right-hand rear step of the caboose, as soon as he saw the deceased approaching, yelled at him, and waved for him to stop, and immediately gave the emergency signal to the engineer; that at that time the deceased was upon the passing track, which was about 13 feet from the main line track upon which the caboose was approaching; that the engineer was constantly observing the track and the brakeman on the rear of the caboose for the purpose of safeguarding those approaching on the highway; that he saw the frantic gestures of a man near the stationary electric bell, apparently trying to stop some one approaching on the highway, and that immediately, and without waiting for such person to become visible, he applied the emergency brakes; that he saw the signal of the brakeman for the emergency brakes, but had already applied the brakes; that the deceased moved forward along Main street toward the point of collision without looking to the right or the left or in any way indicating that he saw or had knowledge of the approaching train; that when he was upon the track in front of the caboose, apparently in sudden fright, he leaped from his motorcycle in front of the caboose, the motorcycle passed on and cleared the caboose, falling clear of the track, but deceased fell and was run over by the trucks on the left side of the caboose. From this evidence it is justly inferable that the deceased, without the slightest effort to stop or look or listen, approached the crossing, although knowing that the track was there, utterly heedless of the warning bells and whistle and the gesticulations of the bystanders, and the cries of those who sought to warn him, and the warning shouted at him by the brakeman, who must have been only a few feet from him. From this evidence it is not only apparent that the jury would have been justified in finding the deceased guilty of contributory negligence, but that he was guilty of contributory negligence as a matter of law. The court, however, instructed the jury as follows:

Digitized by Google

"Contributory negligence is such an act or omission on the part of the decedent, amounting to want of ordinary care, as, concurring and co-operating with the negligence of the defendants, was the proximate cause of the injury complained of. Nor is it to be inferred from the evidence offered by the plaintiffs; such negligence is a matter of defense to be proved affirmatively by the defendants; and hence the burden of proof of contributory negligence is on the defendants."

[3, 4] It is difficult to appraise the effect upon the jury of the above instruction, concerning contributory negligence. The plaintiffs in opening their case put before the jury all the elements that went to disclose that the deceased was guilty of contributory negligence, and while the defendants did introduce some evidence in addition to that offered by the plaintiffs, it may be said in general that such evidence did not add materially to the situation as disclosed by the plaintiff's evidence so far as contributory negligence is concerned. The jury might well have believed from this instruction that in the opinion of the court either the plaintiff's evidence did not show contributory negligence, or that they must wholly disregard this chain of circumstances in determining whether or not there was contributory negligence. Of course, there are other instructions upon the question of negligence and contributory negligence and upon the doctrine of the last clear chance. But before considering them it should be observed that the verdict returned by the jury was against all the defendants. The defendants not only included the brakeman and engineer, who saw the deceased approaching the track, but also the conductor and another brakeman who did not observe and did not see the deceased at any time before he was run over and killed. If the jury based its verdict upon the last clear chance doctrine, it could not justly have found a verdict against those employés who knew nothing of the peril of the deceased. It would therefore appear that the jury's verdict was upon the theory that the deceased was not guilty of contributory negligence. The jury were further instructed:

"If you believe from the evidence that the defendants at the crossing where the accident is alleged to have occurred suffered to remain on their tracks box cars so as to exclude to a traveler a view of its track when about to go upon such track, the traveler is excused from looking, and the failure to look cannot be imputed to him as negligence, although it throws upon him additional care in listening and to take such other precautions for his safety as may be reasonably necessary."

Now, with this instruction it should be observed that it is unquestioned that during a part of the time when the deceased was approaching the main line track his view was obscured so that he could not see the approaching engine and caboose. It is also true that as he approached the main line track his view of that track to the south constantly increased. The extent of that view depended upon his location with reference to the end of the standing box car. If, however, we assume that he crossed the passing track as near to the standing car as he could, he had an opportunity the moment that he passed the corner of this car to look down the track toward the approaching engine and caboose, with an unrestricted view for nearly three miles. The phrase used in the instruction, "when about to go upon such track," in view of the conceded location of the tracks and the opportunity to observe, after passing the standing car, might well have been construed by the jury as altogether excusing the deceased from looking, while the law required the deceased to look if after passing the obstruction he could by looking have seen the approaching train, and the court elsewhere so instructed the jury as follows:

"If you find from the evidence that, when the deceased passed the north end of the box car going toward the main line track upon which he was killed, there was a space between the passing track and the main line track, from which he could, under the evidence in the case, in safety have seen the approaching engine and caboose it was his duty to look and listen from this point of safety, and if he failed to do so, but passed on to his death, he was guilty of contributory negligence."

As was said by the District Court of Appeal in its first decision herein:

"There can be no possible doubt under the evidence that there was such a space as is therein indicated. The virtual effect of the instruction was therefore that if the jury believed Bluhm failed to look for the train, he was guilty of contributory negligence."

Again, the jury were instructed as follows:

"If you believe from the evidence that the deceased, Fred Bluhm, while approaching the crossing to a point that was reasonably suitable and proper for ascertaining whether cars were approaching, and while he was yet in a position of safety there was an engine moving upon the main line, but under the facts in the case he then had reasonable grounds for believing the engine was not approaching, or, if approaching, it was not near to the crossing, and was not shoving the caboose near to the crossing, then it is a question for you to determine whether he was negligent in passing the crossing track without stopping."

[5] This instruction simply means, under the facts in the case, that if the deceased saw the smoke of the approaching engine and believed that the smoke was at the front end of the approaching train instead of in the middle, as it appears in fact it was, the jury was to determine whether it was negligence for him to continue without stopping to make further observation. There is no justification

Digitized by Google

for this instruction. If, in addition to the warning given by the track itself, by the ringing of the bell and the blowing of the whistle, he actually saw a train approaching, it was negligence for him to proceed and attempt to cross in front of the approaching train, even if he believed that the smoke was in the front of it. He was bound to look and listen, and, if necessary, to stop, upon approaching the track without knowing that a train was approaching, and that obligation was increased rather than diminished by his knowledge that in fact a train was approaching.

[6] The jury was further instructed:

"You are instructed that the rule which requires a person on a highway to stop, look, and listen for an approaching train, where the view of the track is obstructed, is not an unvarying one applicable to every set of circumstances. Contributory negligence cannot be imputed to one on account of his failure to stop, look, and listen for a train, or a portion of a train approaching the crossing, if, by the acts of those managing the train, or parts of the train at the crossing, appearances are produced which would cause an ordinarily prudent person to refrain from exercising the precaution to stop, look, and listen."

This could only mean, under the circumstances, that the deceased was not required to stop, look, and listen if in the opinion of the jury the appearance of the box car upon the passing track was sufficient in their judgment to excuse him from the burden of the rule. This is not the law. The deceased was under the obligation to look and listen, and if by reason of the obstruction caused by the box car he could not see or hear without stopping in a place of safety so to do, it was his duty to do so.

We have so far discussed the case from the standpoint of the plaintiff's testimony for the purpose of determining whether or not the instruction to the effect that contributory negligence could not be inferred from the plaintiff's testimony prejudiced the appellants. It is apparent from what has been said that the above-quoted instructions upon the subject of contributory negligence were erroneous and require a reversal of the case.

[7] The respondents contend, however, that the defendants were liable on the last clear chance doctrine. It is true that under this doctrine the contributory negligence of the deceased would cease to be a factor as soon as the situation demanded the application of the rule, which is founded upon the theory that the injured person is guilty of negligence. For the purpose of this appeal it is sufficient to say that it is impossible to determine whether the jury awarded the verdict on the theory that the deceased was not guilty of contributory negligence, or upon the theory that the last clear chance doctrine applied, but that the fact that some of the defendants against whom the verdict was found were not liable, in any event, under that doctrine, would indicate that the former was the basis of the jury's verdict. Notwithstanding the necessity of a new trial, we deem it unnecessary to critically examine the instruction of the court on the last clear chance doctrine, for the reason that the doctrine is well settled, and that instructions applicable to the facts of this case may readily be given. The instruction is criticized by the appellants "because it permitted the jury to find the defendants' negligence under the rule, if on the facts the trainmen could have seen Bluhm in time to save him, whereas the law is that they must have actually seen him or known he was there, and have been guilty of an independent and a new negligence thereafter." It is doubtful whether the instruction is susceptible of the interpretation placed upon it by the appellants. Without quoting the entire instruction, it provides:

"That if * * * those in charge of the engine and caboose discovered the plaintiff's presence on the highway * * * and the circumstances were such as to lead an ordinarily prudent person situated as those were in charge of the engine and caboose to believe that the deceased was in the act of crossing the track in front of the caboose, and through fear, excitement, or loss of self-control could not stop and would come in collision with the caboose, if it proceeded, and that those in charge of the engine and caboose, after seeing and realizing such a situation of the deceased, failed to stop the engine and caboose, although they could by the exercise of ordinary care have stopped the same, * * * then in that event the jury will find for the plaintiffs, notwithstanding they believe that the deceased was originally wanting in ordinary care in failing to ascertain that the engine and caboose were coming, and in attempting to cross the main line track."

[8, 9] This instruction is misleading for the reason that there is no evidence to justify the conclusion that the deceased was acting under fear or excitement or had lost self-control until the moment that he leaped from his motorcycle or was knocked therefrom, at which time the accident was unavoidable. The only evidence observable by the train employés was that the deceased was proceeding heedlessly forward. The last clear chance doctrine was not applicable until he arrived at such a point as to be in peril, and this was the point where he could no longer escape injury by exercising ordinary care. Until he reached that point the train employés had a right to rely upon his continuing obligation to observe the approach of the train. The evidence does not clearly indicate this point, for the reason that it does not show within what distance the motorcycle, under the circumstances, could have been stopped. It is important that this should be made clear to the jury for the reason that, in one sense, every person approaching a crossing at a speed which would bring

Digitized by Google

him in collision with a moving train at the crossing is in danger and certain to be injured unless he accelerates his speed, slows down or stops, or the engineer does so. Under the last clear chance doctrine the peril which calls upon the train employés to act must be an actual one from which the imperiled party cannot escape by the exercise of ordinary care. Until the deceased reached the point from which he could not escape injury by the exercise of ordinary care, either by stopping or accelerating his pace, the doctrine of the last clear chance does not apply. The rule is well stated in the following quotation from French v. Grand Trunk Ry., 76 Vt. 441, 58 Atl. 722:

"It is true that, when a traveler has reached a point where he cannot help himself—cannot extricate himself, and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true, that, if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears and physical strength to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case, the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When negligence is concurrent and operative at the time of the collision and contributes to it, there can be no recovery."

We have recently had before us in Basham v. Southern Pacific Co., 176 Cal. 320, 168 Pac. 359, the doctrine of the last clear chance as applied to a crossing case, where the injured party was approaching the track at right angles. It was there said:

"The 'last clear chance' doctrine can have no possible application, unless there was evidence tending to show that the fireman neglected to take steps which due care would have required, when he saw the team and wagon in a position which would have indicated to a reasonable man that Coffey was already in danger, or was immediately about to enter the danger zone."

[10, 11] The court gave the following instruction:

"The jury is instructed that if under the circumstances existing at a crossing proper warning of the danger of the approach of trains cannot be given unless some one is stationed thereat to give warnings, it is the duty of a railroad company making use of the crossing to have some one stationed at the crossing to give such warnings, or to approach such crossing with the engine under such control that it can be stopped in time to avoid injury."

Aside from the proposition that this instruction submitted to the jury, without any standard for the determination of the same, the question of what constituted "proper warning" of the danger of the approaching train, the instruction was objectionable because the complaint did not allege the failure to have a flagman at the crossing as a basis of the claim of negligence. The instruction should not have been given.

We do not deem it necessary to discuss the other instructions complained of by appellants, nor to set out other portions of the evidence, for the reason that the rules applying to accidents at railway crossings are so well settled that on a new trial the court should have no difficulty in correctly instructing the jury. We do not wish to be considered as either approving or disapproving of the instructions that are not herein mentioned.

[12, 13] We have not overlooked the fact that the jury is the exclusive judge of the facts, and can disbelieve the testimony of any witness, and that, if substantial evidence supports the verdict, where the evidence is conflicting, the verdict of the jury must stand. Our discussion of the evidence is for the purpose of making manifest the prejudicial character of the erroneous instructions given by the court.

As to the objection that the complaint does not state that the deceased was an adult son, the evidence clearly shows that fact, and the complaint can be amended in the lower court. We, therefore, deem it unnecessary to give further consideration to that question.

[14] In view of the suggestion that under section 4½ of article 6 of the Constitution the judgment might be affirmed on the theory that an examination of the entire record leads to the conclusion that the errors complained of have not resulted in a miscarriage of justice, we deem it proper to state that we are entirely satisfied from such examination that this court cannot say that there has been no miscarriage of justice. For instance, defendant Conley testified that as soon as he saw the deceased he gave the emergency signal. Defendant Jones, the engineer, testified that he applied the emergency brakes before he received the signal or saw the deceased. Defendant Neibling testified that he saw nothing of the accident until the motorcycle appeared on the far side of the train, and that the emergency brake had been applied before that time. Defendant Waite, the conductor, testified that he was not on the engine or caboose at the time of the accident.

If this testimony is true no verdict should have been rendered against any of these defendants on the last clear chance doctrine, or on the theory that they were guilty of negligence; nor should a verdict have been rendered against the defendant company. The question of whether or not this evidence was true, and, where there was contradictory circumstantial evidence, which should be accepted by the jury, was entirely a matter for the trial court and jury; nor is it a matter for consideration that another jury upon a

Digitized by Google

new trial might, upon such conflicting evidence and proper instructions, render a verdict based on the last clear chance doctrine favorable to the plaintiffs. Furthermore, the fact that a verdict was returned against defendants Waite and Neibling, who neither saw the peril of the deceased nor had anything to do with the instrumentalities by which the train was or could be stopped, is a clear indication that the present verdict was not rendered upon the last clear chance doctrine. If it be conceded that there is sufficient evidence upon which the jury might have based a verdict against some of the defendants on that doctrine, it is equally apparent that as to others such a verdict could not properly be rendered. It cannot therefore be said from the record that this doctrine was the basis of the jury's verdict against all the defendants, and, if not, it cannot be said by this court to be the basis of their verdict against any one of the defendants. Such a conclusion would be in direct conflict with the verdict of the jury, which includes all, and hence implies a sort of negligence in which all participated, and therefore, a sort to which contributory negligence is a complete defense.

The judgment is reversed.

We concur: LENNON, J.; SHAW, J.; MELVIN, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment and in what is said in the main opinion on the question of contributory negligence, and the instructions given the jury thereon. I am not in entire accord with all that is said in the opinion in regard to the last clear chance doctrine, and believe that the instruction on that question was substantially correct and not rendered prejudicially misleading by the use of the words "through fear, excitement or loss of self-control." I am further of the opinion that there was sufficient evidence to sustain a verdict based on the last clear chance doctrine. To my mind, however, it cannot fairly be held that the evidence was such as to require a verdict for plaintiff on that ground, or, in other words, that the evidence was such that defendants are liable under said doctrine as matter of law. This being so, a reversal cannot be avoided, for it is impossible to know upon what theory the verdict was rendered, or that the jury ever concluded that the facts existed which would have warranted a verdict under the last clear chance doctrine.

OLNEY, J. (dissenting). I dissent on the ground that, while the statement in the first instruction discussed in the main opinion, "Nor is it [contributory negligence] to be inferred from the evidence offered by the plaintiff," is erroneous, so palpably so as to make it probable that it was given wholly by inadvertence, and while, in fact, the decedent was plainly guilty of contributory negligence and the jury should have been so instructed, yet the facts of the case are such as to show unmistakably that the verdict was a just one under the last clear chance rule, and to make it evident that the jury, if there is any presumption that they were reasoning beings and acted as such, reached their verdict because of the liability of the defendants under that rule without being affected by the issue of contributory negligence which was erroneously submitted to them. More than this, I do not see how it is possible upon the facts of this case to say truly that the errors relied upon to justify the reversal, of which those concerning the issue of contributory negligence are alone substantial, "resulted in a miscarriage of justice" as required by section 4½ of article 6 of our Constitution. The verdict certainly cannot be said to be an unjust one. If the facts be not such as to require a verdict for the plaintiff as a matter of law, and in my judgment they at least closely approach so doing, at least they amply justify such a verdict and destroy the possibility of its being properly deemed "a miscarriage of justice."

The salient facts are practically without dispute. The decedent, Bluhm, was coming along the street on his motorcycle approaching the crossing in an utterly heedless and therefore perilous fashion. Under these circumstances no recovery could be had for his death unless three things appeared, viz.: (1) That the train crew observed and realized his peril; (2) that the train crew did not act with the promptness which such a situation reasonably demanded of them; and (3) that if they had so acted, the accident would have been avoided. On the other hand, if these things did appear, the plaintiff was entitled to recover. The evidence both for the plaintiff and the defendants shows unmistakably that they did in fact exist.

First, as to the train crew observing and realizing the decedent's peril. The decedent was killed by being struck by a caboose which was being pushed by a locomotive. As the caboose was being so backed, one of the brakeman, the defendant Conley, was stationed on the steps of the forward platform of the caboose, that is, the platform that was forward as the caboose was then being moved, to direct and control the movement of the train to look out for any danger. Before the decedent came in sight, and before the train reached the street, both Conley and the engineer, the defendant Jones, observed a bystander on the sidewalk, who, in Conley's language, was "making all kinds of demonstration. It seemed as though he was motioning to a fellow going across the track, you know—stopping him that way, and then he grabbed his hat and motioned and waved it." By the actions of this bystander Conley

Digitized by Google

and the engineer must both have realized the possibility of an impending danger, and must have been mentally prepared for the peril which immediately after developed within their observation when Bluhm came into view. So forewarned, their natural and almost inevitable mental reaction when Bluhm did come into view was to realize this peril. That there was, in fact, such realization appears from Conley's testimony, which is that when he first saw Bluhm he "hollered" and waved at him and gave the emergency stop signal to the engineer. From these actions of Conley's there is but one possible conclusion, and that is that he observed and realized that Bluhm was in peril.

Second, as to the train crew not acting with the promptness which Bluhm's observed and realized peril reasonably demanded of them. It needs no argument to establish the proposition that it was the duty of the train crew upon observing and realizing Bluhm's peril promptly to stop the train. The testimony, however, leaves no doubt that they did not do so. The engineer Jones testified for the defendant that the train could be stopped in 40 feet. It is well-nigh incredible that a freight engine with only a light caboose attached, traveling a little faster than a fast walk, and moving on a slight up grade such as existed at the place of accident, could not be stopped in much less than 40 feet. But however this may be, there can be no disputing the fact that the train was stopped only after it had proceeded 75 or 80 feet from the point where it first struck Bluhm. This distance, of course, is less than the distance through which the train moved after Bluhm's peril was observed by the train crew, since by all the testimony this was observed before Bluhm was struck. The following facts are those which conclusively show the movement of the train through 75 or 80 feet after striking Bluhm. When Bluhm was struck he was 8 or 10 feet south of the tracks of an electric road which runs along the street on which he was riding and crosses the steam railroad tracks. The train was moving north, and, when it was finally stopped, the gangway between the engine and its tender was immediately over the electric tracks. The engine was moving forward so that the whole length of the engine as far as the gangway had crossed the electric tracks. It necessarily follows from these facts that after striking Bluhm the train moved through the distance from the point of contact to the electric tracks, some 8 or 10 feet, plus the length of the caboose, which it was testified by the defendants' witnesses was something over 30 feet, plus the length of the engine without the tender, which was testified by the defendants' witnesses to be about 40 feet. The sum of these distances is 78 or 80 feet, or almost twice that within which, according to the testimony of the engineer, the train could have been stopped. I can see but one reasonable conclusion from these facts, and that is that the train was not in fact stopped with the promptness which the situation of observed peril reasonably demanded.

Third, as to the fact that if the train had been stopped with reasonable promptness the accident would have been avoided. This is shown conclusively by the fact that a very slight checking of the speed of the train woud have avoided the accident. Bluhm was struck by the far side of the platform; that is, he was almost across the track and out of danger. In fact, if he had remained on his motorcycle he probably would not have been struck at all, for the motorcycle was not hit, but went on completely across and was there picked up uninjured. Just as the caboose was almost upon Bluhm he was observed to throw up his hands and fall off his wheel, and it was due to his falling off, probably caused by fright at his observing the caboose so close upon him, that he was struck.

The foregoing facts appear so plainly in the evidence and the conclusion to which they lead is so plain that, as I have said, it seems evident that it was because of these facts, and not because of any erroneous view as to the decedent's contributory negligence, that the jury returned the verdict which they did. That verdict cannot be said to be a miscarriage of justice, and the errors dwelt upon in the main opinion seem to me to come fairly within the remedial amendment mentioned of our Constitution.

What I have said does not apply to the members of the train crew other than the brakeman, Conley, and the engineer. The other members of the crew were not shown to have had any connection with the failure to stop the train promptly on Bluhm's peril being observed, and the judgment as to them is properly reversed.

I concur: LAWLOR, J.

On Rehearing.

PER CURIAM. [15, 16] In a petition for rehearing it is stated that the learned trial judge insists that no such instruction on contributory negligence as the one first discussed in the opinion was ever given; that instead of the words "nor is it to be inferred" the instruction actually given commenced with the words "unless it may be inferred." So changed, the instruction would be a correct statement of the law. The settled record on appeal is, in the light of this statement, incorrect, but even if the record in this behalf could now be corrected to show the truth, it would make no difference in the result. The gist of the opinion in this matter is that the question of contributory negligence should not have been submitted to the jury, the deceased being clearly guilty of contributory

Digitized by Google

negligence as a matter of law. There were several instructions on the question of contributory negligence, and that question was submitted to the jury.

The application for a rehearing is denied.

ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; KERRIGAN, Judge pro tem. concur.

CITIZENS' SAVINGS BANK OF SAN DIEGO v. BENNETT et al. (L. A. 5281.)

(Supreme Court of California. May 13, 1920.)

1. **Partition ⇐116(2)—Effect of partition decree changing boundaries of mortgaged lands stated.**

Where decree in partition suit, brought to determine boundaries of lots and blocks in subdivision of city, decreed mortgagors to be owners of the lots mortgaged but located such lots so that buildings constructed on such lots as originally platted by mortgagors with money borrowed from mortgagee were not located thereon, the effect of the decree was to substitute the land within boundaries fixed by such decree as mortgage security, so that mortgage foreclosure purchaser acquired no right in the houses.

2. **Mortgages ⇐309(1)—Foreclosure and sale as to only part of property covered held to have released part omitted.**

Where holder of mortgage covering certain land and also certain houses not a part of such land obtains a decree foreclosing on the land alone and buys it in for the full amount due, the omission of the houses from foreclosure and sale releases them from the mortgage.

3. **Mortgages ⇐538—Reopening foreclosure decree only remedy where part of property omitted from decree by mistake.**

Where mortgage covering certain realty and certain houses not a part of such realty is foreclosed by decree omitting by mistake foreclosure as to the houses, mortgagee purchaser at foreclosure sale, if entitled to relief, could secure such relief only by having the decree reopened or set aside in suitable proceedings.

Department 1.

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by the Citizens' Savings Bank of San Diego against Carrie E. Bennett and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Herbert N. Ellis and C. B. Ellis, both of San Diego, for appellants.

Albert J. Lee and William G. Mirow, both of San Diego, for respondent.

OLNEY, J. This is an appeal from a judgment for the plaintiff declaring it to be the owner of two certain dwelling houses, enjoining the defendants from affixing the houses to two certain lots onto which they had just been moved when the action was brought, and giving the plaintiff possession of them. The appeal is on the judgment roll alone. The real parties in interest are the plaintiff and the defendant Carrie E. Bennett.

The findings show that Mrs. Bennett and her husband were formerly the owners of certain unimproved lots designated by number in a block in an outside subdivision of the city of San Diego. While such owner, Mrs. Bennett and her husband mortgaged the property to the plaintiff to secure a loan of $2,000 made by the plaintiff to the Bennetts upon the understanding that the money would be used in building dwellings upon the property. The subdivision had been platted and the lines of its lots and blocks staked on the ground, and at the time of the giving of the mortgage the president of the plaintiff and the Bennetts went to the subdivision and definitely located the lots of the Bennetts as so platted and staked. Upon these lots the Bennetts then built four houses, two of which are those whose ownership is now in question.

Subsequent to the execution of the mortgage, what is termed a "partition" suit was brought to determine the boundaries of the lots and blocks in the subdivision. All the owners of lots in the subdivision were made parties, and the plaintiff here and the Bennetts were among the parties plaintiff. In the partition suit a survey was made of the subdivision with the consent of the parties whereby the boundary lines of the various lots were located differently from the boundaries previously platted and staked and according to which the Bennetts had purchased and then mortgaged to the plaintiff. On July 12, 1915, a decree, agreeable to all the parties, was entered in the partition suit, whereby the boundaries of the various lots were fixed in accordance with the survey made in the suit. By this decree the Bennetts were declared to be the owners of the lots mortgaged subject to the plaintiff's mortgage, but the lots so owned and mortgaged were defined and bounded according to the partition survey and not as originally platted and staked. The result was that two of the houses built by the Bennetts, the two in question here, were not on the property of which they were declared by the decree to be the owner. It is this circumstance which gives rise to the present litigation.

While the partition suit was pending, the plaintiff here brought suit to foreclose its mortgage, and in June, 1915, obtained a decree of foreclosure, under which the mortgaged property was sold and purchased by the plaintiff three days before the entry of the decree in the partition suit. The foreclosure sale was simply of the lots mortgaged designated by number. The lots were bid in by the plaintiff for the full amount found to be due by the foreclosure decree.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

Some time subsequently, Mrs. Bennett proceeded to move the two houses in question from the lots on which they were built to two other lots owned by her and in which the plaintiff had no interest and was about to affix the houses to the latter lots when stayed by the commencement of the present action.

It is at once apparent that, if the plaintiff be entitled to recover, it must be upon the theory that the houses in question were subject to the mortgage lien. It is also apparent that, if such lien existed, it was because of one or the other of two alternatives. One is that the property actually owned and mortgaged by the Bennetts was the lots as originally platted and staked and actually located by the parties to the mortgage upon the ground, in which case the houses were built upon the mortgaged land and became a part of the realty and as such were subject to the lien of the mortgage. This is probably the true view of the situation. The other alternative is that by mistake the houses were built on the wrong property, and that because of this mistake and because of the intention and understanding that the houses would be built on the mortgaged lots and thereby become subject to the mortgage lien, the lien of the mortgage would, as between the parties, be extended to include the houses although they were not actually a part of the mortgaged realty. Assuming that there was a lien in plaintiff's favor on one or the other of these theories, what is the effect of the partition and foreclosure decrees upon the rights of the parties?

[1] Assuming that the property mortgaged was the lots as originally platted, staked, and located on the ground, it is apparent that the effect of the partition decree was to substitute other lots as the mortgage security. The effect of the decree was exactly the same as if the parties by proper releases and conveyances had made the substitution. There can be no question but that in such a case the mortgagee must look to the substituted property as his security, and of such substituted property the houses here were not a part. It may be that the parties did not realize the effect of the decree and that it was made under a mistake, so that it could have been reopened or set aside upon a proper showing and its effect in substituting other property for that actually mortgaged corrected. But such relief against the effect of the partition decree was not sought, there is no finding that the parties were not aware of and did not intend the very thing which the partition decree accomplished, that is, that substitution of lots according to the new survey for the lots as originally platted, staked, and located, and full effect must be given to the decree. Giving it effect means, as we have said, that the realty of which the houses were a part, assuming that such realty was subject to the mortgage, has been removed from under the mortgage and other property substituted for it, and the plaintiff has no right in the houses.

[2] On the other hand, assuming that the second alternative stated is the correct view of the original rights of the parties, then the situation was that the plaintiff owned a mortgage, the lien of which covered certain realty and also covered certain houses which were not a part of such realty; the lien of the mortgage extending to the houses nevertheless because of the mistake in their location. In this situation the plaintiff brought suit to foreclose, obtained a decree foreclosing on the mortgaged realty alone, and bought it in for the full amount due. It is at once apparent that by the omission of the houses from foreclosure and sale they were released from the mortgage. There is no difference whatever between such a case and one wherein different pieces of realty are subject to mortgage, and a foreclosure is had which omits one of the pieces. The rule is well established and hardly admits of question that in such a case the omitted parcel is released or, perhaps more accurately, is discharged of the mortgage. Mascarel v. Raffour, 51 Cal. 242; Mitchell v. Canal Co., 75 Cal. 464, 479, 17 Pac. 246; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Stockton, etc., Co. v. Harrold, 127 Cal. 612, 60 Pac. 165.

[3] Here again, if the omission of the houses from the foreclosure was by mistake and by mistake under such circumstances as to entitle the plaintiff to relief, such relief could be had only by reopening or setting aside the foreclosure decree by suitable proceedings. This has not been done, there is no showing here upon which it could be done, and the foreclosure decree must be given its full effect. That effect was to release or discharge the houses from the mortgaged lien, if the fact be that they were not a part of the mortgaged realty. It follows that, upon either alternative upon which the plaintiff could have a lien upon the houses, such lien, and with it every right of the plaintiff in the houses has been lost.

Judgment reversed, with directions to enter judgment for the defendants upon the findings.

We concur: LAWLOR, J.; SHAW, J.

Digitized by Google

In re MURPHY'S ESTATE. (L. A. 5608.)

(Supreme Court of California. May 12, 1920. Rehearing Denied June 10, 1920.)

1. Taxation ⟸878(2)—Remainder held subject to inheritance tax; "vested remainder."

Where testator reserving life estate in income from certain property had transferred the remainder to his wife and children subject to his right to dispose of the property by power of appointment to be exercised in his will, the remainders were "vested," though defeasible under Civ. Code, §§ 694, 781, and were subject to inheritance tax under Laws 1911, p. 713, § 1, subd. 3, upon his death leaving will directing that the terms of such agreement be carried out, since the power was not exercised by such will, though will contained general devise, such general devise having reference to other property, under Civ. Code, § 1330, and since remaindermen's title dated from time of such agreement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vested Remainder.]

2. Taxation ⟸861 — Liability to inheritance tax determined by law at time of vesting of interest.

It is the vesting in interest which constitutes the succession, and the question of liability to inheritance tax must be determined by the law in force at such time.

3. Taxation ⟸878(1)—Transfer prior to death held without consideration, subjecting it to inheritance tax.

Where beneficiary of trust fund payable to beneficiary's children in case of his death before certain date transferred the property reserving a life estate in the income and the right to otherwise dispose of the property by testamentary appointment in case he died after such date, there was no consideration for the transfer, subjecting it to inheritance tax.

4. Taxation ⟸867(1)—Transfer to be subject to inheritance tax must transfer property within state.

In order that transfer of property of nonresident be subject to inheritance tax, the property must be within the state.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Albert M. Murphy, deceased. From an order fixing amount of inheritance tax, the State Controller appeals. Reversed, with instructions.

Rehearing denied; OLNEY, J., dissenting. SLOANE, J., not voting.

Robert A. Waring, of Sacramento, and John W. Carrigan and Edwin H. Pennock, both of Los Angeles, for appellant.

O'Melveny, Milliken & Tuller, of Los Angeles, and A. L. Rowland, of Pasadena, for respondent.

PER CURIAM. The following opinion was prepared by Mr. Justice Kerrigan of the District Court of Appeal of the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice Melvin. It is adopted as the opinion of this court:

This appeal involves the question of the amount due as inheritance tax in the above-entitled matter.

Deceased died testate October 19, 1915, a resident of Los Angeles county, and his personal estate was appraised at over a million dollars, and an inheritance tax amounting to the sum of $24,462.67 was paid thereon. No attack is made upon the order impressing this property with a tax or upon the sum found to be due. The value of that estate was exclusive of an interest which the deceased owned in what is known as the Murphy Family Trusts, and the question presented by this appeal is whether or not that interest is subject to the payment of a transfer tax. Deceased acquired this interest from the estate of his father, Simon Murphy, who died February 1, 1905, leaving a will by the terms of which the bulk of his estate was given to his children and other descendants, impressed, however, with certain trusts. The prescribed term of these various trusts was for the period of 10 years, i. e., until February 1, 1915, or upon the earlier decease of the survivor of the two sons named therein. The trustees were directed upon the termination of these trusts to divide the estate into five equal shares among certain of his children, of whom Albert, the deceased, was one. The interest which the deceased took in his father's estate was to go to his issue in the event that he predeceased them during the life of the trust, and upon failure of issue this interest was to be divided among his brothers and sisters. On December 17, 1912, at which time decedent was not a resident of California, the various members of the Murphy family voluntarily agreed to extend the term of the trust created by their ancestor for a period of some 20 years from its termination. In pursuance of this plan all the persons having any interests, including the deceased and his ten children, joined in conveying all such interests upon trusts, which were described and declared as the Murphy Family Trusts. Deceased, in conveying his interest upon these trusts, retained a life estate in the income, with a power of appointment by will over the remainder if he died after February 1, 1915. He furthur provided that in the event of his death prior to February 1, 1915, this interest should go in equal shares to his ten children, and that if he died after February 1, 1915, without exercising the reserved power of appointment, then and in that event his wife, if surviving, should share with the ten children equally.

Digitized by Google

The Murphy Family Trusts conveyance is voluminous, and a full review of its recitals and provisions would extend this opinion to an undue length and answer no useful purpose. Respondents claim that the conveyance by the ten children constitutes a valuable and adequate consideration and one sufficient to prevent the succession tax from attaching.

By his will made on February 16, 1915, which was within eight months of his death, decedent disposed of his entire estate; but respecting the agreement of December 17, 1912, which the respondents properly call a trust conveyance, he made the following special provision:

"It is my will and I hereby direct that the terms, condition and purpose of the trust agreement entered into by me with other heirs and devisees of my late father Simon J. Murphy, on the 17th day of December, 1912, and known as the Murphy Family Trusts, as far as the same shall not be inconsistent with the provisions of this my will or render nugatory any of the provisions thereof, shall be carried out."

The trust of 1905 expired on February 1, 1915, and if the deceased had not made the trust conevyance of 1912 he would have been the owner at the time of his death of his original share in the properties of the trust of 1905. On December 17, 1912, however, he conveyed his share of the trust of 1905, upon trusts whereby he reserved a life estate, transferred the remainders to his widow and his ten children, subject, however, to his power to dispose of this property by power of appointment to be exercised in his will. We have already quoted the provision in his will dealing with the matter, and therefore have before us the facts upon which the decision must turn.

(1) Is the transfer of December 17, 1912, in its nature a taxable transfer?

(2) If so, was there an adequate and valuable consideration therefor which would avoid the tax?

(3) As Albert Murphy was a nonresident of California on December 17, 1912, is the transfer taxable only in so far as it was limited to California assets?

We take these questions up in the order stated.

[1] Albert Murphy was alive on February 2, 1915. On that day, therefore, he would have been the absolute and indefeasible owner of his share of his father's estate if he had not made the transfer of December 17, 1912. In that transfer he reserved the income of the property for his life and transferred the estate in remainder to his wife and children subject to his right to dispose of the property by power of appointment to be exercised in his will. The remainders thus created were vested although defeasible. Civ. Code, §§ 694, 781; Estate of Dunphy, 147 Cal. 95, 81 Pac. 315; Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306. Ordinarily, the transfer of a remainder subject to a life estate reserved by the grantor is a taxable transfer (Estate of Felton, 176 Cal. 663, 169 Pac. 392), and therefore the transfer of December 17, 1912, is taxable under the law of 1911, § 1, subd. 3 (Stats. 1911, p. 713), which provides:

"When the transfer is of property made by a resident, or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death * * *" unless the reserved power of appointment changes the case.

The remaindermen, consisting of the widow and children, who are respondents on this appeal, argue that the reserved power of appointment contained in the transfer of December 17, 1912, and the provisions of the will of Albert M. Murphy which became effective at his death October 19, 1915, do change the case. The respondents argue that they do not take the property as remaindermen under the transfer of December 17, 1912, but claim that their title comes from a power of appointment exercised under the will. They also claim that the exercise of a power of appointment was not taxable when Albert M. Murphy died in 1915, and hence they take the property free from any transfer or inheritance tax. It appears that the exercise of powers of appointment was taxable from 1905 to 1913, and has been from 1917 to the present time, but was not taxable from 1913 to 1917.

Respondents contend that decedent's will contains a general devise, and that this amounted to an exercise of the power of appointment reserved in the trust conveyance of December 17, 1912 (section 1330, Civ. Code), and argue that by the power of appointment thus exercised the shares in the property covered by the trust conveyance of December 17, 1912, were distributed differently than in said trust conveyance.

We think not. The property conveyed December 17, 1912, is controlled by the special clause of the will, which we have already quoted, and not by the general devise. As already stated, the decedent owned at his death property worth $1,000,000 exclusive of the property covered by the trust conveyance of December 17, 1912. We think the true interpretation of his will is that the dispositions therein made deal with the $1,000,000, and that item 3 of the will confirming the trust conveyance of December 17, 1912, was intended to approve of all of the dispositions therein provided for. The language employed in terms confirmed the trust deed. It is not necessary for us finally to determine whether this confirmatory clause amounted

Digitized by Google

to the exercise of the power of appointment or is to be treated as a failure to exercise the power. In either event, the result is the same. If it is to be treated as the exercise of the power of appointment, it is controlled by the views expressed in Matter of Lansing, cited below; and, if it is to be treated as a failure to exercise the power of appointment, then the vested defeasible remainders created December 17, 1912, became indefeasible by the decedent's failure to exercise the power of appointment.

Matter of Lansing, 182 N. Y. 238, 74 N. E. 882, involved property in which a mother had a life estate with remainder to her daughter, subject to the right of the mother to dispose of the property by the exercise of a power of appointment in her will. At her death the mother left a will in which she exercised the power of appointment by devising the property to her daughter. The court said that—

"The execution of the power left the title where it was before, and the result is the same as if there had been no power to exercise."

Speaking of the effect of the exercise of the power upon the title which the daughter had during the mother's life, the court said:

"While the situation was subject to change under the power of appointment, no change was made. Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder,' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance."

Matter of Lansing has been approved and followed in similar cases. Matter of Haggerty, 128 App. Div. 479, 112 N. Y. Supp. 1017, affirmed 194 N. Y. 550, 87 N. E. 1120; Matter of Hoffman, 161 App. Div. 836, 146 N. Y. Supp. 898, affirmed 212 N. Y. 604, 106 N. E. 1034; Matter of Chapman, 61 Misc. Rep. 593, 115 N. Y. Supp. 981, 133 App. Div. 337, 117 N. Y. Supp. 679, 138 App. Div. 923, 123 N. Y. Supp. 1110, affirmed 196 N. Y. 561, 90 N. E. 1157, 199 N. Y. 562, 93 N. E. 1118.

[2] We therefore hold that the title of the remaindermen dates from December 17, 1912, and that the case is controlled by the statute of 1911, for it is settled law that—

"It is the vesting in interest which constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time." Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Gurnsey, 177 Cal. 211, 170 Pac. 402; Nickel v. State, 179 Cal. 126, 175 Pac. 641; In re Brix's Estate, 186 Pac. 135.

In reaching the foregoing conclusions we have not stopped to consider what or to what extent powers may be validly exercised in this state, for, if the power of appointment reserved in the deed had been invalid, then the remaindermen would have taken indefeasible instead of defeasible vested remainders. Estate of Dunphy, 147 Cal. 95, 81 Pac. 315.

We therefore hold that the tax attaches unless the transfer was made upon an adequate and valuable consideration, to which we now address ourselves.

[3] On December 17, 1912, the only interest which the ten children had in their father's share in his father's estate arose from the possibility that he might die before the trust terminated and in that event the ten children would take the share. The trust was certainly to terminate on February 1, 1915, and might terminate earlier. The ten children had nothing to surrender but this possibility of ownership, but they did not even surrender that possibility, for the transfer of December 17, 1912, provided that if Albert M. Murphy died before February 1, 1915, the property should go to the ten children. Hence they gave nothing in the transfer of December 17, 1912. Considering that Albert M. Murphy lived till October 19, 1915, he gave the remainders created in the transfer of December 17, 1912, to his wife and children without any valuable consideration at all.

Counsel for respondents argue, however, that if the father had died before the termination of the trust of 1905 the effect of the trust conveyance of December 17, 1912, upon the children would have been that the property which they were entitled to after the termination of the trust of 1905 would be found to be burdened with another trust, the trust of 1912, to endure. Out of this contingent possibility, which never happened, counsel for respondents seek to work out a valuable and adequate consideration for the vested remainders which were conveyed to the remaindermen by the decedent in the trust conveyance of December 17, 1912. This alleged consideration is very unsubstantial, and we cannot regard it as adequate, and might upon analysis find it to be merely nominal.

[4] We come now to the third question. Albert M. Murphy was a nonresident of California December 17, 1912, so the transfer is taxable only in so far as he conveyed California assets. The record indicates with sufficient clearness that California assets were included amongst those conveyed by the deceased in trust on December 17, 1912, and the order from which this appeal is taken is not being defended on the ground that no California assets were transferred at that time.

The order appealed from is reversed, with instructions to the lower court to impose the tax provided for in the act of 1911 upon the California assets which were included amongst the properties transferred in trust by the decedent December 17, 1912.

One of the ten children died after December 17, 1912, and before the death of his father, Albert M. Murphy, October 19, 1915; but whether the remaindermen taking as a class were reduced to ten, or whether the

Digitized by Google

heirs at law or devisees of the will of this deceased son of Albert M. Murphy are to pay the tax, is a matter to be adjusted in the court below.

Order reversed.

ANGELLOTTI, C. J., and OLNEY, SHAW, WILBUR, LENNON, and LAWLOR, JJ., concur.

SEARCY v. KAY, County Clerk. (Civ. 2178.)

(District Court of Appeal, Third District, California. April 5, 1920.)

1. Venue ⟸79—On order changing place of trial, clerk is required to transmit pleadings and papers despite appeal or subsequent motion.

Where in wife's divorce action she secured order changing place of trial, under Code Civ. Proc. § 399, the clerk was required to transmit the pleadings and papers to the clerk of the court to which the action was transferred, though defendant husband had appealed from the order changing place of trial, and though plaintiff wife had subsequently moved for additional alimony and counsel fees in the original court.

2. Mandamus ⟸44—Writ will issue to compel clerk to transfer papers as required.

Mandamus will issue at the instance of a wife suing for divorce to compel the clerk to transfer the pleadings and papers in the action to the clerk of the court to which it has been transferred on plaintiff's motion, his statutory duty under Code Civ. Proc. § 399.

Application for writ of mandate by Mary Louise Searcy against Fred M. Kay, County Clerk and ex officio Clerk of the Superior Court of the County of Humboldt, to require the transmission of papers. Writ granted.

E. L. Webber, of Napa, for petitioner.
Henry L. Ford, of Eureka, for respondent.

PREWETT, Presiding Judge pro tem. This is an application for a writ of mandate directing the defendant, as said clerk, to transmit to the clerk of the superior court of the city and county of San Francisco the files in an action for divorce commenced by plaintiff against one C. L. Searcy, the material events of which occurred in the following order:

(1) September 19, 1919, action commenced in the superior court of said city and county.

(2) October 10, 1919, place of trial changed to the superior court of the county of Humboldt on motion of the defendant.

(3) After answer and on January 9, 1920, the place of trial was changed back to the superior court of said city and county in order to promote the convenience of witnesses.

(4) On the same day the defendant perfected an appeal to the Supreme Court from the order changing the place of trial to the city and county of San Francisco.

(5) On February 11, 1920, on due notice and affidavit, said superior court of the county of Humboldt made its order allowing to plaintiff certain sums by way of alimony and counsel fees.

(6) On March 16, 1920, this proceeding was commenced.

(7) Subsequent to the commencement of this proceeding the plaintiff procured the issue of process to compel the defendant, Searcy, to comply with said order for the payment of alimony and counsel fees.

The defendant, Kay, refuses to transmit the papers in conformity with said order changing the place of trial. The petition herein contains an allegation that he bases his refusal upon the ground that the appeal from the order changing the place of trial stays all proceedings upon such order. However, in his answer, he expressly disclaims this as a reason. That the appeal does not stay proceedings is placed beyond all question by the language of the Code itself. Section 949, Code Civ. Proc.

The defendant pleads in his answer that it became necessary to retain the papers in order to make out and certify the usual copies to be used on appeal. But if this point ever had any force it has long since ceased to constitute a justification. This proceeding was not commenced until more than two months after the appeal was taken.

Secondly. The clerk insists that the inauguration of the subsequent proceedings with reference to alimony and counsel fees makes it necessary that he retain the papers for use in the determination thereof.

It becomes unnecessary in this proceeding to inquire whether the lower court has jurisdiction to entertain a motion for alimony and counsel fees pending an appeal from an order changing the place of trial, because this application must be decided adversely to the defendant for other reasons. Section 399 of the Code of Civil Procedure requires a clerk, when an order is made transferring the cause to another court, to transmit the pleadings and papers therein to the clerk of the court to which the action is transferred. Commenting upon this section, the court in Chase v. Superior Court, 154 Cal. 789, 99 Pac. 355, says:

"The question in the case is as to when the action was transferred, or, in other words, was the transfer in fact completed by the order made by the court? The Code provides that the court to which the action is transferred 'has and exercises over the same the like jurisdiction as if it had been originally commenced therein.' We are of the opinion that the action was transferred to Santa Clara county when the order was finally made and entered

Digitized by Google

in the superior court of the city and county of San Francisco. There must be a moment of time when the court transferring the case loses jurisdiction, and the court to which it is transferred acquires jurisdiction. When the court to which the action is transferred acquires jurisdiction, the court which made the order transferring it has no power to make any further order in the premises."

[1] Proceedings upon the order changing the place of trial are not stayed by the appeal. The duty devolved upon the clerk, at once upon the entry of the order, to transmit the papers to the clerk of the superior court to which the action was transferred.

The act of the defendant in appealing from the order changing the venue could not operate to deprive the plaintiff of the benefit of the order of change. No more does the act of the plaintiff in moving for additional alimony and counsel fees. Conceding that the superior court of Humboldt county retained any power or authority in the premises after the entry of its order changing the place of trial, still there can be no question that the superior court of the city and county of San Francisco acquired jurisdiction at once by means of the order of transfer, and its clerk became the only person lawfully entitled to the custody of the papers. If the plaintiff had requested the clerk to retain the papers in his office, she would not be permitted to come into court and insist upon a writ against him.

On the contrary, however, she does not ask him to retain them, but she insists that her lawful right to proceed under the order of transfer be conserved by the transfer of the papers to the proper court.

[2] Let a peremptory writ issue requiring the clerk to transmit the papers to the clerk of the superior court of the city and county of San Francisco.

We concur: HART, J.; BURNETT, J.

PIONEER FRUIT CO. v. SOUTHERN PAC. CO. (Civ. 3297).

(District Court of Appeal, First District, Division 1, California. April 8, 1920.)

1. Limitation of actions ⇐27 — Action for breach of contract of shipment not action on oral contract; "bill of lading"; "written contract."

In view of Civ. Code, § 2126, defining a "bill of lading" as an instrument in writing signed by the carrier or its agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing to deliver the freight to a specified person at a specified place, a bill of lading is a written contract, and an action for breach of a contract of shipment in failing to ice the shipment and in permitting an unreasonable delay was not covered by the statute of limitations (Code Civ. Proc. § 339, subd. 1) as to oral contracts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Lading; First Series, Written Contract.]

2. Appeal and error ⇐673(2)—Court cannot know terms of bill of lading when not before it.

The court cannot know on appeal that there was any provision in the bill of lading sued on as to the time within which a claim for damages must be presented, where the parties have not furnished any copy of the bill of lading.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the Pioneer Fruit Company against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

Fred R. Levee and James E. Kelby, both of Los Angeles, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover from the defendant the sum of $2,576.25, damages alleged to have been sustained by the plaintiff in connection with the shipment of a carload of cherries from San Jose, Cal., to Boston, Mass., during the month of June, 1913, and which were consigned by the plaintiff to a corporation known as California Fruit Distributors through the defendant as shipper, upon a bill of lading issued in compliance with the Interstate Commerce Act. The plaintiff's claim was based upon two alleged breaches of the contract of shipment, in that, first, the defendant allowed the car in which these cherries were transported to be insufficiently iced; second, that the defendant permitted an unreasonable delay to occur in the shipment of the cherries, as a result of both of which alleged breaches of the terms of shipment the cherries arrived in Boston in a damaged condition, to the plaintiff's detriment in the sum for which suit was brought. The defendant denied specifically the averments of the complaint as to any breach of its duty as a carrier in the premises, and also pleaded that the plaintiff's cause of action was barred under the provisions of subdivision 1 of section 339, Code of Civil Procedure, and was also barred under the provisions of section 3 of the bill of lading, requiring claims for damages for loss or injury to goods shipped to be made in writing to the carrier at the point of delivery or of origin within four months after the delivery of the property, which

Digitized by Google

claim the defendant avers was not so presented. Upon the trial of the issues thus framed the trial court made its findings in favor of the plaintiff, except as to the amount of its said damages, which it fixed at $574. The defendant prosecutes this appeal.

[1] The main point urged by the appellant relates to the bar of the statute of limitations under the section of the Code above quoted. It is argued by it that this is not an action upon a contract, obligation, or liability founded upon an instrument in writing, and hence that the action must have been commenced within two years after the liability arose, and that, not having been so commenced, it is barred under said section of the Code. In order to support this proposition the appellant argues that the bill of lading issued by the defendant to the plaintiff upon the receipt of these goods for shipment was not the contract between the parties, but was only a receipt for the goods orally consigned to the defendant for shipment, and that, such consignment being oral, the action must, under said section of the Code, have been commenced within two years.

We are unable to adopt this view of the appellant as to the place and function of a bill of lading in a shipping consignment. Section 2126 of the Civil Code defines a bill of lading as "an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing" to deliver the freight to "a specified person at a specified place." In the American & Eng. Ency. of Law (2d Ed.) p. 521, the status and function of a bill of lading in relation to a shipment of goods are thus defined:

"Although the primary object and purpose of a bill of lading is to express the terms of a contract between the shipper and the carrier, it partakes of the two-fold character of a receipt and a contract; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract as to the transportation and delivery of the goods to the consignee or other person therein designated and upon the terms therein specified."

In the case of Seaboard Airline Ry. v. Luke, 19 Ga. App. 100, 90 S. E. 1041, it was held in relation to an interstate shipment that the bill of lading was the contract between the parties to the shipment, citing Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; while in the cases of Texas, etc., R. Co. v. Williamson & Co. (Tex. Civ. App.) 187 S. W. 354, and N. Y. C. R. R. Co. v. Mutual Orange Distributors, 251 Fed. 230, 163 C. C. A. 386, it was held that the bill of lading constituted the contract for carriage between the parties, for actions for the breach of the terms of which the period of limitations was that provided for the breach of contracts in writing. We find nothing in the authorities cited by the appellant which militates seriously against these views, and hence are entirely satisfied that this action was commenced in time.

[2] As to the second point urged by the appellant, to the effect that the plaintiff did not present a proper claim for damages against the defendant within the time required by the terms of the bill of lading, we find that the record does not bear out this contention, since it sufficiently appears that written notice of the claim was given by the agent of the consignee to the general freight agent of the delivering carrier at the time of the arrival of the shipment at its destination. Besides, the parties to this appeal have not furnished us with any copy of the bill of lading involved in this case, and hence we cannot know that there is any such provision in it as to the time within which the shipper's claim for damages for the breach of its terms must be presented.

No other points being urged upon this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

SHEEHAN v. BOARD OF POLICE COM'RS, etc., et al. (Civ. 3155.)

(District Court of Appeal, First District, Division 1, California. April 7, 1920. Hearing Denied by Supreme Court June 3, 1920.)

1. Municipal corporations ⇐187—Policeman retired on pension has vested right to pension during disability.

Under San Francisco Charter, c. 10, art. 8, § 3, relative to police pensions, a police officer placed on the retired list and regularly granted a pension on proof of disabilities had a vested right to retain his place on the retired list and to have his pension continued until his disabilities should have ceased.

2. Mandamus ⇐107—Lies to compel retention of policeman on retired list on pension.

A police officer retired on a pension under San Francisco Charter, c. 10, art. 8, § 3, because of disabilities, is entitled to a writ of mandate to compel the board of police commissioners acting as a board of police relief and pension fund commissioners to maintain him in his position as a retired patrolman and to continue to pay his pension.

3. Municipal corporations ⇐187 — Police board's determination that disabilities had ended and dismissal of policeman for failure to report held void.

As the San Francisco Charter confers on the board of police commissioners no power to finally determine any question of fact in con-

Digitized by Google

nection with a pension, its attempted action, in its capacity as a board of police relief and pension fund commissioners, in declaring that a retired policeman's disabilities had ceased, without any proof or showing on the subject and contrary to the practically undisputed fact, was beyond its charter powers, and its acts in so declaring and in ordering him to report for duty and in dismissing him for insubordination in refusing to report were void.

4. Mandamus ⟸3(12)—Lies to compel reinstatement and payment of police pension though certiorari would also lie.

Where the San Francisco board of police commissioners acting ex officio as a board of police relief and pension fund commissioners found contrary to the fact that a retired policeman's disabilities had ceased and ordered him to report for duty and dismissed him for insubordination in refusing to report, the policeman was entitled to a writ of mandate to compel his reinstatement and payment of his pension, though he might have applied for a writ of review to test the jurisdiction of the board to make such orders.

5. Mandamus ⟸14(1)—Presentation of claim for police pension to auditor and treasurer not condition precedent.

As under San Francisco Charter, c. 10, art. 8, § 9, claims against the police pension fund must be passed on by the board of police relief and pension fund commissioners, a policeman without a warrant from that board could not apply to the auditor or treasurer for payment of his claim, and presentation of the claim to them under chapter 4, art. 3, § 1, was not a condition precedent to his application for a writ of mandate to compel such board to pay the pension.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceeding by James F. Sheehan for a writ of mandate directed to the Board of Police Commissioners and others. From a judgment granting the writ, defendants appeal. Affirmed.

Geo. Lull, City Atty., and Chas. S. Peery, Asst. City Atty., both of San Francisco, for appellants.

Charles J. Heggerty and Knight & Heggerty, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in a proceeding wherein he sought and obtained a writ of mandate requiring the defendants, as the board of police commissioners of the city and county of San Francisco, to restore said plaintiff to the position of a police officer of and in the police department of the said municipality, and also to restore the plaintiff to the pension roll of the police and pension fund of said department, and to pay to said plaintiff his accrued pensions as a retired police officer, amounting to the sum of $4,600.

The facts of the case are embraced in the findings of the court which may be summarized as follows: The plaintiff was appointed a police officer of the police department of the city and county of San Francisco on September 20, 1895, and continued in active service as such police officer until August 1, 1899, when he was injured in the performance of his duty by being thrown from a horse which he was breaking to the saddle under the orders of his superior officer, and which said horse fell upon him, causing severe injuries to his head and side, resulting in a total deafness in his right ear and injuries to his brain, producing recurring epileptic convulsions. Thereafter the plaintiff presented to the said board of police commissioners his verified petition, accompanied by suitable certificates and recommendations, requesting his retirement upon a pension on account of his disabilities, which his examining physician certified to be permanent. The said board on October 6, 1903, made its order granting said petition to the effect that the plaintiff should be retired from further service in the police department until his disabilities should cease, and that he be paid from the police relief and pension fund of said police department a yearly pension of $600, being one-half the amount of salary attached to his rank as a patrolman in said department at the time of his said injuries. On January 11, 1904, the said board of police commissioners, who are also ex officio the board of police relief and pension fund commissioners, caused a subpœna to be issued and served upon the plaintiff requiring him to appear before them on the afternoon of said day, and show cause why he should not be restored to active duty on the ground that his said disabilities had ceased. The plaintiff appeared at the time appointed in response to said subpœna, whereupon he was informed by said board that it had been reported to it that the plaintiff had been for some time prior thereto in the employ of the United Railroads of San Francisco in a professional capacity, viz., that of an attorney at law. The plaintiff admitted that since his retirement from active duty as a police officer he had become an attorney at law and was employed as such by the United Railroads, but stated that his disabilities for service as a police officer had not ceased, and that he was still unable to perform the duties of a patrolman in the department; and he then applied for a hearing before said board upon a day set when he could produce witnesses and prove his continuing disability for such service. The board of police commissioners refused this application and, thereupon, sitting as a board of police relief and pension fund commissioners, ordered the plaintiff to report on January 12, 1904, to Dr. O. W. Jones, the police surgeon, for the purpose of physical examination, and to further report to said board at their regular

Digitized by Google

meeting to be held in the evening of the last-named day. The plaintiff endeavored to comply with this direction as to his examination by the police surgeon, but the latter refused to set a date for said examination earlier than January 15, 1904, at which time the plaintiff was to appear to be examined by him. On the evening of January 12, 1904, the plaintiff appeared before said board, sitting as police relief and pension fund commissioners, according to their direction, and informed them of his inability to procure said examination by the police surgeon before January 15, 1904, and requested a postponement of his matter until that time. This request was refused and an immediate hearing ordered to be proceeded with, to which the plaintiff objected upon the ground of the shortness of the time, the absence of his attorney to represent him, and of his witnesses, and requested a continuance until he could procure the attendance of these. This request the board also denied, and thereupon proceeded, without any further hearing or trial or investigation, and without any examination of the facts of the case, to pass a resolution purporting to restore the plaintiff to active duty in the police department of the city and county of San Francisco as a patrolman, and to order the plaintiff to report to the chief of police on the following day for assignment to active duty as such. Plaintiff did not report to the chief of police in accordance with said order, and thereupon charges of insubordination were presented by the chief of police to said board of police commissioners for the plaintiff's said failure to report for active duty. These charges were set for hearing by and before the board of police commissioners for January 26, 1904, and came on for hearing on the evening of said day, whereupon plaintiff appeared and objected to said proceedings upon the ground of want of jurisdiction in the said board to make their said order restoring him to active duty, and hence of a want of jurisdiction in them to try him upon the charge of insubordination for any disobedience of said former order. The board of police commissioners overruled his said objection, and at once proceeded to find the plaintiff guilty of insubordination and to dismiss him from the department. The plaintiff thereafter demanded of said board that they vacate and set aside their said several resolutions, and also repeatedly demanded his restoration to the pension roll as a retired police officer and the payment of his accruing pension as such. All of these demands were refused, whereupon the plaintiff instituted this proceeding in mandamus to compel his restoration and reinstatement as a retired police officer, and also to compel the payment of his accrued and accruing pensions as such. He also instituted a proceeding in the nature of a writ of review to have annulled the aforesaid orders of the board of police commissioners for want of jurisdiction in the board to make the same. Upon the hearing of the plaintiff's petition for a writ of mandate in this case, it was affirmatively made to appear that the plaintiff's disabilities which had led to his original retirement from active service in the department had not ceased but still existed, and that by reason thereof the said plaintiff continued to be unable to perform active duty as a patrolman in said department. It was also conceded at the trial that there was at all times in the police relief and pension fund sufficient money to have paid the plaintiff's pension if he should be found entitled to the same.

Upon the foregoing facts as found by the trial court it rendered its judgment in the plaintiff's favor, directing a writ to issue as prayed for, and from such judgment the defendants have prosecuted this appeal.

The charter of the city and county of San Francisco provides in section 3, c. 10, art. 8, thereof, that—

"Any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty upon filing with the commissioners a verified petition setting forth the facts constituting such disability and the cause thereof, accompanied by a certificate signed by the chief of police, the captain of the company to which he belongs, and by two regularly certified physicians of the city and county recommending his retirement upon a pension on account of such disability, may be retired from the department, upon an annual pension equal to one-half the amount of salary attached to the rank which he may have held three years prior to the date of such retirement, to be paid to him during his life and to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service, in the rank he occupied, at the time of his retirement."

[1, 2] In the case of Kavanagh v. Board of Police Pension Fund Commissioners, 134 Cal. 50, 66 Pac. 36, it was held that a person entitled to a pension from the police pension fund of the police department of the city and county of San Francisco had a vested right to such pension which could not be taken away by subsequent changes in the charter. It is true that this ruling was made in the construction of a former statute creating a police pension fund in said municipality (Stats. 1889, p. 56); but the Supreme Court, in the case of French v. Cook, 173 Cal. 126, 160 Pac. 411, points out that the provisions of the present charter of the said city and county are so far similar to those of the earlier statute as to justify the application of said former case to the charter in its present form. The plaintiff herein having been regularly granted his pension upon proof of his disabilities had, therefore, a vested right to retain

Digitized by Google

his place upon the retired list and to have his pension continued until his disabilities should have ceased. This being so, the plaintiff, so long as his disabilities continued, would have been entitled to a writ of mandate to compel the board of police commissioners, acting as a board of police relief and pension fund commissioners, to maintain him in said position as a retired patrolman and to continue to pay his pension. French v. Cook, supra. In the case last above cited the Supreme Court points out that there is no provision in the present charter of San Francisco confiding to the board of police commissioners, acting in any of its capacities, the power to finally determine any question of fact in connection with such a pension.

"The board is apparently in the same position," says the court, "with relation to such a matter as is any officer required by law to do a prescribed act in a certain contingency, where no special method is provided by law for the ascertainment of the facts. Under such circumstances it may often be true that there is uncertainty or dispute as to the facts, but in such a case the only resort of the officer is such investigation as he may be able to himself make for the purpose of determining his own course of action. His determination as to the facts, however, is not effectual for any other purpose. If not satisfied as to the evidence of the essential facts he may refuse to act until required to do so by the judgment of some tribunal invested with the power to finally determine such controversy, but before such tribunal any conclusion to which he may have come on the facts has no legal force whatever. The sole question there is whether the facts are in reality such as to require the performance of the act, and this altogether regardless of the officer's conclusion as to the facts. The party having a vested right in the performance of the act, if the facts are as claimed by him, has also the right to have his claim as to the facts judicially determined. The functions of the board in such a matter as this are really ministerial only, and come under the same principle as would apply in the case of a county or city auditor, in so far as any finality to its conclusions are concerned. * * * As we read the charter it gives no judicial function whatever to the board in such a matter as this, confers upon it no authority to hear and determine a controversy in a judicial sense. It is not a board or tribunal by law vested with authority to decide a question, and herein lies the distinction between this case and the cases cited in which it was substantially held that the statute was to be construed as submitting the question to the decision of the board or officer. To hold in accord with defendants' claim in this connection would be, as we read the charter, to hold that any officer authorized and required by law to do a prescribed act upon a prescribed contingency, where no method is specially provided for the ascertainment of the facts, is invested with the power to judicially determine the facts, and that his conclusion is a judicial determination as to the facts. Such has never been declared to be the law."

[3, 4] Giving to this language of the Supreme Court full force and effect in its application to the facts of this case, we are constrained to hold that the attempted action of the board of police commissioners, acting in the capacity ex officio of a board of police relief and pension fund commissioners, in declaring that the plaintiff's disabilities had ceased without any proof or showing upon the subject, and in the face of the practically undisputed fact, as shown by the trial of this case, that the plaintiff's disabilities had not ceased, was entirely beyond their charter powers, and hence that their attempted acts in so declaring and in seeking to compel the plaintiff to report for duty as a patrolman, and in ordering his dismissal from the department for alleged insubordination in refusing to obey its order to so report for duty, were each and all void. Being so, the plaintiff had a right to a writ of mandate to compel said board to reinstate him in his position as a retired police officer and to compel the payment of his pension. That he may have had also the right to apply for a writ of review to test in that form of limited inquiry the jurisdiction of the board to make its said several orders cannot be held to have deprived him of his larger and more fully effective remedy by way of a writ of mandate. We are therefore of the opinion that the trial court was correct in holding upon the practically undisputed facts before it that the plaintiff was entitled to such a writ.

[5] As to the appellants' contention that the plaintiff, conceding his right to his writ restoring him to his place upon the retired list, is not entitled to that portion of the relief granted as gives him the right to recover his accrued pension for the reason that he was not shown to have complied with section 1, c. 4, art. 3, of the Charter, requiring the presentation of all claims upon the treasury of said municipality to the auditor and treasurer thereof within a limited period after the demand became due and payable, we are of the opinion that this contention has no merit. We are cited to the case of Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 Pac. 553, as supporting the appellants' contention in this regard. But we think a clear distinction exists between that case and the case at bar, since, as pointed out in that case, the plaintiff therein was urging a salary claim as a police officer which did not require approval by the board of police commissioners before presentation to the auditor in accordance with the requirements of the section of the charter above referred to; while in the instant case the charter (section 9, c. 10, art. 8) specifically requires that claims against the pension fund shall be passed on by the board of police relief and pension fund commissioners, who shall issue warrants to the persons entitled thereto. It is clear that, until the person entitled to such pension had

Digitized by Google

received from that body his warrant, he could not have applied to the auditor or treasurer of the municipality for payment of his claim. The undisputed proofs in this case show that the plaintiff made repeated demands upon the said board for the issuance of his pension warrant, which demands were refused. He could not do more under the charter, and hence was entitled to a writ of mandate compelling the action of said board in this respect also.

Judgment affirmed.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

SHEEHAN v. BOARD OF POLICE COM'RS, etc., et al. (Civ. 3156.)

(District Court of Appeal, First District, Division 1, California. April 7, 1920. Hearing Denied by Supreme Court June 3, 1920.)

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceeding by James F. Sheehan against the Board of Police Commissioners and others for a writ of mandate requiring the restoration of the petitioner to the San Francisco police force and pension roll. From a judgment granting the writ, defendants appeal. Affirmed.

George Lull, City Atty., and Chas. S. Peery, Asst. City Atty., both of San Francisco, for appellants.

Charles J. Heggerty and Knight & Heggerty, all of San Francisco, for respondent.

PER CURIAM. The facts in this case are identical with those set forth in the case of Sheehan v. Board of Police Commissioners (No. 3155) 190 Pac. 51, this day decided by this court, and on the authority of that case the judgment is affirmed.

KELLEY v. GOLDSCHMIDT et al. (Civ. 2081.)

(District Court of Appeal, Third District, California. April 8, 1920. Hearing Denied by Supreme Court June 7, 1920.)

1. Guaranty ⟸1—An independent contract.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person, and a person may become the guarantor even without the knowledge or consent of the principal, under Civ. Code, §§ 2787, 2788. It is therefore an independent contract, and an action on a guaranty is one with which the principal debtor has nothing to do.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

2. Guaranty ⟸75—Creditor may resort either to guarantor or security furnished by principal.

Where a debt secured by a mortgage or trust deed is guaranteed, the creditor may resort either to the security or the contract of guaranty; a guarantor not having the right given a surety by Civ. Code, § 2850, to compel the holder of security to apply the same to the payment of the debt.

3. Mortgages ⟸118 — Subsequently given mortgage must express intent to secure performance of contract of guaranty.

To justify a court in holding that the purpose of a mortgage or trust deed given subsequently to the execution of a contract of guaranty was to secure the performance of the contract of guaranty, such intent must be expressed clearly and unequivocally in the mortgage or trust deed.

4. Mortgages ⟸118—Subsequently given trust deed held not intended to secure performance of contract of guaranty.

A trust deed given by principal debtor subsequent to the execution of a contract of guaranty "to secure the payment to H. of the debts evidenced by two notes," etc., *held* not to show an intent to secure the performance of the contract of guaranty as well as payment of the note, although the declaration of trust set out not only the notes, but also the contracts of guaranty; the latter being indorsed on the back of the notes.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by H. B. Kelley against Max Goldschmidt and another, individually and as copartners doing business under the fictitious firm name and style of Goldschmidt Bros. From an order denying their motion to discharge an attachment, defendants appeal. Affirmed.

Ernest C. Griffith, Loewenthal, Loeb & Walker, and Loewenthal, Collins & Loewenthal, all of Los Angeles, for appellants.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles, for respondent.

HART, J. The appeal in this action is prosecuted by defendants H. H. Goldschmidt and Goldschmidt Bros. from an order made by the superior court in and for the county of Los Angeles, on August 7, 1917, denying a motion made by said defendants to discharge an attachment theretofore levied upon certain personal property belonging to them.

The complaint was filed on the 20th day of June, 1917, against the above-named defendants and one Milton Kauffman, but on the 16th day of July, 1917, plaintiff caused the action to be dismissed as against said defendant Kauffman. From that time on the action was against the guarantors alone, and consequently, upon the contract of guaranty only, and thus the action stood when

Digitized by Google

the notice of the motion to discharge the attachment was given on August 1, 1917.

The complaint was in two counts, in the first of which it was alleged that, on or about the 17th day of August, 1915, at the city of Los Angeles, defendant Kauffman, for a valuable consideration, executed and delivered to Heilman Commercial Trust & Savings Bank, a corporation (hereinafter called the bank), his promissory note in writing for the sum of $19,000, payable on demand; that thereafter, for a valuable consideration, said bank assigned and transferred the said note to plaintiff; that the sum of $5,000 was paid upon said note; and that at the date of the commencement of the action there was due thereon the sum of $14,000.

In the second count of the complaint it was alleged that, contemporaneously with the making of said promissory note and as a part of the same transaction, the defendants Goldschmidt delivered to said bank their written contract of guaranty, indorsed upon the back of said note, by which they guaranteed "the payment of the within note or any renewal or extension thereof, and all expenses of collection thereof," and also agreed to pay reasonable attorney's fees in case suit was brought to enforce the guaranty. The assignment of said guaranty to plaintiff was alleged, as well as demand upon defendants, on the 17th day of November, 1916, that said note be paid, and $1,400 was asserted to be a reasonable fee to be paid plaintiff's attorneys.

On June 22, 1917, plaintiff filed an affidavit for attachment, in which he stated:

"That defendants in the said action are indebted to him in the sum of $14,585.27 * * * upon an express contract, for the direct payment of money, to wit, upon a promissory note and contract of guaranty, and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property, or any pledge of personal property. * * *"

Accompanying said affidavit was a "Statement to Clerk," directing that an attachment be levied upon certain real property in the county of Orange, describing it. On the 25th of June, 1917, another "Statement to Clerk" was delivered to the county clerk, directing the attachment of the wholesale liquor establishment of Goldschmidt Bros. in Los Angeles; "also run a personal property garnishment directed to the Title Insurance & Trust Company."

The return of the sheriff showed that he levied said writ of attachment on "all moneys, goods, credits, debts due or owing, or any other personal property belonging to the defendants, or either of them, in the possession of or under the control of Title Insurance & Trust Company," and that he also attached the "stock of liquors, store fixtures and all other personal property located" in the city of Los Angeles in the possession of defendants Goldschmidt Bros.

On August 1, 1917, the defendants Goldschmidt served and filed a notice of motion to discharge attachment, supported by the affidavit of Herman H. Goldschmidt, one of the defendants, in which it was stated that, after the signing by Goldschmidt Bros. of said contract of guaranty, Valencia Groves Company, a corporation, to secure the repayment of the indebtedness arising out of said promissory note and said contract of guaranty, conveyed to said bank certain real property described in a declaration of trust, and that said bank accepted said declaration of trust. "Affiant states that said real property is still subject to the lien aforesaid, and the statement made by plaintiff in his affidavit for attachment that payment of the alleged contract on which suit was brought has not been secured, is erroneous."

Attached to said affidavit was a copy of said declaration of trust, in which said bank certified and declared that it had received and accepted from the Valencia Groves Company, the trustor, deeds conveying to said trustee certain real property in the county of Los Angeles (describing two parcels of land, the first of which was subject to a mortgage of $90,000 and the second to a mortgage of $85,000), in trust for the following purposes: First, to secure the payment to the bank "of the debts evidenced by two notes, for $19,000 and $2,000, respectively," said note for $19,000 being the one herein sued upon. The contract of guaranty signed by Goldschmidt Bros. on the back of said note is also reproduced. The note for $2,000 bore date January 28, 1916, and was signed by Milton Kauffman and Isaac Kauffman, and contained a guaranty signed by Max Goldschmidt. Second, after the payment in full of the debts evidenced by said notes, to secure the payment of a certain note of the Valencia Groves Company to David S. Unruh for the sum of $2,155.12.

The single question presented hinges on the real meaning and scope of the trust deed. The appellants contend that the declaration of trust was intended to secure payment, not only of the promissory notes referred to in said declaration (one executed by Milton Kauffman and the other by Milton and Isaac Kauffman), but also the performance of the conditions of each of the guaranties indorsed on said notes, the one by Goldschmidt Bros. by Max Goldschmidt, and the other by Max Goldschmidt. The position of the appellants is that the provision in the declaration of trust, to wit, "To secure the payment to Heilman Commercial Trust & Savings Bank * * * of the *debts* [italics ours] evidenced by two notes," etc., can reasonably be given no other construction than that it means and was in-

Digitized by Google

tended to mean that the security afforded by the said declaration was to include and cover, not only the promissory notes, but the performance of the contracts of guaranty. With this view of the provision referred to we are unable to agree.

[1] A guaranty is a promise to answer for the debt, default or miscarriage of another person (Civ. Code, § 2787), and a person may become a guarantor even without the knowledge or consent of the principal (Civ. Code, § 2788). A guaranty is therefore an independent contract—that is, entirely independent of any contract of debt the payment of which is thus assured, and it follows that an action on a guaranty such as the one involved herein is upon an independent contract of the guarantor with which the principal debtor has nothing to do. "The liability of the guarantor depends entirely upon the terms of his contract of guaranty, and 'there is no privity, or mutuality, or joint liability between the principal debtor and his guarantor.'" Cooke v. Mesmer, 164 Cal. 332, 340, 128 Pac. 917, 920. See, also, Adams v. Wallace, 119 Cal. 67, 51 Pac. 14; Kinsel v. Ballou, 151 Cal. 762, 91 Pac. 620.

[2] A mortgage or a trust deed given to secure the performance of an obligation to pay money and a guaranty given for the some purpose are each intended, of course, to subserve the same purpose, and where both are given to secure one single obligation of that character, the one operates merely as additional security to the other. But the creditor may resort either to the one or the other to enforce the payment of the money to secure the payment of which both were given. In case of a contract of surety executed to secure the performance of the obligation which is also secured by a mortgage or other collateral security the law is different. In the latter case, the holder of the mortgage or other security would be compelled to apply to the payment of the debt the property of the debtor which had been mortgaged to secure the debt. Civ. Code, § 2850; Adams v. Wallace, supra. Such, however, is not the case as to a guarantor, as we have shown.

[3, 4] In view of the character and effect of a contract of guaranty, as above indicated—that is, that it creates an obligation wholly independent of that of the debt which it is given to secure—there would have to be to that effect a clear and unequivocal intent expressed in a mortgage or a trust deed given to secure the payment of a large sum of money, where there has also been given a guaranty for the payment of the same debt, to justify a court in holding that the purpose of the mortgage or trust deed, given subsequently to the execution of the contract of guaranty, was to secure payment, not only of the promissory note evidencing such debt, but also to secure the performance of the contract of guaranty. This is true because the guaranty is itself security for the payment of the same debt. It is hardly supposable that in such case property would be hypothecated to secure a security already in existence to secure the debt to secure the payment of which such property is hypothecated. No such intent is clearly and unequivocally expressed in the instrument involved herein. The word "debts" we think it is clear, from a fair and reasonable construction of the declaration of trust, means, and was intended to mean, the debts created by the notes themselves, and was not intended to refer to and include the obligations created by the guarantors by their contracts of guaranty. It is true the declaration of trust sets out therein, not only the notes, but also the contracts of guaranty, but the latter contracts were indorsed on the back of the notes, and it was not only proper, but necessary, as a matter of description—that is, for the purpose of describing the notes to secure the payment of which the trust deed was given—to insert in the declaration of trust the contracts of guaranty.

Our conclusion is that the motion to dissolve the attachment was properly denied, and the order denying said motion is accordingly affirmed.

We concur: ELLISON, Presiding Judge pro tem; BURNETT, J.

EDWARDS v. GUARANTY TRUST & SAVINGS BANK. (Civ. 3192.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1920. Hearing Denied by Supreme Court June 10, 1920.)

Gifts ⇐32(1) — No gift where drawer gave check to payee, but payee did not cash it before drawer's death.

There was no valid gift where the donor's check, given to the payee as a gift, and presented to the drawee bank prior to drawer's death, was not accepted or paid before such death, although payment was rejected without any malicious or wrongful intent, for a reason later shown to be incorrect.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by W. S. Edwards against the Guaranty Trust & Savings Bank, as executor. From judgment for plaintiff, defendant appeals. Reversed.

Vincent B. Vaughan and Lewis Cruickshank, both of Los Angeles, for appellant.

F. A. Knight, of Long Beach, for respondent.

Digitized by Google

THOMAS, J. This is an action brought by plaintiff against defendant as executor of the estate of Benjamin Lezer Liveson, deceased, on a "rejected claim," evidenced by a check given to plaintiff by the deceased on February 28, 1916, in the sum of $4,000, and intended as a gift to plaintiff.

From the record it appears that on March 2, 1916, the plaintiff deposited the check in question with the National Bank of Long Beach for collection; that on March 3, 1916, the check was presented to the bank on which it was drawn, and in which it is conceded the deceased had on deposit a sum approximating $9,000, and by said bank payment thereof refused, the check being returned marked "signature incorrect"; and that on March 4, 1916, Liveson, the drawer, died.

The case was tried to the court without a jury, and findings and judgment were in favor of the plaintiff as prayed for. The appeal is from the judgment so entered, on the judgment roll alone. There is just one point, and that one of law, in this case. The question with which we are here confronted is: Can a check, given to the payee as a gift, and presented to the drawee prior to the death of the drawer, and not accepted or paid, but payment of which was rejected for any or no reason, constitute a valid gift inter vivos or a gift causa mortis?

So far as material here, the court found as follows: That the deceased executed and delivered the said check as already stated; that at the time of the execution thereof deceased had a sum in excess of $8,000 in the drawee bank, known as a "term account"; that the bank book evidencing such account, in the possession of deceased at and prior to the time of his death, showed "that the bank reserved the right to require on term deposits six months notice of intention to withdraw"; that said bank refused to pay said check, giving as the sole and only reason for such refusal the fact that the signature of said Liveson on said check was "incorrect"; that said bank waived the provisions requiring six months' notice of intention to withdraw from the funds of the said Benjamin Lezer Liveson, and waived the presentation of the passbook; that the refusal to pay said check was not caused by any malicious intent of the defendant; and that said signature on said check was not incorrect.

As already intimated, the proposition which confronts us on this appeal is whether, under the record here, the intended gift to plaintiff had become complete before the drawer's death, or whether it was merely inchoate. If the transactions between them constituted a completed gift, the money represented by the check—it being conceded here that the drawer had sufficient funds to his credit in the bank to meet the check—belonged to the plaintiff, and, under the facts found, and under this assumed state of facts, it became and was the legal duty of the bank, with respect to the drawer of the check, at least, to honor the same when so presented, although even if, for our present purpose, it be conceded that there was no liability on the part of the bank to the holder of the check. On the other hand, if the gift had not been perfected, but was incomplete at the time of the drawer's death, the money in the bank belonged to the estate of decedent, and descended to his heirs. Under this latter assumption the plaintiff cannot recover.

Counsel for respondent in his brief says:

"We do not know of any case in the United States, and we have looked carefully, where the point involved in the case at bar has been decided."

We, too, have looked, and have, we think, found much law in opposition to the position taken by respondent here. In the case of Provident, etc., v. Sisters, etc., 87 N. J. Eq. 424, 100 Atl. 894, the Court of Chancery of New Jersey had before it a case in its material aspects very similar to the case at bar. Mrs. Bowdoin, an old lady, 86 years of age, had died in the hospital. The day before her death she gave a check to the defendant in that case for $3,000. On the same day the check was given it was presented at the bank upon which it was drawn, and payment was refused, not absolutely, but until investigation could be made. The old lady died the next day, and before any further efforts to collect the check were made. The court in that case—which is a well-considered case, and very illuminating and instructive—among other things said:

"It is well settled that a gift cannot be effected by the delivery of a check upon an ordinary bank of deposit when the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes, or ten hours, or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift, to be effective, must place the thing donated beyond the control of the donor. Where a check on a bank of deposit is given for value, it often operates as an equitable assignment, but such is not the case where a check is given to the payee as a pure donation. * * * It cannot be questioned in this case that, if Mrs. Bowdoin had given a check on an ordinary bank of deposit, no gift would have been effected until the check had been cashed. Nor does it make any difference what may delay or prevent the check from being cashed."

We are in full accord with this reasoning and the conclusion reached. See notes L. R. A. 1918C, 340; Foxworthy v. Adams (Ky.) 27 L. R. A. (N. S.) 308; Estate of Taylor (Pa.) 18 L. R. A. 855. Until the money was actually paid over or transferred from Liveson's account to that of the plaintiff by the drawee bank, the gift, whether it be regarded as inter

Digitized by Google

vivos or causa mortis, would be revocable, and after the death of Liveson the whole transaction would have stood legally as an incomplete gift, entirely unenforceable at law or in equity. Provident, etc., v. Sisters, etc., supra. "To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive or symbolical delivery, without power of revocation." 20 Cyc. 1193. In order to accomplish this, "there must be a parting by the donor with all present and future legal power and dominion over the property." 20 Cyc. 1196; Tracy v. Alvord, 118 Cal. 654, 50 Pac. 757; Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Simmons v. Savings Society, 31 Ohio, 457, 27 Am. Rep. 521. That the law of this state is as stated in the Provident Case, supra, will be seen by a perusal of that and the other cases cited therein, citing and quoting from the California cases at length.

As the result, therefore, of our own independent search, we are confident that "the great weight of authority supports the proposition that one cannot make his own check * * * the subject of a gift, so that, in the absence of payment, it can be enforced against the donor or his representatives." Foxworthy v. Adams, supra, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308 and note thereunder.

It may be conceded that the record here discloses sufficient facts so that we may infer that it was really the intention of the deceased to make a gift of the money on deposit in the bank, to the extent of $4,000 to plaintiff. Still, as was said in the case of Noble v. Garden, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001, "however much we may desire to carry out the intentions of deceased, we cannot do so in this case, because the effect would be to hold valid an oral testamentary disposition of her property," which, under the authorities, as we have seen, cannot legally be done.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

STATE BOARD OF LAND COM'RS et al. v. RIRIE, State Auditor. (No. 3463.)

(Supreme Court of Utah. April 29, 1920.)

1. States ⇐137—Auditor may object to use of money for purposes for which not appropriated.

Under Comp. Laws 1917, § 5715, subd. 16, requiring the Auditor to draw warrants on the State Treasurer for the payment of moneys directed by law to be paid out of the treasury, but providing that no warrant must be drawn unless authorized by law, when money is appropriated for a particular purpose, and it is attempted to be used for a different purpose, it is the Auditor's privilege and duty to object and refuse to draw a warrant.

2. States ⇐137—Auditor cannot inquire into desirability of investment by Land Board.

If the investment of the funds of the State Land Board in town bonds is authorized by law, the Auditor, on requisition from the board for a warrant, has no power to ascertain whether the investment is desirable or the security sufficient, or investigate any of the preliminary steps leading up to the action of the Land Board in deciding to make the investment.

3. Mandamus ⇐168(2)—Presumption indulged that Land Board has satisfied itself as to desirability of investment.

In a mandamus proceeding by the State Land Board to compel the Auditor to issue his warrant for an amount which the board desires to invest in town bonds, the presumption may be indulged, in the absence of any showing to the contrary, that the board has satisfied itself as to the desirability of the investment, the sufficiency of the security, and the legality of the bonds.

4. States ⇐124—Funds of State Land Board may be invested in town bonds; "city."

Under Comp. Laws 1917, § 5607, authorizing the State Land Board to invest its funds in government, state, county, city, or school district bonds, it may invest funds in town bonds, in view of section 5848, providing that, in the construction of statutes, "city" may mean incorporated town, and also in view of the custom of the Land Board for more than 14 years to make such investments.[1]

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, City.]

5. Statutes ⇐208—Words considered in relationship to context and general purpose.

To determine the intent of the Legislature, the words used by it must be considered in their relationship to the context and the general purpose or intent of the act in which such words are found.

6. Evidence ⇐48—Judicial notice taken of acts of Auditor and State Land Board.

Under Comp. Laws 1917, § 7076, the court will take judicial notice of the acts and proceedings of the Auditor and State Land Board, as they are parts of the executive department of the state.

7. Statutes ⇐212—Legislature presumed to know construction by state officers.

The Legislature is presumed to know the construction placed upon a statute by state officers acting under it.

8. Statutes ⇐219 — Executive construction, though not binding, entitled to consideration.

While the construction of a statute by the executive department is not binding upon the courts, it is entitled to serious consideration, unless it does violence to the apparent intent of the language used, especially if the statute has

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Mutart v. Pratt, 170 Pac. 67.

Digitized by Google

been in force for any great length of time and has been so construed.

Frick, J., dissenting in part.

Original mandamus proceedings by the State Board of Land Commissioners and its members against Joseph Ririe, State Auditor. Peremptory writ issued.

Dan B. Shields, Atty. Gen., Jas. H. Wolfe, and O. C. Dalby, and H. Van Dam, Jr., Asst. Attys. Gen., for plaintiffs.

M. E. Wilson, of Salt Lake City, for defendant.

GIDEON, J. This is an original proceeding in this court. By it the State Land Board, and the individual members thereof, as plaintiffs, seek, by mandamus, to compel the defendant State Auditor to issue a warrant upon the Treasurer of the state in favor of the State Land Board in the sum of $20,000, to be used as a first payment on an investment of $110,000 in bonds of the town of Orem, located in Utah county.

The board, at a regular meeting, had determined to make such investment from the funds under its control. On February 25, 1920, the board drew its notice and requisition directed to the Auditor, requesting him to issue his warrant on the State Treasurer for the said sum of $20,000. The Auditor refused to recognize the request and issue the warrant as directed; hence this proceeding.

The defendant demurred to the petition on the ground that it does not state facts sufficient to entitle plaintiff to the relief sought. On that state of the record the matter has been argued and submitted to this court for decision.

Lengthy arguments are submitted, both on the part of the Attorney General for plaintiffs and by counsel for defendant, respecting the duties of the State Auditor. The petitioners contend that it is no part of his duty to inquire into the purpose or object for which the state funds are to be invested; that the Land Board having decided that it is to the best interests of the state to make the investment and having issued the requisition, and the Auditor having satisfied himself that there is sufficient money in the particular fund upon which the warrant is ordered drawn to pay such warrant, and finding that the board is a legally constituted agency with authority to make the requisition, it then becomes his duty, and his only duty, to issue the warrant in accordance with the notice and requisition. On the other hand, it is the contention of defendant that it is his duty to inquire into the authority of the board to make the particular investment and that if such investment is not authorized by law it then becomes his duty to decline to issue the warrant, and that this court will not, by mandamus or other order, coerce or compel him to comply with the notice and requisition.

Comp. Laws Utah, § 5715, defines the duties of the State Auditor. Subdivision 16 thereof reads as follows:

"To draw warrants on the State Treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law. Every warrant must be drawn upon the fund out of which it is payable and specify the appropriation applicable to the payment thereof."

[1, 2] As we view this record, it is neither necessary nor desirable to enter into a lengthy discussion respecting the general duties imposed by law upon the Auditor. It may, however, be said, as a general proposition, which we think is within the authorities and supported by reason, that when money is appropriated for a particular purpose, and it is attempted to be used for a different purpose, then it is not only the Auditor's privilege, but it is his duty as well, to interpose an objection to such application of the funds. That would be the duty of any officer having to do with the funds of the state. He would, in fact, be derelict in his duty if he failed so to do. However, it is no concern of the Auditor, neither is it a part of his duty, to ascertain whether the investment is desirable or whether the security is sufficient. Whenever the Land Board, or any committee or official whose duty it is to determine those matters, has acted, such acts or conclusions are final and binding upon the Auditor, so long as the investment is authorized by law. If, therefore, the Land Board in this case has attempted to invest or pay out the funds intrusted to it for any purpose not authorized by law, then, clearly, the Auditor would be within his legal rights and duties in declining to move.

In State v. Tarpen, 43 Ohio St. at page 321, 1 N. E. at page 215, it is said:

"If his [the auditor's] duty is clear, its performance will not be excused by his doubts concerning it, however strong or honest they may be. It is not doubted that it is competent for an auditor to defend against an application for mandamus to compel him to issue his warrant on the treasurer, upon an allowance and order of the commissioners, by showing that the order was wholly unauthorized, and that the commissioners had no authority to make it. State v. Yeatman, 22 Ohio St. 546. It is enough to say that in the present case no fact is shown which impeaches the original order of the commissioners, or excuses the auditor from obeying its command. His duty to draw his warrant in favor of the relator is clear. That mandamus is the proper remedy to compel the performance of that duty is abundantly established by authority."

[3] The Land Board in this case has acted. It has decided to invest certain of the state's money intrusted to it for investment in the bonds of the town of Orem. This court

Digitized by Google

has the right to indulge the presumption, in the absence of any showing to the contrary, that the board has satisfied itself as to the desirability of the investment and the sufficiency of the security as well as the legality of the bonds. If the Land Board is authorized under the statutes to invest the state funds in the bonds of a town, then it is no part of the Auditor's duty to question the wisdom of that investment. Neither is he required, nor is it his duty, to investigate any of the preliminary steps leading up to the action of the Land Board in deciding to make the investment. The law has granted to, and imposed upon, the Land Board both that power and the responsibility. In the very nature of things, in carrying on the affairs of the state, it could not be otherwise. If the Auditor were charged with the duty and responsibility of examining and determining the regularity and desirability of the investment of the funds of the state, then, indeed, would conflicts, disputes, and general chaos follow. The law has vested no such duty or authority in the Auditor. It therefore only remains for this court to determine whether the Land Board has authority, under the statute creating it and defining its duties to invest the funds under its control in the purchase of town bonds. That is the precise question here presented, and the one upon which, as we are advised, the judgment of this court is desired.

[4] The act which is known as chapter 1, tit. 101, Comp. Laws Utah 1917, gives to the State Land Board the direction, management, and control of all lands which have heretofore been, or which may hereafter be, granted to the state by the United States government, or otherwise, with power to sell or lease the same for the best interests of the state and in accordance with the provisions of said chapter and the Constitution of the state. It is also made the duty of the State Land Board to invest the funds arising from the sale and lease of such lands "in the manner provided in this chapter." In section 5607 (which is a part of said chapter and title) it is provided:

"The board shall make the necessary orders for the investment or disposal of the funds derived from the sale and rental of public lands of the state, in the state treasury. Such funds shall be invested for and on account of the specific purposes for which the lands were granted, in government, state, county, city, or school district bonds. * * * Whenever the board shall order the investment of any part of such funds, said board shall notify the State Auditor of such order and the State Auditor shall draw a warrant for the amount stated in the notice in favor of the State Board of Land Commissioners, and the State Treasurer shall pay such warrant out of the funds designated. * * *"

Defendant contends that, under the provisions of the foregoing statute, the State Land Board is without authority to invest the state school funds in bonds of incorporated towns; that the act has undertaken to and does enumerate the political subdivisions whose bonds may be purchased by the board; that the mention or enumeration of certain municipalities or legal subdivisions of the state negatives the intent to authorize the investment in bonds of any other or additional political subdivisions. It is further contended that by the general statutes of the state cities and towns have different powers and are organized under different provisions of law; that their powers are not similar; and that the authority and powers delegated to trustees of towns are much more limited than those delegated to the governing bodies of cities. Therefore it is insisted that the Legislature, recognizing this difference, intentionally omitted the word towns from the statute enumerating the municipalities in the bonds of which the funds of the state may be invested.

It is the contention of the plaintiffs that Comp. Laws Utah 1917, § 5848, constitutes the rule of construction to be applied to section 5607, supra. Section 5848, so far as material here, provides:

"In the construction of the statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute: * * * (21) The word 'town' may mean incorporated town and may include cities, and the word 'city' may mean incorporated town."

In 36 Cyc. 1105, it is said:

"It is competent for the Legislature to enact rules for the construction of statutes, present or future, and when it has done so each succeeding Legislature, unless a contrary intention is plainly manifested, is supposed to employ words and frame enactments with reference to such rules."

[5] It is a well-recognized rule of construction that, in order to determine the intent of the Legislature, the words used must be considered in their relationship to the context and the general purpose or intent of the act in which such words are found.

The evident intent of the particular section under consideration was to direct or provide for the investment of the funds in the custody of the Land Board in securities usually considered safe, and such as would in due course be redeemed, both principal and interest. It is therefore pertinent to inquire what elements of security, if any, a city bond has over that of a town bond. In every case the final answer to such inquiry must depend (a) upon the prior indebtedness of such city or town; (b) the value of the taxable property in such city or town. The ascertainment of these facts are questions that must, in the present case, be left to the determination of the Land Board. Authority is granted towns to issue bonds for certain specific mu-

Digitized by Google

nicipal purposes, and we, as before indicated, assume that the bonds of the town of Orem have been regularly authorized and are legally issued. Such being the case, the town trustees have the same power and authority to levy taxes for the redemption of such bonds as have city officials. That the powers of the governing bodies of cities and towns may differ in other respects ought not to be of much influence in the determination of the question here involved.

The act in question was first adopted in 1897 (Laws 1897, c. 37), and the provision above quoted was substantially the same in the original enactment as in the present law. It was carried forward into the revision of 1898 (Rev. St. 1898, § 2357), then into the compilation of 1907 (Comp. Laws 1907, § 2357. The Legislature amended said section 5607 in 1911 (Laws 1911, c. 71), and again in 1915 (Laws 1915, c. 37). As amended it was carried into the Compiled Laws of 1917. It was again re-enacted and amended in 1919 (Laws 1919, c. 109). The particular part of the statute authorizing the investment of the funds in the custody of the Land Board "in government, state, county, city or school district bonds" has remained the same from the original enactment through all revisions, compilations, and amendments down to the present law.

[6] It has been the custom of the Land Board for more than fourteen years to invest funds in its custody in town bonds within this state. Such is a matter of public record, both in the Auditor's office and in the office of the State Land Board. The Auditor and the State Land Board are parts and parcels of the executive department of the state. This court, therefore, is authorized to and will take judicial notice of the acts and proceedings of the two offices. Comp. Laws Utah 1917, § 7076.

[7, 8] The Legislature is presumed to know the construction placed upon the language of the act by both the Land Board and the State Auditor. Notwithstanding that fact, the Legislature has met biennially, and there have been three revisions or compilations of the statutes since the original enactment. Futhermore, the particular section has been amended by the Legislature in 1911, 1915, and 1919. At no time, apparently, has the Legislature been dissatisfied with the interpretation of the Land Board and the State Auditor, but has given its affirmative approval by the re-enactment of the section with full knowledge of the interpretation placed upon it. While it is true that the construction of a statute by the executive department is not binding upon the courts, it is, nevertheless, also true, and is so determined by the overwhelming weight of authority, that unless such construction does violence to the apparent intent of the language used it is entitled to serious consideration by the courts, and especially so if the statute has been in force for any great length of time and has been so construed. The general rule under such facts may be found stated in Black, Int. Laws (2d Ed.) § 94. There the author says:

"The executive and administrative officers of the government are bound to give effect to the laws which regulate their duties and define the sphere of their activities, and in so doing they must necessarily put their own construction upon such acts. * * * Now, such practical constructions are never binding upon the courts. * * * But it is a rule, announced by the Supreme Court of the United States at an early day, and which has since been followed in numerous cases, both in the federal and state courts, that the contemporaneous construction put upon a statute by the officers who have been called upon to carry it into effect, made the basis of their constant and uniform practice for a long period of time, and generally acquiesced in, and not questioned by any suit brought, or any public or private action instituted, to test and settle the construction in the courts, is entitled to great respect; and if the statute is doubtful or ambiguous, such practical construction ought to be accepted as in accordance with the true meaning of the law, unless there are very cogent and persuasive reasons for departing from it."

In Bloxham v. Consumers' Elec. L. & St. R. Co., 36 Fla. at page 540, 18 South. at page 446, 29 L. R. A. at page 509, 51 Am. St. Rep. at page 47, the court says:

"Besides the judicial construction of statutes, there is known to the law another kind of construction. This kind of construction has especial application to statutes made for the regulation of the different departments of the government, and is the interpretation put upon them by the actual administration of them by such departments. As distinguished from judicial construction, it is called the practical construction of statutes. While not of such high authority as a judicial interpretation of the act, such practical construction of the class of statutes referred to, when not in conflict with the Constitution or the plain intent of the act, is of great persuasive force and efficacy."

The second headnote to City of Louisville v. Louisville School Board, 84 S. W. 729 (119 Ky. 574), which correctly reflects the decision, reads as follows:

"The contemporaneous construction of legislation, covering a long period of time, by those charged with its enforcement, is highly persuasive of the correctness of that interpretation, especially where the Legislature readopts the act without change after the construction has been given."

The syllabus to State v. Sheldon, 79 Neb. 455, 113 N. W. 208, reads as follows:

"When a statute has for nearly 40 years been practically construed by the officers whose duty it is to enforce it, and has during that time been several times re-enacted by the Legislature in substantially the same terms, such construction will be regarded as adopted by the Legis-

Digitized by Google

lature, although the language of the statute would indicate a different meaning."

The second headnote to Van Veen v. Graham County, 108 Pac. 252 (13 Ariz. 167), reads as follows:

"Where the Legislature re-enacts a statute after uniform construction by the officers required to act under it, the presumption is that the Legislature knew of such construction, and adopted it in re-enacting the statute."

We are of the opinion that by reason of the interpretation of this law by the executive department and its implied adoption by the Legislature, the provision of the statute that the word "city" may include incorporated towns, and it not appearing that such interpretation is inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute, that this court ought not, under all the surrounding facts, adopt a construction contrary to that given the statute by the executive department. No, "very cogent and persuasive reasons for departing from" such construction have been suggested. These conclusions are supported by the opinion of this court in Mutart v. Pratt, 170 Pac. 67.

Moreover, and aside from the rule of construction stated in our statute, it is held by the great weight of authority that "cities include towns." 11 C. J. 790. See, also, note "City as Including Towns and Villages," Ann. Cas. 1914B, 215.

The alternative writ of mandate heretofore issued is vacated and a peremptory writ is ordered issued.

CORFMAN, C. J., and WEBER, J., concur.

THURMAN, J. I concur in the opinion of Mr. Justice GIDEON. There is but one question in this case, may the word "city" in section 5607, Comp. Laws 1917, mean "incorporated town"?

I have read with interest the dissenting views of my Associate, Mr. Justice FRICK. The question is one upon which reasonable minds may differ. The fact that my Associates disagree is a demonstration.

In the interpretation of statutes, unless technical terms are used, we should give to the words employed their plain ordinary meaning. We should not resort to technical rules of construction unless the meaning is obscure. My views upon questions of this kind are amplified in State v. Davis, 184 Pac. 161, and need not be repeated here. There is no necessity for resorting to technical rules or judicial determinations. The statutes themselves furnish us an unfailing guide.

Comp. Laws Utah 1917, § 5848, in part reads:

"In the construction of the statutes, the following rules shall be observed, *unless such construction would be inconsistent with the manifest intent of the Legislature.*"

Subdivision 21 of said section is as follows:

"The word 'town' may mean incorporated town and may include cities, and the word 'city' *may mean incorporated town.*" (Italics mine.)

It is insisted that this statute is not in pari materia with section 5607. Even if such contention be true, it nevertheless stands as an unimpeachable fact that the statute is a positive rule of construction enacted as such by the Legislature, and must be given full force and effect. 36 Cyc. 1105, and cases cited. No statute or series of statutes in pari materia could by any possibility be more potent in determining the meaning of a word or words used in a statute than is an act of the Legislature itself enacted for that especial purpose.

The statute says the word "city," when used in the statutes of the state, may mean incorporated town, and, unless such construction in the particular case would be contrary to the manifest intent of the Legislature, I see no reason why such construction should not be given. The Legislature of the state, acting within constitutional limits, is the highest authority in this jurisdiction. There is no pretense that the statute is unconstitutional. Rules of construction adopted by the Legislature are entitled to serious consideration in arriving at the intent and meaning of the statutes. In a recent case before this court we found it necessary to resort to a statutory rule of construction, and were thereby enabled to satisfactorily solve a difficult legal question that would otherwise have given us serious trouble. Industrial Com. v. Agee, Dist. Judge, 189 Pac. 414.

Whether or not construing the word "city" in the present case to also mean incorporated "town" is inconsistent with the manifest intent of the Legislature is the only question that remains to be considered. As to that question the statute itself imposes the burden upon those who take the negative view.

I have carefully read and considered the able briefs of defendant's counsel, and the masterly presentation by my Associate, Mr. Justice FRICK, in which every possible argument that can be made has been advanced in favor of the negative, and still I am unconvinced. Without intending to arrogate to myself the functions of either a critic or a censor, I am strongly impressed with the view that the elaborate discussion indulged in, in the briefs and opinion referred to, tends to confuse rather than to enlighten. There is no necessity of going outside of the statute itself. The question is, is the construction contended for by plaintiff inconsistent with the manifest intention of the Legislature? It is not contended that the town of Orem is without power to contract a bonded indebtedness. It is not shown that the security is hazardous, doubtful, or pre-

Digitized by Google

carious. With all that has been said it is not made to appear that a loan to an incorporated town to the extent of its ability to pay is not as safe an investment as would be a loan under similar circumstances to an incorporated city. Much has been said as to the vast powers of an incorporated city as compared with the limited powers of an incorporated town. All this is aside from the question we are here to consider. The material bearing of such facts on the question before us is not made to appear. The bonds of a city, with its extensive powers, after all may be a poor security for a loan, while the bonds of an incorporated town may be gilt-edged. It all depends upon the financial ability of the city or town in the particular case to pay its obligations. The extent of their municipal powers, except as relates to their power to raise money to pay their debts, has nothing to do with the question under review. I find nothing in the nature of an incorporated town as defined by the statutes of the state which militates against its financial ability. The financial ability of either a city or an incorporated town, in the last analysis, depends upon the quantity and value of the taxable property within its municipal boundaries and its authority to levy a tax. As far as the power to raise money by bonding is concerned, both the power and the modus operandi are the same in incorporated towns as they are in cities. Comp. Laws 1917, §§ 792, 793, and 794.

Examining the case from every possible angle, I am unable to perceive any reason why it should be presumed that the construction contended for by plaintiff is inconsistent with the manifest intent of the Legislature. I see no reason, viewing the case from the standpoint of legislative intent, why the Legislature should have intended to exclude incorporated towns from the operation of section 5607. The fact that incorporated towns are not expressly mentioned in section 5607 is the main pillar of strength of those who are opposed to the views herein expressed. Such contention would have been conclusive prior to the legislative session of 1907, for previous to that time the word "city" did not, in any case, mean incorporated town. As the law stood prior to 1907, the statute read: "The word 'town' may mean incorporated town and may include cities." Revised Statutes 1898, § 2498, subd. 21. Under that statute the word "town" might mean a city, but the word "city" might not mean an incorporated town. In 1907 the Legislature, evidently noting the discrepancy, amended the statute of 1898, subd. 21, to read as follows: "The word 'town' may mean incorporated town and may include cities, and the word 'city' may mean incorporated town." Sess. Laws 1907, p. 79. Such is the law at the present time. In this amendment no exception is made of section 5607 or any other section of the statutes. Thereafter, unless such construction in a given case would be inconsistent with the manifest intent of the Legislature, the word "city" might mean incorporated town.

I have endeavored conscientiously to find some logical reason why the statutory rule of construction as regards the word "city" should not be applied in the case at bar. The sole purpose, apparently, the Legislature had in view in 1907, in the amendment referred to, was to make the word "city" mean incorporated town whenever such construction would not be inconsistent with the legislative intent. The amendment had the effect of curing a condition for which no logical reason could be given as cities and towns are known and understood among the people of the state. The Legislature in enacting section 5607, in relation to the loaning of money, evidently had a twofold purpose in view: (1) The stability of the security upon which the money was loaned; (2) to accommodate our municipalities, and thereby assist in building up the commonwealth. The money thus loaned would be like "bread cast upon the water to be gathered after many days," whether the money was loaned to a county, city, school, or incorporated town. In view of all these considerations, what grounds are there for the assumption that the loan of money, arising from the sale or rental of state lands, to incorporated towns is inconsistent with the manifest intent of the Legislature? I think there are none. I do not care to discuss the question of practical construction. If the Land Board has adopted the practice of lending money to incorporated towns since the amendment of 1907, then there is some logical connection between the custom adopted and the law itself. In any event, I rest my opinion upon the meaning and intent of the statutes referred to as applied to this particular case.

I am of the opinion the writ should issue as prayed for in the complaint.

FRICK, J. (dissenting). I concur in the conclusion of Mr. Justice GIDEON that the defendant, as the Auditor of this state, may and ought to refuse to draw his warrant for any purpose for which no legal appropriation has been made, or for any purpose which is not authorized by law. I also concur in the conclusion that if an appropriation has been made for the purpose for which a warrant is demanded, or if the expenditure is authorized by law, then he may not legally refuse to issue his warrant for the reason that in his judgment the expenditure or investment, as the case may be, is unwise, unsafe, or otherwise. I am unable to concur in the conclusion however, that the investment sought to be made in this case, and for which plaintiffs ask this court for a

Digitized by Google

writ of mandate to coerce the defendant to issue a warrant, is "authorized by law." In my judgment it is not authorized by law, and hence it is not only the privilege but it is the duty, of the defendant, as Auditor of this state, to refuse to issue his warrant against the school land fund.

I regret that my convictions compel me to take this position, and that hence I cannot concur with my Associates. I fully appreciate that dissenting opinions are not only stillborn, but, in most instances, useless; and that they detract from the weight of the decisions. Further, that it is the duty of every member of this court, where such a course is possible, to reconcile his views with those of his associates and submit to their judgment. I am, however, not able to do so in this case. In my judgment the prevailing opinion disregards the rules of construction, which, if heeded, would necessarily lead to an opposite conclusion. That fact standing alone, however, would not be sufficient in this case to induce me to separately state my views in a dissenting opinion. Laying aside all other considerations, and considering this case alone, it is not of much consequence whether the decision is one way or the other. The decision, however, is much more than of ordinary importance, since it may affect hundreds of other cases in which the principles of interpretation and the rules of construction are involved.

There never was a time in the history of jurisprudence when it was more important than at the present time that the courts adhere religiously to the well-recognized and well-established rules of interpretation and construction, and thus declare the law as it is written by the lawmaking power. There never was a time in the history of the world when as many statutes were enacted as at the present time, nor upon a greater variety of subjects. These statutes, in very numerous instances, are so written as to require careful consideration and construction, not only for the purpose of determining the intention and meaning of the lawmakers, but for the purpose of harmonizing the various conflicting enactments which relate to the same or cognate subjects. Moreover, it is a well-known fact that those very numerous statutes are constantly submitted to the opinions of lawyers by their clients for the purpose of having the meaning and effect thereof determined as guides for their conduct in the most important as well as the most varied affairs of life. These lawyers are familiar with the rules of interpretation and construction which have been evolved by the experience and wisdom of thousands of judges sitting as courts during a period covering centuries for the purpose of ascertaining the actual intention and meaning of the lawmakers, and to the end that that intention may be declared and enforced. The lawyers, therefore, ascertain the meaning and intention of the lawmakers by the aid afforded by those rules, and advise their clients accordingly. It is safe to assert that at least 90 per cent. of the legal business transacted in law offices does not reach the courts, and that these lawyers implicitly rely upon the decisions of the courts in determining and applying the law in accordance with the rules of construction. It is of the highest importance, therefore, that the courts strictly adhere to those rules in rendering their decisions. To depart from them is to destroy both the stability and the certainty of the law, and might not infrequently leave both the lawyer and the client stranded upon a desert, in a state of fear and doubt, without guide or bearing.

Before proceeding to a statement of the rules of construction that are applicable here, it becomes necessary to refer to the statute in question, which is found in Comp. Laws Utah 1917, § 5607, as amended by Laws Utah 1919, p. 308, c. 109. So far as material here, that section provides:

"The board shall make the necessary orders for the investment or disposal of the funds derived from the sale of public lands of this state, in the state treasury. *Such funds shall be invested for and on account of the specific purposes for which the lands were granted, in government, state, county, city, or school district bonds*, or in scrip or warrants issued against the funds to be raised by special or local taxes or assessment under the provisions of the laws of the state of Utah, or notes of the state made under the provisions of sections 3806–3807, or in warrants on the reservoir land grant fund issued under the provisions of section 5664; or in mortgages on improved farm lands within the state, or otherwise as provided by law. * * *"

The italicized words are the only ones that are of compelling force here.

The act in which section 5607, supra, was included was first adpoted in the year 1896. Laws Utah 1896, p. 238, c. 80. As first written the section, in addition to the italicized words, after the words "school district bonds" contained the following words, "or in first mortgages on improved farms within the state." The act was in some particulars amended and re-enacted in the year 1897. Laws Utah 1897, p. 61, c. 37. The italicized words remained precisely as they were in the act as originally passed in 1896. In 1899 (Laws Utah 1899, p. 85, c. 64) the act was again amended and re-enacted. The italicized words were left the same, but, after stating that the funds could be invested in first mortgages, the following words were added, "or otherwise as provided by law." In 1903 (Laws Utah 1903, p. 54, c. 62) the particular section limiting the kinds of securities in which the funds could be invested was again amended by adding the words, "or notes of the state made under the provisions

Digitized by Google

of chapter 8 of the Laws of Utah, 1899." The italicized words were, however, re-enacted precisely as in all the former changes or amendments. The act was again amended in 1905 (Laws Utah 1905, p. 34, c. 36), when the language respecting the kinds of securities in which the funds should be invested was left precisely as it was originally adopted. The section was again amended in 1907 (Laws Utah 1907, p. 145, c. 115). The kinds of securities in which the school funds should be invested were again extended by adding the following words: "Or in scrip or warrants issued against the funds to be raised by special or local taxes or assessment under the provisions of the laws of the state of Utah." The words in italics were, however, left precisely as before. In that form the section was finally incorporated into Comp. Laws Utah 1907 as section 2357. The section was again amended in 1911 (Laws Utah 1911, p. 100, c. 71). In that amendment the kinds of securities in which the funds should be invested were again enlarged by adding the words, "irrigation district or drainage district bonds." Otherwise the section remained precisely the same as before. In 1915 (Laws Utah 1915, p. 43, c. 37) the kinds of securities were again enlarged by adding the words, "or in warrants on the Reservoir Land Grant Fund issued under the provisions of section 6 of chapter 116, Laws of Utah 1909." Otherwise the language remained the same. The law was finally amended in 1919 (Laws Utah 1919, p. 308, c. 109). The amendment, however, has no particular bearing upon the question involved here, except that the language with respect to the kinds of securities in which the school land funds should be invested was left as before.

I have been thus specific and careful in noting the nature of the foregoing amendments for the purpose of showing (1) that the language with respect to the investment of the school land funds as originally enacted was never changed in so far as the investment should be made "in government, state, county, city, or school district bonds," which are the italicized words before referred to; and (2) that whenever the right of the land board to invest the funds was enlarged the kinds of security in which the funds should be invested were specifically designated.

It is of the utmost importance, therefore, to bear these facts in mind when we seek for the intention of the Legislature respecting the kind of security in which the funds should be invested by the Land Board.

Let me pause here for a moment to determine the nature of the language which is in question here. It will be observed that the language is mandatory in letter, in spirit, and in its purport. The language is to the effect that the Land Board *shall* invest the funds in the designated securities. It must also be kept in mind that whenever the Legislature deemed it proper to enlarge upon the kinds of securities in which investments should be made it distinctly specified what those securities should be, precisely as was done when the act was first adopted. I make this statement as conclusive proof that no discretion whatever was ever vested in the Land Board respecting the kinds of securities in which the funds should be invested. Again, the language shows two limitations: (a) That the funds *shall* be invested "on account of the specific purposes for which the lands were granted"; and (b) that they shall be invested in the kinds of securities designated in the act. The language with respect to these matters is simple, clear, plain, and free from all ambiguity, and hence free from uncertainty. Moreover, no difficulty whatever arises in ascertaining the meaning of the language by reason that there is some other statute which must be considered as in pari materia with the one under consideration. The statute with respect to the rules of construction to which I shall hereinafter refer is not in pari materia, and hence cannot be considered upon that phase of the case. 2 Lewis, Suth. Stat. Const. (2d Ed.) §§ 443, 444. The language being free from all ambiguity and uncertainty with respect to the kinds of securities in which the funds shall be invested, there is no room for construction; and the court is powerless, therefore, to expand or to restrict the ordinary and usual meaning of the language used, or to add to or to take away anything therefrom.

In this connection it must be borne in mind that the cities and towns of this state are by law segregated into distinct classes, with governments entirely different in many respects. From the legal point of view therefore—and that is the only view in which the word "city" is mentioned in the act and can be considered—the term "city" does not include town unless there is something in the statute itself which indicates such an intention. There not only is nothing in the statute in question indicating such an intention, but the very contrary is clearly manifested.

Let me refer briefly to a few of the cardinal canons and rules of construction. In 2 Lewis' Suth. Stat. Const. § 366, the primary or first rule is stated to be that the meaning and intention of the lawmaker must be determined from "the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." Again, it is said in section 367: "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses." What, then, is the meaning of

Digitized by Google

the language used in the act of 1896, and continued in force from that day to this so far as that language is now material? It is that the funds derived from the school land fund shall be invested "in government, state, county, city, and school district bonds." The primary indeed the foundation of all rules of construction that are employed to determine the meaning of language is that unless the words are used in a technical sense they must be given their usual and ordinary meaning and effect. There is not one word in the list to which I have referred that is not used in its ordinary sense and purport. The only word, however, that is here in question is the word "city." Even if the cities and towns of this state were not segregated into distinct classes, there still could be no doubt respecting the meaning of the word "city" as used in the section. Its usual and ordinary meaning, indeed its only meaning, is that "city," as used in the section, was intended to include a city of the first, second, or third class; that is, a city as it is known to our law and nothing else. In this connection it is of the utmost importance that the object or purpose of the lawmaker be kept in mind. The statute in question does not deal with the rights, privileges, or duties of cities or towns; but its exclusive purpose was to select and designate the kinds of securities in which the Land Board should invest certain trust funds. In view that under our statute town organizations are inferior to city organizations, and belong to the lowest order or class of municipalities, the legislators were not only justified in excluding town securities from the kinds in which the funds should be invested, but it was most natural that they should do so. The rule of construction is universally applied and enforced that where things of a higher class or order are enumerated, things of a lower or inferior class or order must be deemed excluded, unless it appears from what is said, in express terms or by unavoidable implication, that those of a lower order were intended to be included. Under the construction now placed upon the statute, if A. enters into a contract to purchase $100,000 of city bonds from B., B. might comply with the terms of his contract by offering to deliver to A. either city or town bonds, although A. has expressly agreed to purchase city bonds. A lower class or order of securities may thus be substituted for a higher and superior class, and this may be done in the very teeth of the terms of the contract. That is precisely the effect of what is permitted here. No one, I think, will deny that it was the exclusive province of the Legislature to select the kinds of securities in which the funds should be invested, and it is not for the Land Board, nor for this court, to substitute others for those that were selected merely because such others may partake of the same nature or may be deemed as secure as those that were selected. To do that is to deny the Legislature the right of choice. To my mind, there is no escape from the conclusion that under every rule of construction it is the duty of this court to hold that town bonds were intentionally excluded from the kinds of securities selected.

Referring again to 2 Lewis, Stat. Const. § 366, it is there said:

"The statute itself furnishes the best means of its own exposition; and if the sense in which the words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction."

The rule is so well and so clearly stated by Mr. Justice Brewer, in his inimitable style, in United States v. Goldenberg, 168 U. S. at page 102, 18 Sup. Ct. at page 4, 42 L. Ed. 394, that I take the liberty of quoting what is there said. The Justice said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of the words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

In this case, therefore, if the court confines itself to the language of the statute, as it is required to do, there is absolutely nothing to justify a holding that the Legislature intended to include any class of securities other than those that are expressly mentioned in the statute. It is only when recourse is had to another statute, which has absolutely no connection with the one in question, and which was intended to and can apply only in cases where uncertainty and doubt arise from the language used in the statute, that any doubt is created as to the meaning of the word "city" in the statute now under consideration. That other statute cannot be used to create a doubt. It can only be applied where the meaning is not clear and manifest. The statute relied on provides: "The word 'town' may mean incorporated town, and may include cities; and the word 'city' may mean an incorporated town." That statute merely states a rule of construction which has been in force for at least several centuries in England, and has been incorporated into the Codes of many of the states of the Union, while in

Digitized by Google

other states the rule is applied without being expressed in the statutes. It is therefore no more than a declaration of the common law upon the subject.

It goes without saying that it often occurs that a town is intended to be included in the word "city," and vice versa. When that is the case, however, there is always something in the context which indicates the sense in which the word "city" or "town," as the case may be, was used. The concrete cases clearly illustrate the doctrine just stated. Such is the case in Burke v. Monroe, 77 Ill. 610, Trueman v. Village of St. Maries, 21 Idaho, 632, 123 Pac. 508, and state v. Harbor Line Com'rs, 4 Wash. 6, 29 Pac. 938. Upon the other hand, in those cases where there was nothing to indicate that the word "city" or the word "town" was not used in its ordinary sense, the courts have held that the word "city" does not include a town. In Welch v. Post, 99 Ill. 471, the statute referred to "villages, cities, counties and townships," and it was held that incorporated towns were excluded. The court, in passing on the meaning of the words used, said: "What seems to have been deliberately omitted * * * cannot be supplied by judicial construction." To the same effect is Day v. Morristown, 62 N. J. Law, 571, 41 Atl. 964, Wight v. Wolff, 112 Ga. 169, 37 S. E. 395, and Anderson v. Blakesly, 155 Iowa, 430, 136 N. W. 210. The case last cited affords a striking illustration of the mischief that might result from a careless or loose substitution of the word "town" for the word "city."

I know of no instance, have heard of none, and have found none in the books where the Legislature so persistently and so consistently manifested its intention to exclude the securities of towns from the kinds of securities in which the school land funds should be invested as in this case. Here the Legislature amended the act, in which it created and empowered the Land Board to invest the school funds, and in which it designated the kinds of securities in which such funds should be invested, nine times, and in each change persisted in using the precise words, so far as cities were concerned, as were originally used. Moreover, when any change was made in the kinds of securities in which the funds should be invested, the kinds were specifically designated. Under such circumstances, to hold that the Legislature intended to use the word "city" interchangeably with "town" not only does violence to every known rule of construction, but it ignores and repudiates the very meaning of the words used.

It is, however, insisted that the contention of the Land Board should prevail upon the theory of what is termed "contemporaneous construction." In this case it would mean that the Land Board must succeed because it had construed the statute to mean that where the word "city" is used by the legislators it includes a town. In other words, that when the Legislature designated that the funds should be invested in city securities it likewise meant town securities. A number of cases and other authorities are cited and quoted from which, it is urged, support this contention. I have no quarrel with the doctrine announced in those cases and authorities. Indeed, the doctrine is wholesome and sound when applied to proper cases. But it has no application here. First, then, what is meant by "contemporaneous construction"? And under what circumstances may it be invoked? In 2 Lewis' Suth. Stat. Const. (2d Ed.) § 472, the rule is stated thus:

"The aid of contemporaneous construction is invoked where the language of a statute is of doubtful import and cannot be made plain by the help of any other part of the same statute, nor by the assistance of any act in pari materia which may be read with it, nor of the course of the common law up to the time of its enactment. * * * A contemporaneous construction is that which it receives soon after its enactment."

In the succeeding section it is said:

"Long usage is of no avail against a plain statute; it can be binding only as the interpreter of a doubtful law, and as affording a contemporary exposition."

In Black, Interp. Laws (2d Ed.) pp. 40, 41, the author, in discussing the question of when and under what circumstances contemporaneous construction may be invoked, says:

"It is properly resorted to to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause. And the credit to which it is entitled is in proportion to the uniformity and universality of that construction, and the known ability and talents of those by whom it was given. But it is to be resorted to with much qualification and reserve. 'It can never abrogate the text; it can never fritter away its obvious meaning; it can never narrow down its true limitations; it can never enlarge its natural boundaries.'"

Now, what are the facts here? The Land Board, for our information, has furnished us with a list of investments that have been made in town securities. That list is conclusive proof that the construction that the board relies on, to say the least, is not a contemporaneous construction. It is the very reverse of that. The law, as I have pointed out, in so far as investments in city securities are concerned, was first passed in 1896. From the record of the Land Board as first presented the first investment that was made in town bonds was in 1909. From a letter later written by the clerk of the Land Board it now seems that the first invest-

Digitized by Google

ment was in 1906. To my mind it is neither very clear nor very material which is the correct date. In either case no investments in town securities were made until either 10 or 13 years, as the case may be, after the law was passed, and not until the law had been amended or changed either five or six times. Up to that time the investments were limited to the kinds of securities specified in the law itself. If, therefore, there was any contemporaneous construction at all, it was in favor of the law as written and not as now construed. But I most respectfully submit that there is no merit in the claim of contemporaneous construction, because the law as written was plain, simple, and free from ambiguity, and hence no construction was permissible.

It is contended that the author in Black, Inter. Laws (2d Ed.) § 94, supports the contention, and he is quoted from at some length. If all that Mr. Black says upon the subject in section 94 is considered, then there is absolutely no conflict in his statements. In referring to contemporaneous, or what he in that section calls "practical construction," he says:

"The courts cannot be controlled by them, for the reason that the courts alone are invested with the power and charged with the duty of putting a final and authoritative interpretation upon the laws. And if the statute to be construed is a recent one—so that official action cannot be seriously deranged, nor private rights be very much affected, by a change in its interpretation—the mere fact that subordinate officers have already begun to read it in a certain way and to regulate their actions accordingly will have no weight or influence with the courts in their search for the true meaning of the law."

The foregoing statement applies to this case in every particular except that the law was not of recent enactment. That fact, however, as I have pointed out, militates against the claim of contemporaneous construction rather than supports it, for the reason that for at least 10 and perhaps 13 years after the law was passed, and during which time it was changed and amended five or six times, all investments under it were limited to the kinds of securities specified in the act. No rights whatever, either public or private, have grown up under it, and the only result that can possibly follow the application of the law as written is to prevent the Land Board from further transgressing its plain provisions. That, in the very nature of things, can, however, only be wholesome, and, in the end, beneficial in many ways, since it will be notice to all officials to remain, so far as possible, within the letter of the law.

Nor can the other cases quoted from by Mr. Justice GIDEON in his opinion have any controlling influence here. The case of Bloxham v. Consumers' L. & S. R. Co., 36 Fla. 519, 18 South. 444, 29 L. R. A. 507–509, 51 Am. St. Rep. 44, was in one aspect only a proper one for the application of the doctrine of contemporaneous construction. The statute upon its face was doubtful in that the question was whether the word "railroad" applied to street railroads or was limited to steam railroads. The executive officers had construed the statute so as to apply it to street railroads as well as to steam railroads, and the court, independently of such a construction, held that street railroads were included within the term "railroads." The court, however, referred to a prior contemporaneous construction, but that did not have controlling influence in determining the meaning of the statute. In City of Louisville v. Louisville School Board, 119 Ky. 574, 84 S. W. 729, also quoted from by Mr. Justice Gideon, the court said: "We are of opinion that, on the face of the statute, the claim of the school board is without foundation." It is somewhat difficult to perceive how the prior contemporaneous construction could influence the court if the statute upon its face indicated the intention of the lawmakers to such an extent that a contrary claim had no foundation. The case of Van Veen v. Graham County, 13 Ariz. 167, 108 Pac. 252, is also quoted from. In that case the statute was doubtful in that the term "actual traveling expenses" was used, and the question was whether the term included all the expenses of sustenance while the official was away from home on official business, or whether he was limited merely to traveling expenses. The executive officers had held that it included all expenses, and the court so held. Neither that case nor the Louisville case is of controlling influence here. The only case in which the doctrine of a contemporaneous and long acquiesced-in construction was actually applied is the case of State v. Sheldon, 79 Neb. 455, 113 N. W. 208. In that case it appeared that the statute providing for the manner of assessing railroads had been construed and applied by the state and county officers without protest for a period of more than 40 years. It was therefore held that the construction placed upon the statute by the officers should prevail, although the correctness of the construction in some respects was doubtful. It will be observed however —and that is the thought I desire to impress —that in all of the cases referred to a doubt arose upon the face of the statute and an interpretation of the meaning of the language contained therein was absolutely necessary. Moreover, in some of the cases a different construction by the courts would have unsettled and disarranged the adjustment of public affairs to a large degree. We have no such case to deal with here.

Neither can I yield assent to the proposi-

Digitized by Google

tion that either this court or the Legislature was required to take notice of the construction placed upon the statute in question after the year 1906 or 1909 by the Land Board. It is true, as suggested, that our statute (Comp. Laws Utah 1917, § 7076), so far as material here, provides that courts take judicial notice of the "public and private official acts of the legislative, executive, and judicial departments of this state and of the United States." Just what is meant by the private official acts I am unable to grasp. That question has, however, no relevancy here, and hence may be ignored. By the public official acts of the departments referred to I make bold to assert, however, that it was not intended that either this court or the legislative department should be required to take judicial notice of all the administrative acts of boards or other officers that may be considered a part of the executive department of this state. Neither this nor the legislative department is required to take notice of the various contracts that any board or officer may enter into, or the various business transactions it or he may have with private citizens, or even municipal corporations. To hold that any department, whether judicial or legislative, is required to take notice of all the acts of inferior boards and all inferior officers is to require such departments not only to take notice of all the proceedings of such boards and officers, but requires such departments also to take notice of all the correspondence and every act or transaction that may arise in the course of the business intrusted to such boards or officers. This court would thus be required to take notice of all that transpires in the offices of the Secretary of State, of the State Auditor, of the State Treasurer, and of all other state officers. That would place a burden upon this and all other departments of the state government which would be utterly impracticable, and would tend to confuse rather than to bring about an orderly and a reasonably expeditious and safe administration of justice. The rule applicable here is well stated in 16 Cyc. p. 904, in these words:

"To require courts to notice not only the regulations of prominent executive officers, state or national, but also what they do in discharge of their legal powers, would impose a burden of multitudinous details, often of slight importance, and more familiar to litigants than to the court. Dispatch of business is usually served by requiring such facts to be proved."

Then follows an enumeration of the character of executive acts of which the courts are required to take judicial notice. In my judgment, the foregoing is a plain and sound exposition of the law. Any other course must inevitably lead to interminable turmoil. In view of the foregoing, and in view of the fact that the Legislature from first to last, in express terms, specified the several kinds of securities in which the funds should be invested, there is no basis for the contention that the Legislature adopted the construction that was placed upon the statute after 1906 or 1909 by including town securities.

I have thus shown that the Legislature for 23 years persistently and consistently used the same language in designating the kinds of securities in which the school funds should be invested, and that whenever it deemed it necessary to change the kinds of securities in which the funds might be invested it in express terms designated the kinds of securities in which the funds should be invested. What better method could the Legislature have adopted in emphasizing its intention respecting the kinds of securities in which investments should be made? It had from the very inception of the law specifically mentioned and enumerated the several kinds of securities in which the funds should be invested. By pursuing that method all securities not mentioned were necessarily excluded from the list specified. According to the arguments now advanced, however, it seems that the Legislature, in addition to particularly specifying the various kinds of securities, should also in express terms have excluded all others. That is the effect of the holding, and in view of that, the decision is not only contrary to all rules and canons of construction, but may prove exceedingly harmful in the future. Suppose this court for a period of 23 years had constantly applied the same language in determining a particular question, what possible effect would be given to the argument that because some officer or some one else had applied the decision otherwise than as it was written, this court was required to declare that it meant precisely the contrary of what it said, and, in the event that it failed to do so, it might be urged that it adopted the construction of such officer or other person? Courts are, and of right should be, jealous in guarding their decisions, and when deliberately declared should not permit any one to disregard them upon the flimsy ground that he placed a different meaning upon them than that justified by the language used. The courts should, however, if possible, be more jealous in guarding the law as it is written by the lawmakers; and, unless there is something in the law manifesting the contrary intention from that which the ordinary meaning of the language implies, the courts should adhere to the law as written. In this case, therefore, the contentions of the Land Board should not prevail, (1) because the language of the statute which it has attempted to construe is simple, plain, and free from all ambiguity; (2) because that language has been steadfastly adhered to for practically 23 years without a

Digitized by Google

change; (3) because for more than 10 years after the statute was enacted its language and meaning were followed; (4) because to construe the statute as contended for by the Land Board results in applying the words "city" and "town" interchangeably and as meaning the same thing; (5) because the Legislature has clearly, and at numerous times and in many ways, indicated that such was not its intention, for the reason that every time that it became necessary to mention a town or towns such has invariably been done in terms, and there is not a single statute of which I have any knowledge in which such was not the case—there is, therefore, no room for construction; (6) because to refuse the writ in this case simply arrests unauthorized acts, and can neither affect any vested rights nor hamper the execution of any law; and (7) because, if there are any changes to be made in the law and in the kinds of securities in which the funds shall be invested, the changes should be made by the lawmaking power precisely as has been done in amending and changing the statute numerous times.

The alternative writ should therefore be quashed, and a peremptory writ denied.

STATE v. SHEEHAN. (No. 3067.)

(Supreme Court of Idaho. May 28, 1920.)

1. Criminal law ⟸792(3)—Instruction as to who are principals held to substantially conform to statute.

An instruction that "under the laws of this state all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or advise and encourage its commission, are principals in any crime so committed, * * *" is in substantial conformity with C. S. § 8093, and correctly states the law.

2. Intoxicating liquors ⟸167—One aiding or abetting in transporting liquor into Idaho is guilty of transporting.

C. S. § 8093, makes one who aids, abets, or encourages another in the transportation of intoxicating liquor into the state of Idaho guilty of the act of transporting whether or not he was actually present and participating in such act.

3. Criminal law ⟸1168(4), 1173(2)—Refusal to strike erroneous testimony and to instruct to disregard it held harmless.

It is not prejudicial error to refuse to strike out erroneous testimony, nor to refuse to instruct the jury to disregard the same when by his subsequent answers the witness has shown that he had no personal knowledge of the facts testified to.

4. Criminal law ⟸1172(2)—Instruction as to weight to be given erroneous testimony held not prejudicial error.

Nor is it prejudicial error for the court to instruct the jury that they may give such testimony what weight they think it is entitled to, when it is apparent from all of the facts and circumstances in connection therewith that the jury could not have been misled or the defendant prejudiced thereby.

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

J. A. Sheehan was convicted of the crime of transporting intoxicating liquor into the state of Idaho, and he appeals. Affirmed.

K. I. Perky and Dana E. Brinck, both of Boise, for appellant.

Elbert S. Delana, Pros. Atty., of Boise, Roy L. Black, Atty. Gen., and Dean Driscoll, Alfred F. Stone, and James L. Boone, Asst. Attys. Gen., for the State.

BUDGE, J. This appeal is from a judgment convicting appellant of the crime of transporting intoxicating liquor into the state of Idaho. From the evidence it appears that the appellant arrived in Boise from Salt Lake City early on the morning of May 16, 1916; he had checked two trunks at Salt Lake City as baggage to be transported to Boise. Subsequent to accepting the trunks for transportation the railroad company discovered the trunks each contained kegs of whisky, and the superintendent at Pocatello wired the railroad offices at Boise that this certain baggage contained liquor, and to get in touch with the sheriff's office in Boise, and further suggested that the party calling for the same should be arrested. About 8 o'clock on the morning of the 16th appellant called at the Peasley transfer office at Boise, and gave an employé the two baggage checks for the trunks. These checks were delivered to an employé by the name of Waymire who presented them to the railroad company, and was informed that the trunks had not arrived, but that they expected them on the 6:15 train that evening. This employé discovered that there was something wrong with this baggage, and that it was being watched, so the checks were returned to appellant with the request that he get some one else to look after them. Appellant, on the evening of the 16th, went to the railroad station at Boise and called Mr. Phillips, the baggageman, outside and gave him the two check numbers for trunks, and asked him if they were in, and at the same time informed Phillips that the trunks contained intoxicating liquor. Subsequent to appellant's arrest he informed the sheriff the trunks belonged to him. Mrs. Lizzie Johnson had been staying at appellant's house while appellant and

Digitized by Google

his wife were in Salt Lake City, and testified that when appellant arrived home he brought three or four quart bottles of liquor with him in his suit case. Sheehan never had the liquor alleged to have been transported in the trunks in his personal possession in Idaho.

[1, 2] The court gave an instruction, which was in part as follows:

"Under the laws of this state all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or advise and encourage its commission, are principals in any crime so committed. * * *"

An instruction requested by the appellant, to the effect that the act of the shipper in delivering goods to the carrier, in this case the Oregon Short Line Railroad Company, does not amount to transportation, the carrier being the only party who in such case does the transporting, was refused. The giving of the former instruction and the refusal to give the latter are assigned as error.

In this same connection, and on the theory embodied in the requested instruction, appellant assigns as error the denial of his motion for an instruction advising acquittal and the insufficiency of the evidence to sustain the verdict.

C. S. § 8093, provides that—

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."

The instruction which the court gave is substantially in the language of the statute, and correctly states the law. The crime of transporting intoxicating liquor into the state of Idaho, of which appellant was convicted, is committed whenever one knowingly and intentionally transports intoxicating liquor. No other intent is necessary in order to complete the offense, when coupled with the act of transporting, than the intent to transport. The evidence shows that the intoxicating liquor in this case was actually transported into the state of Idaho; that the appellant had the intent that it should be so transported; that he aided, abetted, encouraged, and procured the transportation. His acts and his intent, coupled with the act of the railroad company in knowingly transporting the intoxicating liquor, bring him clearly within the terms of the foregoing statute, and make him a principal in the commission thereof as defined therein.

In this connection appellant also contends that the railroad company is in the position of a feigned accomplice. In order to become such the company must have held itself out to the appellant as being in fact an accomplice. This the company did not do. There is therefore no element of feigned accomplice in the case.

[3, 4] Appellant moved to strike out the testimony of Mrs. Johnson relating to certain bottles of liquor which she stated he had in his possession. The motion was denied. Appellant then recalled her for further cross-examination, during which she testified as follows:

"Q. Now you spoke about seeing some liquor, I think you said four bottles in the house. Do you know whether they were whisky or not? A. No, sir, I don't know, I never tasted it.

"Q. Do you know whether it was intoxicating liquor of any kind of your own knowledge? A. No; I don't know how I could answer that, because I don't know.

"Q. You didn't taste any of it? A. No.

"Q. Did you see this liquor in the possession of Sheehan, or did you see it at the house? A. No, sir; I did not.

"Q. You do not know whether it was intoxicating liquor of any kind, do you? A. No, sir; it was on the table when I seen it."

Appellant requested the court to instruct the jury to disregard her testimony concerning the possession of the liquor in bottles and to give it no consideration as bearing upon the probability of appellant having committed the offense upon which the state had elected to rely, viz., the transportation of the liquor contained in the trunks. This request was refused, and the court instructed the jury that they could convict appellant only of transporting the liquor contained in the trunks; that her testimony was permitted to remain in evidence only for the purpose of enabling them to decide whether appellant transported the liquor contained in the trunks; that if they thought it had any bearing upon that question they might consider it for that purpose, giving to it such weight as they thought it entitled to.

The denial of the motion to strike, the refusal to give the former instruction, and the giving of the latter, are assigned as error.

While we are satisfied that the court erred in the respects complained of, we do not regard these errors as prejudicial or as justifying a reversal. The witness' testimony on the cross-examination shows that she had no knowledge as to whether the bottles about which she had testified contained intoxicating liquor. The rule is that it is not prejudicial error to refuse to strike out erroneous evidence where the witness whose testimony the court is asked to strike out has shown by subsequent answers that he has no personal knowledge of the facts testified to. 17 C. J. 333, § 3677; Drew v. U. S., 192 Fed. 854, 113 C. C. A. 178. When we apply this rule to the facts and circumstances of the case at hand we are satisfied that no prejudice could have resulted to appellant from failure to strike out the evidence in question, and that the

Digitized by Google

jury could not have been misled either by the evidence or the instruction complained of.

The judgment is affirmed.

MORGAN, C. J., and RICE, J., concur.

RABIDO et al. v. FUREY.

(Supreme Court of Idaho. April 12, 1920. On Petition for Rehearing, June 12, 1920.)

1. Waters and water courses ⇐142—Rights under a water license are confined to waters described in application.

Rights acquired under a water license are confined to the water described in the application.

2. Waters and water courses ⇐133—Hostile diversion of water from another's ditch cannot initiate a water right.

One who diverts water from the ditch of another, against the will and without the consent of the latter, cannot thereby initiate a water right.

3. Waters and water courses ⇐140—Priority of appropriation depends on application to a beneficial use.

Where a water right is dependent upon appropriation, rather than application for a permit, priority depends on application of the water to a beneficial use, not on date of commencement of construction of diversion works.

Morgan, C. J., dissenting.

Appeal from District Court, Blaine County; F. J. Cowen, Judge.

Suit by Mary Rabido and another against Sherman Furey, to determine priority to the right to use the water of certain springs, with cross-complaint by defendant. Judgment for plaintiffs as to a certain use, and for defendant as to a certain use. From the judgment and an order denying his motion for a new trial, defendant appeals. Modified and remanded, with directions.

Hawley & Hawley and O. W. Worthwine, all of Boise, for appellant.

Clark & Brodhead, of Mackay, for respondents.

McCARTHY, District Judge. This is an action brought by respondents in the district court in and for Blaine county to determine the relative rights of the parties in and to the waters of Jagles or Goggles springs, in Blaine county. The district court entered judgment, awarding to respondents the right to the use of .8 second feet of the waters of the springs for the irrigation of land owned by respondent Mary Rabido, described in the amended complaint, with date of priority of April 1, 1904, and to appellant the right to the use of 1.4 second feet thereof for the irrigation of land described in his answer and cross-complaint, with date of priority of December 4, 1907. From the judgment, and from an order denying a motion for a new trial, appellant appeals to this court.

The principal point raised by appellant is that the evidence is insufficient to sustain the findings of fact and judgment. It is admitted that respondent Mary Rabido and appellant are the owners of the lands described in their pleadings; that they are agricultural in character, and require the artificial application of water in order to raise profitable crops. The springs in question are situate on unoccupied public land of the United States, some distance up a canyon known as "Jagles canyon." While there is some conflict in the evidence, the preponderance of the evidence shows that respondents cleaned out the springs, constructed a ditch to conduct the water around a flat situate some distance below them, cleaned out the channel through which the water flowed down the canyon, thus succeeding in bringing the water to the mouth of the canyon, and then conducted it into a ditch which they had constructed.

The evidence is sufficient to sustain the finding of the trial court that prior to the time respondents performed this labor the water from the springs never reached the mouth of the canyon, and that it was entirely the result of their labor that the water became available for irrigation purposes. However, the evidence shows that the work commenced in 1906 instead of 1904 as found by the court. As a result of respondents' labor, in the fall of 1907, the water came down to the mouth of the canyon and into the ditch which they had built, but they did not apply the water to a beneficial use that fall.

In December, 1907, appellant discovered the water coming out of the canyon, and, without making any investigation to determine its source, filed in the office of the state engineer, on December 4th of that year, an application for a permit to appropriate 1⅞ second feet of the waters of Goggles creek, giving the source of supply as Goggles creek, and the location of the point of diversion as the mouth of Goggles Creek canyon. In May, 1908, he took some water from the ditch which respondents had constructed near the mouth of the canyon, conducted it to his land, and applied it to a beneficial use. The finding that about May 1, 1908, appellant applied to a beneficial use 1.4 second feet of said water is hardly sustained by the evidence. The evidence shows that in the spring of 1908, appellant applied said water on about 3½ acres, in 1909 and 1910 on about the same amount of land, and in 1911 on about 80 acres. There is no definite evi-

Digitized by Google

dence to show just how much water he applied on his land at those times. It is clear, however, that he did apply some of said water upon his land before the respondents applied any of it on the land described in their complaint, and that he diverted it from the ditch which respondents had built near the mouth of the canyon. Thereafter he made proof of completion of works, and on March 5, 1913, a water license was issued to him for 1.4 second feet of the waters of Goggles creek; the date of priority designated in said license being February 3, 1908.

On June 3, 1908, respondent Joseph Rabido and Ben Burnett filed in the state engineer's office an application for a permit to use 6.2 second feet of the waters of Jagles springs, which was approved by the state engineer on June 13, 1908. The application specified that the waters were to be used on a desert claim of Joseph Rabido. Any rights which may have accrued under that permit were subsequently quitclaimed by Rabido and Burnett to respondent Mary Rabido. In 1909 respondent Mary Rabido filed on the desert claim described in the amended complaint. On September 30, 1911, she applied for and received a permit to use four-fifths second feet of the waters of Jagles springs on her desert claim, giving the source of the water supply as Jagles springs, and the location of the point of diversion as about one mile from the mouth of Jagles creek. On April 21, 1916, the state engineer certified that the proof of completion of works under that permit had not been made as required by the laws of the state of Idaho, and that the permit was therefore voidable. In June, 1908, respondents continued their ditch to the desert claim of respondent Joseph Rabido, and irrigated 7 acres of his land with it, and in 1909 irrigated 40 acres of the desert claim of Mary Rabido with it.

[1] C. S. § 5556, provides as follows:

"Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed. * * *"

C. S. § 5558, reads as follows:

"The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation."

C. S. § 5561, reads as follows:

"As between appropriators, the first in time is first in right."

C. S. § 5562, reads as follows:

"All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams."

C. S. § 5560, provides as follows:

"The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed. * * *"

C. S. § 5569, which deals with applications to appropriate water, provides that the application shall give the source of the water supply, and a permit issued upon an application also mentions the source of the water supply as given in the application.

Appellant's application for a permit designates the source of supply as Goggles creek, and the location of the point of diversion as the mouth of Goggles Creek canyon. In other words, the application is for a permit to appropriate the waters of Goggles creek. The evidence shows that Goggles springs are not naturally tributary to or a feeder of Goggles creek. On the contrary, the waters of the springs spread over and sink into the ground at a place in the canyon known as "Rye Grass Flat," a little below the springs. The respondents, after clearing out the springs and increasing the flow, took the water around this flat and diverted it into the creek, cleaned out the creek, and thereby conducted the water in question down to the mouth of the canyon and into a ditch which they had dug, utilizing the creek part of the way as their ditch, which they had a right to do under the provisions of C. S. § 5560, supra.

The water in question was therefore not the water of Goggles creek, but the water of Goggles springs. The application to appropriate the water of Goggles creek covered only water which was naturally flowing therein, not the water of the springs, which did not naturally flow in it, but were diverted into it by respondent in the manner above indicated. We conclude that the application and permit issued pursuant thereto did not initiate a right to the water in question, namely, the water of Goggles springs.

[2, 3] Appellant also claims a right to the water by reason of prior actual diversion and application to a beneficial use. The provision of C. S. § 5561, supra, has been enforced by a long line of decisions of this court. But in every case the water in question has been properly appropriated under the provisions of our statutes.

Whether or not appellant obtained any

Digitized by Google

right to the water by his attempted appropriation depends upon whether the water was subject to appropriation at the place and in the manner in which he attempted to appropriate it. The language used in C. S. § 5556, indicates that water is subject to appropriation only when flowing in its natural channel, and that it must be appropriated therefrom. The principle underlying this statutory provision is recognized by the Supreme Court of Utah in Sowards v. Meagher, 37 Utah, 212, 108 Pac. 1112, and by the Supreme Court of Wyoming in McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773. It is similar to the generally recognized principle that a valid water right cannot be initiated by using another's ditch against his will, or by any other trespass. Wiel, Water Rights in Western States (3d Ed.) vol. 1, §§ 221, 391; McRae v. Small, 48 Or. 139, 85 Pac. 503; Marshall v. Niagara Springs Orchard Co., 22 Idaho, 144, 125 Pac. 208.

A general definition of the term "natural channel," applicable to all cases, is a difficult matter. A great deal depends upon the circumstances of each individual case. It may be that water which has once been diverted from its original natural channel, and has, after being used or abandoned, gotten into a channel other than the original one, can be said to be flowing in a natural channel within the meaning of this statute. That question is not before us, and we do not pretend to decide it. It is not necessary in this case to apply the language of that statute to all possible cases which may arise when water has been diverted from its original natural channel and does not return to it. The specific question upon which we pass in this case is whether the water in question, which respondents caused to flow down the canyon and into the ditch which they had constructed, and from which appellant diverted it, was flowing in its natural channel and was diverted therefrom by appellant. In view of the evidence, as summarized above, we answer this question in the negative. Goggles creek, or canyon, was not the natural channel for said water, but was used by respondents as a ditch to carry to their ditch the water which they had diverted from the springs. It is perfectly clear that the ditch out of which appellant diverted the water was not its natural channel. We must not be understood as holding that respondents acquired a completed water right merely by thus diverting it. On the contrary, in the absence of a valid filing by them, or a completed appropriation, appellant or any one else could have gone to the source of the water, namely, the springs, and made a valid filing or appropriation. But under this statute the water was not subject to appropriation at the place and in the manner attempted by appellant.

We conclude that the evidence supports the finding of the trial court to the effect that respondent Mary Rabido has a prior right to .8 second feet of the waters of Goggles springs. However, the date of priority should not be 1904, as found by the trial court, nor even 1907, the year the water was brought down the canyon. Since the state engineer certified that the water permit granted her was voidable because of failure to make proof of completion of works, we must fall back on the date of the actual application of the water for the date of her priority. From the evidence in the record it is not possible to state exactly when the .8 second feet of water was applied to her entry. The taking of further evidence on this point by the trial court will be necessary.

So far as appellant is concerned, we find that he has acquired no valid right to the waters of Goggles springs, being the water in question. His permit and license give him a right to the waters of Goggles creek, and would apply to any water which may run down that creek, as distinguished from the waters of Goggles springs. The only waters in litigation under the issues of this case are the waters of Goggles springs. Since appellant has no right to them, no relief can be afforded him in this action.

The case is remanded to the trial court, with instructions to modify its findings of fact and conclusions of law, and decree in accordance with the views herein expressed. In order to fix the exact date of respondents' priority, the trial court is ordered to take further evidence on the question as to the date when the .8 second feet of the waters of Goggles springs were applied by respondents to the land belonging to respondent Mary Rabido and described in the amended complaint.

No costs are awarded on this appeal.

RICE, J., concurs.

MORGAN, C. J. (dissenting). The waters of Jagles springs are property of Idaho, and were subject to appropriation wherever found. They were unappropriated public waters, the right to use which might be acquired, until they were used in the irrigation of the lands of these litigants. The parties to this action having failed to conform to the requirements of the law in making their applications to the state engineer, their priorities depend on the dates they placed the waters to a beneficial use.

It must not be understood that C. S. § 5560, grants to respondents the right to use the creek bed as a ditch without the consent of the owner of the land on which it is situated. Furthermore, the evidence does not justify the conclusion, which may be drawn

Digitized by Google

from the foregoing opinion, that, in taking the water, appellant committed a trespass.

On Petition for Rehearing.

McCARTHY, District Judge. The foregoing opinion holds that appellant did not acquire any right to the waters of Goggles springs. The questions as to whether he acquired a right to the waters flowing in Goggles creek, and as to whether waters originating in Goggles springs, but which are permitted to flow in Goggles creek, are waters of Goggles creek, are not discussed or decided.

Since the appeal was taken from the judgment, and not from a portion thereof, the entire judgment is before the court, and subject to review, even though the respondents took no cross-appeal.

The petition for rehearing is denied.

MORGAN, C. J., and RICE, J., concur.

HERRING-HALL-MARVIN SAFE CO. v. BALLIET. (No. 1900.)

(Supreme Court of Nevada. June 8, 1920.)

1. **Costs ⟸42(2)—Offer of judgment as to undisputed part of claim makes cost dependent upon result of disputed part.**

When plaintiff unites in the same action a claim that is not disputed with one that is, defendant may remove from the controversy the undisputed claim by offer of judgment, as authorized by Comp. Laws, § 3470, and thus make the subsequent costs of the litigation depend upon the result of the litigation in regard to the disputed claim.

2. **Costs ⟸42(2)—Offer of judgment need not include costs.**

Offer of judgment under Comp. Laws, § 3470, need not include costs.

3. **Costs ⟸42(4)—Offer of judgment does not affect costs accruing prior to offer.**

Although plaintiff failed to obtain a more favorable judgment than offered by defendant, plaintiff was entitled to accrued costs up to the time of the making of the offer.

4. **Appeal and error ⟸984(1)—Whether judgment "more favorable" than that offered, as affecting costs, within discretionary determination of court of jurisdiction.**

Whether judgment recovered was "more favorable" than judgment offered by defendant, within the meaning of Comp. Laws, § 3470, as to offer of judgment as affecting costs is to be determined by the tribunal having jurisdiction of the matter, and the exercise of the district court's sound discretion in this respect will not be disturbed, although the Supreme Court is not without power to correct abuse thereof.

Appeal from District Court, Nye County; Mark R. Averill, Judge.

On rehearing.

Former opinion (38 Nev. 164, 145 Pac. 941) adhered to, with modification as to costs.

H. R. Cooke, of Tonopah, for appellant.

SANDERS, J. This case was commenced in the lower court in 1908. It was appealed to this court in 1910. The judgment and order appealed from was affirmed on January 2, 1915. See opinion, 38 Nev. 164, 145 Pac. 941. Upon the application of the losing party a rehearing was granted in March, 1915. The matter of rehearing slumbered on the calendar of this court until December, 1919, and was presumably brought to a hearing because of an order directed to the parties to show cause why the case should not be stricken from the trial calendar.

No member of this court as it is at present constituted participated in the opinion. The transcript consists of more than 800 pages. The cause appears to have been submitted upon full and exhaustive briefs covering every step in the proceedings. Ordinarily, unless limited or restricted by order, a rehearing opens up the entire case; but in this instance we are justified in confining this opinion on rehearing to the points raised in the petition for rehearing.

It is pointed out in the petition that the court neglected to pass upon and decide two vital points necessary for a complete disposition of the case. One is that the court neglected and failed to decide which of the parties is entitled to costs of trial in the district court; and the other, Did the trial court err in giving a certain instruction over the objection of plaintiff, and duly excepted to at the time?

[1] The question of costs involves the construction and application of section 3470, Cut. Comp. Laws of Nevada, the statute in force when the cause was tried in the court below. When the plaintiff unites in the same action, as it did in the present case, a claim that is not disputed with one that is, the defendant may remove from the controversy the undisputed claim by the offer of judgment, as authorized by said section 3470, and thus make the subsequent costs of the litigation depend upon the result of the litigation in regard to the disputed claim. The defendant by his answer in this case offered to allow plaintiff to take judgment against him for the sum of $616, less the sum of $42.80, for and on account of the second cause of action set forth in the complaint. The plaintiff did not accept the offer. By proceeding to trial it in effect elected not to accept, and evidently was content to take the chance of obtaining upon the trial a more favorable judgment than that offered. The verdict of the jury is

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

for the sum of $573.20, with interest thereon at the legal rate from June 8, 1908, and that the plaintiff take nothing by his first cause of action, and that the defendant have his costs and disbursements, taxed at $———. Both parties filed with the clerk a memorandum of costs. Each moved to strike the cost bill of the other. The plaintiff's memorandum amounted to $547.05, and the defendant's to the sum of $563.05. The court struck plaintiff's cost bill, and, with certain deductions, allowed that of the defendant.

[2] It is contended that the so-called offer to allow judgment was ineffectual, because it did not tender or include costs. The statute contains no such requirement. It is enough that the offer contains a sum for which judgment is to be entered, and, if the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendant's costs from the time of the offer. Hammond v. N. P. R. R. Co., 23 Or. 157, 31 Pac. 299; Megrath v. Van Wyck, 5 N. Y. Super. Ct. 750.

[3] It is further objected that the court disallowed to plaintiff the accrued costs up to the time of the making of the offer, amounting to the sum of $26. This was error. Douthitt v. Finch, 84 Cal. 214, 24 Pac. 929; 5 Standard Enc. Proc. 871, note 19.

[4] The appellant contends that the judgment recovered was "more favorable" to it than the judgment offered. Therefore it is entitled to its costs as a matter of right. Whether or not a judgment is "more favorable" in the particular case, within the meaning of the statute, is a question to be determined by the tribunal having jurisdiction of the matter. State v. District Court, 26 Nev. 253, 66 Pac. 743. It is true the court in the case cited had under review a statute relative to the power and authority of the district court on an appeal from a justice of the peace. No good reason appears why the same reasoning should not be applied to the statute in question. We are of the opinion that the term "more favorable" must be construed with reference to the facts and circumstances of each particular case. While we do not go to the extent of holding that this court is without power or authority to correct an abuse of the power conferred by the statute, we do hold that whether or not a judgment is "more favorable" in the particular case must be left to the sound discretion of the district court. Without reviewing the facts, we conclude to accept the lower court's version of the judgment that it is not more favorable to the plaintiff than to the defendant.

The instruction complained of reads as follows:

"The jury is instructed that, where one sells an article of his own manufacture, he thereby warrants it to be free from any latent defect not disclosed to the buyer arising from the process of manufacture; and if you believe from the evidence in this case that the plaintiff was the manufacturer of the safe, which is the subject-matter of this action, and that said plaintiff sold said safe under an order therefor from defendant which safe was by him intended to be, and was, used for the ordinary and usual purposes for which safes are used, then plaintiff warranted by the sale of said safe that said safe was reasonably fit for purpose and use."

If we clearly interpret the position taken by counsel, it is his contention that the instruction is not applicable to the case in any of its phases, and is a mere abstract statement of the law. Whether an abstract instruction calls for a reversal of the case depends upon whether as a result of the instruction prejudice resulted to the complaining party. We are not prepared to say that the instruction was calculated to mislead the jury and affect their conclusion upon the issue of express warranty.

Entertaining these views, we are of the opinion that the judgment and order appealed from should be affirmed, and that the defendant's costs should be reduced, by crediting the plaintiff with the sum of $26, the amount of its accrued costs before the time of the offer of judgment was made.

It is so ordered.

COLEMAN, C. J., and DUCKER, J., concur.

SHILL v. JONES et al. (No. 1767.)

(Supreme Court of Arizona. June 3, 1920.)

1. Pleading ⟸367(6)—Motion to make more definite and certain addressed to discretion.

Motion to make a pleading more definite and certain is always addressed to the sound discretion of the court, which should be exercised in the interest of justice, not arbitrarily or capriciously.

2. Appeal and error ⟸960(2)—Order on motion to make pleading more definite and certain will not be revised.

When an order granting or denying motion to make a pleading more definite and certain is made, it will not be revised by the appellate court.

3. Pleading ⟸367(1)—Motion to make complaint more definite and certain cannot take place of demurrers.

A motion to make more definite and certain, made under Civ. Code 1913, par. 474, cannot take the place of general and special demurrers to the complaint, as it should be employed when the pleading is defective in some respect, but not demurrable under paragraph 468.

4. Pleading ⟸367(2)—Motion to make complaint more definite and certain addressed to indefinite statement of cause of action.

Motion to make the complaint more definite and certain is addressed to a statement of

Digitized by Google

a cause of action so indefinite and uncertain that the precise nature of the charge is not apparent.

5. Pleading ⇐367(4) — Complaint being indefinite as to damages, plaintiff should have complied with order to make more definite.

In action against irrigating canal association and its members for damage to plaintiff's land by washing, where complaint was indefinite in allegations of elements of damage in that it failed to give area destroyed or its value, whether cultivated or not, or its real character as being tillable, plaintiff should have complied with trial court's order on defendants' motion to make complaint more definite and certain, and where he failed to do so, and stood on the complaint, judgment dismissing cause will be affirmed.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Wright P. Shill against Cyrus Grant Jones and others. From order dismissing the cause on plaintiff's refusal to make the complaint more definite, plaintiff appeals. Affirmed.

W. H. Stilwell, of Phœnix, for appellant.
Charles Woolf, of Tempe, for appellees.

ROSS, J. This action was instituted by the appellant, herein called plaintiff, against the appellees, herein called defendants, for damages. The plaintiff alleges in his complaint that he was at the time of the alleged injury, and is now, the owner of the southeast quarter of the southeast quarter of section 34, township 2 north, range 5 east, Gila and Salt rivers base and meridian, Maricopa county; that the defendants had constructed a dam across the Salt river for the purpose of diverting the waters thereof into a canal, constructed and maintained by defendants, running along and adjacent to his said premises. Paragraph 5 is as follows:

"That the said water of said river so obstructed, diverted, and thrown to and against and along the said bank of said river by defendants as aforesaid, has during the years 1917 and 1918 crumbled, dug out, caved, carried away, and destroyed a large portion of plaintiff's said premises, to plaintiff's damage in the sum of $1,500."

Thereafter and in due course the defendants filed their motion for an order requiring the plaintiff to make the allegations in paragraph 5 of plaintiff's complaint more definite and certain in this, to wit:

"To show in said allegations: (1) The quantity or area of land claimed by plaintiff to have been carried away and destroyed. (2) The character of the land so claimed to have been carried away and destroyed; i. e., whether said land was tillable and whether or not the same was at the time of such carrying away and destruction being cultivated to crops, and, if so, the kind and character of crops thereon. (3) The particular location, according to legal subdivision, of the lands so claimed to have been carried away and destroyed in each of the years 1917 and 1918, and the time in each of said years when such carrying away or destruction is claimed to have taken place."

The court granted the motion to make more definite and certain, and, the plaintiff choosing to stand on the complaint, without complying with the order of the court, the cause was ordered dismissed. The appeal is from the order dismissing the cause.

[1, 2] We understand the law to be that a motion to make a pleading more definite and certain is always addressed to the sound discretion of the court. This discretion should be exercised in the interest of justice, and not arbitrarily or capriciously. Generally speaking, when an order granting or denying the motion is made, it will not be revised by the appellate court. Harn v. Missouri State Life Ins. Co. (Okl.) 173 Pac. 214; Sartin v. Springfield Hospital Ass'n (Mo.) 195 S. W. 1037; Bristol v. Railroad Co., 175 N. C. 509, 95 S. E. 850.

[3] It is, we think, very well settled that a motion to make more definite and certain cannot be made to take the place of the general and special demurrers. Stansfield v. Dunne, 16 Ariz. 153, 141 Pac. 736; 31 Cyc. 644, 645. It is to be employed when the pleading is defective in some respect, but not demurrable. Our statute sets forth the specific grounds for which demurrers may be interposed to the plaintiff's complaint. Paragraph 468, Civil Code. It also (paragraph 474) indicates quite clearly that this kind of a motion is to be employed for a specific purpose; that is, if the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be amended. The demurrers and the motion to make more definite and certain have very different functions to perform.

"A petition may be so drawn that a demurrer thereto would not lie, and yet be so indefinite and uncertain as to make it unfair for the defendant to be forced to a trial thereon. In fact the filing of a motion to make more specific and certain is, in effect, a concession that a cause of action is stated in the petition; but, in effect, it challenges the injustice of such petition as to defendant. The peculiar province of the trial court is to take such action as will insure a fair and impartial trial to all litigants, whether they be plaintiffs or defendants, and hence numerous discretionary orders may be made by such court in the course of the litigation, and its discretion, when soundly exercised, will not be disturbed by this tribunal." Sartin v. Springfield Hospital Ass'n (Mo.) 195 S. W. 1037.

[4] The motion is not addressed to a statement of a defective cause of action, nor a defective statement of a cause of action, but only to a statement of a cause of action so indefinite and uncertain as that the precise

Digitized by Google

nature of the charge is not apparent. The precise nature of the charge must be made apparent by the pleading or it is amenable to this motion.

The statutory requirement that the nature of the charge upon motion shall be alleged in the pleading is for the information of the adversary, so that he may prepare his defense. The motion should not be denied because the complaint states a cause of action, for it may do that and still be equivocal and uncertain in respect to the particulars or nature of the charge, and, if so, the adversary must seek an amplification of the allegations by his motion to make more definite and certain, or he will be considered as having waived the defects.

It must be admitted that the elements of damage to which plaintiff might be entitled are very indefinitely and uncertainly stated, in that the complaint fails to give the area of ground destroyed or its value, whether cultivated or not, or its real character as being tillable. Its location is described generally as being along defendants' canal, but at what point, or whether the entire width of his 40 acres, is not shown. We cannot say that the defendants' information on these points is as good as plaintiff's. It might be that, if the land were more particularly described, defendants would be able more intelligently to prepare their defense. They might be able to show that it was of little or no value, or that it was in fact not the plaintiff's land.

[5] In all fairness to defendants, we think plaintiff should have complied with the court's order to the best of his ability. The observance of the order would have been a very easy and simple matter, and, being so, plaintiff should have been sure of his grounds before ignoring it. In a doubtful case it would seem quick and willing acquiescence is due the respect owed by the bar to the court. The fact that we, in the same circumstances, might have overruled the motion, is not sufficient reason to reverse the ruling of the trial court. Before we should do that, it must appear that his action was arbitrary and capricious.

The judgment of the lower court is affirmed.

CUNNINGHAM, C. J., and BAKER, J., concur.

ALLAIRE v. LAUREL CANYON MINING CO. et al. (No. 1729.)

(Supreme Court of Arizona. June 3, 1920.)

1. Garnishment ⟸56—When bank deposit for distribution among creditors subject to garnishment stated.

Where money was placed with a bank by a debtor for distribution pro rata among creditors, such money was subject to garnishment if the bank was holding it as the agent of the debtor, subject to orders that it could subsequently give to the bank as to the disposition of the money; but if the bank was holding the money as a trustee for the use and benefit of the creditors, who expressly or impliedly assented to such arrangement for their benefit, such creditors having a vested interest in the money in the trustee's hands, it was not subject to garnishment, under Civ. Code 1913, par. 1427 et seq.

2. Fraudulent conveyances ⟸225 — Creditor accepting payments from trustee for creditors could not garnishee.

Where a creditor was notified that debtor had placed certain credits with a bank, to be collected and distributed pro rata between the creditors, and acquiesced therein to the extent of accepting dividends, he cannot assume an inconsistent position and attempt to forestall other creditors by proceeding against the bank in garnishment on a judgment in his favor subsequently obtained, even though the transaction was designed to hinder and delay creditors; such party impliedly becoming a party to and being benefited by the transaction.

Appeal from Superior Court, Graham County; A. G. McAllister, Judge.

Action by Thomas Allaire against the Laurel Canyon Mining Company, with the First National Bank of Globe as garnishee. From an order discharging the garnishee, plaintiff appealed. Plaintiff dying pending the appeal, Mrs. Thomas Allaire, as administratrix of his estate, was substituted as party appellant. Affirmed.

Thomas Allaire commenced this proceeding of garnishment on a judgment in his favor against the Laurel Canyon Mining Company, serving the First National Bank of Globe as garnishee. The garnishee made its answer, showing that the Laurel Canyon Mining Company, judgment debtor, prior to the service of the writ of garnishment, had empowered the bank, in writing, to receive from lessees of the debtor's mines all payments of rent as they accrue on its mines to the amount of $25,000 during the five-year term of lease, ending on the 11th day of June, 1920, as the same become due, and distribute said money to all the creditors of the said defendant Laurel Canyon Mining Company pro rata; that the bank, at the time of making its answer, had in its possession for disbursement to the said creditors the sum of $2,077.14, and many thousands of dollars yet remain to be paid on rent, and, if paid, to be distributed as aforesaid; that the bank is not indebted to the defendant, and has no effects, property, or shares of stock in its possession or under its control belonging to the defendant.

The plaintiff filed an affidavit controverting the answers of the garnishee, and ten-

Digitized by Google

dered an issue in garnishment, alleging that the said agreement set forth by the bank is in violation of law and void, for the reason it was made for the purpose of hindering, delaying, and defrauding the creditors of the defendant mining company, and as a consequence the money the garnishee bank admits in its answer to be in its possession belongs to the defendant Laurel Canyon Mining Company and is subject to the garnishment, and therefore to be applied to the plaintiff's claim. The court, after hearing oral testimony, disallowed plaintiff's contention, and decided the issue in favor of the garnishee, and discharged the bank with its costs. From the order discharging the garnishee, the plaintiff appeals.

Since this appeal was filed in this court, the death of Thomas Allaire has been suggested, and the administratrix of his estate has been substituted as party appellant.

E. L. Spriggs, of Safford, for appellant.

L. L. Henry, of Globe, for appellee garnishee.

CUNNINGHAM, C. J. (after stating the facts as above). The issue joined and tried involved the inquiry whether or not the money paid to the bank by Ruff and Carlson, lessees, as payment of rent on a lease for the occupation of mines belonging to the Laurel Canyon Mining Company, received by the bank and paid to the bank pursuant to instructions of the Laurel Canyon Mining Company, and held by the bank to be distributed to the creditors of the Laurel Canyon Mining Company pro rata, subjected the bank to the garnishment process as one indebted to the defendant mining company while holding such money—$2,077.14—for distribution among the creditors of the defendant mining company.

[1] Of course, the question whether the money in the bank is liable to the garnishment depends upon the inquiry as to whether the bank was holding the money for the defendant as its agent or bailee or other like relation, or whether the bank was holding the money as the trustee of the creditors of the defendant mining company, over which the mining company had no control. If the garnishee bank was holding the money as the agent of the defendant mining company, subject to orders the mining company could subsequently give to the bank directing the disposition of the money, then the bank was the agent of the defendant company, and its discharge from the garnishment process was erroneous. Otherwise, if the bank was holding the money as a trustee for the use and benefit of the creditors of the defendant company, provided, of course, said creditors had expressly or impliedly assented to such arrangement for their benefit, and accepted the bank as such trustee, then whenever the facts appear that the trustee has been accepted by the creditors—and such facts do appear from the record—such creditors so accepting the changed conditions of payment of their claims thereafter look to the trustee for payment, and they have a vested interest in the money in the trustee's hands to the extent that the same is applicable to their respective claims. The trustee is not then the agent of the defendant debtor, but it is the agent, the trustee, of the said creditors, and owes such creditors, and not the defendant, the money in its possession. This fair principle was applied in Strayhorn v. Webb, 47 N. C. 199, 64 Am. Dec. 580, and the cases cited in notes.

Under our statutes (chapter 2, title 6, R. S. A. 1913), and as recognized by the garnishment laws generally, to render a person liable to garnishment, he must have in his possession, belonging to the defendant, property, money, credit, or effects, or he must be indebted to the defendant (Smith v. Davis, 1 Wis. 447, 60 Am. Dec. 390), and the Arizona statute, supra, gives recourse to shares of stock owned by the defendant in a corporation served as garnishee.

[2] The plaintiff admitted at the trial, through his attorney, that he received pro rata payment on his judgment debt from the bank, as late as the 4th day of December, 1918. The answer of the garnishee was filed in this matter on the 19th day of October, 1918. There are some, although not very satisfactory, statements in the record tending to show that the plaintiff received a dividend payment from the bank prior to December 4, 1918. The fact clearly appears from the record that the plaintiff, Thomas Allaire, was notified of this transaction of the mining company and the bank, and that he acquiesced in the transaction to the extent of accepting a portion of the benefits provided for him by the transaction after, if not before, he commenced this proceeding.

It would be assuming inconsistent positions for the plaintiff to accept dividends under the transaction for a time, and then change his mind and attempt to forestall other creditors similarly situated from receiving their dividends and appropriate an entire fund to the payment of his claim to the exclusion of the other creditors, as well as to the hindering and delaying of the other creditors. Hence, conceding that the transaction was designed to hinder and delay creditors, and for that reason the transaction was liable to be annulled at the suit of a creditor thereby injured, yet neither the plaintiff nor other creditors who accepted a dividend, or other benefits, knowing the same was offered and paid pursuant to the said transaction, can be heard to complain that he has been hindered, delayed, or defrauded by that particular agreement, for the reason that such creditor has impliedly become a

Digitized by Google

party to and is benefited by such transaction.

We find no error in the record. The order appealed from is therefore affirmed.

ROSS and BAKER, JJ., concur.

STOLAROFF et al. v. BASSETT LUMBER CO. (No. 1804.)

(Supreme Court of Arizona. June 3, 1920.)

1. Mechanics' liens ⟸239—No implied notice to materialman of source of money credited to contractor's account other than intended by owner.

Where landowner would not trust contractor and made check out to third person to pay materialmen, and such third person went to a materialman with the contractor and indorsed and presented such check, and both directed that it be applied on the account of the contractor for materials furnished an another job, the fact that the check was made by the owner furnished no reasonable or natural clue to the materialman that the third person had received the check in a fiduciary capacity or as agent or trustee of the property owner, and that he was about to misappropriate the funds; such third person having been in the habit of aiding the contractor financially in the conduct of his business.

2. Mechanics' liens ⟸239—Notice of source of money paid on account of contractor too late to affect liability of owner, where payment was not applied as owner intended.

Where owner did not trust contractor, and made check to a third person to pay accounts of materialmen, and such third person and contractor gave the check to a materialman, and directed him to apply it upon the account of the contractor for material furnished upon a different job, and the materialman discharged such other account on its books and gave the contractor a receipt, a notice 30 minutes thereafter that the third person misapplied the check was too late to affect the equity of the materialman.

3. Mechanics' liens ⟸239 — Materialman applying payment from contractor to certain account, must have notice of equity in landowner.

In order to deprive a materialman of the right to apply a payment made by a contractor to an account directed by the contractor, it must know that it is receiving money of a certain owner, or the facts must be sufficient to put it on notice of some equity in such owner.

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Proceeding by the Bassett Lumber Company against Frank Stolaroff and others. Judgment for plaintiff, and the named defendant and others appeal. Affirmed.

David Benshimol, of Douglas, for appellants Stolaroff.

Boyle & Pickett, of Douglas, for appellant Bank of Douglas.

Manatt & Stephenson and McFarland & Sames, all of Douglas, for appellee.

BAKER, J. The plaintiff, Bassett Lumber Company, sought to establish a mechanic's lien against the property of the defendant Frank Stolaroff, to the amount of $1,326.40, for lumber and other materials sold at that sum to the defendant M. Morris, who, under a contract with Stolaroff, used the lumber and materials in constructing a dwelling house for Stolaroff on the property against which the lien is sought to be established. Stolaroff pleaded payment in full of the plaintiff's claim. Notice of the lien was duly filed and served. The case was tried before a jury, and after the close of all of the evidence the judge instructed the jury to return a verdict for the plaintiff in the amount claimed, which was done, and thereupon judgment was rendered in favor of the plaintiff for the said sum of $1,326.40, against the defendant M. Morris, which amount was declared to be a lien on the Stolaroff property, and superior to a mortgage held by the defendant, the Bank of Douglas, on the property. The defendant M. Morris did not appeal. Frank Stolaroff, Lillie Stolaroff, and the Bank of Douglas are the only parties appealing.

The action of the trial judge in directing a verdict is the only assignment of error possessing any merit. It is urged that the directed verdict was unauthorized by the evidence.

The undisputed facts show the following case: Morris, as contractor, was employed by Stolaroff to put up a dwelling house for him on lots 31 and 32, block 22, of the Clauson addition in the city of Douglas, for the contract price of $3,300. The lumber and materials used in the construction of the building under the contract was bought by Morris from the Bassett Lumber Company. Stolaroff knew that Morris had not paid for the lumber and materials, and he promised Bassett Lumber Company that he would see that its account was paid. Morris, at the time he was performing the Stolaroff contract, was indebted to Bassett Lumber Company for lumber and materials which he had purchased and used in another building constructed by him for another party. This account was known as the Itule account, and was in the sum of $1,800. Stolaroff lacked confidence in the integrity of Morris to pay the Bassett Lumber Company's claim if he should intrust him with the money for that purpose, and after some discussion of the matter with Morris, Stolaroff decided to give the money to one Jake Kerner and trust him

Digitized by Google

to make the payment. In pursuance of this determination, Stolaroff gave Kerner a check on the Bank of Douglas for the sum of $1,688, and instructed him to pay the Bassett Lumber Company's claim, and another claim held by the Brophy Carriage Company, out of the check. The check was made payable to Kerner direct, who, in company with Morris, took it to the agent of the Bassett Lumber Company. Kerner indorsed the check and handed it to the agent. Kerner and Morris jointly instructed the agent to place the amount of the check to the credit of the Itule account, Morris furnishing some $200 in cash so that this account could be paid in full. The agent, acting under the instructions of Morris and Kerner as to the application of the funds, placed the check to the credit of the Itule account, and discharged the account on the books of the company, delivering Morris a receipt in full. In this transaction nothing was said about the account which Morris owed for the lumber and materials used in the Stolaroff building, and no mention was made of the circumstances under which Kerner obtained possession of the check. In a short while after the completion of this transaction, say within 30 minutes, and upon inquiry by the agent as to when the Morris account for lumber and materials used in the Stolaroff building would be paid, Kerner exhibited to the agent a copy of a written agreement which he had with Stolaroff in reference to the payment of the claims against the Stolaroff property. This agreement had been entered into between Stolaroff and Kerner at the time Stolaroff gave Kerner the check. The instrument was lost at the time of the trial, and the parol evidence as to its terms or contents was conflicting. The defendant's testimony, however, tended to show that it was a guaranty on the part of Kerner that he would pay the claim of the Bassett Lumber Company out of the specific check which Stolaroff had given him. It further appears from the uncontradicted testimony that Kerner had been furnishing Morris with money to carry on his contracting business, and that fact was known to the Bassett Lumber Company. In fact, Morris had informed the company some time prior to the transaction in question that he was going to borrow the money from Kerner to pay the Itule account.

[1] It is insisted that under this evidence Bassett Lumber Company, in equity and good conscience, should have placed a sufficient amount of the check to the credit of the account for lumber and materials sold to Morris and used in the Stolaroff building to have satisfied it, and not to have placed the check to the credit of the Itule account. It is insisted that the transaction should be treated equitably as payment of the first-mentioned account. But we do not think there is any evidence in the record tending to support this claim. There was nothing in the transaction to put the Bassett Lumber Company on notice, either actual or constructive, that the check should be applied to the payment of the first-mentioned account. Had the check been made payable to Morris, and by him indorsed to the Bassett Lumber Company, some contention might be made that it conveyed notice to the Bassett Lumber Company of the source of the money, and that it should be credited to the Morris account for lumber and materials used in the Stolaroff building, and not to the Itule account. Flexner Univ. School v. Strassel Gans Paint Co. (Ky.) 112 S. W. 686; Peterson v. Shain, 4 Cal. Unrep. 122, 33 Pac. 1086; Bowles Co. v. Clark, 59 Wash. 336, 109 Pac. 812, 31 L. R. A. (N. S.) 613. Especially would this be true had the check borne any distinguishing words, such as "on contract" or "trustee" or "agent." 8 Corp. Jur. 515; Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633. But the check was made payable to Kerner or bearer, and was for a larger amount than the Morris account for lumber and materials used in the Stolaroff building. It bore no words or signs importing any equity in the drawer so as to exempt it from the provisions of the Negotiable Instrument Law (Civ. Code 1913, pars. 4146–4339). Bassett Lumber Company might reasonably have assumed that Kerner was the absolute owner of the check, and that he had received it in the ordinary course of business. The fact that the check was made by Stolaroff, and represented funds which belonged to him when the check was made furnished no reasonable or natural clue to the Bassett Lumber Company that Kerner had received the check in a fiduciary capacity, or as agent or trustee of Stolaroff, and that he was about to misappropriate the funds in the payment of the Itule account.

Stolaroff promised to pay the Morris account for lumber and materials used in his building, but it was perfectly reasonable for the Bassett Lumber Company to assume that Stolaroff would fulfill his promise in a usual business method by making the payment in cash or by sending a check for the amount payable to the company. The company was not called upon to suppose for a moment that Stolaroff intended to pay the account by sending a check payable to Kerner in a greater amount than such account.

We see nothing suspicious, at least nothing sufficient to put the Bassett Lumber Company upon inquiry, in the circumstances that Kerner and Morris were together and both took part in directing the application of the funds represented by the check to the payment of the Itule account. The Bassett Lumber Company might reasonably have inferred that Kerner was advancing money to enable Morris to pay the account. The undisputed

Digitized by Google

evidence shows that Kerner had been in the habit of aiding Morris financially in the conduct of his contracting business, and this fact was known to the company. Furthermore, Morris had informed the company that he was going to obtain money from Kerner to pay the Itule account.

[2] If full faith and credit be given to the statement of the defendant's witnesses that the written instrument which Kerner gave to Stolaroff at the time he obtained the check was, in effect, a guaranty that he (Kerner) would pay the Morris account for lumber and materials used in the Stolaroff building out of the specific check, yet the undisputed fact remains that knowledge of this instrument did not come to the agent of the Bassett Lumber Company until after the Itule account had been paid and discharged on the books of the company, and a receipt given to Morris, and the relation of the Bassett Lumber Company as owner of the check had become fixed and absolute. The notice came too late to affect the equities of the company, and was immaterial. 8 Corp. Jur. 507.

[3] In several cases it has been held that the owner of a building cannot object to the application of payments as between the contractor and the lien claimant, where the lien claimant had no knowledge that the money paid to him was furnished by the owner. These cases are not exactly in point on the facts, but we think they establish the equitable principle applicable to the case at bar. In order to deprive the Bassett Lumber Company of the right to apply the payment to the Itule account, the company must have known that it was receiving Stolaroff's money, or the facts must have been sufficient to put the company on notice of some equity in Stolaroff. Thacker v. Bullock Lbr. Co., 140 Ky. 463, 131 S. W. 271; Flexner Univ. School v. Strassel Gans Paint Co. (Ky.) 112 S. W. 686; Waterman v. Younger, 49 Mo. 413; Bohn v. Wilson, 53 Or. 490, 101 Pac. 202; Portland F. Co. v. C. K. Spaulding L. Co., 64 Or. 316, 130 Pac. 52.

In Grace Harbor Lbr. Co. v. Ortman, 190 Mich. 429, 157 N. W. 96, it is held that if the owner wishes to obtain a credit for money paid by him to the contractor who turns over the money to the materialman, it is his duty to see that it is properly applied.

There is no doubt from the testimony that Stolaroff was deceived by Kerner, but the loss must fall upon him, and not upon the Bassett Lumber Company.

The judgment of the lower court is affirmed.

CUNNINGHAM, C. J., and ROSS, J., concur.

DEY v. LAUREL CANON MINING CO.
(No. 1605.)

(Supreme Court of Arizona. June 8, 1920.)

Appeal and error ⟸790(3)—Appeal from judgment for defendant in possessory action dismissed as moot.

Appeal from judgment for defendant in possessory action, based on breaches of covenant in lease, will be dismissed on the ground that the case has become moot, by reason of a subsequent action for the same purpose based on breaches of the covenant subsequent to those in the first action, the second action resulting in judgment, which has become final, because unappealed from, that the lease is valid and subsisting, and defendants entitled to possession.

Appeal from Superior Court, Graham County; A. G. McAlister, Judge.

Action by Richard V. Dey against the Laurel Cañon Mining Company. Judgment for defendant, and plaintiff appeals. Dismissed.

Ben C. Hill, R. W. Sprague, and Frank E. Curley, all of Tucson, and L. Spriggs, of Safford, for appellant.

John H. Campbell, of Tucson, and L. L. Henry, of Globe, for appellee.

ROSS, J. The appellees have moved for a dismissal of this appeal upon the grounds that the questions involved in this case have become moot by reason of a final judgment in another case between the same parties concerning the same subject-matter. The facts upon which the motion is based, more fully stated, are as follows: January 17, 1917, appellant, as plaintiff, instituted this action in the superior court of Graham county against appellees to recover possession of certain mines and improvements thereon, alleging as grounds therefor that appellees had forfeited their lease of premises by breaching certain covenants of the lease. A trial of the issues resulted in a verdict and judgment in favor of appellees, and thereafter on June 12, 1917, appellant perfected his appeal to this court.

Later, on July 20, 1917, and after the case had been appealed, appellant instituted another action in said superior court under the Landlord and Tenant Act (paragraph 1552, Civil Code), against appellees to recover possession of the same properties, alleging breaches of the same covenants as in the first action, and also some other breaches. The last action was tried, and resulted, as did the first, in a verdict and judgment in favor of appellees. The judgment in the last case was not appealed, and has therefore become final.

The lease was a working lease and gave an option of sale to appellees. It contained,

Digitized by Google

among others, covenants to pay to lessor certain royalties and to keep mill in continuous operation, and to keep same and other improvements in repair; to work mines in minerlike manner, and to timber where necessary; to pay promptly all debts incurred; to keep property free from liens; and to keep posted on property notices against liens for labor and material. The violation of these covenants in the present case cover the period of time prior to filing the complaint, and the violations in the last case cover the period of time subsequent thereto and up to the filing of the last complaint.

It is all too apparent that the covenants are continuous, and that the two complaints, taken together, allege a continuous breach of those covenants beginning with the inception of performance, and, without interruption, extending down to the time of filing the last complaint. The object of both suits was the same. They were both possessory actions. The effort of appellant was to dispossess the appellees. The facts going to make out his cause of action, and the wrongs charged against appellees, in both cases were the same, except that they occurred on different dates. In the last case appellant was unable to establish the breaches alleged, and a final judgment, therefore, has forever settled his contentions against him. Paragraph 1552, Civil Code, under which appellant alleges in his complaint he brought the last action, provides that, when a tenant shall neglect to pay his rent for five days after it becomes due, "or whenever said tenant shall violate any of the provisions of his lease," the landlord or lessor "shall have the right by law to re-enter and take possession of said leased premises for nonpayment of said rent or violation of said lease." The judgment in the case was that appellant "have and recover nothing from his complaint; * * * that the lease * * * is a valid and subsisting lease. * * * Defendants are entitled to the possession of all the properties described in said complaint."

If this case should be reversed and remanded for a new trial, and that is the order sought, appellant would be confronted with the judgment just quoted, the judgment finally and conclusively settling the rights involved in this case. Liebuck v. Stable, 66 Iowa, 749, 24 N. W. 562, was a case somewhat similar in its facts. It was a possessory action for real estate by the landlord against his tenant. The plaintiff was defeated in the first action and appealed. Pending the appeal, he brought another action in which judgment was again given the tenant, from which no appeal was taken. It therefore became final. The court, in sustaining a motion to dismiss the appeal, used this language:

"Both actions were commenced to accomplish the same result. Both were pending at the same time; one on appeal to this court, and the other in the court below. When the second action was commenced the defendant was bound to appear and defend. Having thus brought the defendant into court and subjected him to the expense of defending, the plaintiff took an appeal in the first action, but he prosecuted the second action to judgment, and he now seeks to prosecute the appeal to this court. By the prosecution of the second action to judgment his right to further prosecute this appeal was waived and lost. It is against the policy of the law that two actions for the same thing, or to accomplish the same result, should be pending at the same time. The plaintiff elected that he would take his chances, and prosecuted the second action to judgment, and he cannot now be permitted to say that it was a mere experiment. He elected which course he would take. Both were open to him, and it is neither right nor just that he should prosecute this appeal, and put the defendant to the cost, trouble, and expense of defending it."

If the result of the last suit had been favorable to appellant, and he had been awarded possession of the premises, it would hardly be contended that the appeal in this case should not be dismissed on the ground that the question had become a moot one. Because he lost, the question is no less finally settled. There are cases holding that a party may waive the right of appeal that he otherwise would be entitled to by the institution in the same court, or some other court, of a suit to accomplish the same purpose and prosecuting it to final judgment, whether the result be favorable or unfavorable. City v. Ross (Mo.) 208 S. W. 454; Samuel v. Samuel, 59 Kan. 335, 52 Pac. 889.

The appellant having voluntarily instituted the second suit to accomplish the same purpose as the first, and having prosecuted it to final judgment, it would seem, on principles of right and justice, he should be held to have waived his right to further pursue this appeal. When the question involved in an appeal has become moot, the court, being advised thereof, will refuse to review it. Gibson v. Board of Supervisors, 20 Ariz. 222, 179 Pac. 640.

The appeal is dismissed.

CUNNINGHAM, C. J., and BAKER, J., concur.

Digitized by Google

ARIZONA HERCULES COPPER CO. v. PROTESTANT EPISCOPAL CHURCH CORPORATION OF ARIZONA et al.
(No. 1731.)

(Supreme Court of Arizona. June 3, 1920.)

1. Nuisance ⟸3(3)—Construction of ore bins close to church not actionable.

A mine had the right to construct ore bins at the mouth of its shaft on its own property, and the fact that they were in close proximity to a church, and that in their reasonable use the noise therefrom disturbed public worship or other functions of the church, and thereby diminished the value of the church's property, gave church no right of action for damages.

2. Eminent domain ⟸95 — Taking land for tracks by mining company governed by principles applied to common carriers acting in private capacity.

Where a mine condemns property and lays tracks for its private use, the principles applied to common carriers when acting in their private capacity should be adopted in fixing the liability of the mine for damages to private property.

3. Eminent domain ⟸104—Mine constructing private tracks on highway liable for damages by reason of noise, smoke, etc.

A mine which condemns a small strip of land for a track and in the general plan of construction intends to construct several other tracks on a highway, tracks being for the private use of the mine, the rule of incidental or consequential damages should be extended to all the tracks and their operation, and the landowner is entitled to damages by reason of noise, smoke, cinders, vibrations, etc.; the improvements amounting to a private nuisance, under Const. art. 2, § 17, Civ. Code 1913, par. 3087.

4. Eminent domain ⟸194 — Amendment allowed after verdict.

Where in eminent domain proceeding defendant alleged damages of $500 and jury found damages to be $910.50, the court could after verdict amend the answer to conform to the proof, under Civ. Code 1913, par. 422.

5. Eminent domain ⟸262(5)—Failure to rule on motion to amend answer after verdict and allowing judgment for more than prayed, not reversible error.

In a proceeding to condemn land, where defendant alleged damage of $500 and verdict was for $910.50, failure of the court to formally grant a motion after verdict to amend the answer to conform to the proof was not reversible error, in view of Const. art. 6, § 21, where the court treated it as granted by entering judgment upon the verdict in the larger amount without objection by the plaintiff; the failure to formally rule being at most a procedural matter not affecting the merits of the case.

Appeal from Superior Court, Pinal County; O. J. Baughn, Judge.

Condemnation proceeding by the Arizona Hercules Copper Company against the Protestant Episcopal Church Corporation of Arizona and another. From a judgment in favor of the named defendant, plaintiff appeals. Affirmed.

George J. Stoneman and W. L. Barnum, both of Phœnix, for appellant.

Armstrong & Lewis, of Phœnix, and E. P. Patterson, of Florence, for appellees.

ROSS, J. This is a condemnation proceeding whereby the appellant mining company, hereinafter designated plaintiff, sought to condemn a right of way for a steam railway over the property of appellee, hereinafter designated defendant.

The defendant church, in 1914, obtained from the Ray Consolidated Mining Company, the owner thereof, a 50-year lease of a lot or parcel of land situated between the railroad depot and on the east side of the main highway or street leading therefrom to the town of Ray, and constructed thereon a church building to be used for religious, educational, and social purposes. Thereafter, on May 20, 1918, the plaintiff, finding it necessary for the successful operation of its mines, constructed at or near shafts on its mines, ore bins, and in pursuance of a general plan proposed and undertook to construct three railroad tracks leading from ore bins to the main line of the Ray and Gila Valley Railway Company. The church building and grounds were about 75 feet from ore bins, and the three tracks passed it on the west, two of them being entirely in the main highway or street leading from the town of Ray to the railroad depot, and the other passing over the southwest corner of the church property within 10 feet and 2 inches of the church wall. The strip of land taken is very small, the right of way extending over it being about 80 feet long. This proceeding is to condemn this particular piece of land. Ore cars and steam engines are to be operated on all three of these tracks for the general purposes of conveying supplies to the mines and ore bins and taking from the ore bins and mines the products of the mines. It is agreed that the life of the lease is the entire value of the land. The Ray Consolidated Mining Company defaulted, and therefore claims nothing as the owner of the fee. The only question litigated was one of damages.

The defendant in its answer adopted the theory that because the three tracks were included in the general plan of construction by plaintiff they in fact were but one improvement and because one of the tracks was on defendant's property the same rule of incidental or consequential damages should be

Digitized by Google

extended to all the tracks and their operation. It was accordingly alleged in the answer that—

"By the operation of said trains through, over, and along the property of this defendant [the plaintiff] will interfere with the access to the property of this defendant of the communicants and attendants upon the services had in the church, * * * and by reason of the construction, operation, and use of said railroad of the plaintiff passing through, over, across, and along the property of this defendant the defendant's church building and leasehold estate will be rendered of no value as a place of worship and for the holding of the meetings of the various organizations conducted by the defendant therein. That the ringing of bells, sounding of whistles, the blowing off of steam, the loud puffing of plaintiff's locomotive engines, combined with smoke, dust, and foul, noxious, and offensive odors emitted from plaintiff's engines, and which will enter the church, and the noise and rattle of its trains as the result of stopping them at points immediately adjacent to the property of this defendant, will constantly disturb religious exercises and meetings in said church, and will render the said church and the said land and leasehold interests of this defendant of no value whatever. That the operation of said trains of this plaintiff within a short distance of the walls of said church will damage and destroy the said church by shaking down and breaking the adobe walls of which it is constructed."

The plaintiff specially demurred to the above allegations of damages, asserting that they "do not constitute just, proper, or legal ground of damage, * * * and are not a proper basis of damages to be considered by the court or jury in this case." The same objection was made to the introduction of evidence in support of the allegations of damages, and finally plaintiff excepts to instructions of the court submitting to the jury these elements of damages.

The Constitution, article 2, § 17, provides that—

"No private property shall be taken or damaged for public or private use without just compensation. * * *"

The statute (paragraph 3087, Civil Code) points out what the compensation shall consist of, as follows: (1) The value of the property taken or condemned and the improvements thereon; (2) incidental damages or depreciation in value by reason of the severance and the construction of the improvements in the manner proposed by plaintiff, to the land not taken.

In a proper case these may be offset by benefits, but, as there are none in this case, that feature will not be considered.

As already indicated, the controversy is over the compensation sought for incidental damages occasioned by the taking of a small strip of land for the right of way for one of the tracks, and for the operation of the other two tracks, upon the public street adjacent to defendant's property.

[1] Plaintiff suggests that a different rule of compensation should be applied in this case than in the ordinary one, for the reason that the defendant knew when it entered the mining camp of Ray that the dominant interest was mining, to which every other interest was or should be subservient, and that, having placed its house of worship where it did, it ought not to be permitted to complain when the chief industry of the community, in its growth and development, encroached upon or inconvenienced or incidentally injured its property. To a limited extent, this contention is unquestionably correct. Plaintiff had the undoubted right to construct its ore bins at the mouth of its shaft on its own property, and to use them as a means to facilitate the handling of its ores. The fact that the bins were in close proximity to the church, or that in their reasonable use the noise therefrom might have a tendency to disturb public worship or other functions of the church, and thereby diminish the value of defendant's property, would not give rise to a cause of action.

"It has been held that every landowner has the right to develop and use the natural resources of his land, and in the absence of negligence is not liable for consequences incidental to such development and use." Brede v. Minn. Crushed Stone Co. (Minn.) 173 N. W. 805.

This rule has special application to mines, oil wells, and stone quarries that must be operated at a fixed place. However, defendant does not claim any damages or compensation on account of the location of the ore bins or the noise or inconveniences occasioned thereby. When a mine owner seeks a right of way to his mines for the purpose of facilitating his operations, and in doing so creates conditions the natural and logical result of which is to inflict damage upon his neighbor's property, we apprehend a different rule applies. While in this case it is proposed to build on the right of way condemned and along the street adjacent to defendant's property railroad tracks upon which trains are to be moved by means of locomotive engines, the utility is entirely of a private nature. It is not to be a common carrier. It will serve only the plaintiff as an ore and supply train. The way sought and taken is therefore nothing but a private way.

"He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own act. The interests in conflict in this case are therefore, not those of the public and an individual, but those of two private owners who stand on equal ground as engaged in their own private business." Robb v. Carnegie & Co., 145 Pa. 324, 22 Atl. 649, 14 L. R. A. 329, 27 Am. St. Rep. 694.

Digitized by Google

[2] It would seem from reason that the principle applied to common carriers when acting in their private capacity should be adopted in a case of this kind. The rule in such cases is stated by 1 Lewis on Em. Do. (3d Ed.) 450, as follows:

"On general principles, when railroad appurtenances, such as a roundhouse, switchyards, repair shops or terminal plant, cause a nuisance to a neighboring property by reason of noise, smoke, cinders, vibrations, etc., there may be a recovery. But there are authorities to the contrary."

In Killam v. Norfolk & W. Ry. Co. (Va.) 96 S. E. 506, after quoting the above language the court commented:

"Examination of the authorities cited by the learned author last quoted pro and con satisfies us that the text is supported by the greater weight of authority, and is impregnably sustained by reason and upon principle, where the switchyard operation complained of does not serve a passenger station or freight depot, so that such operation is not required of the railroad company in the discharge of its public duty in connection with such station or depot."

The leading case announcing this rule is Matthias v. Minn., etc., R. Co., 125 Minn. 224, 146 N. W. 353, 51 L. R. A. (N. S.) 1017. This is what is known as "a switchyard" case, and it holds, even though the railroad company did not take any part of the adjacent landowner's property, still it was liable to him for incidental damages caused by smoke, cinders, noise, and vibrations.

In a later case, Stuhl v. Great Northern Ry. Co., 136 Minn. 158, 161 N. W. 501, L. R. A. 1917D, 317, in commenting on the Matthias Case, it was said:

"In that case defendant was held liable in damages for construction and operation of a switchyard near plaintiff's home, although it was held that the location was a proper one. It was said that 'while suitable location has a bearing on the question it is not controlling' that the 'right not to be injured by a nuisance on adjoining land cannot be taken without compensation' "—quoting Lewis, Em. Do. § 238.

In Southern Ry. Co. v. Fisher, 140 Tenn. 428, 205 S. W. 126, it is said:

"The true test for distinction between cases of liability and nonliability of a railway company for the maintenance of a nuisance in the way of switch tracks is: Was the company acting in its private capacity, as distinguished from its public function, when operating the claimed nuisance?"

[3] We take it that the rule founded upon public policy and necessity of exempting a common carrier from liability for incidental damages to property adjacent to its right of way by reason of noise, smoke, cinders, vibrations, etc., while operating at public stations, or on tracks between stations, is not applicable where these conditions are brought about by the same utility in furtherance of its own private ends.

The present plaintiff could in no event invoke the protection of the rule of exemption sometimes extended to public utilities, because it is not a public utility and does not seek access to its mine as a servant of the public, but solely in its private capacity and for its own private use and benefit. In such circumstances, we conclude that the elements of damage alleged in the complaint, to which objection was taken, were such as the law would permit to be proved as tending to show that the improvements made by plaintiff amounted to a private nuisance and, as such, depreciated the value of defendant's property. 10 R. C. L. p. 71, § 62.

Until now we have treated this case as though no part of defendant's premises had been invaded or taken. Where there is an actual taking, under constitutions and statutes like ours, the almost universal rule is that the landowner is entitled to incidental damages to the land not taken, and that such damages may include the diminution in market value caused by the operation of the road, taking into consideration danger from fire, noise, smoke, and vibrations. Lewisburg, etc., Co. v. Hinds, 134 Tenn. 293, 183 S. W. 985, L. R. A. 1916E, 420; Idaho-Western Ry. Co. v. Columbia Conference, 20 Idaho, 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497, 10 R. C. L. p. 155, § 136; Richards v. Washington Terminal Co., 233 U. S. 546, 34 Sup. Ct. 654, 58 L. Ed. 1088, L. R. A. 1915A, 887.

The rule applied in estimating the depreciated value of land left is stated by Sutherland on Damages, vol. 4, § 1065, as follows:

"If the land is rendered less valuable because it is exposed to fire, or if access is rendered more difficult, or if the use of the remainder is more inconvenienced by reason of the railroad, or if its value is depreciated by the noise, smoke, or increased dangers caused by such use, all these are to be included in the estimate of damages; not that witnesses are to be called upon to estimate the damages for each or any of them, for, though they enter into the estimates, the question is, What is the market value of the land without, and what is the market value of the remainder of the piece with, the railroad? In other words, what is the value of the piece which is taken, and how much is the residue depreciated in its market value by its separation and by the construction of the railroad? These two sums, added together, cover the amount of compensation to which the injured party is entitled."

And again in section 1066:

"Where a part has been taken for a railroad it is proper to consider all the inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, from smoke, invasion of privacy, and the deprivation of light, means of access, and like matters so far as they severally arise from the use of the strip taken and opened up to use, excluding

Digitized by Google

all common and indirect damages; that is, such as affect the owner in common with all other members of the community."

We conclude the demurrer was properly overruled. The evidence objected to was competent and material, and the instructions criticized were a correct statement of the law applicable under the facts of the case.

[4, 5] Objection is made that the judgment for land actually taken is erroneous, in that it exceeds the amount claimed by defendant in its answer. There is perfect agreement that during the trial plaintiff, under permission of the court, amended its complaint, enlarging the area of ground to be taken or condemned. The answer which claimed the value of the land originally sought to be condemned to be $500 was not amended or asked to be amended at that time. The verdict of the jury fixed the value of the land taken at $910.50. Whereupon defendant moved the court to allow its answer to be amended to conform to the proof by substituting as the value of the land taken $1,200 for $500, as originally claimed. The court reserved its ruling on this motion. This occurred June 20, 1918. Thereafter, on July 1st, plaintiff filed its motion to set aside verdict, but did not suggest therein that the verdict was excessive. Again on December 7, 1918, it filed a motion for a new trial without urging the excessive verdict and judgment as a ground. The point is first made in this court. We think the failure of the court to act on motion to amend answer to conform to proof and to grant same was clearly an oversight, and it should be so treated. The statute (paragraph 422, Civil Code) empowers the court to permit amendments of pleadings at any stage of the trial. The motion, therefore, did not come too late, and, the court having treated it as granted by entering judgment upon the verdict for the larger amount, and the same having been acquiesced in, or at least not objected to, at the time by plaintiff, we think we too should treat it as though the motion to amend answer had been formally granted and entered. The failure of the court to formally rule upon the motion does not go to or affect in any way the merits of the case. It was at most a procedural matter; and, while technically it should have received attention, we think the error is such as the Constitution (article 6, § 22), contemplates as insufficient reason to reverse the case.

The plaintiff made a number of assignments upon the refusal of the court to give instructions requested by it. These instructions contain propositions of law the converse of those given by the court and heretofore considered. For that reason, a consideration of them separately is not deemed necessary. The form of the verdict is also criticized. But it seems to be in substantial conformity with the law.

The judgment is affirmed.

CUNNINGHAM, C. J., and BAKER, J., concur.

INSPIRATION CONSOL. COPPER CO. v. CONWELL. (No. 1757.)

(Supreme Court of Arizona. June 3, 1920.)

1. Master and servant ⟸351 — Compensation Act does not preclude recovery in action for death of servant caused by negligence.

The Compensation Act does not preclude recovery by representatives of the deceased employé for wrongful death under Lord Campbell's Act, Civ. Code 1913, par. 3372, though the Compensation Act was applicable to the employment.

2. Courts ⟸90(1)—Rule of decision ought not to be disturbed.

A rule, once deliberately adopted and declared, ought not to be disturbed except for very urgent reasons and upon a clear manifestation of error.

3. Master and servant ⟸276(2) — Evidence held to show deceased motorman was thrown from ore car by derailing.

Evidence that a mine motorman was found between the motorcar and the car following, which had been derailed, causing a severe jolt of the train, *held* to warrant jury in inferring, not merely guessing, that he was thrown from his seat by the jolt.

4. Negligence ⟸56(1) — "Proximate cause" defined.

The cause is proximate without which the accident would not have happened.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

5. Negligence ⟸136(25) — Proximate cause question for jury.

Proximate cause is a question of fact for the jury if there is substantial evidence from which it may be reasonably deduced that the negligence shown was the proximate cause; that is, proximate cause may be determined from circumstantial evidence.

6. Master and servant ⟸276(3) — Evidence held to show derailing of ore cars was proximately caused by defective track.

In an action for death of a mine motorman, evidence that the track was defective and the ore cars following the motor were derailed *held* to show that the defective track was the cause of the derailment.

7. Appeal and error ⟸1002—Finding of proximate cause not disturbed, though evidence warranting inference was contradicted.

Where there was evidence introduced by plaintiff showing a defective condition of the track sufficient to warrant the jury in infer-

Digitized by Google

ring that such condition was the cause of the accident, the jury's finding to that effect will not be disturbed, though such evidence was strongly contradicted by defendant's evidence.

8. Appeal and error ⟸987(2)—Constitution makes jury finding against assumption of risk conclusive.

Const. art. 18, § 5, making contributory negligence and assumption of risk in all cases questions of fact to be left to the jury, makes verdict of the jury conclusive on appeal, though the evidence is such that in the absence of the provision the court would find assumption of risk as a matter of law.

9. Death ⟸99(4)—$17,000 for death of husband, a mine motorman, held not excessive.

A verdict allowing $17,000 damages for the death of a mine motorman, 32 years old, who left a wife and two minor children, and who at the time of his death was earning $165 a month and was considering a proposition to enter business whereby he would probably make more, is not so excessive as to show that the jury was influenced by passion or prejudice.

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

Action by Emily Conwell, as administratrix of the Estate of Lawrence Conwell, deceased, against the Inspiration Consolidated Copper Company. Judgment for plaintiff and new trial denied, and defendant appeals. Judgment and order affirmed.

This is an action for damages for the death of Lawrence Conwell, alleged to have been caused by the negligence of the defendant. The plaintiff is the administratrix of Conwell's estate. Conwell was a motorman in the service of the defendant, and was killed by the derailment of a train of ore cars. The plaintiff claimed damages in the sum of $25,000. The defendant interposed a general demurrer to the complaint, and pleaded both in abatement and in bar that the employment of Conwell was under the "Compensation Act," and that in consequence the "Compensation Act" furnished the exclusive measure of the liability of the defendant. The court overruled the demurrer, and on motion of the plaintiff struck out both pleas. The action was tried on the complaint and the answer thereto, in which the defendant pleaded negligence on the part of the deceased Conwell, assumption of risk, and a general denial. The jury returned a verdict for plaintiff in the sum of $17,000. A motion for a new trial was made and overruled by operation of law. The defendant appeals, and assigns numerous errors.

E. W. Rice, of Globe, for appellant.

Norman J. Johnson, and H. M. Foster, both of Globe, for appellee.

BAKER, J. (after stating the facts as above). [1, 2] The defendant's assignments of error Nos. 1, 2, 3, and 10, are based upon the action of the court in overruling the general demurrer to the complaint, striking out pleas in abatement and in bar of the action, and the denial of the defendant's request for an instructed verdict. These matters were all predicated upon the proposition that the Compensation Act (chapter 7, title 14, Rev. Stat. 1913) was applicable, and governed the employment of the deceased, Conwell, and that it measured the liability of the defendant and precluded plaintiff from instituting or maintaining the present action. The exact question was presented for decision, and has been considered and decided in this state adversely to the defendant's contention in Behringer, Adm'x, etc., v. Inspiration Consolidated Copper Co., 17 Ariz. 232, 149 Pac. 1065. We are pressed in a very elaborate argument to reconsider and overrule this decision. The case construes the statute touching the right of a personal representative to sue for wrongful death, and holds that the "Compensation Act" does not restrict or limit the right of a personal representative to resort to Lord Campbell's Act (paragraph 3372, Rev. Statutes 1913). It was decided July 7, 1915, and has been accepted and acted upon as correct ever since. The argument fails to convince us that the opinion violates any principle of law, or works any injustice, and we must consider the question as at rest. When a rule has once been deliberately adopted and declared, it ought not to be disturbed except for very urgent reasons, and upon a clear manifestation of error. We adhere to the ruling in the Behringer Case.

Assignments Nos. 8, 9, 10, 13a, 13b, 13c, 13e, 13f, 13g, 14, and 15 raise the contention that the verdict and judgment are not sustained by the evidence: First, because there is no proof of proximate cause; and, second, because it is clear that the deceased, Conwell, assumed the risks. The undisputed facts of the case are that the deceased was engaged at work for the defendant, driving a motor to which was attached 15 cars loaded with ore on the 400-foot level in the defendant's mine. Conwell, when driving the motor, rode on the right-hand side near the rear. While upon a curve, and going at a speed of four or five miles an hour, two of the cars immediately in the rear of the motor jumped the track on the right-hand side, one of the cars striking and scraping the timber standing on the side of the track for a distance of about ten feet. The motor remained on the track. One or two jolts or jars of the cars occurred, one being so violent that Conwell's helper, who was riding on the motor in front, was compelled to hold onto a rod very tightly so as not to lose his seat. When the cars stopped, Conwell was found behind the motorman's seat between the motor and the first car, holding onto the seat. His leg had been

Digitized by Google

dragged along the right-hand side of the track; one of the witnesses put his arms around Conwell to assist him, and found that he was crushed; he was bleeding at the mouth, and died in about ten minutes. No one actually saw just how the accident occurred.

[3] It is argued that in the absence of direct evidence it was mere guess or speculation as to how Conwell came to his death, and for that reason the plaintiff could not recover. It is suggested that Conwell might have been standing up and accidentally overbalanced, or that a chain might have dropped off the pan on the motor, and he might have reached from his seat to the other side between the safety post and the projecting rib on the first car to rescue this chain when it was engaged by the wheel of the car, and the car was thereby derailed, pinning him between the car and the safety post, and that if his death thus occurred the liability of the defendant would not be involved. We are not at all impressed with this argument. Conceding, as we do, that it was not for the jury to guess or speculate as to the cause of the accident, we think it is far more reasonable to suppose, and the jury, in our opinion, might well have inferred, that the jolt of the derailment caused Conwell to lose his seat and fall between the car and the motor, or between the safety post and the car, and that he was thus crushed and killed. The jolt was so violent as to compel Conwell's helper to hold on very tightly to avoid losing his seat, and it seems reasonable to infer that the same jolt unseated Conwell. In our opinion, the evidence was sufficient to send the case to the jury upon this point, and we think that the jury was warranted in finding, as they must necessarily have done, that Conwell was killed by the derailment of the cars without any intervening cause such as suggested by the defendant.

[4-6] The material question is, What was the proximate cause of the accident? It must be conceded that unless the bad condition of the track as alleged in the complaint was the efficient and dominant cause of the derailment of the cars, the plaintiff had no case. That cause is proximate without which the accident would not have happened. Railroad Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. Proximate cause is a question of fact, and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was the proximate cause of the injury complained of. In short, proximate cause may be determined from circumstantial evidence. Railroad Co. v. Kellogg, supra; Weleetka Cotton Oil Co. v. Brookshire (Okl.) 166 Pac. 408; Missouri, K. & T. Ry. Co. v. Minor, 75 Okl. 10, 181 Pac. 142. The evidence with reference to the condition of the track at the place of derailment tends to show that it was in a flagrantly defective condition. Two accidents had occurred at the same place prior to the one in question. The ground was muddy, soft, and yielding under the track. The rails would go up and down when the motor was passing; the water being forced from under the ties. The rail on the right-hand side of the curve of the track was lower than on the left, and when the motor was passing, it would swing two ways; one movement went up and one went sideways, giving a lurch and jerk. There was also evidence that there was a joint in the rail at the softest place in the track where the accident occurred, and that at that point the track gave way more than at other points. It is not considered necessary to enter into a lengthy discussion for the purpose of showing that the evidence of the bad condition of the track was sufficient to carry the case to the jury upon the point that the derailment would not have occurred had it not been for this bad condition. The inference seems irresistible that such was the case.

[7] It is true that the evidence tending to show that the defendant was negligent in permitting the bad condition of the track to exist was strongly contradicted by the witnesses for the defendant. But it is not denied that there was a very material conflict in the testimony upon that point. Thus, the question whether the defendant's negligence was the proximate cause of the disaster became a question for the jury. We will not disturb a verdict where the evidence is conflicting.

[8] As to the assumption of risk, it must be admitted that the uncontradicted evidence proves that Conwell, for some time prior to the accident, had actual and positive knowledge of the bad condition of the track, and understood and appreciated the danger arising from running the ore cars over it. Were it not for article 18, section 5, of the state Constitution, which provides that "the defense of contributory negligence or of assumption of risk shall in all cases whatsoever be a question of fact, and shall, at all times, be left to the jury," it would have been the duty of the trial court to have granted the defendant a new trial on the ground that the verdict was contrary to the evidence on the question of the assumption of risk. We are therefore called upon to determine for the first time in this jurisdiction, the scope and effect of the constitutional provision. The language of the provision is plain and unambiguous, and to our minds clearly indicates that the power or duty to finally and conclusively settle the question of contributory negligence or assumption of risk is, by its terms, transferred from the court to the jury. If this is not the force and effect of the provision, we can conceive of no reason why the framers of the Constitution should have adopted the measure. We think that the evident purpose and intent of the provision is to make the jury the sole arbi-

Digitized by Google

ter of the existence or nonexistence of contributory negligence or assumption of risk in all actions for personal injuries. The same question arose in the case of Eva Roberts Cole, Administratrix of the Estate of A. W. Roberts, Deceased, et al. v. Jacob M. Dickinson, Receiver of the Chicago, Rock Island & Pacific Ry. Co. (Dickinson v. Cole [Okl.] 177 Pac. 570), and the Supreme Court of Oklahoma, construing the section of the Constitution of that state, which is exactly like ours, held, in effect, that the verdict of the jury on the question of contributory negligence or assumption of risk was conclusively upon the court. The syllabus of the case as prepared by the court is as follows:

"Article 23, § 6, of the Constitution of Oklahoma is not merely declaratory of the common law, but requires that the defense of contributory negligence and assumption of risk as to questions of fact in all cases whatsoever shall at all times be left to the jury, and the finding of the jury upon these defenses is conclusive upon the court."

The case was carried to the United States Supreme Court on writ of error (Chicago, R. I. & P. R. Co. v. Eva Roberts Cole, etc., reported in 251 U. S. 54, 40 Sup. Ct. 68, 64 L. Ed. —), and was there affirmed. Mr. Justice Holmes, speaking for the court, said:

"As it [state] may confer legislative and judicial powers upon a commission not known to the common law (Prentis v. Atlanta Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150), it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the states, and the controversy with regard to their powers in matters of law more generally as illustrated in Sparf v. United States, 156 U. S. 51, 715, 15 Sup. Ct. 273, 30 L. Ed. 343, 10 Am. Crim. Rep. 168, and Georgia v. Brailsford, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed."

Since the verdict of the jury upon the question of assumption of risk was conclusive upon the court, it was not error to deny the defendant's motion for a new trial.

[9] Assignment 13a is directed at the amount of the verdict as being excessive and unreasonable, and that it was rendered under the influence of passion and prejudice. The verdict was for $17,000. We have discovered nothing in the record tending to disclose anything which happened during the trial from which it can be inferred that the jury might have been influenced by passion or prejudice in arriving at their verdict. The deceased, Conwell, was a married man, the father of two minor children, and at the time of his death was 32 years old. His life expectancy, as proven by the American Experience Tables of Mortality, was $33^{93}/_{100}$ years. He was in robust health; industrious and attentive to business; he had specialized in glass making as a stencil cutter or pattern maker for the molding of glass, making figures on glass, etc., and had a proposition in view at the time of his death wherein he would go into business for himself in sand glass, cutting stencils or patterns, whereby he would probably make more than he would as a mere wage-earner. He owned his own home, and at the time of his death had saved about $400 out of his wages. The evidence showed that he was saving and laying aside a considerable portion of his wages every month. As a motorman he was earning, at the time of his death, approximately $165 per month. If the deceased had lived for the full period of his expectancy, and had continued to earn $165 monthly, as at the time of his death, he would have been approximately 65 years old, and would have earned approximately $65,000. In view of these facts we do not think it can be said that the verdict was excessive. As a general rule, the amount of damages recoverable in an action for death by wrongful act is a matter peculiarly within the province of the jury, and their finding will not be set aside as excessive, unless it is the result of passion or prejudice. De Amado v. Friedman, 11 Ariz. 56, 89 Pac. 588; Southern Pac. Co. v. Wilson, 10 Ariz. 162, 85 Pac. 401.

In McGrory v. Pac. Elec. R. Co., 22 Cal. App. 671, 136 Pac. 303, it is said:

"In order to warrant a court in setting aside a verdict for damages on the ground that too great a sum of money has been awarded, the sum must be so disproportionate to the result of any reasonable computation, based on the facts shown in evidence, as to suggest at once that the jury must have been influenced by some factor, improper for them to consider, such as their sympathy for the plaintiff or their bias or prejudice against the defendant."

We have discussed substantially all the points raised by the defendant which we deem vital, or requiring extended discussion. Other assignments relate to the introduction of certain testimony over the objections of the defendant, and submitting certain instructions to the jury. We have considered these assignments, but, in our opinion, they present no sufficient reason for reversing the judgment of the lower court. The judgment and order appealed from should be affirmed; and it is so ordered.

CUNNINGHAM, C. J., and ROSS, J.

Digitized by Google

WILLIS v. STATE INDUSTRIAL COMMISSION et al. (No. 10816.)

(Supreme Court of Oklahoma. March 30, 1920. Dissenting Opinion April 20, 1920. Rehearing Denied May 18, 1920.)

(Syllabus by the Court.)

1. Master and servant ⇐373 — Injury by "horseplay" of coemployé held to "arise out of and in course of employment" within Compensation Act.

Where an employé, during an interval in his work, was warming himself by a fire on the premises of the employer, and was injured by the explosion of a piece of dynamite containing a cap, brought there and thrown into the fire by a fellow employé, who picked up the dynamite and threw in the fire to see if it would explode, the injury received by the employé arose out of and in the course of his employment under the Workmen's Compensation Law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Disposition of appeal.

On review, the order of the Industrial Commission denying compensation is reversed, and the cause remanded, with directions.

Higgins, Pitchford, and Bailey, JJ., dissenting.

Action by Lon Willis to review the decision of the State Industrial Commission of the State of Oklahoma, denying petitioner compensation under the Workmen's Compensation Act, in proceeding under the act opposed by Alko Nak Coal Mining Company and another. Cause reversed and remanded, with directions.

E. W. Smith, of Henryetta, for petitioner.

Hummer & Foster, of Henryetta, for respondents.

JOHNSON, J. This action was commenced in this court on the 9th day of August, 1919, for the purpose of reviewing a decision of the State Industrial Commission rendered on the 14th day of July, 1919, wherein the petitioner was denied compensation under the Workmen's Compensation Act (chapter 246, S. L. 1915).

The findings of the commission were as follows:

"The facts in this case agreed upon are as follows: It is agreed between the claimant and respondent Alko Nak Coal Mining Company and Coal Operator's Exchange that on the 18th day of February, 1919, the employés of the Alko Nak Coal Mining Company had been accustomed, during the hours of their service, when not actually engaged in their work, to stand by a fire that was kept on the premises, with the knowledge and acquiescence of the company, for the purpose of providing a place where they could be comfortable while not actually engaged at work, and such fire was had with the permission of the company.

"The facts further show that claimant and three other workmen on February 18, 1919, were warming by the fire at an interval in their work, and were not actually working at that particular time, but were on the pay roll and their time was going on. A fellow employé came along where they were warming around the fire, and threw a piece of split dynamite in the fire. When the dynamite was thrown into the fire the fellow servants, after being warned, all ran away, except claimant, who had his shoe off trimming a corn. Claimant saw an old piece of dynamite, but not the cap. The fire was on the premises of the company where claimant was working. Claimant's daily wage was $5.40."

After the foregoing findings of fact, the commission made the following order, to wit:

"Now on this July 14, 1919, this cause coming on to be heard in its regular order pursuant to a hearing held in Henryetta on June 12, 1919, at which hearing the claimant was present in person and by his attorney, E. W. Smith of Henryetta, and respondent and insurance carrier by their attorneys, Hummer and Foster of Henryetta, and the commission after examining the testimony, briefs of counsel, filed in the case, and being otherwise well and sufficiently advised in the premises, finds that the injury complained of did not arise out of and in the course of his employment with respondent, and that compensation should be denied.

"It is ordered that compensation in the above claim be denied."

The commission further finds:

"That the injury did not arise out of and in the course of his employment, and that compensation should be denied."

Petitioner makes the following assignments of error:

(1) That the commission erred in holding that the injury complained of did not arise out of and in the course of the employment of the petitioner.

(2) That said award or decision is contrary to law.

(3) That said award or decision is not supported by the evidence and is contrary to the evidence.

And then states in his brief as follows:

"While there are three assignments of error in the petition filed herein by the petitioner, it is our purpose to treat them all under the first assignment, which fairly covers the entire objection to the ruling of the commission."

"(1) That the commission erred in holding that the injury complained of did not arise out of and in the course of the employment of the petitioner."

It is provided by section 1, article 2, of the Workmen's Compensation Act (chapter 246, S. L. 1915) that:

Digitized by Google

"Every employer subject to the provisions of this act shall pay or provide as required by this act compensation according to the schedules of this article for the disability of his employé resulting from an accidental personal injury sustained by the employé arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employé to bring about the injury of himself or of another, or where the injury results directly from the willful failure of the injured employé to use a guard or protection against accident furnished for his use pursuant to any statute or order of the State Labor Commission, or results directly from the intoxication of the injured employé while on duty."

It is also provided by section 11, article 2, of the Workmen's Compensation Act (chapter 246, S. L. 1915) that:

"In any proceeding for the enforcement of a claim * * * under this act, it shall be presumed in the absence of substantial evidence to the contrary."

1. "That the claim comes within the provisions of this act." We agree with counsel for respondents that the words "arising out of" and "in the course of employment" are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" employment.

From the facts found by the commission that the petitioner, "during an interval in his work, was warming himself by a fire on the premises of the employer, was injured by the explosion of a piece of dynamite containing a cap, brought there and thrown into the fire by a fellow employé, who picked up the dynamite and threw into the fire to see if it would explode," upon the facts thus found the commission concludes as a matter of law "the injury received by the employé did not arise out of and in the course of his employment under the Workmen's Compensation Law."

Counsel for the respondents say in their brief:

"We shall brief this case under the following proposition of law: The injury to the petitioner, as set forth in the above statement of facts, was not an accidental injury sustained by the employé arising out of and in the course of his employment.

"The petitioner urges in his brief that, since it was not shown that he was intoxicated, or failed to use any safeguard provided for his safety, or that he brought his injury about willfully, the respondents are liable to him for compensation, as he was where he had a right to be. Of course if this were a true statement of the law, there would be no defense to this case, for it is not contended by the respondents that the petitioner was not in the employ of the company, or that he was in a place where he had no right to be, but it is not sufficient under the many decisions of the various Supreme Courts and commissions construing the provision 'out of and in the course of employment' that the injury be received while the employé was working for his employer. This is probably sufficient to warrant the statement that the injury was received while in the course of his employment, but does not come within the provision 'arising out of the employment.' It is held by practically all of the decisions that the words 'arising out of' and 'in the course of employment' are conjunctive, and relief can be had under the act only when the accident arose both 'out of' and 'in the course of' employment. The injury must be received: (1) While the workman is doing the duty he is employed to perform; and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work."

These clear statements of counsel for respondents of their position very greatly simplify the case; it being admitted that the petitioner was an employé of the company, and that he was in a place where he had a right to be, and that the injury was received while in the course of his employment, leaves the only question to be determined, Did his injuries come within the provision "arising out of the employment"?

In Honnold on Workmen's Compensation, vol. 1, § 101, in discussing the question here involved, it is said:

"According to the usual language of the acts, to warrant recovery of compensation for the injury or death of a workman, the injury must be one 'arising out of and in the course of' his employment. This phrase is used in the same sense in the acts of England and of many of the states, and, though its literary construction is well settled, its application to particular cases has given rise to differences of opinion not easily harmonized. Attempts of the courts to formulate general rules relative to the distinction between the terms 'out of' and 'in the course of' have not been entirely successful. All agree, however, that the terms are not intended to be synonymous. An injury may be received in the course of employment, and still have no causal connection with it, so that it can be said to arise out of the employment. But it is difficult, if not impossible, to conceive of an injury arising out of and not also in the course of the employment. The importance of distinguishing between these terms arises from the facts that each represents an element essential to, but not authorizing, recovery of compensation without the presence of the element represented by the other. In other words, even though the injury occurred 'in the course of' the employment, if it did not arise 'out of the employment' there can be no recovery. Yet, in the words of an English jurist: 'If you find that the accident arose in the course of the employment, you may have gone a certain way towards finding that it arose out of the employment, but you have not gone the whole way.' The words, 'out of' point to the origin and cause of the accident or injury; the words, 'in the course of' to the time, place, and circumstances under which the accident or injury

Digitized by Google

takes place. The former words are descriptive of the character or quality of the accident; the latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves the idea that the accident is in some sense due to the employment. It must result from a risk reasonably incident to the employment."

If it be, as stated in the text quoted supra that "the words 'out of' point to the origin and cause of the accident or injury," and the commission having found that the injury was caused by a fellow employé, and it being admitted that the petitioner was an employé, and was where he had a right to be, it seems to us that it necessarily follows that the accident was due to the employment, and resulted from a risk reasonably incident to the employment.

The author cites in support of the text the decisions of the cases of Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458; Buckley, L. J., in Fitsgerald v. Clark & Son, 2 K. B. 796; Hulley v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79; Zabriskie v. Erie R. Co., 85 N. J. Law, 157, 88 Atl. 824; Terlecki v. Strauss, 85 N. J. Law, 454, 89 Atl. 1023; Armitage v. Lancashire & Yorkshire Ry. Co., 2 K. B., 178; Collins v. Collins, 2 I. R. 104; Murphy v. Berwick, Ir., I. T. R. 126; Blake v. Head, 106 L. T. R. 822. In the case of Scott v. Payne Bros., 85 N. J. Law, 446, 89 Atl. 927, it was said:

"An injury arises out of and in the course of employment where at the time and place of its occurrence the workman is doing what he might reasonably then do."

To the same effect was the holding of the Supreme Court of Kansas in the case of Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 Pac. 372; N. W. Iron Co. v. Industrial Commission et al., 160 Wis. 633, 152 N. W. 416; Whiting-Mead Commercial Co. v. Indus. Accident Com., 178 Cal. 505, 173 Pac. 1105. This court in the case of Wick et al. v. Gunn et al., 169 Pac. 1087, 4 A. L. R. 107, in an opinion by Stewart, C., said in paragraph 1 of the syllabus thereof:

"The Workmen's Compensation Act of this state (Laws 1915, c. 246) must be construed as a whole, and all presumptions indulged will be in favor of those for whose protection the statutory compensation was fixed, and who, by the terms of the act, are deprived of the ordinary remedies open to others whose rights are invaded."

Such was the holding of this court in the case of Adams v. Iten Biscuit Co., 162 Pac. 938.

[1] We think the correct rule is, and so hold in these cases, that if a workman is an active participant in what has been denominated "horseplay," he is not entitled to compensation, but if, while going about his duties, he is a victim of another's prank, to which he is not in the least a party, he should not be denied compensation. 53 Am. Law Rev. p. 75; Harrison v. Central Const. Corporation et al. (Md.) 108 Atl. 874.

[2] We are of the opinion that the conclusion reached by the commission was erroneous, and the cause is therefore reversed and remanded, with directions to proceed in accordance with the views herein expressed.

OWEN, C. J., and KANE, McNEILL, and RAINEY, JJ., concur.

PITCHFORD, HIGGINS, and BAILEY, JJ., dissent in an opinion by HIGGINS, J.

HIGGINS, J. (dissenting). I dissent from the opinion of the majority in the application of the law to the facts in this case. I do not question but what the injury in the instant case to the employé was in the course of his employment, but I do not believe from the facts and circumstances of the case that it arises out of his employment. As to an injury to an employé arising out of his employment, Honnold at section 115 states as follows:

"The use of the words 'arising out of,' or words of similar import, makes it a condition precedent to the right to recover compensation that the occurrence shall have resulted from a risk reasonably incident to the employment; that there be causal connection between the conditions under which the employé worked and the resulting injury. While the occurrence need not have been foreseen or anticipated, it must appear after the event to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In this case there is no contention in the briefs or finding in the opinion of the majority that there was a connection between the throwing of the piece of dynamite in the fire, which caused the injury, and the work being done there by the party injured or by his fellow workman, who threw the dynamite in the fire. The opinion of the majority is in error in citing Hulley v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79, for the reason the opinion in that case is overruled and reversed in the same court at a later date, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. That was a case in which it was claimed that the injury suffered arises out of the employment, and goes into detail as to when an injury arises out of the employment, and is as follows:

"It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural in-

Digitized by Google

cident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it 'arises out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Applying this law to the facts of the instant case, where is the causal connection between the throwing of the piece of dynamite in the fire and the work being done and the party injured? Was the throwing of the piece of dynamite in the fire a natural incident of the work? Would the injured party have been equally exposed to this hazard apart from his employment? Was the causative danger, that is of throwing the dynamite in the fire, peculiar to the work and not common to the neighborhood? Was it incidental to the character of the business and dependent on the relation of master and servant? Did the throwing of the dynamite in the fire have its origin in the risk connected with the employment, or flow from that source as a rational consequence? If so, compensation should be allowed; if not, it should be refused. In my judgment the throwing of dynamite in the fire by a fellow servant, in play, and the resulting injury is not an injury arising out of the employment. The throwing of the dynamite in the fire was not a natural incident to the risk; neither was it peculiar thereto. It is stated in the opinion as a reason why petitioner should recover:

"If it be, as stated in the text quoted supra, that 'the words "out of" point to the origin and cause of the accident or injury,' and the commission having found that the injury was caused by a fellow employé, and it being admitted that petitioner was an employé, and was where he had a right to be, it seems to us that it necessarily follows that the accident was due to the employment, and resulted from a risk reasonably incident to the employment."

If this be a correct doctrine, then an employer becomes an insurer if his servant is at a place he has a right to be when injured, and is injured by a fellow servant, regardless of what may have caused the injury, for the reason that it is stated that when these two conditions exist, then there necessarily follows that the accident arises out of the employment and from a risk reasonably incident to the same. I do not believe this is sound reason or correct law. It merely goes a portion of the way. It leaves out the question whether or not the injury arises out of the employment, which is the sole issue to be tried in this case. Neither in the briefs nor in the opinion of the majority is there any contention that the throwing of the dynamite in the fire had any connection with the work being done. It was totally foreign to same. The throwing of the same in the fire was merely a prank of a fellow employé, commonly called horseplay or skylarking.

Whether or not an employé can recover for an injury brought about through a joke, horseplay, prank, or skylarking of a fellow employé is set forth in section 121, Honnold:

"Unless the workman is actually engaged at the particular time in the performance of some duty which contributes to the injury, an injury to a workman from skylarking or horseplay or practical joking, though it may arise in the course of, cannot be said to arise out of, the employment, whether the injured person instigated the occurrence or took no part in it."

It will thus be seen that the general rule is that recovery cannot be had for an injury brought about by skylarking or horseplay of a fellow employé. There are many opinions upholding this doctrine, too numerous to mention. The footnotes of Honnold cite many.

Where an employé, who was peculiarly susceptible to being tickled, was going down a flight of stairs with a filled bucket, and one of associates punched him in the back with a newspaper, causing him to make a sudden movement and to fall, injuring one knee seriously, it was held that the injury was in the course of, but did not arise out of, his employment. Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164.

A fellow employé directed a trick camera toward the claimant, and a missile from the camera hit him in the eye, and the sight of the eye was destroyed. It was held that the injury did not arise out of the employment. Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215.

An injury from a stream of hot water turned on an employé by a fellow employé as a practical joke was held not to arise out of the employment. Vittorio v. California Battery Co., 3 Cal. Industrial Comm. 26.

Our laws relating to workman's compensation are similar to the New York statute. Laurino v. Donovan et al., 183 App. Div. 168, 170 N. Y. Supp. 340, is a case very similar to this case. In that case a fellow employé injured another by the explosion of a percussion cap with which he was experimenting. The court held:

"Where a chauffeur, doing his master's work in a garage, was injured by the explosion of a percussion cap brought in by another chauffeur,

Digitized by Google

his fellow servant, with which the latter was experimenting, the injury to the first chauffeur did not arise out of his employment, within the workman's compensation law * * * to entitle him to an award."

The authorities on this point are collected in review. Ann. Cas. 1913C, 1; Ann. Cas. 1914B, 498; Ann. Cas. 1916B, 1293; Ann. Cas. 1917C, 760; Ann. Cas. 1918B, 768; Ann. Cas. 1918E, 1164. In the many cases cited in the opinion of the majority, none hold to the contrary of this general rule, but it is held in some that there may be circumstances which will take it out of the general rule, for instance in the case of Thomas v. Proctor, cited. Therein a girl employé was riding upon a truck, and fell therefrom and was injured. The riding upon the truck seems to have been in play. The custom of riding this truck at the noon hour was within the knowledge and with the express consent of the foreman, and, the court found, was one of the conditions upon which the business was carried on, and for that reason the case did not fall within the general rule, though the girl was injured while at play. It has been further held that, where horseplay has grown into a custom and to the knowledge of the employer, he may be held liable for injury resulting therefrom. White v. Stockyards, 104 Kan. 90, 177 Pac. 522. In all these cases cited there are some circumstances taking the case out of the general rule in which the courts have ever held that an employé can recover where the injury is by a fellow employé while engaged in horseplay or skylarking.

In this case there are no circumstances of any kind whatsoever taking the case out of the general rule. It was a prank of a fellow employé, commonly called horseplay or skylarking, pure and simple, and nothing else; and for that reason, and in keeping with the authorities above cited as I understand them, I do not believe that the petitioner should recover in this case.

In the opinion of the majority there is laid down as a principle of law that, if one is the victim of the prank of a fellow employé to which he, the injured employé, is not a party, he should be allowed compensation. To fortify this principle there are two authorities cited. An examination of the Maryland case throws no light upon the subject whatsoever as there is no contention in that case that the employé was injured by a prank of another employé. The other (53 Amer. Law Review, p. 75) is a quotation from a paper prepared by the commissioner of the Workmen's Compensation Board of the Province of Ontario, and read at an international meeting of Industrial Boards at Madison, Wis., in which the writer stated:

"Our board in Ontario has adopted the rule in these cases if while he [the injured party] is going about his duties he is the victim of another's prank to which he is not in the least a party, we do not deny him compensation."

This paper states that a board, not a court, has adopted a rule, not construed law, that an employé is not denied compensation if injured by the prank of a fellow employé if he, the injured employé, is not a party to the prank.

There is to the contrary of this principle section 121 of Honnold on Workmen's Compensation, above cited in this opinion, that if the injured party was injured by horseplay or prank of a fellow workman he cannot recover, even though he took no part in it. In Hulley v. Moosbrugger, supra, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203, this identical issue was passed upon, the court holding:

"An employer is not liable under the Workmen's Compensation Act * * * to make compensation for injury to an employé, which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the course of, it cannot be said to arise out of, the employment."

Similar holdings are made in the following cases: Knopp v. Amer. Car Co., 186 Ill. App. 605; De Filippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761.

I do not believe that this principle of law that a fellow workman may recover if an injury is caused by the prank of a fellow workman if he, the injured party, was not a party to the prank is upheld by the light of judicial decision, but to the contrary all appellate courts speaking thereon, as far as I have been able to find, have spoken to the contrary. I believe that the opinion of the majority in this case gives no meaning to that part of the statute which states that the injury must arise out of the employment; but that if the injury arose in the course of the employment that it is sufficient for an award of compensation, and by so holding I believe that violence was done to the statute, and for this reason I dissent.

I am authorized to state that PITCHFORD and BAILEY, JJ., concur in this dissenting opinion.

Digitized by Google

VOSE v. PENNY et al. (No. 9666.)

(Supreme Court of Oklahoma. April 13, 1920. Dissenting Opinion April 27, 1920. Rehearing Denied June 1, 1920.)

(Syllabus by the Court.)

1. Guardian and ward ⟸108—Mortgages ⟸157—As to bona fide mortgagee, lien of mortgage on realty sold by guardian not defeated, because sale not for cash.

Where the probate proceedings, as disclosed by the records, are regular, and guardian's sale of real estate for cash, and the purchaser at such sale executes a mortgage upon said lands, the lien of the mortgagee will not be defeated, upon proof that the sale was not, in fact, made for cash, but by an exchange of other real estate, where the mortgagee did not participate in this fraud, or have notice sufficient to put him upon inquiry.

2. Election of remedies ⟸1—Definition.

An "election of remedies" is the choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same state of facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election.]

3. Election of remedies ⟸14—Effect of election stated.

When the law gives several means of redress or kinds of relief, predicated on conflicting theories, the election of one with knowledge, and the prosecution to final judgment, operates as a bar to the subsequent adoption of any other.

4. Election of remedies ⟸7(1) — Guardian, electing to avoid deed to premises incumbered by mortgage, held precluded from questioning validity of mortgage.

Where a guardian elects to void the deed given at a guardianship sale, and in his action to void said deed seeks to secure personal judgment against the grantee for the amount of a mortgage placed upon the premises by grantee, and recognizes a proceeding brought against the grantee to foreclose the mortgage, and fails to intervene therein, but instead pursues his remedy against the grantee to judgment, he is precluded from thereafter raising the question of the validity of the mortgage foreclosed.

5. Mortgages ⟸186(5)—Evidence held insufficient to charge mortgagees with notice of fraud in guardian's sale.

The circumstances relied upon to charge mortgagees with notice, so as to put them upon inquiry, *held* not sufficient to charge notice of fraud in the guardian's sale.

6. Principal and agent ⟸54—Agent has no implied authority to delegate powers.

An agent has no implied authority to delegate his powers to a subagent, and persons employed by him as subagents do not become the agent of the principal, without the principal's consent.

McNeill and Johnson, JJ., dissenting.

Error from District Court, Grady County; Thos. A. Edwards, Judge.

Action by Oren Seldon Penny, as guardian of his minor children and others, against R. A. Vose, to cancel conveyances of real estate and to quiet title. Judgment for plaintiffs, and defendant brings error. Reversed.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, and Welborne & Bailey and Barefoot & Carmichael, all of Chickasha, for plaintiff in error.

F. E. Riddle, of Tulsa, and Harry Hammerly, of Chickasha, for defendants in error.

OWEN, C. J. Certain lands owned by the minors were deeded by their guardian to Mrs. Gillespie, sale being made through the probate court. Immediately after the delivery of the guardian's deed, Mrs. Gillespie and her husband executed separate mortgages on the land to the Alliance Trust Company, the Holmes & Hibbard Mortgage Company, and the Bryan-Gow Investment Company. An action to foreclose the last-mentioned mortgage was begun in the district court June 23, 1913; the mortgagors and M. C. Ringo, who was vested with the apparent title, being made defendants. On the following day, June 24th, action was brought by the guardian in the same court to set aside his deed to Mrs. Gillespie; her husband and M. C. Ringo being joined as defendants. Neither of the mortgagees was made party to the action. These actions proceeded contemporaneously to final judgment, and plaintiff in error Vose purchased the land at the foreclosure sale. This action is to cancel the sheriff's deed at that sale; also to cancel the other mortgages executed by the Gillespies and to quiet title in the minors.

The guardian, in the action to cancel his deed to Mrs. Gillespie, alleged the existence of the mortgages and the pending action to foreclose the mortgage to the Bryan-Gow Investment Company, and prayed an accounting to determine the amount due under the mortgages; the minors to have judgment against the Gillespies for the amount due, together with the court costs accruing in the foreclosure proceeding. Judgment was rendered in that action, setting aside the guardian's deed and reinvesting title in the minors. A personal judgment was also rendered against the Gillespies for the amount found to be due under the Bryan-Gow mortgage and the costs in the foreclosure proceeding, and this judgment decreed to be a specific lien on certain real estate owned by the Gillespies. Upon this judgment the guardian caused execution and order of sale to issue, under which the property covered by this

Digitized by Google

specific lien was sold and the proceeds credited on the judgment against the Gillespies.

[1] It appears the sale made by the guardian to Mrs. Gillespie, although regular in form, so far as the record of the county court disclosed, was not, in fact, made for cash as required by statute (section 6567, Rev. Laws 1910), but was in exchange of other real estate. The trial court held the sale in these circumstances was void, and that, the sale being void, the mortgages could not be valid liens. The sale was not void, and, although voidable as against parties to the transaction and persons claiming with notice, may not be set aside against persons claiming through the purchasers without notice. Berry v. Tolleson, 172 Pac. 630; Penny v. Alliance Tr. Co. (C. C. A.) 259 Fed. 558.

[2, 3] The question presented as to the Bryan-Gow mortgage is whether, by taking judgment for the amount of the mortgage, the guardian elected his remedy and is now estopped from questioning the validity of that mortgage. An election of remedies is the choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same state of facts. The basis for the application of the doctrine is in the proposition that, where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. The doctrine of election of remedies is therefore generally regarded as being an application of the law of estoppel, upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions. 9 R. C. L. 956. In First Trust & Sav. Bank v. Bloodworth, 174 Pac. 545, it was said:

"When the law gives several means of redress or kinds of relief, predicated on conflicting theories, the election of one and the prosecution to a final judgment operates as a bar to the subsequent adoption of any other."

To the same effect is Herbert v. Wagg, 27 Okl. 67, 117 Pac. 209; Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479; Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; Gaffney v. Megrath, 23 Wash. 476, 63 Pac. 520; Gentry v. Bearss, 88 Neb. 742, 130 N. W. 428. In the last-mentioned case an Oklahoma guardian undertook to sell and transfer a mortgage owned by his ward without permission of court, and absconded with the money received therefor. The subsequent guardian prosecuted an action against the bondsmen of the absconding guardian, and later instituted an action to foreclose the mortgage. The action to foreclose was instituted in Nebraska, and the Supreme Court of that state held the action against the bondsmen was such an election of remedies as to estop the guardian from maintaining the action to foreclose the mortgage.

[4] The action of the guardian, in the instant case, having knowledge of the existence of the mortgage, and taking judgment against the mortgagors for the amount due under the mortgage, elected his remedy, and by such election is precluded from questioning the validity of the mortgage.

[5] The question presented concerning the mortgages to the Alliance Trust Company and the Holmes & Hibbard Company is whether these mortgagees were innocent incumbrancers for value. It appears the Holmes & Hibbard Mortgage Company was the agent in this state of the Alliance Trust Company, and appointed G. A. Ramsey district agent in Grady county. Ramsey had an understanding with Ed Shegog, under the terms of which he would share Ramsey's commission on any loan for which application came through Shegog. Shegog shared his portion of the commission with M. C. Cralle. The trial court found that neither the Alliance Trust Company, the Holmes & Hibbard Mortgage Company, Ramsey, nor Shegog had knowledge of any facts sufficient to charge them with notice of any irregularity in the guardian's sale. The court also found that Cralle, while preparing the abstracts for the guardian, to be submitted to the representatives of the Alliance Company, obtained information to the effect that certain property would be taken by the guardian on the deal with the purchaser, and it is urged by defendants in error this was sufficient to put the mortgagees upon inquiry. It does not appear this information was conveyed to either of the mortgagees or to Ramsey, their agent, Cralle, at most, was a subagent of Shegog, who was a subagent of Ramsey, and it does not appear that Ramsey had authority from the mortgagees to appoint subagents. Cralle not being an agent of either mortgagee, and not having conveyed his information to Ramsey, the mortgagees must be held to be innocent incumbrancers.

[6] In Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 Pac. 161, it was said:

"The general rule of law is that an agent has no implied authority to delegate his powers to a clerk or subagent; and persons employed by him as clerk or subagent do not become the agent of the principal, without the principal's consent."

In People's Bank v. Frick, 13 Okl. 179, 73 Pac. 949, it was said:

"An agent or factor has no implied authority to appoint subagents, or to delegate his powers; and persons employed by him in handling his principal's property do not become the agent of the principal, without the principal's consent."

Digitized by Google

To the same effect is Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Mechem on Agency, §§ 184 to 197.

The mortgages in question, in view of the circumstances of this case, must be held to be valid liens. It appears that Vose purchased at the foreclosure sale under a contract entered into with Mrs. Penny, for use of herself and the minor children. It is unnecessary to define the rights of Vose under this sale, or of the minors under that contract. That question is not properly before us.

The judgment of the trial court is reversed, with directions to grant a new trial and proceed in accordance with the views herein expressed.

JOHNSON and McNEILL, JJ., dissent. BAILEY, J., being disqualified, did not participate. The other Justices concur.

McNEILL, J. (dissenting). I am unable to agree with the opinion of the majority for the reasons hereinafter stated:

A brief statement of a history of the facts in the case discloses that Mr. and Mrs. Penny were enrolled citizens of the Choctaw Nation, and resided at Chickasha, Okl., and each had received an allotment. At the commencement of the transactions involved herein the title to both allotments was in the name of Mrs. Penny. The land consisted of 330 acres in McLain county, which was incumbered in the sum of $15,840.

The Pennys were the parents of four minor children, each of whom had received an allotment, consisting of practically 160 acres. The total amount of land owned by Mrs. Penny and the four minors was over 900 acres. A great portion of the same was Washita river bottom lands. The allotments of the minors were evidently considered too valuable for their use and benefit; hence the father and mother, no doubt lured by the idea of getting rich quick, entered into contracts to dispose of the minors' lands. In April, 1913, Mr. Phillips and the Bryan-Gow Investment Company, real estate agents, succeeded in having Mr. and Mrs. Penny contract in writing with Mr. Gillespie for an exchange of properties, whereby it was agreed that Mr. Gillespie, who owned lots 9, 10, 11, and 12, in block 17, Oklahoma City, incumbered for some $35,000, should exchange his equity for the allotments belonging to the minors and the 330 acres in the name of Mrs. Penny, subject to the incumbrance on Mrs. Penny's land. The contract provided that Mr. Penny should be appointed guardian, and the sale of the minors' property should be carried through the county court, and that Mr. Gillespie should bid upon the same, but, instead of paying for the property, the same should be an exchange of property. While the guardian's proceedings were being carried through the county court of Grady county for the purpose of divesting the minors of the title to the land and placing the title in Mrs. Gillespie, and during said proceedings, Mrs. Gillespie, prior to the time the guardian's sale was completed, made application to obtain loans upon the land of each of the minors. The applications were made to Ed Shegog, of Chickasha, Okl., who was the agent for the Holmes & Hibbard Mortgage Company and the Alliance Trust Company. On July 10, 1912, guardian's deeds were executed by Mr. Penny as guardian for all the lands of the minors to Mrs. Gillespie, and on the same date Mrs. Gillespie executed mortgages upon each allotment to the Alliance Trust Company and the Holmes & Hibbard Mortgage Company. None of these deeds or mortgages were filed for record until the 16th day of July, 1912, when all of them were filed for record at the same time, to wit, at 2 o'clock P. M. on said date.

On the 12th day of July, 1912, Mrs. Gillespie executed a note, payable to the Bryan-Gow Investment Company, in the sum of $2,000, being their commission for making the exchange of said property. A few days after receiving title to the land, Mrs. Gillespie deeded the same to an aunt.

A few days after the Bryan-Gow Investment Company received its note and mortgage for $2,000, it transferred the same to Mr. Phillips. Everything then rested peacefully until the 23d day of June, 1913, when Mr. Phillips filed suit against Mrs. Gillespie for judgment on the $2,000 note, and asked to foreclose the mortgage which covered the 320 acres involved in this controversy. At the time of filing the suit Phillips executed a bond for costs signed by Mr. Penny as surety. On the next day, June 24, 1913, Mrs. Penny, as plaintiff and her four minor children, as coplaintiffs, by Mr. Penny, their guardian, filed an action in the district court of Grady county against the Gillespies to set aside the deeds the Gillespies obtained to all the land received from the Pennys in the exchange of property, alleging the deeds were obtained by fraud, false representations, and that the minors' land was an exchange of property, and not a sale. The petition further alleged that the Gillespies had executed mortgages on said land to the Holmes & Hibbard Mortgage Company, and the Alliance Trust Company, and the mortgages to the Bryan-Gow Investment Company, and that a suit was pending to foreclose the Bryan-Gow Investment Company mortgage; but the plaintiffs did not have sufficient knowledge to know whether the mortgagees were purchasers for value, and, if it developed that they were not purchasers for value, that the minors would ask to have the said mortgages canceled. The American National Bank was made a party defendant to this proceeding, for the reason it claimed some interest in the premises.

In January, 1914, judgment was rendered

Digitized by Google

in favor of Mrs. Penny and the four minor children against the Gillespies, canceling the deeds executed by the Pennys to the Gillespies, and reinvesting the title to all of the farm lands back in the Pennys, and canceling the deed Mrs. Penny had received to the Oklahoma City property, and reinvesting that title in Mr. Gillespie, and the court then rendered judgment in favor of Mrs. Penny and the minors against the Gillespies for rents while occupied by Gillespies, and the amount of the incumbrance that Gillespies had placed upon the lands of the Pennys, amounting to some $23,000, and decreed that said judgment should be a lien upon the Oklahoma City property which was decreed to be the property of Mr. Gillespie, subject to all incumbrances executed thereon prior to June, 1914. The court also decreed that the American National Bank had no title and interest in and to said premises, but, if any, the same was junior to the rights of the Pennys and the minor children. This case was appealed by the Gillespies and the American National Bank to this court, and remained undisposed of until after Mr. Vose acquired the record title to all of the property, both the Oklahoma City property and the property involved in this controversy, and then the appeal was dismissed.

In June, 1914, or some six months after the title to the lands in controversy was revested in these two minors, Mr. Phillips obtained a judgment against the Gillespies in the sum of approximately $1,700, and the mortgage was decreed to be a lien upon the lands of these two minors; this being the mortgage executed by Mrs. Gillespie to the Bryan-Gow Investment Company. Said mortgage was decreed to be a lien subject to the mortgages executed by Mrs. Gillespie to the Holmes & Hibbard Mortgage Company and the Alliance Trust Company. The minors were not made parties to this proceeding. All proceedings rested quietly until in January, 1915. The status of the minors' property in January, 1915, was as follows:

The two minors, being plaintiffs in this action, were the owners of the 320 acres in controversy in this action, and there were upon record mortgages executed by Mrs. Gillespie to the Alliance Trust Company in the sum of $4,800, and the mortgage of the Holmes & Hibbard Mortgage Company in the sum of $480, as liens or clouds upon each allotment. These were the mortgages that were referred to by the minors in their petition, wherein they alleged they did not know whether the mortgagees were purchasers for value or not. There was also a judgment of foreclosure in favor of Mr. Phillips against Mrs. Gillespie, to which the minors were not made parties, on the Bryan-Gow Investment Company mortgage, which covered the 320 acres in controversy, upon which there was practically $1,700 due. In addition, these two minors and Mrs. Penny and two other minors had a judgment against the Gillespies for approximately $23,000, which judgment was by the court made a lien upon the Oklahoma City property, subject to certain prior mortgages. The judgment of these minors against the Gillespies was more than sufficient to cover the amount of the two mortgages to the Alliance Trust Company and the Holmes & Hibbard Mortgage Company and the judgment of Mr. Phillips as the judgment against Mr. Gillespie also included certain rents during the time Gillespie was in possession of the farms.

Some time prior to January, 1915, Mr. Vose had become the owner of the Oklahoma City property, which was subject to the $23,000 judgment in favor of the Pennys and some prior incumbrances. We now come to the last and final contract concerning the minors' property, dated January 30, 1915, between Mrs. Penny and Mr. Vose, wherein it was conceived that the best method to handle all the property would be to have the property conveyed to Mr. Vose, and he to hold the same for Mrs. Penny according to this contract. The contract provided Mr. Vose would protect the minors' lands, except in the case of Phillips v. Gillespie, where the two minors' land should be sold; that Mr. Vose should purchase the same at the foreclosure sale, and if it brought more than sufficient to pay the judgment of Phillips, the minors should be paid said amount, and Mr. Vose should hold the title, according to the terms of the contract with Mrs. Penny. It is quite evident that the $23,000 judgment of Mrs. Penny and the minors upon the Oklahoma City property was worrying Mr. Vose to some extent, because it was provided in said contract that this property, which belonged to him, should be sold at execution sale and his appeal dismissed and he should purchase the same property at the execution sale, and hold it for the use and benefit of Mrs. Penny according to the terms of the contract.

After entering into said contract, certain correspondence transpired between Mr. Vose and Mr. Penny. After the order of sale was issued in the case of Penny v. Gillespie, and the land of these two minors advertised for sale, and although the contract provided that any surplus that the lands brought over and above the amount to pay the Phillips judgment was to go to the minors, it appears that Mr. Vose and Mr. Penny had decided that there should be no surplus, for on the 1st day of March, 1915, Mr. Penny wrote to Mr. Vose, answering a letter received by Penny from Mr. Vose. The letter contained the following statement:

"He does not know any way that we could keep parties from bidding on the lands, more than to be present at the sale and tell the bidders they would buy a lawsuit, as the lands were in litigation and the suit pending, and that

Digitized by Google

the only reason the lands were selling were to get the titles clear, and in our own hands again. He states that by doing this it would keep any one from bidding that has sense enough to make money enough to buy with."

The minors' land was advertised to be sold, subject to the $10,560 mortgages, to satisfy a judgment amounting to approximately $1,760 in favor of Mr. Phillips. According to the contract of Mr. Vose and Mrs. Penny, the value of this land was $22,000, or the equity of the minors in the property, conceding, for the sake of argument, the judgment and mortgages bona fide were of the approximate value of $10,000. The land was sold March 26, 1915, to Mr. Vose at foreclosure sale for the sum of $1,760. The record disclosed $1,708 was the amount received by Mr. Phillips to satisfy his judgment, and the other $52 was presumably to pay the court costs and costs of sale. In any event, the title was divested out of the minors and into Mr. Vose, without the minors receiving a dollar therefor. This is the deed by virtue of which Vose claims absolute title to the land, and under which the opinion of the majority holds that Vose holds the land for Mrs. Penny and the minor children, but does not decide what their rights are under the same.

The contract between Mr. Vose and Mrs. Penny provided for eliminating the judgment of the minors against Mrs. Gillespie, in so far as it was a lien upon the Oklahoma City property. How Mr. Vose and Mr. Penny regarded this judgment, and the way and manner they could deal with the judgment of the minors, is set forth in a letter, dated October 10, 1914, written by Mr. Penny to Mr. Vose, wherein it stated as follows:

"He stated that he was still confident that his view of the matter of deeding the lands back to my wife by Mr. Gillespie and his wife and aunt, and by my wife and myself as guardian of the children dismissing the suit or acknowledging judgment, that there could be no further attack on the title of the lands by the children, and that the title then would be absolutely perfect."

On the 3d day of March, 1915, which was two days after Mr. Penny's letter to Mr. Vose, advising the way and means to prevent bidders from bidding upon the lands at foreclosure sale, an order of sale was issued in the case of Penny v. Gillespie, directing the sale of the Oklahoma City property, subject to certain mortgages amounting to approximately $48,000. The sale was for the purpose of satisfying the judgment of Mrs. Penny and these minors against the Gillespies, or at least to satisfy the same in so far as it was a lien upon the Oklahoma City property. Although the case of Penny v. Gillespie was still pending in this court and undisposed of, the order of sale was issued and the land was advertised, and Mr. Vose purchased the property at sheriff's sale for $1,460, or, in other words, purchased his own property at sheriff's sale, but by virtue of the execution sale he had extinguished the lien of some $23,000 on the property for the sum of $1,460, and although the land was sold to satisfy the judgment of the minors, the record disclosed that the minors received no portion of the $1,460, and after paying the costs the balance of the money was used by Mr. Vose and Mrs. Penny in carrying out the terms of their contract of January 30, 1915.

I have heretofore stated the status of the minors' property prior to the date of the contract between Mr. Vose and Mrs. Penny, dated January 30, 1915. After carrying out the terms of the contract between Mr. Vose and Mrs. Penny, which consumed less than six months, it might be well to again look to the status of the minors' property. The two judicial sales, as contemplated by the contract between Mr. Vose and Mrs. Penny, had taken place, and we find the allotments of the minors and all equity they had therein had been wiped out, and the record title transferred from them to Mr. Vose without the minors receiving a dollar consideration. Second, we find that the judgment of $23,000, of which more than $12,000 of the same was in favor of these two minors, had been declared a junior lien upon the Oklahoma City property; that said judgment, in so far as it was a lien upon the Oklahoma City property, which was owned at that time by Mr. Vose, was canceled and eliminated, and the amount paid for canceling the said judgment by Mr. Vose was the sum of $1,460, and no portion of that sum was paid to the minors, but was used by Mr. Vose and Mrs. Penny in carrying out the terms of their contract. So the status of the minors, six months after the contract of Mrs. Penny and Mr. Vose, and as a result of the two contracts entered into by the parents of the minors, has left the minors with no allotments, but a worthless judgment against Mrs. Gillespie, and the only part of the judgment which could have been of any force and effect was that portion of the same which was made a lien upon the Oklahoma City property, and that has been eliminated and the minors received nothing therefor.

With the title of the property all appearing in the name of Mr. Vose in September, 1917, the minors, through the same guardian, Mr. Penny, brought suit to cancel the Holmes & Hibbard mortgages and the Alliance Trust Company mortgage, which were held by Mr. Vose. The petition alleged that the Holmes & Hibbard Mortgage Company and the Alliance Trust Company were not bona fide purchasers and took with notice. The petition further asked to have the sheriff's deed of Mr. Vose to the 320 acres of land canceled, for the reason the minors were not parties to said suit and not bound by the judgment against Mrs. Gil-

Digitized by Google

lespie, and that Vose only acquired such rights as Mr. Phillips acquired under the note of the Bryan-Gow Investment Company, and that the Bryan-Gow Investment Company nor Mr. Phillips were innocent purchasers. All the parties answered, denying they had any interest in the premises, except Mr. Vose. He first claimed title by reason of the sheriff's deed; second, he pleaded the minors had obtained judgment against the Gillespies for the amount of all the mortgages, and had elected to pursue the remedies against the Gillespies, therefore the minors could not question the validity of any mortgages; third, that the Holmes & Hibbard Mortgage Company and the Alliance Trust Company were innocent purchasers, and he was protected through them. To this petition the minors replied, setting forth the fact that, if Mr. Vose purchased at the foreclosure sale, it was by reason of the contract had with Mrs. Penny, and the minors were not parties to said contract, and therefore were not bound by the same.

With the pleadings in this condition, I cannot agree with that portion of the opinion of the majority which deals with the deed of Mr. Vose to the minors' property where it says:

"It appears that Vose purchased at the foreclosure sale under a contract entered into with Mrs. Penny for the use of herself and the minor children. It is unnecessary to define the rights of Vose under this sale, or of the minors under that contract. That question is not properly before us."

I am unable to agree that this question is not squarely before this court, for the reason plaintiffs ask to have the deed canceled, and defendant claims title by virtue of the deed in his answer, and the plaintiffs replied that defendant had obtained said deed according to a contract with Mrs. Penny and to which the minors were not parties, and therefore think the same was ineffective.

While the opinion of the majority has reversed the case and remanded it for further proceedings, which will be an accounting between Mr. Vose and Mrs. Penny, for the use of the minors, under the contract dated January 30, 1915, which prevents the minors from contesting the validity of the three mortgages, but requires Mr. Vose to account for the rents and profits of the farms, and also will include an accounting for the Oklahoma city real estate all of which Mr. Vose purchased by virtue of the contract with Mrs. Penny, and while this will grant to the minors some protection, yet a reading of the contract between Mr. Vose and Mrs. Penny discloses that Mr. Vose under the contract was placing a $7,000 lien which he purported to have on said premises prior to the rights of the minors, both upon the farm land and upon the Oklahoma City property, while the district court, in the case of Penny v. Gillespie, held that this same claim of $7,000 there presented by the American National Bank, which Mr. Vose represented, was inferior to the title of the minors in so far as the farm land was concerned, and inferior to their judgment in the Oklahoma City property. It seems to me that this court, while the case is here, should determine whether the district court in hearing the accounting should hold that Mr. Vose will be permitted by contract with the mother to make a lien which the district court held a junior lien a prior lien on the premises in controversy. My objection to this portion of the opinion is that it recognizes a contract between Mr. Vose and Mrs. Penny in dealing with minors' property, and attempts to hold the minors to the terms of said contract. I realize that Mr. Vose would be estopped to claim that he was not bound by said contract, but I cannot agree that the proper remedy to be adopted by this court is to recognize such a contract and to hold it binding upon the minors, or that it has any legal effect whatever. My judgment is neither the contract nor the deeds secured thereunder should be recognized, but should be canceled and held for naught. This would follow the holding of this court in the case of Cameron v. Yarby, 175 Pac. 206, wherein it was held:

"A guardian cannot make a contract which will bind the person or estate of his ward, unless authorized by a court of competent jurisdiction to enter into said agreement."

See, also, Jones v. Johnson, 178 Pac. 984.

The opinion of the majority holds that the election of remedies only applies to the Bryan-Gow Investment Company mortgage and judgment and does not apply to the Holmes & Hibbard Mortgage Company nor to the Alliance Trust Company. I am unable to understand how a different rule can be applied to one mortgage than to the others. The opinion is based upon the theory that the taking of a judgment by the minors against Gillespies, wherein said judgment was made a lien upon the Oklahoma City property, was such an election as precluded the minors from questioning the validity of the mortgages. This judgment of the minors against the Gillespies covered all three mortgages, but still a different rule is applied to one than to the others.

It is conceded that Mr. Vose has no other defense to the Bryan-Gow Investment Company mortgage than that of election of remedy, and it is conceded that neither he nor Mr. Phillips or the Bryan-Gow Investment Company were bona fide purchasers. I do not think the election of remedies can be invoked in the case at bar for two reasons:

First. That the plaintiffs are minors, and their guardian was implicated in every one of the illegal transactions and contracts

Digitized by Google

which resulted in depriving the minors of their property, and certainly any election the guardian might make would not be binding upon the minors, unless the minors received some benefit from the same, or the party seeking to invoke said remedy has been prejudiced by such an election.

Second. Mr. Vose, by reason of his contract with Mrs. Penny, has deprived the minors of the opportunity of realizing any benefit upon their judgment against Mrs. Gillespie, and as said judgment, in so far as it was a lien upon the Oklahoma City property, has been canceled by carrying out the terms of his contract with Mrs. Penny, and the minors have received no benefit therefrom. Therefore a court of equity under such circumstances will not permit a plea of election of remedies to enable a party to take advantage of his own illegal contract.

As was said by this court in the case of Alliance Trust Co. v. Choate, 185 Pac. 113, speaking through Justice Rainey, the rule relating to election of remedies is as follows:

"The doctrine of election has been generally regarded as being an application of the law of estoppel upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions." 9 R. C. L. 957.

Again the court stated:

"It clearly appears that the defendant trust company has not suffered any detriment, and that, as yet, the plaintiffs have not received any benefit under their action against the sureties on the former guardian's bonds."

If we apply the same rule to the case at bar, it seems to me we must reach the same conclusion. It must be remembered the suit of Mrs. Penny and the minors against the Gillespies included many transactions, and included different transactions than those involved in the case at bar. It included the title to other lands, and it included the rents and damages, while the same was held by the Gillespies, and if we apply the same rule, in my judgment, as was applied by Mr. Justice Rainey in the case of Alliance Trust Co. v. Choate, supra, the doctrine of election of remedies would not be applicable to the facts in this case.

In reference to the plea of estoppel, the Supreme Court of Colorado in the case of Kirby v. Union Pac. Ry. Co., 51 Colo. 509, 119 Pac. 1043, Ann. Cas. 1913B, 461, stated as follows:

"The doctrine of estoppel by conduct is not available, except in defense of a legal or equitable right or claim made in good faith, junior in point of time, against which an older right ought not to be heard to assert itself, but the doctrine can never be asserted to defend or uphold crime or fraud."

In addition to the reasons stated above, there appears to be a different rule applicable, when dealing with the election of remedies where the rights of minors are concerned, than where the rights of adults are concerned. None of the proceedings in this case were ever ordered and directed by the county court or the district court, but were prosecuted by the guardian, who himself was one of the principals in all the illegal contracts which had for their purpose disposing of the minors' property. This court, in the case of Alliance Trust Co. v. Choate, supra, where the same question was at issue, stated as follows:

"There is no merit in the contention that this action was not authorized. These minors could not elect and did not attempt to do so. The county court directed the bringing of both actions, and the district court found that it was for the best interest of the [minors] for this action to be tried first, and while the present guardian did not direct the bringing of this action, it appears from the evidence in the record that Mr. Lasater was employed by him to look after the interest of his wards, and said guardian has made no objection to the prosecution of the case."

The case of Alliance Trust Co. v. Choate was cited with approval and followed by this court again in the case of Cushing v. Choate, 186 Pac. 481. The rule as stated in Pomeroy on Equity Jurisprudence, vol. 1, p. 509, is as follows:

"It is very clear that an infant cannot elect. In cases where an infant, if he had been an adult, would be bound to elect, the court has sometimes deferred the question of election, where this could be done without prejudice to the rights of the other parties, until the infant came of age. The ordinary rule is for the court to direct an inquiry to be made whether it is to the infant's advantage to elect or not, and what election ought to be made. In other words, the court as a result of a judicial examination, itself makes the election on the infant's behalf."

This rule is supported by the case of Gentry v. Bearss, 88 Neb. 742, 130 N. W. 428, the court, in passing upon this question, said:

"The Oklahoma statutes applicable to this inquiry are in the record. They show that the guardian, in the management of the ward's estate, is under the directions of the county court. Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077; In re Ross, 6 Cal. App. 597, 92 Pac. 671. The evidence discloses that before the present suit was brought plaintiff was ordered by the county court of Grant county, Okl., to bring an action on the bond of the former guardian for the full amount of his defalcation, and that the order was obeyed. That suit is pending in the district court of the county named. The petition therein alleges that the entire estate was squandered, and prays for judgment for $2,000. The trust funds in the hands of the defaulter were approximately $1,700. A witness testified, without objection, to plaintiff's admissions in connection with the bringing of both suits as follows: 'He said that the guaranty company brought the suit. He knew nothing about it, but he wasn't certain whether they brought it

Digitized by Google

in their own name or in his name, but he took no part in bringing the suit; that he had been instructed to sue the bonding company, and that was as far as his interests extended in the matter.' "

There is no contention that the county court ever ordered the guardian to elect and bring suit against the Gillespies.

Plaintiffs in error contend that obtaining the judgment, irrespective of whether any benefits have accrued therefrom, is such an election of remedies as will preclude the minors from thereafter pursuing a further remedy without considering the fact that the plaintiffs are minors. I cannot agree with this contention, even though the same rule pertains to a minor as to an adult. The Supreme Court of the United States in the case of Edward S. Thomas, as Trustee in Bankruptcy, v. Sugarman, 218 U. S. 129, 30 Sup. Ct. 650, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250, stated as follows:

"The trustee in bankruptcy does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer."

In the case of Register v. Carmichael, 169 Ala. 588, 53 South. 799, 34 L. R. A. (N. S.) 309, the note on page 310 states as follows:

"The clear weight of authority, though there is some conflict in the decisions, seems to sustain the position taken by the court in Register v. Carmichael, that 'an election, to be conclusive, must be efficacious to some extent at least. The mere bringing of a suit is not determinative of the right. The party against whom the estoppel is pleaded must have received some benefit under his election,' or have caused some detriment to the other party."

The doctrine of election of remedies is also stated in Words and Phrases, vol. 3 (First Series), p. 2337, as follows:

"The doctrine of election depends, not on technical rules, but on principles of equity and justice and actual intention. An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So, if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. Watson v. Watson, 128 Mass. 152."

The rule stated in 9 R. C. L. p. 958, is as follows:

"Another class of cases exists, where there is but one cause of action, but in which different or alternative remedies may be pursued. It is permissible to follow these remedies or reliefs independently, even in some cases to judgment, although but one satisfaction can be had."

The petition of the minors against the Gillespies in their joint suit of Mrs. Penny against the Gillespies stated that they did not intend to elect. The record on page 401 sets out positively that the minors never received any benefits from said judgment. If we take the facts in the case at bar, and construe them according to law laid down in the case of Watson v. Watson, supra, where it is said:

"So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed"

—and if we apply this rule to the case at bar, it would follow that, when the minors in their petition alleged that they did not intend to make such an election, no such election was made or could be presumed. Again, applying the following rule:

"The doctrine of election depends, not on technical rules, but on principles of equity and justice and actual intention"

—to the facts in the case at bar, the election of remedies does not apply. There are no equities in favor of Mr. Vose upon the Bryan-Gow Investment Company mortgage. It is admitted that he knew the mortgage was without consideration, that it was obtained by fraud, and that the parties from whom he purchased could not bring themselves within the rule of being bona fide purchasers. There could be no more equity in a case of this kind than there could be in a man who bought stolen property, knowing at the time he purchased it had been stolen. In my judgment, the election of remedies has no application to the facts in this case.

The court, in the opinion of the majority, cites the case of First Trust & Savings Bank v. Bloodworth, 174 Pac. 545, and, while the syllabus announces the rule laid down by this court, the facts are altogether different, and there was equity in that case, for the party there, not only obtained a judgment against the agent for the money, but the money had been garnisheed in a prior action in the agent's hands, and the plaintiffs had interpleaded in said garnishment and claimed the money. Commissioner Davis, who wrote the opinion, attempted to follow the rule laid down by the Supreme Court of Kansas, and cited certain Kansas cases to support this theory. These same cases were cited and relied upon in the case of McIntosh v. Lynch, 188 Pac. 1079, decided by this court, but not officially reported, but this court refused to follow these, but followed the rule announced in the case of Register v. Carmichael, 169 Ala. 588, 53 South. 799, 34 L. R. A. (N. S.) 309. In my judgment, the only defense available to Mr. Vose is: Were the mortgagees under whom he claims bona fide purchasers? If so, he would be protected, although it is conceded that he is not an innocent purchaser.

Digitized by Google

I cannot agree with the opinion of the majority that the Holmes & Hibbard Mortgage Company and the Alliance Trust Company were purchasers in good faith, nor with the finding of the court that Mr. Shegog was a subagent. Upon the question of whether Mr. Shegog was a subagent, upon the trial of the case Mr. Shegog was asked the following questions by Mr. Vose's attorney:

"Q. What company or companies, if any, did you represent in the farm loan business, Mr. Shegog? A. I have been representing the Alliance Trust Co. * * *

"Q. Are you the regular duly authorized agent for the Holmes & Hibbard Mortgage Company, acting through Mr. Ramsey? A. I was; yes.

"Q. You are not at this time? A. Well, yes."

Mr. Hibbard, of the Holmes & Hibbard Mortgage Company, was asked the following question:

"Q. How long has Mr. Shegog here to your knowledge been accepting applications and sending them in, either direct or through Mr. Ramsey, to your office for the Alliance Trust Company? * * * A. Oh, I should think it was 7 or 8 or 9 years, possibly."

Mr. Holmes, of the Holmes & Hibbard Mortgage Company, in defining Mr. Shegog's duties, stated:

"Q. Did Mr. Shegog, under his connection with you, have anything to do in the matter outside of, as you have stated, furnish the abstract, and the application and the delivery of the check to the borrower and the filing of the mortgages? A. That is all."

It seems to me, when Mr. Vose's attorney proved these facts, he could not now contend that Shegog was only a subagent, and such a finding is contrary to the evidence.

The rule announced in the opinion of the majority, that an agent has no implied authority to appoint a subagent or to delegate his power, and persons employed by him in handling his principal's property do not become the agents of the principal without the principal's consent, certainly cannot be applicable when Mr. Vose produced Mr. Shegog as a witness, who testified that he had been representing the Alliance Trust Company for seven or eight years, and Mr. Hibbard, in defining Mr. Shegog's duties, stated that Shegog's duties were to receive the application, obtain the abstract, file the mortgages, and then deliver the money to the borrower. This was all that was to be done, except to inspect the property. Shegog had direct authority, and duties that were given him, and that he was delegated to do. This court, in Alliance Trust Co. v. Choate and Cushing v. Choate, supra, held, under similar facts, that the party was the agent, and this is where I think the majority of the court has committed error in holding Shegog as a subagent, and especially after Mr. Vose proved that he was the agent. Of course, if Mr. Shegog was a subagent, the opinion of the majority is correct, but with that I cannot agree.

In determining whether the Holmes & Hibbard Mortgage Company and the Alliance Trust Company were purchasers for value, it must be determined under the rules laid down by this court in the case of Adams Oil & Gas Co. v. Hudson, 55 Okl. 386, 155 Pac. 220, where the court said:

"Purchasers of the land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed."

The court further stated that three things must exist: First, a purchase in good faith; second, for value; third, without notice. Winsted v. Shank, 173 Pac. 1041, announced the rule of innocent purchaser as follows:

"A purchaser, or incumbrancer, from the vendee of a guardian's sale, with notice of such fraud as renders the sale void, is not an innocent purchaser, even though he pays a valuable consideration. The essential elements which constitute a 'bona fide purchase' are valuable consideration, absence of notice, and the presence of good faith."

It is further conceded that a person who had notice of a fraudulent transfer may become an innocent purchaser, if the person from whom he purchased was an innocent purchaser, providing he was not a party to the original contract. The rule as stated by the United States Supreme Court in the case of Rogers v. Lindsey, 13 How. 441, 14 L. Ed. 215, is as follows:

"A purchaser with notice may protect himself by obtaining the title of a purchaser for a valuable consideration without notice, unless he be the original party to the fraud. The bona fide purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title, except it be that of the original party, whose conscience stands bound by the violation of the trust and a meditated fraud."

See, also, the case of Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388.

Considering, first, the mortgage made by the Holmes & Hibbard Mortgage Company, the records disclose that these two mortgages were made to secure four promissory notes, of $240 each. Mr. Vose obtained one of these notes from Mr. Phillips. Now, counsel for Vose concedes that Mr. Phillips could not be an innocent purchaser of the Bryan-Gow Investment Company note; so, by applying the rule as stated in the case of Rogers v. Lindsey, 13 How. 441, 14 L. Ed. 214, when Mr. Phillips obtained this $240 note, made payable to Holmes & Hibbard Mortgage Company, he would be estopped from claiming as a bona fide purchaser, and all the equities would be purged away, as he was a party to

Digitized by Google

the original contract. Then certainly, in my judgment, the holding of the court that this portion of the Holmes & Hibbard Mortgage Company is bona fide, and must be protected, would be erroneous, and contrary to the rule announced in the case of Rogers v. Lindsey, supra.

The record disclosed that these four notes, while payable to the Holmes & Hibbard Mortgage Company, were for a commission. The record does not disclose how this commission was divided, but it does disclose the Holmes & Hibbard Mortgage Company were to receive a portion of the same, Mr. Ramsey a portion of the same, and Mr. Shegog a portion of the same, and Mr. Shegog was to divide his portion with Mr. Cralle and Mr. Phillips. It was admitted that Mr. Cralle was familiar with all the transactions. Mr. Shegog states that he did not know that the sale of the property from Mr. Penny to Gillespies was anything other than for cash. He at that time was a partner with Mr. Cralle, dividing their profits in the abstract and loan business. Mr. Cralle was familiar with all the facts. Mr. Phillips brought the Gillespies to Mr. Shegog to obtain the loan. Shegog divided his commission with Mr. Phillips, and testified that Mr. Phillips was very active around his office. Mr. Penny testified that he informed Mr. Shegog that he was making an exchange of the minors' property for the Oklahoma City property, and that Mr. Shegog replied that he hoped he (Penny) would make as much money out of the deal as Dan Garland made out of a similar deal. This Mr. Shegog denies. Of course, if Mr. Shegog had knowledge of the facts, this would be knowledge to the Holmes & Hibbard Mortgage Company and the Alliance Trust Company, provided he was their agent.

At the time Mr. Shegog received the application for the loan, Mrs. Gillespie was not the owner of the land. He was advised that the lands were being purchased from the guardian. He was advised by the application that the purchaser had no other means or property with which to purchase said premises, and when the check for the loan was forwarded to him the check was payable to Mrs. Gillespie and O. S. Penny, guardian. This check further advised Shegog that it was his duty to see that the purchase price was paid. As to what directions the loan company sent with the check to Mr. Shegog, this does not appear in evidence. For some reason, neither they nor Mr. Vose have seen fit to introduce those instructions. There could be no other reason for making the check payable to Mrs. Gillespie and Mr. Penny, as guardian, than for the purpose of seeing that the purchase price of the land had been paid; but when Mr. Shegog received said check, and simply had the guardian to indorse it, and then delivered it to Mr. Gillespie, who was not borrowing the money, without inquiring if the purchase price had been paid, he certainly was not using the proper diligence to ascertain whether the purchase price had been paid. The manner he had the check indorsed, first by Mrs. Gillespie, and then by Mr. Penny, as guardian, and delivering it to Mr. Gillespie, convinces my mind beyond any doubt that he knew of the contract between Mr. Gillespie and Mr. Penny, and was simply helping them carry out the terms of their contract.

From the facts that Mr. Shegog and Mr. Cralle were partners, one looking after the abstract and the other the loan business, and Mr. Phillips working around the same office and receiving a part of the commission for bringing persons to the office to obtain loans, that while Mr. Penny was making an exchange of over 900 acres of valuable bottom farm land for Oklahoma City property, through Mr. Phillips, who was in the office, which exchange and transactions extended over a period of time from April 24, 1912, to July 16, 1912, one of the exchanging parties, Mrs. Gillespie, to complete the transfer, obtained a loan on the land she was receiving, which loan was applied for through Mr. Shegog, to whom Phillips took her, the partner, Cralle, making the abstracts covering all the farming lands, it seems unreasonable to believe and hard to conceive, where the entire transactions occurred in this office, and each of these three parties was connected with some portion of the transaction, that Shegog should be the only one who knew nothing of the facts that the same involved an exchange of property.

Another incident: Mr. and Mrs. Gillespie acknowledged the mortgage before Mr. Shegog on July 10th, so at the time of executing the mortgage he knew they did not own the property, for the reason the deed had never been filed, and he held this mortgage until the 16th day of July, 1912, at 2 p. m., when it was recorded, and it was recorded at the same hour as the deed from the Pennys to the Gillespies. I cannot believe, with all these facts in the record, but what Shegog knew there was an exchange of said property being made, or at least knew that the purchase price had not been paid, and he had knowledge of sufficient facts which, if he had made inquiry, would have revealed the fact, either that there was an exchange of property, or that the purchase price had not been paid. I do not believe a simple denial on his part is sufficient to overcome so many strong facts and circumstances. This would bring him within the rule laid down by this court in the case of Brooks v. Reynolds, 37 Okl. 767, 132 Pac. 1091, as follows:

"Where a person has knowledge of circumstances such as would put a prudent person, acting in good faith, upon inquiry, he is chargeable with actual notice of the facts the inquiry would have disclosed."

Digitized by Google

This court, in the case of Winsted v. Shank, supra, upon the question of bona fide purchaser, said:

"Whatever is 'notice' enough to excite attention and put a reasonably prudent person on his guard, and calls for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it."

Having reached this conclusion, this being an equity case, the rule laid down by this court in the case of Pyeatt v. Estus, 179 Pac. 42, 4 A. L. R. 1570, applies:

"In a case of equity jurisdiction, this court will examine the whole record, and if it clearly appears that the judgment of the trial court is contrary to the preponderance or weight of the testimony, or a gross injustice committed, will render such decree as should have been entered, or reverse, with directions for such decree to be entered in the trial court."

The trial court having rendered a judgment in favor of the minors and against the defendant Vose, by applying the same rule as applied in the case of Board of Equalization of Oklahoma County v. First State Bank of Oklahoma City, decided March 9, 1920, 188 Pac. 115 (not officially reported) stated as follows:

"Therefore it appears the trial court arrived at the correct conclusion, although giving a wrong reason for the conclusion. It is a settled rule that a judgment of the lower court will be affirmed, although a wrong reason was given for such judgment. Nance v. Fouts, 68 Okl. —, 173 Pac. 1038; Kibby v. Binion, 70 Okl. —, 172 Pac. 1091; McKee v. Title Ins. & Trust Co., 159 Cal. 206, 113 Pac. 104; Scattergood v. Johns, 57 Kan. 450, 46 Pac. 935."

I am of the opinion that the trial court reached the right conclusion, but gave the wrong reason therefor, and that the judgment should be affirmed, but on grounds other than that given by the trial court.

I am authorized to state that Mr. Justice JOHNSON concurs in this dissenting opinion.

STATE v. SMITH. (No. 4487.)

(Supreme Court of Montana. May 3, 1920.)

1. Jury ⟸131(8)—Defendant should be allowed on voir dire to ascertain whether juror would give benefit of doubt.

In a prosecution under Sedition Act, providing that, whenever the United States shall be engaged in war, any person who shall utter, print, write, or publish language calculated to incite or inflame resistance to duly constituted authority, etc., shall be guilty of sedition, the exclusion of questions to a venireman whether, having a reasonable doubt whether the article was calculated to inflame or incite resistance, he would give defendant the benefit of such doubt, was improper, for defendant was entitled on voir dire to ascertain such matter.

2. Jury ⟸131(1)—Purpose of voir dire examination stated.

The purpose of the voir dire examination of veniremen is to enable counsel to determine whether there exists a state of mind on the part of any which will prevent him from acting with entire impartiality, and without prejudice to the substantial rights of either party, or, in other words, to determine whether the jury is biased within Rev. Codes, § 9261, and for the further purpose of enabling counsel to exercise intelligently the peremptory challenges allowed by law.

3. Jury ⟸34(2)—Assumption by trial court that fact is proven is erroneous.

It matters not how conclusive the evidence on any essential element of the offense charged may appear, the constitutional guaranty of trial by jury precludes the court from assuming the fact as proven.

4. Criminal law ⟸21—Criminal intent not necessary to violation of police statute.

In case of violation of a statute enacted under the so-called police power, the intent is immaterial; the usual rule of the common law that in every crime there must be a union or joint operation of act and intent, which is likewise declared by the Montana statutes, having no application.

5. Statutes ⟸181(1)—In construing statutes, the legislative intent must be sought.

It is both a common-law and statutory rule of construction of statutes that the intention of the Legislature must be discovered, and, if possible, pursued.

6. War ⟸4—Intent in publishing language calculated to cause resistance to authorities immaterial.

In a prosecution for violation of the Montana Sedition Act, declaring that any person who shall utter, print, write, or publish any language calculated to incite or inflame resistance to any duly constituted state or federal authority shall be guilty of sedition, the intent of defendant is immaterial, if it was likely to incite or inflame resistance; this being abundantly established by the fact that other portions of the act relating to other offenses required a guilty intent.

7. War ⟸4—Instruction on intent given in sedition case too broad, including intent to publish.

In a prosecution for sedition, where the court refused to include in the instructions the provisions of Rev. Codes, §§ 8112, 8113, but instead charged that in every crime there must be a joint operation of act or intent, but that in a statutory offense, such as the one involved, proof of a violation raises a conclusive presumption of intent, such instruction was erroneous, in view of sections 7961, 7962, declaring that a malicious and guilty intent is con-

Digitized by Google

clusively presumed from the deliberate commission of a wrongful act, and that other presumptions are disputable, including the one that an unlawful act was done with an unlawful intent, for the instruction given was so broad as to include general intent to publish the article, and is not limited to the intent presumed from publication of an article likely to incite resistance.

8. War ⟸4—Defendant, charged with publishing article likely to cause resistance to authorities, should be allowed to show intent.

In a prosecution under the Sedition Act for publishing, etc., an article likely to cause resistance to the duly constituted authorities, defendant should be allowed to prove that he did not intend to publish, write, print, or utter the article, for the presumption that an unlawful act is committed with an unlawful intent is disputable.

9. War ⟸4—Officer of corporation publishing seditious article liable, if he could have prevented it.

The vice president of a corporation, who knew of the publication of a seditious article in time to have prevented it, is liable under the Sedition Act for failure to prevent.

10. Criminal law ⟸814(3)—Instruction not based on evidence is erroneous.

Although an instruction may state a correct principle of law, if it is not based on or in conformity with the issues of fact raised by the evidence, it is erroneous.

11. Criminal law ⟸822(1)—In determining correctness of instructions, they should be examined in their entirety.

In determining the correctness of instructions, they must be examined in their entirety, and where as a whole they correctly state the law, and where those instructions general in their nature are by specific instructions limited to the facts in the case, error cannot be predicated on an incomplete or too general instruction.

12. Indictment and information ⟸125(2)—Information can charge but one offense, which must be proved.

An information must charge but one offense, and accused can be convicted only of the offense so charged.

13. Criminal law ⟸814(21)—Instructions should be explicit and closely connected with the facts.

An instruction should be so explicit and so closely connected with the facts of the case as to enable the jury to apply the law to those facts.

14. Criminal law ⟸814(5)—Instruction allowing jury to consider other seditious publications held erroneous.

In a prosecution under the Sedition Act for the uttering and publishing of a particular article, claimed calculated to arouse resistance to the duly constituted authorities, a general instruction that, if defendant did unlawfully utter, write, print, or publish any language calculated to inflame resistance to any duly constituted state or federal authority, while correct in the abstract, is erroneous, tending to allow conviction for publication, etc., of other articles not charged.

15. Criminal law ⟸814(5)—Instruction that defendant could be convicted for either writing, publishing, or uttering seditious article held erroneous.

An instruction that defendant could be convicted for writing, printing, uttering, or publishing an article calculated to inflame resistance against duly constituted authorities, and that it was not essential to establish all three, was erroneous, where there was no evidence that defendant printed or published the article in the county where the prosecution was laid.

16. Witnesses ⟸259—Where proper foundation laid, stenographer may testify from transcript.

Where proper foundation is laid, establishing the accuracy of the notes and transcript, a stenographer may testify from the transcript, instead of reading and translating the notes.

17. Witnesses ⟸259, 271(1)—Where stenographer attempts to testify from transcript preliminary examination should be allowed.

Where a stenographer attempts to testify from transcript, instead of his notes, a liberal cross-examination should be permitted, and, if timely application is made, the opposing party should be permitted the right to ask preliminary questions to test the accuracy of the notes and transcript.

18. Criminal law ⟸369(1), 1169(11)—Admission as to other seditious statements held improperly admitted and prejudicial.

In a prosecution for uttering and publishing an article calculated to inflame resistance against the duly constituted authorities, evidence concerning statements made by defendant before the state council of defense, offered as an admission, should have been stricken, as they referred to another publication, and the error was made prejudicial by instructions of the court and remarks of the county attorney.

19. Witnesses ⟸350—Credibility may be attacked by cross-examination showing conviction.

Under Rev. Codes, § 8907, a witness may be required to answer on cross-examination whether he had been convicted of a felony, for the purpose of attacking his credibility.

20. War ⟸4—Legislature may define limits of freedom of speech and press.

The constitutional guaranty of free speech and free press is not suspended by war, and no one by reason of a state of war lost his right to criticize either men or measures; but under stress of war the Legislature may define the limits of liberty of speech and press, and restrain language calculated to inflame resistance to duly constituted federal or state authority acting in connection with the war.

21. Criminal law ⟸300—Issues raised by plea of not guilty.

In a prosecution for sedition, where defendant was charged with publication, etc., of an

Digitized by Google

editorial calculated to inflame resistance to duly constituted authority, defendant's plea of not guilty put in issue, not only the question whether the editorial was calculated to inflame resistance, but whether it was published, written, or uttered by defendant in the county where the prosecution was laid.

22. Criminal law ⟸335—Proof that offense occurred in county of prosecution necessary.

The guaranty of Const. art. 3, § 6, of the right to a speedy public trial by an impartial jury of the county or district in which the offense was alleged to have been committed, is one of the fundamental guaranties, and so proof that the offense occurred in the county where the prosecution was laid is essential to conviction.

23. War ⟸4—All publications of inflammatory language not necessarily seditious.

As Sedition Act, making it an offense to publish language calculated to incite or inflame resistance to duly constituted authorities, requires the language published to be likely to have such effect, all publications of inflammatory language are not necessarily seditious, as where publication is made to duly constituted authorities, or is made in such manner as to counteract the evil of the language.

24. War ⟸4—Whether language was calculated to inflame resistance to authority is for jury.

In prosecution under Sedition Act, for publication, etc., of language alleged to be likely to inflame resistance to duly constituted authorities, the question whether it was likely to have such effect is for the jury.

25. War ⟸4—Publication of inflammatory article to member of state council of defense not seditious.

Proof that an alleged inflammatory article denouncing the state council of defense was published by bringing the article to the attention of a member of the council will not support a conviction under the Sedition Act, where there was no evidence that it was otherwise published in the county where prosecution was had, for the publication under such circumstances was not likely to cause resistance to the council of defense.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

R. B. Smith was convicted of sedition, and he appeals. Reversed and remanded.

Wheeler & Baldwin and Nolan & Donovan, all of Butte, for appellant.

S. C. Ford, Atty. Gen., and Otto A. Gerth, Asst. Atty. Gen., for the State.

PER CURIAM. The defendant was convicted of the crime of sedition and appealed from the judgment.

The information charges that the defendant willfully and feloniously did write, print, and publish of and concerning the Montana council of defense a statement (which is set forth in the information, but which is too long to be here reproduced), which contained, among other things, the following:

"Fortunately they have no legal status or authority. They can fulminate to their heart's content against anything and everything that menaces their master's interest, but no one need pay any attention to them."

It is charged that this statement so published was calculated to incite and inflame resistance to the Montana council of defense, a duly constituted state authority in connection with the prosecution of the war. Counsel for defendant made 107 assignments of error, but such of these as require special consideration may be grouped under a comparatively few heads. A number of the contentions have been determined adversely to defendant in other sedition cases recently decided.

[1] Upon the voir dire examination, counsel for defendant propounded to the juror Ellis this question:

"Q. And if, after hearing all of the evidence in this case, there was a reasonable doubt in your mind as to whether or not this article in question was calculated to inflame or incite resistance to the state council of defense, would you give the defendant the benefit of the doubt and vote for his acquittal?"

An objection by the county attorney was sustained, and the juror was not permitted to answer. The same question was asked the juror Porter, with the same result. In each instance the court erred. The defendant was prosecuted under the provision of the Sedition Act (Laws Ex. Sess. 1918, c. 11) which provides:

"Whenever the United States shall be engaged in war, any person or persons who * * * shall utter, print, write or publish any language calculated to incite or inflame resistance to any duly constituted federal or state authority in connection with the prosecution of the war, * * * shall be guilty of the crime of sedition."

[2, 3] The purpose of the voir dire examination of veniremen is to enable counsel to determine whether there exists a state of mind on the part of any juror which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which the statute (section 9261, Rev. Codes) denominates actual bias, and to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Brooks, 188 Pac. 942, decided Apr. 8, 1920, and not yet [officially] reported. The gist of the offense with which the defendant was charged was that the published statement was calculated to incite or inflame resistance to the Montana council of defense in connection with the prosecution of the war. It may be that

Digitized by Google

the error would have been cured if the court had instructed the jury, as it should have done, that in order to justify a conviction they must find from the evidence beyond a reasonable doubt that the statement was calculated to incite or inflame resistance to the Montana council of defense in connection with the prosecution of the war; but the court failed to give any instruction upon the subject, and from this omission, and from the ruling upon the question now under consideration, the jurors must have understood that the allegation of the information that the statement was calculated to incite or inflame resistance was an immaterial one, or one upon which it was not necessary for the jury to find. In other words, the effect of the court's ruling, and its failure to instruct upon this subject, was to take from the jury the determination of the principal question involved in the trial and to determine it as one of law. It matters not how conclusive the evidence upon any essential element of the charge may appear to be, the constitutional guaranty of trial by jury absolutely precludes the court from assuming that the fact is proved.

Many errors are assigned on the rulings of the trial court in the examination of jurors and of witnesses, and in the settlement of instructions, in consistently excluding the theory of the defense that the intent or intention of defendant and his colleague, Dunn, in either writing, printing, uttering, or publishing the article in question, is a necessary ingredient of the crime charged. These specifications raise but two questions: (1) As to the admissibility of evidence of the intent to "incite or inflame resistance," etc.; and (2) as to the intent of the defendant to publish the article, and call for a determination as to what intent, if any, must be established by the state in order to warrant a conviction in sedition cases.

[4-6] The validity of the Sedition Act was upheld by this court in the case of State v. Kahn, 56 Mont. 108, 182 Pac. 107, and in that case, and in the later case of State v. Wyman, 56 Mont. 600, 186 Pac. 1, this court gave the question of intent some consideration, although in neither case was it necessary to go into the matter fully. In the Kahn Case we said:

"Sedition is a purely statutory offense, and our act is declared to be, and is in fact, a general police regulation. It is elementary that for the preservation of the peace, the safety of the people, and the good order of society the Legislature may prohibit certain acts, and attach a penalty for disobedience, without including any evil intent as an ingredient of the offense other than the general intent implied from a violation of the statute [citing 12 Cyc. 148; 8 R. C. L. 62]. But the provision of the statute is 'shall utter language calculated to incite or inflame resistance,' etc. Primarily the word 'calculate' means to compute mathematically, and it implies power to think, to reason, to plan. In its broader significance it means to intend, to purpose, to design. Century Dictionary; Standard Dictionary."

In the Wyman Case we said:

"The same [that the question was disposed of by the Kahn Case] is true of appellant's contention that the Sedition Law is defective, in that it * * * omits the 'basic element of "intent" altogether'; the Kahn Case laying down the rule that the Sedition Act, being purely statutory, is valid, though intent is not made an ingredient, and that, if the intent were needed, the word 'calculated' is sufficiently broad to include intent [quoting the above excerpt from the Kahn Case]."

In the consideration of these cases we might well have omitted the reference to any analogy between "calculated" and "intended," as having no place in the opinion, and based our conclusion squarely on the principle quoted from Cyc. in the Kahn Case. While it is true that our statute declares that "in every crime there must be a union or joint operation of act and intent," the statute is but declaratory of the common-law rule (Bishop's New Crim. Law, c. 18; 16 Corpus Juris, 75), and an exception to this rule, in so-called "statutory crimes" enacted under the police power of the state, is recognized by the great weight of authority. As stated in the Kahn Case:

"Our act is declared to be, and is in fact, a general police regulation."

The writer on the subject of "Intent," in 16 Corpus Juris, p. 76, disposes of this question as follows:

"The Legislature * * * may forbid the doing of an act, and make its commission criminal, without regard to the intent or knowledge of the doer; and, if such legislative intention appears, the court must give it effect, although the intent of the doer may have been innocent [citing cases from a large per cent. of the states]. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state."

A like rule is announced in 12 Cyc. 148; 8 R. C. L. 62. The legislative intention in the enactment of a statute, if ascertainable, is controlling.

"It is both a common-law and a statutory rule of construction of statutes that the intention of the Legislature must be discovered, and, if possible, pursued." Power v. County Com'rs, 7 Mont. 82, 14 Pac. 658; Lerch v. Missoula Brick & Tile Co., 45 Mont. 314, 123 Pac. 25, Ann. Cas. 1914A, 346.

Happily, in this instance, the wording of the statute itself clearly indicates the intention of the Legislature as to the crime charged against this appellant. An analysis of section 1 of the act discloses that, while a large number of prohibited acts are em-

Digitized by Google

braced within a single section, they naturally fall into eight distinct subdivisions, to wit:

"Whenever the United States shall be engaged in war, any person * * *

"(1) Who shall utter, print, write or publish any disloyal, profane, violent, scurrilous, contemptuous, slurring or abusive language about the * * * government of the United States, * * * or the soldiers or sailors of the United States; * * *

"(2) Or any language calculated to bring the form of government of the United States, * * * or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, into contempt, scorn, contumely or disrepute;

"(3) Or shall utter, print, write or publish any language calculated to incite or inflame resistance to any duly constituted federal or state authority in connection with the prosecution of the war;

"(4) Or who shall display the flag of any foreign enemy;

"(5) Or who shall by utterance, writing, printing, publication or language spoken, urge, incite or advocate any curtailment of production in this country of any thing or things, product or products necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war;

"(6) Or, * * * shall willfully make or convey false reports or statements with intent to interfere with the * * * success of the military or naval forces of the United States, or promote the success of its enemy or enemies;

"(7) Or * * * shall willfully cause * * * disaffection in the military or naval forces of the United States;

"(8) Or who shall by uttering, printing, * * * publication, language spoken, or by any act or acts, interfere with, obstruct, or attempt to obstruct, the operation of the national selective draft law or the recruiting or enlistment service of the United States to the injury of the military or naval service thereof, shall be guilty of the crime of sedition."

Thus dividing the act into its component parts, it will be readily seen that, as to those subjects falling in subdivisions 1 and 4, the prohibition is against the doing of the act itself, no matter what the intent or what the result thereof may be, while, as to those falling in subdivisions 2 and 3, the Legislature also omitted the element of intent, but made the guilt or innocence of the accused depend upon whether the language used was "calculated" to bring about the undesirable results enumerated. Coming down to subdivisions 5 and 6, we find that the Legislature was not unmindful of the element of intent in criminal offenses, and, as to the acts here enumerated, made the intent of the offender the gist of the crime; while, as to those acts included in subdivision 7, they again excluded the question of intent, but made the law applicable to those persons only who commit the forbidden acts "willfully," and under subdivision 8 they again prohibit the commission of certain acts without regard to intent, but provide for punishment only in case those acts result in actual injury to the military or naval forces of the United States.

It is therefore apparent that, in drafting the act, the Legislature exhibited a nice discrimination in the treatment of the several subjects under consideration, as constituting the crime of sedition, and that, whenever that body deemed a specific intent a necessary ingredient of the crime defined, it had no hesitancy in including it in the definition of the crime; and when it felt, for the peace and safety of society, an act should be prohibited, regardless of the intent of the doer of that act, it had as little hesitancy in excluding that element from its definition. It is clear from this analysis that, as to the acts here complained of, the Legislature intended to prohibit the writing, printing, uttering, or publication of any language likely to incite or inflame resistance to any duly constituted federal or state authority in the prosecution of the war, regardless of the intent or intention of the offender—to prevent, at all hazards, the results likely to flow from the commission of the act itself. As it appears that the Legislature included the element of intent in the definition of the crime of sedition in certain of the subdivisions indicated, and enumerated all the elements that body considered essential to the crime as defined in the subdivision under consideration, the element of intent was manifestly excluded, as an essential ingredient of the crime as here charged, both by the clear intention of the Legislature and under the rule "expressio unius est exclusio alterius."

The rule heretofore announced, under which the Legislature is conceded to have the authority so to provide, is in conformity with the former decisions of this court and with the great weight of authority throughout the United States. In the case of State v. Rechnitz, 20 Mont. at page 491, 52 Pac. at page 265, this court said:

"We do not lose sight of the fact that the rule above discussed is not inflexible, and that many acts may become crimes by violation of statutes relating to certain subject-matters, and that a statute may be so worded as to make an act criminal without regard to the question of the intent of the person doing such act."

In the case of Leggatt v. Prideaux, 16 Mont. 205, 40 Pac. 377, 50 Am. St. Rep. 498, this court quoted with approval from Gardner v. People, 62 N. Y. 299, as follows:

"The rule on the subject appears to be that in acts mala in se the intent governs, but in those mala prohibita the only inquiry is: Has the law been violated?"

Digitized by Google

In State v. Gilbert, 141 Minn. 263, 169 N. W. 790, the Supreme Court of Minnesota, in passing on a statute prohibiting teaching or advocating nonenlistment, etc., said:

"The statute makes teaching or advocating nonenlistment or nonaid unlawful. It does not make the intent of the teacher or advocate an ingredient of the offense. The statute is a police regulation, and under it the doing of the forbidden act is a criminal offense, regardless of the intent."

"There is a well-recognized distinction between acts mala in se and mala prohibita. Under the latter it is well settled that criminal intent forms no part or element of the offense." People v. D'Antonio, 150 App. Div. 109, 134 N. Y. Supp. 657. See, also, People v. Werner, 174 N. Y. 132, 66 N. E. 667. "It is the province of the Legislature to determine in the interest of the public what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality." People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; 16 Corpus Juris, 77, note a.

The Supreme Court of Michigan, in upholding a statute forbidding certain acts without regard to the intent, said:

"As a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. * * * Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270.

This case is cited with approval in People v. Snowberger, 113 Mich. 86, 71 N. W. 497, 67 Am. St. Rep. 449, where many cases upholding the doctrine are cited, and where it is said:

"Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of the citizen or interferes with his liberty, it is for the courts to determine whether it relates to and is appropriate to promote such public health. Under the police power, the conduct of individuals and the use of property may be regulated, so as to interfere to some extent with the freedom of the one and the enjoyment of the other. It cannot be doubted that the Legislature intended by this act to protect the public against the harmful consequences of sales of adulterated food, and, to the end that its purpose might not be defeated, to require the seller, at his peril, to know that the article which he offers for sale is not adulterated. As was said by the Supreme Court of Ohio in State v. Kelly, 54 Ohio St. 166: 'If this statute had imposed upon the state the burden of proving * * * his knowledge of its adulteration, it would have thereby defeated its declared purpose.'" Kelley v. Daily Co., 56 Mont. 63, 181 Pac. 326.

In the case of State ex rel. Rowe v. District Court, 44 Mont. 318, 119 Pac. 1103, this court said:

"When an act is in general terms made indictable, a criminal intent need not be shown, unless from the language of the law applicable a purpose to require the existence of such an intent can be discovered [citing cases]. In State v. McBrayer, 98 N. C. 619, 2 S. E. 755, in considering a statute prohibiting the sale of intoxicating liquor, the court said: 'It is a mistaken notion that positive, willful intent, as distinguished from a mere intent, to violate the criminal law is an essential ingredient in every criminal offense, and that where there is the absence of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation.'"

After citing many other authorities, the court concludes:

"Though in every public offense there must exist a union of intent and act (Rev. Codes, § 8112), in statutory offenses, such as this, the intent is conclusively presumed, when it is shown that the statute has been violated."

It is therefore apparent that the intention of the writer of the objectionable article, in deliberately writing the same, or of the printer, or of those persons who deliberately publish the article so written or printed, is wholly immaterial and not an ingredient of the crime charged, and therefore the court committed no error in sustaining objections to questions concerning such intent, whether propounded to prospective jurors or to witnesses.

[7] Specifications 70 and 71 are based on the court's refusal to include in the instructions the provisions of sections 8112 and 8113 of the Revised Codes; instead, the court gave the following, as instruction No. 8:

"The court instructs the jury that in every crime or public offense, there must be a union or joint operation of act and intent, but that in statutory offenses, such as the case on trial, if the state first proves, beyond a reasonable doubt, that the statute has been violated, then the intent above mentioned is conclusively presumed."

While, ordinarily, the statutory provisions concerning intent should be given, as offered by the defense, the offered instructions were intended to apply to the intent heretofore discussed, and, as offered for that purpose, the court did not err in its refusal. Instruction No. 8, however, while it follows the lan-

Digitized by Google

guage used in State ex rel. Rowe v. District Court, supra, in the statement of a principle of law, is, as an instruction, inapt and incorrect and is misleading to the jury; it does no more than to advise the jurors that, if the defendant is proven guilty, a guilty intent is "conclusively presumed." Of what aid was the instruction to the jury? The question for them to solve was: Did the defendant violate the provisions of the statute? Its determination involved the questions as to whether the article was published by the defendant and was "calculated" to "incite or inflame resistance," etc. And if the intent to incite and inflame resistance was the only element of intent which could enter into the commission of the act, it might be said that, though erroneous, the instruction could not have prejudiced the defendant, for it could not then have had any effect on the minds of the jurors in arriving at a verdict.

However, section 7961, Revised Codes, provides that—

"The following presumptions, and no others, are deemed conclusive: 1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another."

While section 7962 provides:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 2. That an unlawful act was done with an unlawful intent."

Now, while a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another, the element of intent which must enter into the commission of the crime here charged, does not come within that classification; i. e., the general intent, viz. to publish the article in question.

[8] This brings us to the consideration of specification 66, the defendant's offer to prove that he did not—

"on August 16, 1918, or at any other time, intend to publish, write, print, or utter the editorial entitled 'The State Council Again,' or any other article of similar import."

The "deliberate commission" of an act necessarily includes the intent to commit the act. The presumption that "an unlawful act was committed with an unlawful intent" is disputable, and, considered as evidence, "may be controverted by other evidence." While the publication of the article entitled "The State Council Again" might be punishable under subdivision 3 of section 1, as heretofore divided, a conviction could be had only if the act was deliberately or intentionally committed, and, although the intent to publish the article might be drawn from the surrounding facts and circumstances, if the defendant was in the possession of facts from which the jury might have reasonably drawn the conclusion that he did not intend to publish the article at all, as, for example, that it was published without his knowledge or against his express command, or through the negligence or misconduct of an employé, those facts should have gone to the jury, to be weighed against the disputable presumption of intent arising from the commission of the act. This the court did not permit, but, without discrimination, sustained objections to all questions concerning any intent whatsoever. Thereupon defendant made his offer, and the court, consistently, sustained the state's objection. The objection should have been overruled, and the facts, if any the defense had, admitted, to be considered under appropriate instructions on the subject. The court's failure to do so was erroneous.

[9] Specification No. 100 predicates error on the court's refusal to give offered instruction 38, which, if properly drawn to cover the question just discussed, would have been proper; but, as it appears from the testimony that Smith was the vice president of the company publishing the article, a greater burden was upon him than that defined in the proposed instruction. We apprehend that "mere failure to prevent its publication" would not exonerate the accused, had he known of the proposed publication in time to prevent it, and therefore the court was justified in refusing the proposed instruction.

[10-14] In specification No. 102, the appellant urges that the court erred in giving instruction No. 4, which reads as follows:

"You are instructed that the crime of sedition as applied to this case is complete if you find from the evidence, beyond a reasonable doubt, that at the county of Lewis and Clark, state of Montana, at any time subsequent to February 22, 1918, and prior to the filing of the information herein, and while the United States be engaged in war, the defendant did unlawfully, willfully, wrongfully, feloniously, and seditiously do or commit any of the following acts, to wit: Utter, or write, or print, or publish any language calculated to incite or inflame resistance to any duly constituted state authority in connection with the prosecution of the war."

It is urged that the instruction does not properly apply to the facts; that there is no evidence that the defendant did utter, write, or print any language, but was responsible, if at all, only for the publication; and that the instruction does not confine the issues to language calculated to incite or inflame resistance to the Montana council of defense. While the instruction is approximately a correct statement of an abstract rule of law, and would have been harmless, had it been followed by other instructions applying that law to the facts in this case, the record dis-

Digitized by Google

closes no such instructions, while the instruction given advises the jurors that they may find the defendant guilty if they find that he had, at any time between February 22, 1918, and the date of the filing of the information, uttered, written, printed, or published, in Lewis and Clark county, any language calculated to incite or inflame resistance to any duly constituted state authority in connection with the prosecution of the war.

"Although an instruction may state a correct principle of law, if it is not based upon or in conformity with the issues or facts raised or supported by the evidence, it is erroneous." 16 Corpus Juris, 1043, and note.

"In reading the statute, it is error for the court to read that portion thereof which does not define the crime charged, but defines another and distinct crime, unless he expressly limits the application of the statute to the charge." 12 Cyc. 614, and note.

In determining the correctness of instructions, the rule is that they must be examined in their entirety, and where, as a whole, they correctly state the law and where those instructions general in their nature, are by specific instructions limited to the facts in the case, error cannot be predicated on an incomplete or too general instruction. State v. Brooks, 23 Mont. 146, 57 Pac. 1038; Territory v. Hart, 7 Mont. 489, 17 Pac. 718. We have searched the record in vain for an instruction limiting the one under consideration to the facts of this case.

No attempt was made to prove that Smith either wrote or printed the article complained of in Lewis and Clark county, and he could be convicted, if at all, only of its publication in that county; and, of course, he could not be convicted on proof of the writing, printing, uttering, or publication of any article other than that set out in the information, no matter how vicious or seditious such article might have been. In a prosecution of this nature, proof of other acts are admissible for certain purposes; but, under such an instruction as we are considering, the accused might be convicted of the commission of any act of a similar nature, though the proof utterly failed to establish his guilt of the crime charged. That this cannot be is elementary. An information must charge but one offense, and the accused can be convicted only of the offense so charged. As was stated in the case of State v. Gaimos, 53 Mont. 118, 162 Pac. 596:

"When the information fixes a date, and the evidence shows an act of the character charged as a crime at that time, the state cannot be allowed to claim a conviction under that information for a similar act at some other time."

In the absence of an instruction directing the jury to return a verdict based upon the specific offense charged in the information, instruction No. 4 was prejudicially erroneous.

"An instruction should be so explicit and so closely connected with the facts of the case as to enable the jury to apply the law to the facts. It must present the law substantially and correctly and in such a way that it will be understood by the jury." 12 Cyc. 645; Ritte v. Commonwealth, 18 B. Mon. (Ky.) 35; Farrar v. State, 29 Tex. App. 250, 15 S. W. 719; Ashlock v. State, 16 Tex. App. 13.

[15] In instruction No. 17 the court advised the jury that—

"It is not necessary to prove all three of the acts mentioned, to wit, write, print, publish; but it is sufficient if the state proves any one of these, viz. that the defendant wrote, or that the defendant printed, or that the defendant published the language complained of in Lewis and Clark county, Montana."

In so far as it covers the subject, the instruction correctly stated a general proposition of law; but, as there was no evidence adduced and no contention on the part of the prosecution that the defendant either wrote or printed the article complained of, the instructions should have been limited to the question of publication in Lewis and Clark county.

"The sufficiency and correctness of instructions must be determined with reference to the evidence, and therefore a charge which asserts correctly an abstract proposition of law, but is not applicable to the evidence, or which is based upon the assumption of the existence of material facts of which there is no evidence, should not be given." 12 Cyc. 651.

In the absence of any evidence tending to prove that the defendant either wrote or printed the article complained of in Lewis and Clark county, it was error to instruct the jury that he could be convicted of either writing or printing the article. Such an instruction could serve no good purpose, and, in the absence of evidence on which to base it, the instruction should not have been given, as it could only tend to mislead and confuse the jury.

[16, 17] Error is predicated upon the court's ruling permitting the witness Winters to testify from a transcript made by him of his shorthand notes concerning proceedings had before the state council of defense, upon the ground that the notes, and not the transcript, constituted the best evidence. The witness, however, stated that his original notes had not been preserved, and, in effect, that the transcript was an accurate reproduction of translation thereof. As said by the Supreme Court of Indiana, in the case of Bass v. State, 136 Ind. 165, 36 N. E. 124:

"When the official stenographer is called, * * * his shorthand notes must be translated, either by himself or some one else who is able to do so. It being necessary that they should be translated, we think it wholly imma-

Digitized by Google

terial whether it is done orally or in writing. In this case it was done in writing. There is no claim that it was not done correctly. We think the court did not err in permitting Spencer [the stenographer] to read a transcript of the evidence."

See, also, Barber v. State, 64 Tex. Cr. Rep. 96, 142 S. W. 577; Mackmasters v. State, 83 Miss. 1, 35 South. 302; State v. Gentry, 86 Kan. 534, 121 Pac. 352; Fletcher v. State, 20 Wyo. 284, 123 Pac. 80.

It is true that the county attorney did not lay a very complete foundation for the introduction of the testimony, and it also appears that, when the defendant's attorney sought to question the witness concerning the accuracy of the transcript, the court refused to permit it. As the case must be reversed on other grounds, it is not necessary to go into this matter in detail. While it is better practice for the stenographer to read from his notes, we can see no objection to permitting him to testify from the transcript, in the event a sufficient foundation is laid establishing his ability to report the testimony accurately, the accuracy of the notes and transcript, allowing the defendant to inquire fully into the matter to test the stenographer's competency and accuracy, with the right to insist upon the production of the original notes if such are in existence, and, if necessary, to require the stenographer to read from his notes, to test the accuracy of the transcript. A liberal cross-examination should be permitted, and, if timely application is made, the defendant should be permitted the right to ask preliminary questions to test the accuracy of the notes and transcript.

[18] The article which is the basis of the charge against the defendant appeared as an editorial in the Weekly Bulletin of August 16, 1918. Upon the trial, with the witness Winters on the stand testifying concerning certain statements made by the defendant before the state council of defense, which were reported stenographically by the witness, Winters read from a transcript of his notes the following, to which objections were made and overruled:

"Q. 'Were you responsible afterwards for publishing the statement that you knew nothing about this order that appeared in the August 3d issue, I think it was, or September 3d? Mr. Smith: Yes. Mr. Campbell: In black type? Mr. Smith: Yes; Mr. Dunn wrote it. I asked him to write it. Mr. Campbell: You are absolutely responsible personally? Mr. Smith: Personally responsible. Mr. Campbell: For the editorial that Mr. Dunn wrote and the denial of the fact that you had ever received notice? Mr. Smith. Yes, sir.' "

Later a motion to strike this testimony from the record was made, upon the ground that the same did not refer to the publication constituting the offense with which the defendant was charged. In connection with the motion the defendant's attorney said:

"That does not refer to the editorial here in question.

"The County Attorney: We submit that it does.

"The Court: Yes. I overrule the motion to strike."

From a reading of the testimony above set forth, it plainly appears that defendant admitted his responsibility for writing the editorial of September 3d; but the court and county attorney assumed that the defendant admitted responsibility for writing the editorial of August 16th. The introduction of this testimony standing by itself, and the refusal of the court to strike the same, might be regarded as harmless error; but in view of the court's instruction numbered 4, in which the jury were advised that the crime was complete if the defendant wrote, printed, or published "any language," etc., the testimony should have been excluded. In addition, the error was emphasized by the remarks of the county attorney and the court's affirmation of the same in the words used in denying the motion to strike, thereby leading the jury to believe that the defendant, before the state council of defense, admitted his responsibility for printing the language set forth in the information.

[19] W. F. Dunn, a witness for the defendant, was asked on cross-examination if he had not been convicted of sedition, and over objection was required to answer and answered in the affirmative. Complaint is made of the court's ruling, but it was clearly correct. Section 8907, Rev. Codes.

[20] Finally, it is urged that the evidence is insufficient to sustain the verdict. It is to be remembered that the constitutional guaranty of free speech and free press was not suspended by the war, and that no one lost his right to criticize either men or measures. It is only for an abuse of the liberty that one may be called to account for his language, either in peace or in war. Under the stress of war the Legislature may define the limits of liberty of speech and make punishable the use of language which in time of peace it would be powerless to restrain, and this is just what was done by the enactment of the Sedition Act. Under that provision of the statute now before us, it was declared that the use of language calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war constituted an abuse of the liberty of speech and press and a crime against the commonwealth.

[21, 22] Though the information charges that the editorial in question was written, printed, and published in Lewis and Clark county, there is not any evidence that it was either written or printed here. Eliminating

Digitized by Google

those elements of the charge, and the material allegations of the information now to be considered are: (1) That the editorial was published in Lewis and Clark county; (2) by the defendant; and (3) that it was calculated to incite or inflame resistance to the Montana council of defense in connection with the prosecution of the war. The defendant's plea of not guilty put in issue every one of those allegations and imposed upon the prosecution the burden of proving every one of them by competent evidence, beyond a reasonable doubt. The allegation that the editorial was published in Lewis and Clark county was indispensable, in order to give the court of that county jurisdiction to try the case, for the Constitution (article 3, § 16) secures to everyone accused of crime the right to "a speedy, public trial by an impartial jury of the county or district in which the offense is alleged to have been committed," subject only to the right to a change of venue. This is one of the fundamental guaranties of our Bill of Rights, intended to be honored by its observance, and not defeated by any subterfuge.

[23-25] The allegation that the published editorial was calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war was equally necessary in order to state a public offense. In our judgment, the word "calculated" was used advisedly and with appreciative discrimination. After a more critical examination and analysis of the statute, we are satisfied that it was intended to be understood to mean "likely to produce a certain effect, whether intended or not." The observations heretofore made upon the subject "intent" render further discussion of this matter unnecessary.

The only evidence in support of the allegation that the editorial was published in Lewis and Clark county was given by Mr. Will A. Campbell, who testified that he was a subscriber to the Bulletin; that he received his copy of the paper containing the editorial in the due course of the mail, at his office in Helena; that the paper came to him inclosed in a separate wrapper; that he read the editorial in this county; and that he was then a member of the Montana council of defense. The Attorney General directs our attention to an admission made by the defendant before the council of defense on September 9, 1918, to the effect that the Bulletin had subscribers in Lewis and Clark county; but the evidence discloses that the witness referred to the Bulletin, then issued as a daily paper, and evidence of the extent of the circulation of the Daily Bulletin on September 9th would not constitute evidence of the circulation of the Weekly Bulletin on August 16th.

We may assume, for the purposes of this appeal, that the evidence is sufficient to show a publication of the editorial in Lewis and Clark county, using the term "publication" in the broad sense of divulgation, promulgation, or making known. But it is not every abusive or even libelous statement that constitutes sedition. The language of this editorial might be published in time of war under such circumstances that would not make it a crime. Frohwerk v. United States, 249 U. S. 204, 208, 39 Sup. Ct. 249, 63 L. Ed. 561. To illustrate from this record: It appears from the evidence that Mr. Campbell exhibited the editorial to the county attorney, and that afterwards it was reprinted in the Helena Independent, a newspaper of which Mr. Campbell is the guiding genius. In each instance there was a publication, but not such a publication as constituted a crime. In other words, to bring the publication under the condemnation of the statute, it must have occurred under such circumstances that the language thus published was calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war. Whether it was or was not calculated to have that effect was a question of fact to be determined by the jury (State v. Kahn, above) from all the surrounding facts and circumstances, including the manner and extent of publication, as well as the inherent quality of the language itself. So far as this record discloses the defendant was not responsible for the editorial becoming known to any person in Lewis and Clark county, other than Mr. Campbell, who was then a member of the Montana council of defense. Can it be said, then, that in the hands of Mr. Campbell alone the published editorial was calculated to incite or inflame resistance to the council? Who but Mr. Campbell could be incited or inflamed to resistance, and is it within the range of probabilities that he would be incited to resist the very organization of which he was a member? We think not.

In the purpose sought to be accomplished and in the means employed to effectuate that purpose, our Sedition Act is not unlike the espionage statute (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 20212a–20212h) passed by the Congress of the United States, and concerning a prosecution under that statute the Supreme Court of the United States said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470.

Applying that rule and paraphrasing the language of this court in State v. Kahn, above, could the jury find from the evidence, beyond a reasonable doubt, that the natural tendency and reasonably probable effect of the editorial, in the hands of Mr. Campbell

Digitized by Google

alone, was to incite or inflame resistance to the Montana council of defense in connection with the prosecution of the war? The bare statement of the proposition would seem sufficient for its own complete refutation.

In failing to prove that the defendant was responsible for the editorial being made known in Lewis and Clark county to any person other than a member of the Montana council of defense the state failed to prove the offense charged in the information. For the reasons given, the judgment is reversed, and the cause is remanded to the district court of Lewis and Clark county for a new trial.

Reversed and remanded.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

STATE v. DIEDTMAN. (No. 4398.)

(Supreme Court of Montana. May 8, 1920.)

1. Jury ⟸110(1)—Challenge for cause may be waived.

A challenge for cause may be waived, and is waived, unless availed of at the proper time.

2. Jury ⟸109—Trial court's remark that challenge to jury would be sustained erroneous.

In a criminal prosecution, where the trial court, on examination of a venireman, interposed with the remark that, if the county attorney would challenge, he would sustain the challenge, and it did not appear that there was any ground for sustaining a challenge for cause, such action of the court was erroneous, amounting to the exercise of peremptory challenge, which right the trial court does not possess, particularly as the right to challenge can be waived by failure to exercise.

3. Jury ⟸109—Defendant entitled to insist that the jury be selected by legal method.

A defendant is not only entitled to a fair and impartial jury, but he is entitled to insist that the jury shall be selected according to the methods established by law.

4. Criminal law ⟸655(4)—Announcement by court that he would sustain a challenge to juror held prejudicial.

In a prosecution for sedition, the action of the trial court in announcing on voir dire examination that he would sustain a challenge to a venireman, amounting to the exercise by the court of peremptory challenge, *held* most prejudicial, because indicating to the remaining jurors that the court entertained prejudice against any of the veniremen who manifested a friendly disposition toward defendant.

5. Criminal law ⟸419, 420(1)—That State Department had passed favorably on record of prosecuting witness inadmissible.

In a prosecution for sedition, where evidence of the good character of the state's witness was offered, it was improper to allow testimony that the State Department had investigated his record and passed favorably upon it; such testimony being the veriest hearsay.

6. Criminal law ⟸1186(4)—Judgment not reversed for technical errors not affecting substantial rights.

A judgment will not be reversed for technical defects and errors appearing in the record, where they do not affect the substantial rights of the parties.

7. Criminal law ⟸1169(1) — Testimony that State Department acted favorably on record of prosecuting witness held prejudicial.

In a prosecution for sedition, where the prosecuting witness, a former officer in the Germany army, was an admitted forger and exconvict, and testimony of witnesses as to his good reputation was of little weight, because of the brevity of the acquaintance, the erroneous admission of testimony that the State Department investigated the record of the prosecuting witness, and found it good, was prejudicial.

8. Witnesses ⟸405(1)—Collateral answer on cross-examination as to character is binding.

In a prosecution for sedition, where defendant's witness was asked whether he had not on a previous occasion used language indicating a pro-German sympathy, and the witness denied such implication, his answer is conclusive, and cannot be contradicted; the matter being collateral.

9. Witnesses ⟸405(1)—Collateral nature of question depends on whether it could be proved by opposite party in chief.

The test whether a question on cross-examination of defendant's witness relates to a collateral matter, so that it cannot be contradicted, is whether the state could have introduced evidence on the subject in chief.

10. Criminal law ⟸785(2)—Witnesses ⟸258—Where witness testified from written memorandum, it was improper to deny a cautionary instruction.

In a prosecution for sedition, where the witness for the state repeatedly asserted that, in order to give the language employed by defendant it was necessary for him to use memorandum, an instruction, in harmony with Rev. Codes, § 8020, that if the witness could not recollect the particular words used by defendant, and required memorandum to testify thereto, his evidence should be received with caution, was improperly refused; for, while a witness may refresh his memory by reference to his memorandum, yet where he relies, not on his refreshed memory, but the assumed correctness of the memorandum itself, such evidence should be received with caution.

11. Criminal law ⟸1173(2)—Refusal of cautionary instruction as to testimony based on written memorandum prejudicial.

In a prosecution for sedition, where the only witness to the alleged seditious remark, who was a former officer of the German army and was an admitted forger, testified from memorandum having no independent recollec-

Digitized by Google

tion of defendant's remarks, the refusal of an instruction that such testimony should be received with caution *held* prejudicial error.

12. Witnesses ⊂⊃330(1)—Broad cross-examination allowed, where only means of ascertaining credibility.

Where the prosecuting witness had been in this country but a comparatively brief period, and defendant's only means of ascertaining his credibility or lack of it was by cross-examination, the broadest of cross-examination should be allowed.

13. War ⊂⊃4—Seditious remark not necessarily offense, unless calculated to bring government into contempt.

Under the Sedition Act, making it an offense to utter words calculated to bring the form of government, and Constitution, army, etc., into contempt and disrepute, utterances do not constitute a violation of the act unless made under circumstances likely to have the effect of bringing the form of government into contempt.

14. War ⊂⊃4—Whether defendant's remarks were calculated to bring government into contempt is for jury.

In prosecution for sedition, the question whether defendant's alleged utterances were calculated to have the effect of bringing the Constitution, army, etc., into contempt *held* a question for the jury.

15. War ⊂⊃4—In a prosecution for sedition, the particular charge should be submitted, and mere general instructions insufficient.

In a prosecution for sedition, where defendant by its plea of not guilty has put in issue every averment of the indictment, including the one that his utterances were calculated to bring the Constitution, army, etc., into scorn and contempt, it was error for the court to submit the case with mere general instructions to find defendant guilty if he had at any time between a date specified and the filing of the information done any of the acts or things condemned by the Sedition Act, without giving instructions with reference to the particular charge in the information.

16. Criminal law ⊂⊃300—Plea of not guilty puts in issue all allegations of information.

A plea of not guilty puts in issue all the allegations of the information, and the prosecution has the burden of establishing the same beyond a reasonable doubt.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Tony Diedtman was convicted of sedition, and he appeals. Reversed and remanded.

Henry C. Smith, of Helena, for appellant.

S. C. Ford, Atty. Gen., and Frank Moody, Asst. Atty. Gen., for the State.

PER CURIAM. By an information filed in the district court of Lewis and Clark county on May 31, 1918, the defendant was charged with the crime of sedition. Upon his first trial the jury failed to agree upon a verdict. The second trial resulted in a verdict of guilty, with a recommendation to the mercy of the court. The defendant was sentenced to imprisonment in the penitentiary for a term of not less than 10 years nor more than 20 years, and has appealed from the judgment and from an order denying his motion for a new trial. There are 47 assignments of error, but the contentions made upon some of them have been determined adversely to defendant in sedition cases recently decided. The other assignments may be considered in groups.

[1, 2] 1. Henry Latch, a juryman, was examined on his voir dire by the county attorney at some considerable length, when the court interposed with the remark that, "if counsel will challenge this juror, I will sustain the challenge." The suggestion was availed of, the juror challenged and excused, and exception was taken to the remark of the court, as well as to the ruling. There was not any intimation contained in the evidence that the juror was disqualified; on the contrary, he had shown himself possessed of the statutory qualifications for jury service. Neither do we think that the record discloses sufficient ground for challenge for cause; but, even if it did, any ground for such challenge may be waived, and is waived unless availed of at the proper time, and in this instance, if the county attorney had not seen fit to interpose a challenge for cause, the competency of the juror to sit in the trial of the cause could not be questioned. To all intents and purposes, the action of the court amounted to the exercise of a peremptory challenge by it—a right which the court does not possess. 16 R. C. L. 253. If the court can, of its own motion, excuse one juror without cause, it can excuse a dozen, or, in other words, it can so far pick the jury in advance of the exercise of the peremptory challenges as to compel the defendant to submit to trial before a jury satisfactory to the court, with the only alternative to him to make use of his peremptory challenges among jurors all of whom are equally objectionable.

[3] The statute prescribes the method of selecting a jury, including the challenges and the mode of their exercise, and neither the court nor the parties can select it in any other manner. To admit of any substantial departure from the statutory method would, in effect, nullify the statute itself. In People v. McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, it is said:

"The legal right of a defendant may be violated as well by excluding competent jurors as by admitting incompetent ones. He is entitled in all cases to a fair and impartial jury, but he is also entitled to insist that the jury shall be selected according to methods estab-

Digitized by Google

lished with a view to secure a just and impartial administration of the jury system."

To the same effect are Sullivan v. State, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22; Van Blaricum v. People, 16 Ill. 364, 63 Am. Dec. 316; Welch v. Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 11 L. R. A. 233, 21 Am. St. Rep. 629.

[4] But the error was made more manifest by the manner of the court than by the ruling itself. The remark, considered in connection with the testimony given by the juror, must have led the remaining jurors to believe that the court entertained prejudice against any venireman who manifested a friendly disposition towards the defendant, even though no such prejudice was entertained in fact. We approve the holding of this court in Territory v. Roberts, 9 Mont. 12, 22 Pac. 132; but the facts upon which that case was decided differ materially from the facts of the instant case. In that case the juror excused was not a citizen of the United States, and upon his voir dire examination testified that he had formed an opinion as to the guilt or innocence of the accused. He was challenged by the prosecution and the challenge allowed. The court did not go further than to hold that "the appellant was not injured by the exclusion of the juror."

[5] 2. The county attorney first called as witnesses John Berkin and Thomas Topping, and interrogated them concerning their acquaintanceship with one Eberhard Von Waldru, whose name was indorsed upon the information as a witness for the state. Each witness testified that he knew the reputation of Von Waldru for truth, honesty, and integrity in the neighborhood where he resided, and that it was good. Over the most vigorous objection of defendant's counsel, Topping was then permitted to testify that the Department of Justice at Washington and the Attorney General of the United States had investigated Von Waldru's record, and that they had passed favorably upon it.

Section 8026, Revised Codes, prohibits the introduction of supporting evidence of the good character of a witness until his character has been first impeached, unless his character is in issue; but assuming that an objection to the order of proof was waived—and it was waived as to one of the witnesses at least—or that error may not be predicated upon the court's rulings admitting this character evidence before Von Waldru had testified, the only evidence admissible under any conceivable circumstances was evidence of Von Waldru's general reputation in the neighborhood where he lived. Silver Bow M. & M. Co. v. Lowry, 6 Mont. 288, 12 Pac. 652. The evidence that the Department of Justice had investigated Von Waldru's record and had passed favorably upon it was the veriest hearsay, and its admission violated the most elementary rules of the law of evidence.

[6, 7] That it was error to admit this evidence is not open to controversy, and the only question for determination is: Was the error a material one under the circumstances? The rule is now firmly established in this jurisdiction that no judgment shall be reversed for technical errors or defects appearing in the record, which do not affect the substantial rights of the complaining party. There is no hard and fast rule by which to determine whether a particular error shall be classed as harmful or harmless. Every case must be determined upon its on peculiar facts and circumstances. What are the circumstances of this case which reflect upon the question?

There was no one present, when the alleged seditious remarks were made, but Von Waldru and the defendant, and therefore the state was compelled to rely upon Von Waldru's testimony alone to establish the fact that the words were spoken. Von Waldru admitted that he was an alien enemy, a former officer in the German army, a former convict, who had completed his term in the penitentiary at Deer Lodge about the middle of November, 1917. The necessity of bolstering up Von Waldru's testimony was apparent, and appreciated fully by the county attorney; but neither Berkin nor Topping had known him for a period as long as six months, one-half of which time Von Waldru had spent in Butte, a portion of the remainder in Helena, and the other portion not accounted for. Just how either Berkin or Topping could gain a knowledge of the general reputation of Von Waldru during so short a period, or how Von Waldru could establish a general reputation among the people of a community by such a peripatetic residence, are questions which we need not stop to consider at length. In Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33, this court said:

"Reputation can be proven only by the testimony of witnesses who, by association and acquaintance in the community where the person whose reputation is in question resides, know what is there said of him, and who can, from such knowledge, express an opinion thereon."

Assuming that Berkin and Topping each was competent to answer the question propounded to him, and that his brief acquaintanceship affected only the weight to be given to his opinion (Territory v. Paul, 2 Mont. 314), it must be manifest that under these circumstances the jury could not have given much weight to the expressed opinion that Von Waldru's reputation for truth, honesty, and integrity was good. The defendant denied categorically that he ever made any of the statements attributed to him by Von Waldru and produced several witnesses, each of whom testified to his good reputation; but

Digitized by Google

notwithstanding these facts, and the fact that Von Waldru was a self-confessed forger and an ex-convict, out of the penitentiary only eight months before he gave his testimony upon the trial of this case, the jury were led to say by their verdict that beyond a reasonable doubt the defendant had used the words as Von Waldru had testified that he did. There must have been some consideration which led the jury to this conclusion, other that Von Waldru's testimony standing alone. It could not have been the sustaining testimony of Berkin and Topping, for the opinion of neither could have had much weight, under the meager showing of the facts upon which it was based. But it is easily conceivable that a jury of laymen would be impressed profoundly by the favorable findings of the Department of Justice at Washington and the Attorney General, after an investigation into Von Waldru's history, and we think that it is fairly inferable from this record that the verdict rests largely, if not altogether, upon the support which Von Waldru's reputation received from this hearsay testimony; at any rate, it cannot be said that the error in admitting it was without prejudice.

[8, 9] 3. A witness, Reiss, called by the defendant, testified upon his direct examination that defendant's reputation for honesty and integrity was good. Upon cross-examination, the county attorney was permitted, over objection, to inquire of the witness whether he had not on a previous occasion, or on previous occasions, used language indicating his pro-German sympathies. The witness denied the implication, and upon rebuttal the state was permitted to introduce a witness to impeach Reiss by testimony that he had used the language attributed to him in the county attorney's questions. The error in the court's rulings is manifest. Reiss was not on trial, and, if he had used the language, it could not reflect in the least upon the guilt or innocence of Diedtman. It is elementary that a witness cannot be impeached upon a collateral matter brought out on cross-examination. Bullard v. Smith, 28 Mont. 387, 72 Pac. 761. The rule is stated in Wharton's Criminal Evidence, § 484, as follows:

"When a witness is cross-examined on any irrelevant matter, or any matter collateral to the issue, his answers are conclusive, and he cannot be subsequently contradicted on those matters by the party seeking to impeach him."

The test to be applied in this instance to determine whether the matter was collateral is this: Would the county attorney have been entitled to prove that Reiss made the statements as a part of the state's case in chief? That he would not is manifest. This subject has received the consideration of this court in the recent case of State v. Smith, 188 Pac. 644, and a like ruling was condemned.

[10, 11] 4. It appeared from the testimony of Von Waldru that he made notes at the time of Diedtman's statement, and soon thereafter extended these notes in a memorandum which he produced upon the trial. During the course of his examination he stated repeatedly that, in order to give the language employed by Diedtman, it was necessary for him to use the memorandum. At the conclusion of the evidence counsel for the defendant requested the court to give the following instruction:

"If you find that the witness Von Waldru cannot recollect the particular words used by the defendant on April 26, 1918, and requires his memorandum thereof in order to testify thereto, then I charge you that such evidence should be received with caution."

The request was refused, no instruction upon the subject was given, and error is predicated upon the ruling. The instruction is in harmony with the provisions of section 8020, Revised Codes. That statute but crystallizes rules of evidence recognized generally by the text-writers and applied by the courts of this country for a century before the statute was adopted. It recognizes two classes of subjects to which the rules are applicable. In the first class is the witness who, by referring to his memorandum, has his memory quickened so that he is able to testify from his actual recollection. The second class includes the witness who undertakes to testify to facts, not because of his independent recollection of them, but relying for his confidence in the assumed correctness of the memorandum itself. Davis & Whitaker v. Field, 56 Vt. 426. Recognizing the possibility of error in the memorandum, and the fact that the opposite party is practically precluded from testing its accuracy, the statute has wisely declared that the testimony of a witness of this latter class shall be received by the jury with caution. Whether the witness Von Waldru belonged to the one class or the other was, under the circumstances, a question for the jury to determine, and if they had found that he belonged to the second class, the right of the defendant to have the jury instructed to receive his testimony with caution was absolute, and the refusal of the instruction was error. When it is recalled, as heretofore stated, that the state relied altogether upon Von Waldru's testimony to prove that the statements were made by the defendant, and that it was deemed necessary by the county attorney to bolster up that testimony, even before it was given, by evidence of Von Waldru's good reputation, notwithstanding his previous history, the error in refusing the cautionary instruction is but emphasized.

[12] 5. Errors are predicated upon rulings of the court restricting defendant's cross-examination of the witness Von Waldru. The assignments upon this subject are too numerous to be treated separately. We think the

Digitized by Google

court erred to defendant's prejudice. Von Waldru was a detective employed for hire to ferret out violations of the sedition statute. He had been in America but a comparatively brief period, and defendant's only means of ascertaining his credibility, or lack of it, was by cross-examination, and a broad liberality in this respect should have been indulged. In State v. Whitworth, 47 Mont. 424, 133 Pac. 364, this court said:

"The purpose of trials of issues of fact is to bring out the whole truth, and to that end the right of cross-examination must be liberally interpreted and freely exercised."

The language of the court in State v. Wakely, 43 Mont. 427, 117 Pac. 95, is particularly pertinent here. It was there said:

"We recognize the duty of trial judges to allow the utmost latitude in cross-examination, especially in cases like this, where the question of the guilt or innocence of a citizen depends entirely upon the credit to be given to witnesses hired to detect violators of the statute."

[13-16] 6. Finally, and aside from every other consideration, the record discloses that the case was tried throughout upon an entirely erroneous theory of the statute defining sedition. The court must have proceeded upon the theory that, if the defendant used the language set forth in the information, he was guilty. But this does not follow as of course. The language may have been used, even in time of war, under such circumstances that no crime would have been committed. As observed by this court in the case of State v. Smith, 190 Pac. 107 (just recently decided and not yet [officially] reported), our Sedition Act in its general scope and purpose is not unlike the federal Espionage Law, and concerning a prosecution under that act the Supreme Court of the United States said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470.

The information in this instance charges that the language used by the defendant was calculated to bring the form of government, the Constitution, the soldiers and sailors, the flag and the uniform into contempt, scorn, contumely, and disrepute. This was a necessary allegation under the subdivision of the statute here involved. The defendant's plea of not guilty put that allegation in issue, and devolved upon the prosecution the burden of proving it by competent evidence, beyond a reasonable doubt. Whether the language, if used, was calculated to have the effect imputed to it in the information, was a question of fact to be determined by the jury. State v. Kahn, 56 Mont. 108, 182 Pac. 107. The court did not give any instruction defining the particular issues involved in this case. Nowhere were the jury told that it was necessary to a conviction that the state prove beyond a reasonable doubt that the defendant had used the language set forth in the information, nor were the jury instructed that they must further find that the language so set forth, if used by the defendant, was calculated to bring the form of government of the United States, the Constitution, the soldiers or sailors, the flag or uniform into contempt, scorn, contumely, or disrepute; but, on the contrary, the court gave instruction No. 4 under which the jury were authorized to find the defendant guilty if the evidence established beyond a reasonable doubt that he had at any time between February 22, 1918, and May 31, 1918, the date of filing the information, done any of the acts or things condemned by the statute defining sedition, without reference to the particular charge contained in the information. This question also was considered in the case of State v. Smith, above, and need not be elaborated any further.

For the reasons given, the judgment and order are reversed, and the cause is remanded to the district court of Lewis and Clark county for a new trial.

Reversed and remanded.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

STATE v. DUNN. (No. 4411.)

(Supreme Court of Montana. May 3, 1920.)

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

W. F. Dunn was convicted of sedition, and he appeals. Reversed and remanded.

Wheeler & Baldwin, of Butte, for appellant.
S. C. Ford, Atty. Gen., and Frank Woody, Asst. Atty. Gen., and Lester H. Loble, of Helena, for the State.

PER CURIAM. W. F. Dunn was convicted of sedition, and appealed from the judgment.

In its essential features, this case is not distinguishable from State v. Smith, 190 Pac. 107, just decided. Smith and Dunn were charged jointly, though tried separately. The evidence in each case is substantially the same, and, though there are fewer assignments of error in appellant's brief in this case, the principal errors considered in the Smith Case are involved in this one. They need not be considered separately.

Upon the authority of State v. Smith, the judgment herein is reversed, and the case is

Digitized by Google

remanded to the district court of Lewis and Clark county for a new trial.

Reversed and remanded.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

WORDEN v. MORIGEAU. (No. 4126.)

(Supreme Court of Montana. May 19, 1920.)

1. Bankruptcy ⟸303(1)—Facts which must be proved in suit to set aside preference stated.

A trustee in bankruptcy suing to set aside as a preference a conveyance by the bankrupt in consideration of a pre-existing debt must show by a fair preponderance of the evidence that defendant knew the bankrupt was insolvent at the time of transfer and was indebted to other persons and did not have sufficient other property to satisfy all of them, or show facts sufficient to put a reasonable prudent man upon inquiry.

2. Bankruptcy ⟸303(3) — Evidence held to sustain bona fides of transfer attacked as preference.

In a suit by a trustee in bankruptcy to set aside as a preference a conveyance by the bankrupt to his brother in consideration of a pre-existing debt, evidence *held* sufficient to sustain the bona fides of the transfer.

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

Action by H. O. Worden, trustee of Eli Morigeau, bankrupt, against Joseph Morigeau. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

William Wayne, of Missoula, for appellant.

Hall & Whitlock, of Missoula, for respondent.

COOPER, J. This action was instituted in the court below by appellant, as trustee in bankruptcy of Eli Morigeau, who received patent for his Indian allotment embracing the west half of the northwest quarter, and the southeast quarter of the northwest quarter, of section 25, township 17 north, range 21 west of the Montana meridian, situated in Sanders county, on August 26, 1912. By deed dated December 16, 1913, recorded on the 31st day of that month, the consideration being a pre-existing indebtedness amounting to the sum of $12,000, Eli conveyed the land so patented to his brother Joseph Morigeau. On February 13 following, Eli Morigeau filed his petition to be declared a bankrupt; the approved claims against his estate amounting to the sum of $8,833.85, $2,944.76 of which originated after the date of the issuance of patent. As will be observed, the conveyance was made within four months prior to the filing of the petition in bankruptcy. The district court, aided by the finding of a jury declaring that the defendant, Joseph Morigeau, did not have "reasonable cause to believe that the enforcement of said transfer would effect a preference in his favor," found for the defendant, entered judgment in his favor validating the transfer, and denied plaintiff's motion for a new trial. From the judgment and order so made, this appeal is prosecuted.

[1] It is appellant's contention that the agreed statement of facts admits all of the elements of a voidable transfer, save two, to wit: The insolvency of the bankrupt at the time of the transfer, and that the grantee had "reasonable cause to believe that the enforcement of such * * * transfer would effect a preference." The frailty of appellant's contention lies in the failure of the evidence to show that Joseph Morigeau knew his brother Eli was insolvent at the time of the transfer; knew that he was then indebted to other persons than himself, or, if he owed debts other than those due defendant, that he did not have sufficient other property to satisfy all his creditors. These facts the trustee is bound to establish by a fair preponderance of the evidence before a transfer of this character can be avoided. This is the spirit of the Bankruptcy Act (U. S. Comp. St. §§ 9585–9656).

"By the statute's very words," says the Supreme Court of the United States in Pyle v. Texas Transport & Terminal Co., 238 U. S. 90, 35 Sup. Ct. 667, 59 L. Ed. 1215, "in order to set aside such a transfer and recover the property it must appear that 'the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference.' Whether such 'reasonable cause to believe' existed is a question of fact and the burden of proof is upon the trustee." Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Coder v. Arts, 213 U. S. 233, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Wright v. Sampter (D. C.) 152 Fed. 196; Calhoun County Bank v. Cain, 82 C. C. A. 114, 152 Fed. 983; 2 Remington on Bankruptcy, sec. 1404; Marshall v. Nevins, 242 Fed. 476, 155 C. C. A. 252.

This court, in the recent case of De Forrest v. Crane & Ordway Co., 55 Mont. 494, 179 Pac. 292, had occasion to consider a question similar to the one under discussion, and in its disposition made use of this language:

"Though a transfer is made which amounts to a preference, yet it is not unlawful within the meaning of section 60b [of the Bankruptcy Act (32 U. S. Stat. at Large, 799)], unless the creditor receiving it had reasonable cause to believe that the debtor intended thereby to give him a preference; that is, to pay him a larger percentage of his claim than others would re-

Digitized by Google

ceive. As pointed out by the court in Pirie v. Chicago Title & Trust Co., supra [182 U. S. 438], if reasonable cause for this belief does not exist, the preference cannot be recovered from the creditor by the trustee."

The plaintiff in this case could not hope to prevail until he had established by a fair preponderance of the evidence these conditions: The insolvency of the bankrupt at the time the deed was given; knowledge of insolvency on the part of the transferee sufficient to put a reasonably prudent man upon inquiry; and the existence of other creditors of the same class against whom the conveyance would operate unequally by allotting to them a lesser percentage on their debt than the defendant would receive by reason of the security given. In Grant v. National Bank, supra, this language is used by Mr. Justice Bradley:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt."

The test of the sufficiency of the evidence does not rest upon the assertions by either party of his intent or belief, but on inferences which may fairly arise from the facts in evidence. Hamilton Nat. Bank v. Balcomb, 177 Fed. 155, 100 C. C. A. 575. Financial embarrassment does not necessarily amount to insolvency. In re Bartlett (D. C.) 172 Fed. 679. Something more than suspicion is necessary to put a reasonably prudent man upon inquiry. Brookheim v. Greenbaum (D. C.) 225 Fed. 638. In the latter case the court made use of these very pertinent remarks:

"It does not seem to me that, in case of a man who concededly did business in such an unbusinesslike way as this bankrupt, shortness of cash and absence of free capital, continuing for so long a period of time without any insolvency, ought to be enough to put on inquiry all those who dealt with him. It must be remembered that something more than suspicion is necessary. Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Sharpe v. Allender, 170 Fed. 589, 96 C. C. A. 104 (C. C. A. 3d Cir.); J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433 (C. C. A. 6th Cir.); Re Goodhile (D. C.) 130 Fed. 471. These cases all decide that it is not enough that the bankrupt is in temporary straits and the debt overdue."

[2] The law recognizes in every person the right of absolute dominion over his property; and he may dispose of it at will, so long as he is able to meet his obligations as they fall due. But when he reaches a state of financial disability equivalent to what the Bankruptcy Law terms insolvency, he is precluded from making a transfer of his property, or a payment to a creditor that will give to one creditor an advantage not afforded to all of the same class. Unless, therefore, the evidence establishes that the transfer in question was taken by Joseph Morigeau under circumstances not justified by the law as above stated, the judgment of the district court was right and must be affirmed. In dealing with these considerations it must be remembered that the bankrupt and the defendant lived a distance of more than 25 miles apart; that they seldom met; that they were both Indians and wards of the federal government, and—as the testimony implies—Eli had no more capacity for keeping track of his accounts than could be expected of the average Indian of his class; so that it is hardly to be expected that he could or did impart to his brother a knowledge of his affairs sufficient to create in his mind the degree of apprehension the law demands. These conclusions are fairly deducible.

The evidence relied upon by appellant to upset the findings and judgment of the jury and the court is marshaled in his brief as follows:

"From 1910 to December, 1913, he (defendant) had been letting the bankrupt have money until the bankrupt's indebtedness had grown to the large sum of approximately $12,000. During these years he had been sued at law on notes which he had signed with or for the bankrupt. On the occasion of the bringing of this action, Mr. Violette, the plaintiff's attorney, went to the home of the defendant and the two rode together from Plains to Missoula, Mont., on January 24, 1912, and Mr. Violette testified, 'He told me on that trip to Missoula—we sat together all the way down—of Eli's financial troubles and gave me a history of these troubles.' We were coming down on the train to settle the suit that was brought with one of the defendants; that was the reason he was coming in to see if he could settle, and on the train he discussed Eli's financial troubles and his financial condition with me. We talked about it most all the way. He told me then that likely he would have to pay this, that Eli was broke, that he could not pay his debts, that he owed other people, that was the substance of what he said. The sheriff, who served the papers in the suit referred to, came back from the defendant's home to Plains with the defendant, and during this trip the defendant told the sheriff 'that it was not his own personal debt but that it was Eli, that he went on a note with him at the Western Montana National Bank, and he said he would go in with me and try and settle it up in some way; he said Eli seemed to be in quite a little difficulty financially.' * * * The defendant told the witness that Eli owed him other money and that Eli 'was kind of hard up and owed quite a little.' Also, 'He mentioned owing other people and something to the effect that Eli was in bad shape financially.'"

Digitized by Google

The defendant himself testified that—

"In 1912 he went to the bankrupt and told him that if he kept on loaning him money he would be broke. Q. And, Mr. Morigeau, what made you say that to Eli? A. Well, sir, my money was going, and I could not see a prospect on his side where it was going. He was a brother of mine, and I said a whole lot, and I thought that would let him see a little where I got off at."

Again the witness was asked and testified as follows:

"Q. Well, what did you think, Mr. Morigeau, about the idea of his getting so heavily in debt to you, up to $12,000? A. Well, sir, after I was in so much I thought I might as well stay with it and go broke; it is hard to refuse."

And again:

"Q. Now, Mr. Morigeau, when you decided you would take this property from Eli in payment of everything he owed you, how much did you think the property worth? A. I thought I was getting 30 cents on a dollar and I might as well take that as nothing. Q. Might as well take that as nothing? A. Yes, and I don't believe it is worth any more to-day."

His further testimony was that, when he took the deed, he knew of no other debts for which Eli was liable; that he supposed at the time that no other claims than his own existed against him; that he did not ask Eli about his financial affairs, and no information came to him regarding them from Eli or from any other source. The testimony of Mr. Violette and the sheriff, Mr. Moser, referred to occurrences of two years prior to the giving of the transfer by Eli, and in the very nature of things could shed but little light on the financial condition of the bankrupt at the time of the giving of the transfer to the defendant. It is not disclosed by the record that Joseph believed that the money advanced by him to Eli was not applied to the discharge of other indebtedness owing by him; nor that the taking of the transfer would give him an advantage over other creditors of Eli of the same class. On these and other questions the jury reached a conclusion which the trial court approved. On the whole, we are convinced that the evidence sufficiently preponderates in favor of the bona fides of the transfer to fully justify the verdict and to sustain the judgment appealed from.

The judgment and the order denying a new trial are affirmed.

Affirmed.

HOLLOWAY, HURLY, and MATTHEWS, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

WILLIS v. PILOT BUTTE MINING CO. et al. (No. 4542.)

(Supreme Court of Montana. May 8, 1920.)

1. Master and servant ⟸418(1)—Compensation Act unconstitutional in attempting to confer on Supreme Court jurisdiction to try cause anew.

Workmen's Compensation Act, § 22(d), is unconstitutional in so far as attempting to confer on Supreme Court jurisdiction to try compensation case anew on appeal from district court as though matter was originally before it.

2. Master and servant ⟸417(1)—Compensation Act provision that trial in district court should be de novo constitutional.

District courts being courts of original jurisdiction, it was within constitutional power of Legislature to provide in Workmen's Compensation Act, § 22(b), that trial of a compensation case in district court should be de novo, but power given court is that of review rather than a trial anew, particularly in view of section 20(h).

3. Appeal and error ⟸1012(1) — Supreme Court reverses findings only where evidence clearly against them.

Supreme Court will not reverse findings of district court except where evidence clearly preponderates against them.

4. Master and servant ⟸273—Compensation held allowable for death of employé killed after altercation.

Where night foreman in mine, with authority over station tender, was accused of trying to frame him up for discharge as he had done another employé, and then ordered tender to signal for cage to be raised to next level of mine, but cage went to surface, where foreman attacked tender, and after assault and when tender had desisted from pursuit shot him, tender's widow is entitled to compensation under Workmen's Compensation Act for herself and child.

Appeal from District Court, Silver Bow County; Joseph R. Jackson, Judge.

Proceedings under the Workmen's Compensation Act by Martha Willis for compensation for the death of her husband, W. A. Willis, the employé, opposed by the Pilot Butte Mining Company, the employer, and the Ætna Life Insurance Company, the insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the district court, and from its judgment the employer and insurer appeal. Affirmed.

Frank & Gaines, of Butte, for appellants.
H. A. Tyvand, of Butte, for respondent.

MATTHEWS, J. On March 20, 1916, W. A. Willis, while employed as station tender for appellant mining company, was shot by Nathan Brooks, mine foreman for said company, and thereafter died. Willis was sub-

Digitized by Google

ject to the provisions of the Workmen's Compensation Act, and respondent, for herself and her minor child, filed with the Industrial Accident Board her proof of injury and death, and application for compensation. Two separate hearings were had before the board, and on August 30, 1919, award was made in accordance with the application. The company and its insurance carrier appealed to the district court of Silver Bow county, and, after a hearing, the court found in favor of respondent and entered judgment in accordance with the award made by the board. The matter is before us on an appeal from the judgment of the district court.

It was in the district court, and is here, conceded that the death of Willis resulted from an accident or fortuitous event arising in the course of his employment, and the only question presented is: Did the injuries resulting in the death of Willis arise "out of" his employment?

We are asked to try the case anew and, disregarding the findings of the board and of the trial court, to determine the question so presented, as an original proceeding, on the record made in the district court and before the board, as provided in section 22 (d) of the Compensation Act (chapter 96, Laws of 1915), which section reads as follows:

"Either the board, or the appellant [applicant], or any adversary party, if there be one, may appeal to the Supreme Court. * * * When any such cause is so appealed it * * * shall be tried anew by said Supreme Court upon the record made in said district court and before said board. * * *"

It is urged that this court stands in the same position as a district court on an appeal from a justice's court and that the trial here is a trial de novo. But this cannot be. Section 2, art. 8, of our Constitution, provides:

"The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only. * * *"

And "shall have power * * * to issue and to hear and determine * * * such * * * original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction." Section 3, art. 8.

It "shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law" (section 2, art. 8), and shall have power to issue, hear, and determine the six original writs named in section 3 of article 8.

"The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Section 29, art. 8, Constitution of Montana.

In re Weston, 28 Mont. 207, 72 Pac. 512, this court said:

" 'The source of all power vested in the Supreme Court is the Constitution of the state, and in it must be found the measure of jurisdiction.' * * * The power to issue, hear, and determine the six original writs enumerated above marks the limit of the original jurisdiction of this court."

[1] It will be readily seen, therefore, that the Legislature was without authority to grant to this court jurisdiction to try the cause "anew" as though the matter was originally before us, and, to the extent that section 22(d) of the Compensation Act attempts to confer such jurisdiction, it is unconstitutional. In the language of the opinion in the Weston Case:

"The full measure of the relief which may be granted is a review of the decision of the lower court and a judgment of this court affirming, modifying, or reversing the decision. Further than this we cannot go."

Section 22(b) of the act provides that, on an appeal to the district court from the judgment of the board, "the trial of the matter shall be de nova (de novo)," but further provides that—

"Upon such trial the court shall determine whether or not the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstances of the case," and provides further, "The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard, on the record of the board as certified to the court by it," and (c) "If the court shall find from such trial, as aforesaid, that the findings and conclusions of the board are not in accordance with either the facts or the law, or that they ought to be other or different than those made by the board, or that any finding and conclusion or any order, rule or requirement of the board is unreasonable, the court shall set aside such finding, conclusion, order, judgment, decree, rule, or requirement of said board, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises."

[2] As district courts are courts of original jurisdiction, it was within the constitutional power of the Legislature to provide that the trial in the district court shall be de novo, as indicated; but the power given the district court is that of review, rather than a trial anew. That this is true is emphasized by the provisions of section 20(h) that—

"No orders or decisions of the board shall be subject to collateral attack, and may be reviewed or modified only in the manner provided herein."

[3] The district court of Silver Bow county followed the procedure outlined in the act, and made findings "that the said Industrial Accident Board as far as it proceeded reg-

Digitized by Google

ularly, pursued its authority; that the findings of the said Industrial Accident Board ought to be sustained and that its findings are reasonable under all the circumstances of the case; that the accident to W. A. Willis, which resulted in his death, arose out of his employment for the Pilot Butte Mining Company, and therefore compensation should be awarded to the widow of W. A. Willis, Martha Willis, as per the provisions of the Workman's Compensation Act," and rendered judgment accordingly, without making any further findings in the premises. Our duty, then, is but to determine whether the evidence before the board clearly preponderates against its findings, as adopted by the court; if not, we must affirm the judgment. The rule that the Supreme Court will not reverse the findings of the district court, except where the evidence clearly preponderates against them, is so well settled in this jurisdiction as to hardly require repetition.

Willis was station tender in appellant company's mine; Brooks, the night foreman with authority over Willis. Just prior to the shooting, Brooks visited Willis on the 2,600-foot level and communicated to him an order of the day foreman that he (Willis) should remain on shift until relieved. According to Brooks, an altercation arose concerning his action in discharging one Shannon, Willis accusing him of trying to "frame up on" him as, he contended, Brooks had done on Shannon. Brooks then ordered Willis to signal for the cage to be raised to the next level that he might make an inspection there. Willis gave some signal and entered the cage with Brooks, which he had a right to do. Whether Willis gave the correct signal which was misunderstood by the engineer, or whether he gave the signal to hoist to the surface, could not be ascertained. The cage continued to the surface, and, on leaving it, the two men immediately met in personal encounter. Who was the aggressor is not entirely clear; nor is the evidence satisfactory as to the cause of the trouble. According to Brooks' version of the affray, while he gives no satisfactory explanation for the act, "Willis attempted to grab me and get my lamp, which he finally did"; that he then broke away and ran for the office. On the other hand, Willis being advised that he could not live, made the following statement:

"Since I am going to die, I want you to know just what happened. We were coming up on the cage together and, as we got off the cage on the surface, Brooks hit me on the jaw with his heavy carbide lamp. I clinched him and got the lamp, but he broke away and I after him through the side door of the boiler room, through into the engine room. When I reached the front door of the engine room I could not see him, and thought to myself I'd 'bunch it' (meaning quit). So I started for the dry, and, just as I turned off the trail to leave his lamp on the step of the office, Brooks opened the door with a gun in his hand and aimed at me. I was startled at sight of the gun, but did not think he was going to 'blast' as he held the gun on me for fully a minute before he shot me. I backed towards the dry, and he followed and shot me again and was going to shoot the third time, when I said, 'Well, I guess you got me,' and I fell." Asked the question: "Was there any other trouble?" Willis replied: "No trouble at all; he killed me for nothing, that's all."

Two witnesses were present but saw little of the affray, and their testimony might easily corroborate the theory that either was the aggressor. After the shooting, Willis had a cut on his jaw, while Brooks had no mark on either his face or body. It is significant that, while Brooks ran to the office, Willis followed at a walk. This fact would seem to support his statement that he was but going to the dry to change his clothes; had he been intent on continuing the combat, it would seem that he would have sought to overtake Brooks on the way to the office.

The second hearing was held before the board some two years after the death of Willis and after Brooks had stood trial for the killing; while the first hearing was had before the trial and while Brooks would wish to make the circumstances as favorable to himself as possible. On this second hearing, Brooks still exhibited considerable heat on account of the fact that he was taken to the surface when he wanted to go to the next level, as shown by the following excerpt from his testimony:

"Q. Do you remember when you first saw him that morning? A. On the 2,600 when I went to make my inspection. Q. And then you both came up on the cage together?" Without further question or suggestion, Brooks answered: "We both came up on the cage together. I had an inspection to make, and he took me on over. He had no business going up above. His business was to hoist rock, and he took me on top. I did not want to go on top."

It might be reasonably inferred, taking the statements of the two men together, that Brooks was angered by the action of Willis in taking him "to the top" and thus disobeying his directions, and that the blow struck with the lamp was in the nature of punishment for that act of carelessness or disobedience, and that what took place thereafter was all a part of the same transaction, and the shooting was a sequence and a part of this quarrel over the work. This was the theory of the board when it found that "the possibility of quarrels was an existing fact, as evidenced by the act of the shift boss hitting him on the head with a heavy carbide lamp, apparently because of a mistake in taking the cage to the surface when it should have stopped at the 2,400-foot level," which finding is declared by the district court to be "reasonable."

Digitized by Google

The board also found that—

"The conversation about Shannon would naturally be the reply to the giving of this order (to remain on shift until relieved), as there is testimony to show that the men on the shift were more or less irritated at the discharging of some of their fellow employés, including Shannon, by Mr. Brooks. Some significance is attached to this order by the exclamation of the day foreman, Mr. Little, at the time of the shooting. He seemed to immediately conclude that his order was the cause of it." "There is not a particle of evidence to show that there was any personal animosity between Mr. Brooks and Mr. Willis. In fact, all the evidence shows that Mr. Willis was a peaceably inclined man. * * * The irresistible inference is that this fatal quarrel arose from the work or employment in which Willis was engaged."

The difficulty in this and kindred cases arises from the fact that we must determine a question of fact rather than a proposition of law. No clear-cut rule is, or can be, laid down; each case must be decided on its own facts and attendant circumstances and forms no precedent for future decisions.

"Previous decisions are illustrations of the way in which judges look at cases, and in that sense are useful and suggestive; but I think we ought to beware of allowing tests or guides which have been suggested by the courts in one set of circumstances, or in one class of cases, to be applied to other surroundings, and thus by degrees to substitute themselves for the words of the Act itself." Per Lord Loreburn, L. C., Blair v. Chilton, 8 B. W. C. C. 607, 113 L. T. Rep. (n. s.) 514, aff. B. W. C. C. 324, 30 T. L. Rep. 623; foot-note 76, p. 73, Workman's Compensation Act, a Corpus Juris Treatise.

And the same jurist, in Kitchenham v. Steamship Johannesburg, A. C. 417, 4 B. W. C. C. 311, said:

"We have to decide each case on the facts. Argument by analogy is valueless. I am getting afraid to say anything more by way of judgment than that the appeal should be allowed or dismissed, because what one says in one case is used as an argument why one should decide a particular way in another case."

However, certain general rules will aid in the determination of the question.

In the case of Wiggins v. Industrial Accident Board, 54 Mont. 335, 170 Pac. 9, L. R. A. 1918F, 932, Ann. Cas. 1918E, 1164, this court laid down a general rule as to what accidents come within the provisions of the act, as follows:

"Without attempting to formulate a rule which will include every injury within the meaning of this phrase, it is sufficient for the purposes of this appeal to say that if, by reason of the nature of the employment itself or the particular conditions under which the employment is pursued, the workman is exposed to a hazard peculiar to the employment under the circumstances, and injury results by reason of such exposure, then it may be said fairly that the injury arises out of the employment, or, stated in different terms, the workman must have been exposed by his employment to more than the normal risk to which the people of the community generally are subject, in order that his injury can be said to arise out of his employment," "without reference to * * * fault and altogether irrespective of whether, under existing laws, actions for damages would lie." Lewis and Clark County v. Industrial Accident Board, 52 Mont. 6, 155 Pac. 268, L. R. A. 1916D, 628.

In the case of State ex rel. School District v. District Court, 140 Minn. 470, 168 N. W. 555, the Supreme Court of Minnesota said:

"That under some circumstances an injury from an assault is one caused by accident arising out of the employment is without question; and it is as much without question that under other circumstances it is not. When the nature of the employment is such as naturally to invite assault, or when the employé is exposed to an assault by the character of his work, as when he is protecting or in charge of his employer's property, and the assault naturally results because of the employment and not because of something unconnected with it, so that it is a hazard or special risk of the work, the cases say that it arises out of the employment." (The court then summarizes the cases so holding.) "When the assault is unconnected with the employment, is personal to the assailant and the one assaulted, is not because the relation of employer and employé exists, and the employment is not the cause, though it may be the occasion, of the wrongful act, and may give a convenient opportunity for its execution, the cases say that the intentional injury does not arise out of the employment [giving illustrative cases]."

Bradbury, in his work on Workmen's Compensation (chapter 8, art. F, "Assaults"), digests many cases of assault, clearly demonstrating that the courts are in practical accord that (1) personal altercations in no way connected with the employé's duties do not give rise to accident arising out of the employment, but that (2) where the employé is performing work he was employed to perform, and is assaulted because of the work, or of some incident in connection with the work, or his manner of doing it, and receives an injury, it is an accident arising out of his employment.

Section 24(a) of our Compensation Act provides:

"Whenever this act or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court."

And in the case of Shea v. North-Butte Mining Co., 55 Mont. 522, 179 Pac. 499, it is stated that—

"The theory of such legislation is that loss occasioned by reason of injury to the employé

Digitized by Google

shall not be borne by the employé alone—as it was under the common-law system—but directly by the industry itself and indirectly by the public, just as is the deterioration of the buildings, machinery and other appliances necessary to enable the employer to carry on the particular industry."

Among the illustrative cases cited by Bradbury, at pages 589, 590, we find the following:

"A newspaper reporter was directed by his employer to get the first copy of the newspaper off the press to see if the makeup was correct. He was forcibly resisted by the pressman, the reporter repeatedly and properly attempting to do as he was instructed. When about to report the matter to his superior, the reporter was unexpectedly and without other provocation assaulted. It was held that this was an accidental injury arising out of the employment. (Brown v. Berkely Daily Gazette, 2 Cal. Ind. Acc. Com., 32, [841].)

"Two workmen had an altercation in which the one who finally committed the assault was the aggressor and the employer observing it, told them they would both be discharged unless they desisted. A little later the workman who had originally been the aggressor approached from behind the other workman and struck him on the head with such force that he afterwards died. It was held that the accident arose out of the employment. (McNiel v. Mountain Ice Co., 38 N. J. Law J. 109, 11 N. C. C. A. 238.)

"A driver told a fellow workman in a stable that he was using too much water on a horse, when the workman intentionally sprinkled some water on the driver, who was the claimant. The claimant a moment later spoke to the fellow workman, who slapped the claimant on the shoulder, and as the claimant turned around a finger of the fellow workman struck the claimant in the eye causing injuries by which he lost the sight of the eye. It was held that there was sufficient evidence to sustain a finding that the injury arose out of the employment. (Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, [L. R. A. 1917A, 344].)"

Numerous other cases are noted, but we will not cumber this opinion further by their quotation.

In its final order the board says:

"It must be remembered that Mr. Brooks was night foreman, having charge of the property and employés of the Pilot Butte mine, at the time of the accident, and that he stands in the position of the employer. What he knew and did was really what the employer knew and did. In support of this view is the case of Kinsel v. North Butte Mining Co., 44 Mont. 445, 120 Pac. 797. Part of the opinion in point on this question is as follows: 'The evident purpose was to show that Wells was a vice principal. He was engaged in performing a primary absolute and unassignable duty of the master. * * * This fact in itself takes him out of the category of fellow servants and makes him a vice principal. * * * His negligent act was that of the master itself.' "

There seems to be some authority for an additional exception to the rule that ordinarily assault cases do not form the basis for an award when there is a difference in rank between the employé assaulted and the assaulting employé. Thus in the case of Metropolitan Redwood Co. v. Industrial Accident Board (Cal. App.) 182 Pac. 315, after stating the general rule, the court continues:

"A second exception is also noted in the cases cited which arises * * * where the injured employé was the superior in rank to the one causing his injuries, the assault arising out of an attempted exercise of discipline on the part of the superior employé."

It would seem that, if such a case constitutes an exception to the rule, the converse would also be true, and an exception would exist where, under like conditions, injury resulted to the employé sought to be disciplined.

A case similar to that just noted is Polar Ice Co. v. Mulray (Ind. App.) 119 N. E. 149, where the facts were that Mulray was a bookkeeper charged with the duty of keeping a record of outgoing merchandise and the returns made by the drivers, and collecting for shortage; a driver, being angered over an attempted collection, caused trouble in the office, when Mulray drove him off with a revolver, shooting several times over his head; the driver returned armed and killed Mulray. The court in closing its opinion said:

"While it may be said that the inference that the unfortunate accident in the case was the result of a risk reasonably incident to Mulray's employment, and therefore arose out of his employment, it is not the only inference which might be drawn from the evidence, yet it is a very reasonable one, and since the Industrial Board has so concluded, we are required to uphold the award."

[4] Here the inference might be drawn that the trouble between Willis and Brooks arose on account of a feeling of enmity between Willis toward Brooks by reason of the discharge of Shannon, or a feeling that Brooks was attempting to seek excuse for his discharge; or it might be inferred, as it was by the board, that Brooks was the aggressor in the affray because of his anger toward Willis for carrying him to the surface when he did not want to go above the 2,400-foot level, and that what took place thereafter was all a part of the same transaction, resulting finally in the death of Willis, as a result of, and arising out of, his employment. Assuming that such were the facts, under the authorities and sound reasoning, his widow should be awarded compensation for herself and child; and the board having so found, which finding was declared by the district court, on review, to be reasonable, we are of the

Digitized by Google

opinion that the judgment of the district court should be affirmed.

Affirmed.

HOLLOWAY, HURLY, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

STATE ex rel. LYMAN v. STEWART, Governor, et al. (No. 4577.)

(Supreme Court of Montana. May 8, 1920.)

1. States ⟸114—May engage in business of operating grain elevator.

The state may lawfully engage in the business of operating a grain elevator or another similar business for the benefit of the public; such action not being prohibited by the Constitution.

2. Constitutional law ⟸26—Legislature possesses sovereign lawmaking power subject to constitutional limitation.

Subject to constitutional limitation, the Legislature possesses all the power of lawmaking which inheres in any independent sovereignty.

3. States ⟸114—Constitutional authorization held to include operation of grain elevator by state.

Under Const. art. 10, § 1, the state may establish and operate any sort of an institution which the Legislature may determine the public good requires, including that of a grain elevator.

4. Taxation ⟸40(6)—Tax levy on agricultural lands for support of state-owned grain elevator held not to violate constitutional uniformity.

Laws 1917, c. 150, supplemented by Laws 1919, c. 204, relating to bond issues for the construction of terminal grain elevators, and providing for a tax levy on "lands agricultural in character," does not violate the uniformity provision of the Constitution.

5. Statutes ⟸47—Statute making "agricultural lands" liable for taxation for support of state-owned grain elevator held not uncertain; "agriculture"; "agricultural in character."

Under Laws 1917, c. 150, supplemented by Laws 1919, c. 204, relating to bond issues for construction and maintenance of state-owned terminal grain elevators, and providing for a tax levy on lands agricultural in character, the words "agricultural in character" are sufficiently definite and certain to enable the assessing officers to determine what particular lands shall be listed for taxation, the term lands "agricultural in character" being synonymous with agricultural lands, "agriculture" being the art or science of cultivating the ground.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Agricultural Lands.]

6. States ⟸116—Statute creating state debt without providing for payment is unconstitutional.

A statute creating a state debt, without providing for the levy of a tax for its payment, is void under Const. art. 13, § 2.

7. States ⟸116—Statute held sufficient to provide for taxes to purchase and maintain state-owned grain elevator.

Laws 1917, c. 150, § 4, *held* sufficiently to provide for the levy of a tax for the purchase and maintenance of a state-owned terminal grain elevator.

8. Constitutional law ⟸48—Constitutionality of statute will be sustained unless it appears beyond a reasonable doubt to be unconstitutional.

The courts will sustain the constitutionality of the law unless it appears beyond a reasonable doubt to be unconstitutional.

9. Constitutional law ⟸70(1)—Courts will not determine whether legislative provision for tax levy is sufficient for purpose contemplated.

Whether a tax levy provided by the Legislature for the purpose and maintenance of state-owned terminal grain elevators is sufficient to meet the obligation of the state is a legislative question with which the court has nothing to do, and, in the absence of a showing of insufficiency, it will be presumed to be ample.

Original application for injunction by the State, on relation of E. F. Lyman, against Samuel V. Stewart, Governor, and others. Dismissed on demurrer.

Pray & Callaway, of Great Falls, for relator.

S. C. Ford, Atty. Gen., and Frank Woody, Asst. Atty. Gen., for respondents.

MATTHEWS, J. This is an original application for an injunction to restrain the respondent board of examiners from issuing and selling on behalf of the state bonds to the amount of $250,000 in excess of the constitutional limit and over and above any bonded indebtedness heretofore incurred by the state, authorized by chapter 150 of the Laws of the Fifteenth Legislative Assembly, supplemented by chapter 204 of the Laws of the Sixteenth Legislative Assembly, to procure funds for purchasing or building a terminal grain elevator, with the necessary equipment, at Great Falls, Mont., to be controlled and operated by the state and used for the storage and marketing of grain purchased in Montana. Chapter 150 in terms provides for the submission to the qualified electors of the state, at the following general election, of the question of the issuance of such bonds. So far as pertinent here, the following is an epitome of its provisions:

Section 1 authorizes the state board of examiners to issue bonds in the name of the

Digitized by Google

state of Montana to the amount of $250,000 for the purpose above specified.

Section 2 provides that the bonds shall be issued in denominations of $1,000 each, that they shall become due in ten years from the date of their issuance, redeemable and payable, however, at the option of the state at any time after five years from the date thereof at any interest paying period, and that they shall bear interest at a rate of not to exceed 5 per cent. per annum, payable semiannually on June and December 15 of each year, at the office of the state treasurer.

Section 4 provides:

"The state board of examiners shall make a charge of not more than two and one-half (2½) cents per bushel for grain stored in the terminal elevator and the money so received after paying the expense of maintaining the terminal elevator shall be paid into the state treasury and credited to a separate fund designated as the 'terminal elevator fund,' and said fund shall be used exclusively for the payment of the interest and redemption of such terminal elevator bonds herein provided for. If the money so paid into the 'terminal elevator fund' is not sufficient to pay the semiannual interest on the bonds and the redemption thereof, then and in that event there shall be levied annually not exceeding one-half (½) of a mill on the dollar on all lands, agricultural in character, which said tax when collected by the county treasurer shall be accounted for and paid over to the state treasurer to be by the state treasurer held in the 'terminal elevator fund,' which fund shall be used exclusively for the payment of the interest on such bonds and for the redemption thereof."

Section 5 directs the county assessors of the several counties of Montana, commencing with the year in which the bonds are issued and continuing so long as such bonds, or any part of them, or any interest thereon, shall remain unpaid, shall designate upon the assessment roll the lands subject to the tax.

Chapter 204 above (Laws of 1919, p. 486), provides for the appointment of a board of managers for the elevator, prescribing their powers and duties, and providing for the location, construction, maintenance, and operation of the elevator, and for the issuance of bonds by the state board of examiners under the authority conferred by the people by their vote under chapter 150 at the general election in November, 1918. Section 5 is as follows:

"Upon completion of such study and investigation and having decided upon a workable plan for the construction and successful operation of said terminal elevator and within sixty days after its organization, the board of managers shall notify the state board of examiners that it is ready to proceed with the construction of said terminal grain elevator. The said board of examiners of the state of Montana is hereby authorized and directed to proceed with the issuance and sale of bonds of the state of Montana to the amount of two hundred and fifty thousand ($250,000) dollars for the purpose of constructing said terminal grain elevator with the necessary equipment at Great Falls, Montana, pursuant to the provisions of chapter 150 of the Session Laws of the Fifteenth Legislative Assembly of the state of Montana, and the vote of the electors at the general election in November, 1918."

Section 10 directs that the money received from the storing and handling of grain, after the payment of the expense of maintaining and operating the elevator, including the salary of the superintendent and expense of the board of managers and premiums on the bonds, shall be paid into the state treasury to the credit of the "terminal elevator fund," and that this fund shall be used exclusively for the payment of the interest and principal of the elevator bonds.

On January 29 of this year the board, assuming to act under the provisions of chapters 150 and 204, advertised the bonds for sale. On February 28 this action was brought to enjoin the issuance and sale of the bonds on the ground that the legislation referred to is unconstitutional. The Attorney General interposed a general demurrer to the complaint. The controversy was thereupon submitted for final decision upon the questions of law thus raised.

[1, 2] 1. It is not questioned by counsel for relator that the state may lawfully engage in the business of operating a grain elevator or in other similar business for the benefit of the public, as distinguished from private business. Indeed, it could not be questioned, for the reason that there is no provision of the Constitution which prohibits it. In the absence of such provision, the Legislature is left free to establish, and to provide by law for the conduct of, such a business so long as the plan adopted by it does not inpinge upon some other provision or limitation in the Constitution or some one of the powers delegated by the people to the federal government. It is held that the state may establish such institutions under its police power. State ex rel. Lyon v. McCown, 92 S. C. 81, 75 S. E. 393; Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857. Indeed, it is settled law in this jurisdiction that, subject to these limitations, the Legislature possesses all the power of lawmaking which inhere in any independent sovereignty. State ex rel. Sam Toi v. French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415; In re Pomeroy, 51 Mont. 119, 151 Pac. 333; State ex rel. Hillis v. Sullivan, 48 Mont. 320, 137 Pac. 392; Hilger v. Moore, 56 Mont. 146, 182 Pac. 477.

[3] Section 1 of article 10 of the Constitution declares that—

"Educational, reformatory and penal institutions, and those for the benefit of the insane, blind, deaf and mute, soldiers' home, and such

Digitized by Google

other institutions as the public good may require, shall be established and supported by the state in such a manner as may be prescribed by law."

This language is broad enough in its scope to include any sort of an institution which the Legislature in its discretion may determine the public good requires. Therefore, whether the authority of the Legislature to establish and provide for the support of any public institution by the state is to be found in this clause of the Constitution or in its general police power, there can be no doubt that it exists.

2. It is suggested, though not seriously urged, that the provision requiring the levy of the tax provided for on "lands agricultural in character" violates the uniformity provision of the Constitution. This question is, we believe, disposed of in this jurisdiction by the opinion in the case of Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 Pac. 554, and in Hill v. Rae, 52 Mont. 378, 159 Pac. 826, L. R. A. 1917A, 495, Ann. Cas. 1917E, 210. In the first case noted this court said:

"The state may classify persons and objects for the purpose of legislation, provided the classification is based upon justifiable distinctions, and for a purpose within the legislative power."

In the second:

"It does not follow, however, that the object in respect to which the classification is made must commend itself to 'certain preconceived and deeply rooted notions of lawyers' (Cunningham v. Northwestern Improvement Co., supra), or that the classification must always depend 'on scientific or marked differences in things or persons or relations; it suffices if it is practical, and it is not reviewable unless palpably arbitrary.'"

[4] There being a logical reason for assessing "lands agricultural in character" for the support of an institution which will directly benefit only the owners of such lands, the Legislature was acting within its constitutional power when it made the classification.

[5] 3. The next question presented is: Are the words "agricultural in character" sufficiently definite and certain to enable the assessing officers of the state to determine what particular lands shall be listed for taxation? Relator insists that they are not, for the reason that the phrase used is not defined in the act, "nor was there any act, when chapter 150 was passed, defining 'agricultural lands' throughout the state, to our recollection." Even if such were the case, we do not apprehend that it would be an unsurmountable difficulty, for "that is certain which can be made certain" (Rev. Codes, § 6206), and if the term has, in the law, a well-defined meaning, its use, without specific definition, would not render the act inoperative for uncertainty.

Chapter 147 of the Laws of 1909 makes a specific classification of state lands, general throughout the state, which section was in effect at the time of the passage of the section in question, and which is based on a classification contained in our Constitution, to wit:

"Said lands shall be classified by the board of land commissioners, as follows: First, lands which are valuable only for grazing purposes. Second, those which are principally valuable for the timber that is on them. Third, agricultural lands. Fourth, lands within the limits of any town or city or within three miles of such limits." Section 1, art. 17, Constitution of Montana.

Here the term "agricultural lands," which is synonymous with the term "lands agricultural in character," includes all lands of the state neither included within the limits of a town or city nor within three miles of such limits, lands valuable only for grazing purposes, and lands principally valuable for the timber on them, and, except for the special exclusion of lands which may be agricultural in character, lying within the three-mile limit of cities and towns, which has no application here, might well be taken as a guide for the classification under this act.

The word "agricultural" is defined as pertaining to, connected with, or engaged in agriculture. Century Dictionary.

"The term 'agriculture' has been defined to be the 'art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, planting the seeds, the raising and harvesting the crops and the rearing, feeding, and management of live stock; tillage, husbandry, and farming.'" 2 Corpus Juris, 988, note b.

"It is equivalent to husbandry, and 'husbandry,' Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, or fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces. * * * But in a more common and appropriate sense it is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast." Simons v. Lovell, 7 Heisk. (Tenn.) 510–516.

A phrase having much the same meaning, under the California statutes, is "suitable for cultivation." This phrase was construed in the case of Robinson v. Eberhart, 148 Cal. 495, 83 Pac. 452, to include all land which, by ordinary farming methods, is fit for agricultural purposes.

It will be seen that the term "agricultural lands," or lands "agricultural in character," may be used in a broad or in a restricted sense, depending upon the intention of the Legislature in the use of the term, and that the legislative intent expressed in the act under consideration was that, as the act was passed for the benefit of those owning lands susceptible of being plowed and seeded, or

Digitized by Google

from which crops may be produced, under section 5 of chapter 150, the assessing officers should list those lands within their jurisdiction, and only those, of the character indicated. Many tracts of land not now used for the purpose of raising grain are "susceptible" of being used for such purpose; hay lands and pasture lands, other than those "valuable only for grazing purposes," may produce crops.

Conceding the above to be the intention of the Legislature, and following the constitutional and statutory provisions in effect at the time of the passage of the act, there should be no great difficulty experienced by the assessing officers, and no confusion as between the several counties of the state, and all lands listed as being subject to the tax in one county should, therefore, correspond to like assessment in each of the other counties.

4. It is next urged that the provisions of section 4 of the chapter, heretofore set out in full, do not meet the requirements of the Constitution as to the levying of taxes for the payment of the interest and the extinguishment of the debt within the specified time. It is contended that the means provided are inadequate, in that the section provides for the levying of a tax only in the event the receipts from the terminal elevator are not sufficient, after deducting running expenses, to meet the interest and provide the proper amount to be placed in the sinking fund.

Section 2 of article 13 of the Constitution provides, in so far as applicable here, that—

"Such law shall specify the purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof."

[6, 7] Counsel cites a number of cases involving statutes creating a state debt without providing for the levying of such a tax, and where the court held the law to be unconstitutional. Without question, such a statute would be void under the above provision of our Constitution. But in chapter 150 section 4 does provide for the levying of a tax for the purpose designated. Disregarding for the moment the provision for the payment of interest, etc., from net proceeds of the terminal elevator, the phrase, "There shall be levied annually," etc., is the phrase commonly employed in acts which do "provide for the levy of a tax," under the constitutional provision quoted, and, standing alone in this section, in conjunction with the provisions of section 5, which provides that "the county assessors of the counties in Montana, commencing with the year wherein the bonds herein provided for may be issued and continuing so long as such bonds * * * may remain unpaid shall designate upon the assessment rolls the lands subject to the tax in the foregoing section, provided for," and which makes no provision for a withholding on the part of the assessors until it shall be ascertained whether the net proceeds of the plant will take care of the matter, would give ample authority for saying that the Legislature did "provide for" the tax and provide the power to make the assessment thereunder and to collect the tax on the lands subject thereto. Section 4 is, it is true, loosely drawn, and, to be effective, requires revision. The Legislature should have first provided for the levy of the tax and then provided a method by which, if in any one year after the year in which the bonds are issued the net earnings in the terminal elevator fund shall be sufficient to meet the demands, the tax should not be collected for that year.

[8] The rule is well settled in this jurisdiction that the court will sustain the constitutionality of a law, unless it appears beyond a reasonable doubt to be unconstitutional. In re O'Brien, 29 Mont. 530, 75 Pac. 196, 1 Ann. Cas. 373; Northwestern Mut. Life Ins. Co. v. Lewis and Clark County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572; State v. Camp Sing, 18 Mont. 128, 44 Pac. 516, 32 L. R. A. 635, 56 Am. St. Rep. 551; Missouri River Power Co. v. Steele, 32 Mont. 433, 80 Pac. 1093; Spratt v. Helena P. & T. Co., 37 Mont. 60, 94 Pac. 631. Under the head "Considerations Calling for Construction," the author on the subject, in 25 R. C. L. p. 959, says:

"If the statute under consideration appears to be in conflict with a provision of the Constitution, state or federal, there is an ambiguity; for it is always presumed that the Legislature did not intend to violate either Constitution; it is always presumed it intended its enactments to become valid and enforceable laws. * * * Another occasion for construing a statute is where uncertainty as to its meaning arises not alone from ambiguity of the language employed, but from the fact that giving a literal interpretation of the words will lead to such unreasonable, unjust, or absurd consequences as to compel a conviction that they could not have been intended by the Legislature"—citing cases.

Again, on page 868 of the same work, we find the rule that—

"The reason of the law, as intended by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage."

And in section 225, p. 974, it is stated that—

"Courts cannot by construction supply casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances was not in the minds of the legislature at the time of the enactment of the law."

Digitized by Google

But, while the court cannot add to or supply words or phrases to give to the statute some supposed intention of the Legislature—

"when words occur in a statute which can be given no effect consistent with the plain intent of the statute, they must be rejected as without meaning. And words or phrases which, if given effect, might defeat the manifest purpose of the statute, will be eliminated or regarded as surplusage."

It must be presumed that the Legislature intended to do its duty. That duty in the instant case was to provide for a levy of taxes to meet the interest and discharge the debt within the time provided. Clearly it did not intend that there should be a hiatus when these obligations would not be met, and we think, therefore, that from the loosely worded provisions of section 4 we can presume that the Legislature intended, under any circumstances, that these obligations be met as they fall due, and, by following the rules of construction laid down, eliminate those provisions which would render the section uncertain, and, if sufficient remain to provide for the meeting of these obligations as they fall due, we can uphold the law in its modified form, though we cannot interpolate words into the statute.

Following these suggestions, we have the provision that—

"There shall be levied annually not exceeding one-half (½) of a mill on the dollar on all lands, agricultural in character, which said tax when colected by the county treasurer shall be accounted for and paid over to the state treasurer to be by the state treasurer held in the 'terminal elevator fund,' which fund shall be used exclusively for the payment of the interest on such bonds and for the redemption thereof."

Section 5:

"That the county assessors of the counties in Montana, commencing with the year wherein the bonds herein provided for may be issued and continuing so long as such bonds shall or any part thereof or any interest thereon may remain unpaid shall designate upon the assessment rolls the lands subject to the tax in the foregoing section, provided for."

And we have also the provision that the net proceeds from the elevator shall also be held in such "terminal elevator fund" for a like purpose, and that the provision for meeting these obligations out of the net proceeds of the elevator may be disregarded until such a time as the Legislature may make suitable provision for the payment of the interest on the bonds and the discharge of the principal debt out of the surplus, if any there be, in said fund.

[9] Whether the levy of one-half mill on the dollar is sufficient to meet the obligation is a legislative question with which the court has nothing to do. State v. Holland, 37 Mont. 393, 96 Pac. 719. No showing is made that it will not be sufficient, and for the purposes of this hearing it must be presumed that it will be ample.

Other questions are raised in the complaint filed as to the constitutionality of the act, but were conceded in argument to be without merit, and are therefore not considered.

In our judgment, the act is not open to attack on the grounds urged, and the demurrer is therefore sustained, and the proceedings dismissed.

Dismissed.

HOLLOWAY, HURLY, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

STATE ex rel. WOOSTER v. DISTRICT COURT OF FOURTH JUDICIAL DIST., RAVALLI COUNTY et al. (No. 4623.)

(Supreme Court of Montana. May 19, 1920.)

1. Judges ⟸40—Laws covering disqualification of judge and change of venue to be construed together.

Rev. Codes, § 6315, as amended by Laws 1909, c. 114, relative to the disqualification of a district judge for imputed bias, and sections 6506 and 6507, relative to change of venue after such disqualification has been effected, are companion measures and to be construed together.

2. Venue ⟸49(1)—Disqualified judge without power to grant change of venue unless judge called in fails to appear.

Under Rev. Codes, § 6315, as amended by Laws 1909, c. 114, and section 6506, when an affidavit of disqualification for imputed bias is filed in a district having three judges, it is the duty of the judge to call in another judge of such district to preside, and he has no power to grant a change of venue until another judge had been called in, and fails to appear and assume jurisdiction for 30 days after the motion was made.

3. Venue ⟸75—Disqualified judge granting change of venue must make an order showing reason.

When a judge against whom an affidavit of disqualification for imputed bias has been filed grants an order changing the venue, an order, reciting that another judge has been called in and has failed for 30 days after filing of the motion to appear and assume jurisdiction should be made, and entered of record.

4. Certiorari ⟸28(2)—Lies to annul order granting change of venue by disqualified judge.

An order for a change of venue made by a judge against whom an affidavit of disqualifica-

Digitized by Google

tion for imputed bias has been filed without calling in another judge may be annulled by writ of review.

Original writ of review by the State, on relation of M. E. Wooster, against the District Court of the Fourth Judicial District for the County of Ravalli, and R. Lee McCulloch, a Judge thereof, to review an order in an action by M. E. Wooster against Henry A. Jones and others. Order annulled.

Madeen & Russell, of Missoula, for relator.
Hall & Pope, of Missoula, for respondents.

HOLLOWAY, J. On October 8, 1919, an amended complaint was filed in cause No. 3299, then pending in the district court of Ravalli county, wherein M. E. Wooster is plaintiff and Henry A. Jones and others are defendants. Thereafter defendants, other than Jones, appeared by demurrer and motion to strike, and defendant Jones appeared by a general demurrer. On November 7 the plaintiff prepared and filed an affidavit, imputing bias and prejudice to Hon. R. Lee McCulloch, the presiding judge. On January 27, 1920, counsel for defendants, other than defendant Jones, filed their motion for a change of venue upon the ground that Judge McCulloch had been disqualified by the filing of plaintiff's affidavit. On February 19, 1920, defendant Jones filed an amended demurrer, and four days later plaintiff filed his motion to strike the amended demurrer from the files. On April 12, 1920, the motion for change of venue was granted, and the cause ordered to Powell county for trial. Upon application to this court a writ of review was issued, and the return made by the clerk of the court discloses the foregoing facts and none other.

[1] The statutes providing for the disqualification of a district judge for imputed bias (section 6315, Rev. Codes, and chapter 114, Laws of 1909, amendatory thereof) and for change of venue after such disqualification has been effected (sections 6506–6507, Rev. Codes) have been considered by this court in numerous cases. Chapter 114 above worked a substantial change in the law as it existed theretofore. The provisions of that chapter and of section 6506 above are the only ones material to this controversy. These statutes are companion measures and are to be construed together. The case of State ex rel. Anaconda C. Min. Co. v. Clancy, 30 Mont. 529, 77 Pac. 312, was decided long before the amendment was made to section 6315 above, and much that was said in the opinion was rendered nonauthoritative by the amendment. Since 1909 the law upon the subject before us has been reasonably plain.

[2] In the Fourth judicial district there are three judges, so that, immediately upon the affidavit of disqualification being filed, it became the duty of Judge McCulloch to call in another judge of that district to preside in the action (subdivision 4, § 1, c. 114 above). It was likewise the privilege of the defendants, other than defendant Jones, to move for a change of venue, but it was not within the power of the court, Judge McCulloch presiding, to grant the motion until another judge of the district had been called in and had failed for 30 days after the motion was made to appear and assume jurisdiction of the cause, section 6506.

[3] District courts are courts of record, and when the statute commands a disqualified judge to call in another judge, it implies clearly that an order to that effect shall be made and entered of record to the end that the proceedings may be subject to review. So likewise, when the court, the disqualified judge presiding, grants a motion for change of venue for disqualification of the judge for imputed bias, the statute implies that an order, reciting that another judge has been called in, and has failed for 30 days after the motion was filed to appear and assume jurisdiction, shall be made and entered of record. It does not appear from the record before us that another judge was ever called, or, if called, that he did not respond within 30 days after the motion for a change of venue was filed, and in the absence of any record disclosing that the statute was complied with, the court, Judge McCulloch presiding, exceeded its jurisdiction in granting the motion. Chapter 114 above. As said by this court in State ex rel. Sell v. District Court, 52 Mont. 457, 158 Pac. 1018:

"A change of venue is the last resort under the so-called 'Fair Trial Law.'"

[4] The observation in State ex rel. Interstate Lumber Co. v. District Court, 54 Mont. 602, 172 Pac. 1030:

"And since the court below had jurisdiction to entertain and determine the motion, error in its conclusion was not such an excess of jurisdiction as to render either certiorari or prohibition available"

—was made with reference to the power of a court to change the place of trial upon the ground that the defendant resided in another county and was served with process therein, and has no application here. The authority to change the venue on account of the disqualification of the judge for imputed bias is governed by special statute applicable to that subject alone.

The order of which complaint is made is annulled, and the clerk of the district court of Powell county is directed to return the files of the clerk of the district court of Ravalli county.

Order annulled.

HURLY, MATTHEWS, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

Digitized by Google

NATIONAL CASH REGISTER CO. v. WALL.
(No. 4124.)

(Supreme Court of Montana. May 19, 1920.)

1. **Evidence ⊂=457—Contract for sale of cash register with "special" keys may be orally explained.**

A written contract for purchase of a cash register with special keys may be explained under Rev. Codes, § 5036, by evidence of the negotiations leading to the sale to establish what was meant by "special" keys, since "special," as commonly used in business transactions similar to that involved, means unusual, extraordinary, not general.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special.]

2. **Appeal and error ⊂=1078(4)—Refusal of instruction not discussed in brief need not be considered.**

Refusal to give a requested instruction need not be discussed by the Supreme Court, where, though it was assigned as error, the question was not discussed in the brief.

3. **Sales ⊂=287(1)—Contract held not to require return of defective cash register.**

A provision in a contract for the sale of a cash register by which title was retained by the seller and which required buyer to pay expenses of transportation for repairs does not require the buyer to return register to the seller in case it failed in the purpose for which it was sold, where the defects were inherent.

Appeal from District Court, Musselshell County; Charles L. Crum, Judge.

Action by the National Cash Register Company against F. M. Wall. Judgment for defendant, and new trial denied, and plaintiff appeals. Affirmed.

Boarman & Boarman and C. H. Tylor, all of Roundup, for appellant.

Thomas J. Mathews, of Roundup, for respondent.

COOPER, J. This action was brought by appellant to recover the possession of a cash register sold to the respondent, damages for withholding its possession, and a balance alleged to be due on a promissory note given in payment therefor. The purchase, the execution of the order for its delivery, and the making of the note in payment therefor are admitted. It is affirmatively alleged that, by reason of the failure of the plaintiff to properly equip the machine with a stamping device and special keys suitable for the stamping of checks, deposit slips, and other papers used by defendant in his business—as plaintiff agreed it would do—its attempted use produced such a blurring effect upon the papers upon which it was used as to make the figures difficult to distinguish; that after a fair and persistent trial, and its failure to perform the work for which it was purchased, respondent was obliged to and did discard its further use, tendered it back to the plaintiff, and refused to pay the note given as the purchase price. The defendant's affirmative defense is denied by the plaintiff. Upon the trial the jury awarded defendant a verdict in the sum of $45.33 damages, and judgment was rendered for that amount and costs. Plaintiff has appealed from an order denying its motion for a new trial.

[1] Many of the specifications of error charged against the trial court have to do with the admission and rejection of evidence concerning the alleged defects in the machine forming the subject-matter of this controversy. Appellant insists that the contract sued on was free from ambiguity, and that the evidence interpreting the expression "denomination of keys to be special," was erroneously admitted as tending to vary, rather than to elucidate, the terms of the written instrument in question. We think counsel misconceived respondent's purpose in pressing this inquiry, as well as the theory of the court in permitting it. The only paragraph descriptive of the thing in action is as follows:

"Please ship as soon as possible to your order for the undersigned at Roundup, Musselshell county, Montana, one of your 598E registers, case to be 'B' denomination of keys to be 'special.'"

The word "special" as used, if it means anything, must mean "special" as distinguished from "general," "unusual" as distinguished from "usual," "extraordinary" as distinguished from "ordinary," as the words are commonly used in business transactions involving the sale and description of an article similar to the one here involved. Indeed, without a description of the stamping apparatus allunde the contract itself, it is difficult to conceive how a jury could understand the meaning of the word "special," unaided by an account of the circumstances and the conversation leading up to the making of the contract and the meeting of the minds of the parties upon the particulars necessary to its consummation. Clearly, an explanation of the circumstances and a repetition of the conversation between the parties at the time of the making of the contract fall within the contemplation of section 5036 of the Revised Codes. If this deduction is correct, no injury was done the plaintiff in the admission of the testimony giving the particulars attending the making of the contract. In no other way could the issues the jury were called upon to settle be made intelligible to them. This disposes of assignment of error No. 28, requesting that an instruction be given admonishing the jury to disregard all oral evidence tending to contradict, change, or modify the agreement relating to the terms of

Digitized by Google

the contract. The jury were properly instructed on this branch of the case, and that assignment of error must be overruled.

[2] The refusal of the court to give plaintiff's proposed instruction No. 3 was also free of error. While the refusal of the court to give it is assigned as error, counsel refrained from discussing the question in his brief. We do not, therefore, consider it incumbent upon us to discuss it.

[3] However, nowhere in the contract do we find a provision for return of the register to the seller in case it failed in the purpose for which it was sold. Under its provisions title was to remain in the seller until the purchase price was fully paid, the seller agreeing "to pay transportation charges on register to and from your factory or nearest agency capable of making necessary repairs, or traveling expenses of repairman in case undersigned desires repairs made where register is located. Any repairs made without your authority to be at expense of undersigned."

The defects alleged were inherent—not due to ordinary wear and tear, and the conflict in the testimony concerning them and the representations made by the seller were matters necessary and proper for the consideration of the jury. With their determination of them under proper instructions we may not interfere. The tendered instructions the court refused to give were inapplicable to the issues as finally made up, or were covered by instructions given.

We have considered all the other errors assigned and discussed in the briefs of counsel, and find none of them sufficient to overturn the verdict of the jury nor the action of the district court in entering judgment thereon and overruling plaintiff's motion for a new trial.

The order appealed from is affirmed.

Affirmed.

HOLLOWAY, HURLY, and MATTHEWS, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

CHESTER STATE BANK v. GREAT NORTHERN RY. CO. et al.
(No. 4125.)

(Supreme Court of Montana. May 19, 1920.)

1. Chattel mortgages ⟸150(1) — Notice imparted from filing.

Where defendant's first chattel mortgage, which antedated that of plaintiff, was filed in the county of the mortgagor's residence, pursuant to Rev. Codes, § 5761, such mortgage imparted notice to plaintiff, and plaintiff took its rights subject to the superior right of the prior mortgage.

2. Chattel mortgages ⟸154—Rights of parties fixed by filing, irrespective of failure to file extension affidavit.

Where an earlier chattel mortgage was on file when a second was executed by the mortgagor, the rights of the mortgagees are fixed, and are not affected by the fact that the original mortgagee failed to file extension affidavits.

3. Chattel mortgages ⟸84 — Valid between parties, though not filed.

Regardless of the sufficiency of the filing of a chattel mortgage, it is as between the parties valid until the debt secured has been paid.

4. Chattel mortgages ⟸84—Valid as against all save creditors, though not filed.

Under Rev. Codes, § 5672 (Laws 1913, c. 86, § 5), a chattel mortgage, which is valid between the parties until the payment of the debt, is valid as to all others, except creditors of the mortgagor, subsequent purchasers, and incumbrancers in good faith, regardless as to sufficiency of filing.

5. Chattel mortgages ⟸139—Subsequent incumbrancer in good faith must take without knowledge of prior mortgage.

To become a subsequent incumbrancer in good faith, a party must take his chattel mortgage without knowledge, actual or constructive, of the existence of an earlier mortgage.

6. Chattel mortgages ⟸154—Where mortgage antedating plaintiff's was on file and extended, plaintiff is not a subsequent incumbrancer in good faith.

Where, when plaintiff received its chattel mortgage, an earlier chattel mortgage was on file, having been kept alive by renewal affidavits, plaintiff cannot become a subsequent purchaser in good faith; and this is so, even though the first mortgage was not thereafter renewed.

7. Chattel mortgages ⟸87—Sufficiency of filing not affected by change of statute.

Laws 1913, c. 86, § 4, repealing Rev. Codes, § 5761, and substituting a provision requiring a chattel mortgage to be filed in the county where the property was situated, does not impair the validity of a chattel mortgage previously filed, in accordance with the law then in force, in the county where the mortgagor resided.

8. Chattel mortgages ⟸87—Validity of recordation is not affected by subsequent changes in boundaries of recording district.

It is everywhere recognized that the validity of the recordation of an instrument affecting title to real or personal property is not affected by subsequent changes in the boundaries of the recording district, whereby the property is made to fall within a different district.

9. Chattel mortgages ⟸98—Where boundaries of recording district changed after mortgage filed, subsequent mortgagee cannot defeat renewal in district of original filing.

Where, after defendants' mortgage was filed pursuant to statute in Chouteau county,

Digitized by Google

the mortgagor's residence, such county was divided and a subsequent mortgagee, pursuant to Laws 1911, c. 112, carving Hill county out of Chouteau county, recorded his mortgage in Hill county, which was that of the mortgagor's residence, the subsequent mortgagee cannot, under Rev. Codes, § 5763, repealed by Laws 1913, c. 86, § 6, defeat the rights of the original mortgagee, who kept his instrument alive by filing affidavits of renewal in Chouteau county.

Appeal from District Court, Hill County; John W. Tattan, Judge.

Action by the Chester State Bank against the Great Northern Railway Company, the Minneapolis Threshing Machine Company, and others. From a judgment for plaintiff, defendant Minneapolis Threshing Machine Company appeals. Reversed and remanded, with directions.

H. S. Kline and C. B. Elwell, both of Havre, and J. A. Hosp, of Hopkins, Minn., for appellant.

Frank W. Turcotte and Victor R. Griggs, both of Havre, for respondent.

HOLLOWAY, J. In March, 1910, the Minneapolis Threshing Machine Company (hereinafter referred to as the Machine Company) sold to William Mitchell a steam engine and other personal property, taking from the purchaser his promissory notes, one due October 1, 1910, one October 1, 1911, and one October 1, 1912; each bearing interest at 8 per cent. per annum. To secure the payments of these notes, Mitchell executed to the Machine Company a chattel mortgage upon the property purchased. The mortgage was duly executed, and was filed in the office of the county clerk of Chouteau county, the county in which the property was situated and in which the mortgagor resided. In November of each year, 1910, 1911, 1912, and 1913, the Machine Company filed an affidavit renewing the chattel mortgage, and each of these affidavits was filed in the office of the county clerk of Chouteau county. In December, 1913, the mortgagor having defaulted in the payment of the indebtedness, the Machine Company caused the property to be sold by the sheriff as provided by law and itself became the purchaser. It took possession of the property and delivered it to the Great Northern Railway Company for shipment.

Thereupon the Chester State Bank demanded possession of the property, and, upon refusal, brought this action in claim and delivery against the Railway Company, the Machine Company, the local agent of the Machine Company, and the mortgagor, claiming the right to possession by virtue of two chattel mortgages executed to it by Mitchell upon this same property. The first mortgage, dated July 11, 1911, was filed in the office of the county clerk of Chouteau county and thereafter renewed by an affidavit filed in that county in January, 1912. In February, 1912, Hill county was created out of a portion of Chouteau county, which included the portion where the mortgaged property was situated and where the mortgagor resided. In August, 1912, and again in August, 1913, the bank filed its affidavit of renewal in Hill county. The bank's second mortgage was dated November 17, 1913, and was filed in the office of the county clerk of Hill county.

Upon an agreed statement embracing the foregoing facts, the case was tried by the court, as between the bank, on the one hand, and the Railway Company and the Machine Company, on the other, resulting in a judgment for the plaintiff, from which judgment the Machine Company prosecuted this appeal. The questions presented involve the priority of the Machine Company's mortgage over each of the bank's mortgages.

[1-6] No contention is made that the Machine Company's mortgage was not secured in good faith, so that the only question presented is whether that company lost its priority by failing to file affidavits of renewal in Hill county after that county was created in February, 1912. At the time the bank's first mortgage was taken, in July, 1911, the Machine Company's mortgage was a valid, subsisting lien upon the property in controversy on file in the county where the mortgagor resided, as required by the statute then in force. Section 5761, Rev. Codes. As such it imparted notice to the bank (Isbell v. Slette, 52 Mont. 156, 155 Pac. 503), which acquired its right subject to the superior right of the Machine Company. The rights of the parties became fixed as of the date of the bank's mortgage, and could not be affected thereafter by the failure of the Machine Company to file an extension affidavit, if it had done so. Bank v. Marshall, 51 Mont. 224, 152 Pac. 36; Slimmer v. Meade County Bank, 34 S. D. 147, 147 N. W. 734; Ullman v. Duncan, 78 Wis. 213, 47 N. W. 266, 9 L. R. A. 683; Jones on Chattel Mortgages, § 293; 11 Corpus Juris, 545; note, 47 L. R. A. (N. S.) 668. As between the mortgagor and the Machine Company, the mortgage was valid until the debt secured by it was paid. Laubenheimer v. McDermott, 5 Mont. 512, 6 Pac. 344. It was equally valid during such period as against every one except creditors of the mortgagor and subsequent purchasers and incumbrancers in good faith. Section 5762, Rev. Codes; section 5, c. 86, Laws of 1913. To constitute the bank a subsequent incumbrancer in good faith, it must have taken its mortgage without knowledge, actual or constructive, of the existence of the Machine Company's prior mortgage. Bank v. King & McCants, 37 Okl. 744, 133 Pac. 30, 47 L. R. A. (N. S.) 668. The Machine Company's mortgage, on file in the proper county and kept alive by the renewal affidavits, im-

Digitized by Google

parted notice to the bank (Isbell v. Slette, above), and therefore the bank was not a subsequent incumbrancer in good faith within the meaning of the statute now under review (Howard v. Bank, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537) and could not be heard to complain if the Machine Company's mortgage had never been renewed.

[7] As observed before, when the Machine Company's mortgage was secured, the statute required that a chattel mortgage be filed in the county where the mortgagor resided. By chapter 86, Laws of 1913, section 5761 was repealed, and in lieu thereof was substituted a provision which required a chattel mortgage to be filed in the county where the property was situated. This statute could not affect the validity of the Machine Company's mortgage, but it did operate to require the bank to file its second mortgage in Hill county.

[8, 9] The question then arises: Did the Machine Company maintain the priority of its mortgage on file in Chouteau county upon property which came to be within Hill county, and the mortgagor of which property became a resident of Hill county upon the creation of that county, by filing the renewal affidavits in Chouteau county? At the time the Machine Company's mortgage was executed, it was filed properly in Chouteau county, and could not have been filed elsewhere. The statute then in force required, and the subsequent statute has required, that the affidavit of renewal be "filed in the office where the mortgage therein described is filed," that the clerk attach such affidavit to the mortgage, and that "the original mortgage shall then continue" in force for the period designated. Section 5763, Rev. Codes; section 6, c. 86, above. The act under which Hill county was created (chapter 112, Laws of 1911) provided:

"The board of county commissioners of any new county formed as aforesaid must provide suitable books and have transcribed from the records of the old county or counties all such parts thereof as relate to or affect property or the title thereof situate in the new county, and said records when so transcribed and certified as herein provided shall have the same force and effect as such original records."

Nowhere was provision made for refiling chattel mortgages in the new county, and neither was it necessary to the validity of a chattel mortgage that it designate the particular place in a county where the mortgagor resided or where the property was situated. Manifestly, chapter 112, above, contemplated that only such records of the old county should be transcribed as disclosed on the face of them that they affected property within the confines of the new county. Whether there ever was a transcribed copy of the Machine Company's mortgage filed in Hill county does not appear from this record, and in our view of the case it is altogether immaterial.

Doubtless the Legislature could have required that the original mortgage be transferred from Chouteau county and refiled in Hill county, or it could have required that a certified copy be filed in Hill county, and that thereafter the renewal affidavit should be filed in the new county and attached to such copy; but it did neither of these things. It required the renewal affidavit to be filed with and attached to the original mortgage. But further discussion of the subject is not necessary. The rule is recognized everywhere that the validity of the recordation of an instrument affecting the title to real or personal property is not affected by subsequent changes in the boundaries of the recording district, whereby the property is made to fall within a different district. Keys v. First Nat. Bank, 22 Okl. 174, 104 Pac. 346, and note to same in 18 Ann. Cas. 158.

Upon the agreed statement of facts, the mortgage of the Machine Company was prior and superior to each of the bank's mortgages, and by purchasing the property at the foreclosure sale under its mortgage the Machine Company became entitled to the possession of the property.

The judgment is reversed, and the cause is remanded, with directions to enter judgment in favor of the answering defendants.

Reversed and remanded.

HURLY, MATTHEWS, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

WILCOX v. NEWMAN. (No. 4135.)

(Supreme Court of Montana. May 19, 1920.)

1. Contracts ⇐324(1), 346(3)—In action on quantum meruit, express contract may be proved.

A party to an express contract may sue on quantum meruit, and, on showing performance of the contract, introduce it to prove reasonable value of the services rendered.

2. Trial ⇐165—Mere claim of prejudice by variance does not authorize nonsuit.

Under Rev. Codes, § 6585, making variance immaterial unless it prejudice the adverse party, in which case pleadings may be amended, a mere allegation in a motion for nonsuit, because proof of an express contract was a variance from allegation of implied contract that the variance misled and prejudiced defendant, without any proof of prejudice, is insufficient.

3. Pleading ⇐165—Reply unnecessary when matter in answer could be proved under special denial.

Where the facts alleged in the answer could have been proved under a specific denial of the

Digitized by Google

allegations of the complaint and do not amount to an admission of the complaint with an allegation of matter in avoidance, no reply is necessary.

4. Pleading ⟸165—Answer stating contract different from that sued on does not require reply.

Where the complaint alleged performance of services at defendant's request, an answer, alleging that defendant employed plaintiff's mother to perform all the services which had been performed at a fixed compensation which had been paid to the mother, states only facts showing a contract different from that alleged which could be proved under specific denial of the complaint, so that defendant was not entitled to judgment because of plaintiff's failure to reply thereto.

Appeal from District Court, Jefferson County; W. A. Clark, Judge.

Action by Ruth Wilcox against L. Newman. From a judgment for defendant after nonsuit was granted and an order denying motion for new trial, plaintiff appeals. Reversed and remanded.

Donnelly & Carleton, of Havre, for appellant.

Freeman & Thelen, of Great Falls, and M. H. Parker, of Boulder, for respondent.

MATTHEWS, J. Appellant Ruth Wilcox, Roy J. Wilcox, and Arthur J. Wilcox are the children of one Ida J. Wilcox. The complaint herein contains three causes of action. The first alleges that from November 26, 1911, to December 28, 1913, plaintiff, at the special instance and request of Newman, performed work and labor at his lunch counter at Clancy, Mont., which services were of the "reasonable value of $960, being at the rate of $40 per month"; that no part thereof has been paid, and demand for and refusal of payment. The second cause of action contains like averments, except that the services are alleged to have been performed by Roy J. Wilcox and the claim assigned to plaintiff; while the third cause of action is identical with the second, except that Arthur J. Wilcox is alleged to have performed services, during the period mentioned, of the reasonable value of $760.

The answer, as to each of the causes of action, denies generally each of the allegations, and "alleges the fact to be" that defendant employed Ida J. Wilcox to conduct and operate the lunch counter under an agreement whereby she was to furnish and perform all labor and services necessary in connection therewith, at a wage of $75 per month, later raised to $90 per month, and room and board for her three children; that defendant paid the said Ida J. Wilcox the said wages as they became due during all of the said period, and furnished the room and board as agreed; that defendant had no other agreement or understanding with the said Ida J. Wilcox, or with any other person or persons, with reference to running said lunch counter; and further alleges that, during said period, each of said children was a minor.

On the trial Ida J. Wilcox, and each of the said children, testified that respondent called on them at Shelby, Mont., and employed the entire family, and, while all were present, agreed to pay each of the children $40 per month. Each of the children, in addition to stating that such was the agreement, testified that the sum of $40 per month was a reasonable wage for the services performed. They attempted to explain their failure to collect their wages from month to month, by stating that they did not need the money and would as soon have it with Mr. Newman as in a bank.

The plaintiff having rested, defendant moved for judgment of nonsuit on the ground of variance, in that plaintiff sued upon an implied contract while the testimony shows that, if a contract was entered into, it was an express contract for services at $40 per month, board and room. In urging the motion, counsel stated:

"The defendant has received no intimation that there would be any other contention than the contract sued upon, which is an implied one."

Thereupon the court made the following order, sustaining the motion:

"There is not any question in this case that every witness has gone on the stand and has positively and absolutely sworn, as strong as they could, to an express contract, that Mr. Newman would pay them $40 per month to go down and work for him; that is what they have sworn to on every occasion, uniformly and consistently, and the complaint alleges a quantum meruit, that is, the reasonable value of the services would be $40.00 a month; there is a variance here between the pleadings, and the proof, and it is a matter that the court should take care of. The motion is sustained."

There are but two assignments of error, to wit: That the court erred in sustaining the motion, and that it erred in overruling the motion for a new trial.

[1] There can be no question but that a party with whom an express contract has been made may sue on quantum meruit, and thereafter, on showing a performance of the contract, introduce the express contract to prove the reasonable value of the services rendered. In the case of Blankenship v. Decker, 34 Mont. 292, 298, 85 Pac. 1035, 1037, this court held that—

"Upon a complete performance of an express contract for services at a stipulated compensation, there seems to be no sound reason why a recovery may not be had upon the quantum

Digitized by Google

meruit. Burgess v. Helm, 24 Nev. 242, 51 Pac. 1025; Shepard v. Mills, 173 Ill. 223, 50 N. E. 709; Fells v. Vestvali, 2 Keyes (N. Y.) 152. In such case the effect of proof of the express contract is to make the stipulated compensation the quantum meruit in the case."

While it is said that the statement in the Blankenship Case is obiter, the rule is again announced in the case of Neuman v. Grant, 36 Mont. 77, 92 Pac. 43, and in Waite v. Shoemaker, 50 Mont. 264, 146 Pac. 736, and recently in the case of Daly v. Kelley, 57 Mont. —, 187 Pac. 1022, and in that of Dalgarno v. Holloway, 56 Mont. 561, 186 Pac. 332, where it is said:

"That when a party has fully performed an express contract, he may sue upon quantum meruit, admits of no question in this state."

The general rule is stated in Cyc. as follows:

"Where there is a special agreement and the plaintiff has performed on his part, the law raises the duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on the implied assumpsit or on the express agreement. * * * The only effect in such a case of proof of an express contract fixing the price, is that the stipulated price becomes the quantum meruit in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleading." 9 Cyc. 685.

In the case of Burgess v. Helm, 24 Nev. 242, 51 Pac. 1025, the rule is announced as above, but closes with the statement:

"There is no reason why a recovery may not be had upon a complaint on quantum meruit * * * when the opposite party to the action has not been misled in his defense."

[2] Counsel contends that, even though the general rule is as stated, the court was justified in sustaining the motion under the foregoing qualification to the rule. But, even though it may be said that there was a variance between the pleadings and the proof, which we will go so far as to say, our Code provides that—

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just." Rev. Codes, § 6585.

"Under such statutes, it is not enough for the party to allege merely that he has been misled, but it must be proved to the satisfaction of the court. An affidavit should ordinarily be filed showing in what respect the party has been surprised or misled." 31 Cyc. 703, 704, and cases cited.

Counsel in his motion made no suggestion that defendant was misled to his prejudice in maintaining his defense; the only variance, if any, was as to fixing the wages, rather than leaving the amount to be fixed. The defendant having denied the entire transaction, we cannot see wherein his defense could have differed had the complaint alleged an express contract as to wages in addition to the allegation of a contract of employment. The court based its order squarely on its ruling that there was a variance, without regard to the effect on the defense. The testimony, if uncontradicted, was sufficient to warrant a verdict in favor of the plaintiff, and the court erred in taking the matter from the jury.

2. Counsel for respondent insists that, even though the court erred in granting the motion for judgment of nonsuit, the motion denying a new trial was proper for the reason that new matter was set up in the answer, to which no reply was filed. The rights of the defendant by reason of the failure of plaintiff to file a replication were not raised in the court below, either by motion for judgment on the pleadings or by objection to the introduction of testimony, nor was the fact mentioned in the motion for nonsuit. The cause was tried evidently upon the theory that the issues tendered were joined by the answer. We will, however, dispose of the question of the necessity of a reply, without regard to whether the question was timely raised.

[3] The test as to when a replication is necessary is given in the case of Stephens v. Conley, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958, quoting from Mauldin v. Ball, 5 Mont. 96, 1 Pac. 409:

"'Whatever facts are alleged in the answer, that might have been proved under a specific denial of the allegations of the complaint, may be considered as and are equivalent to a specific denial of such allegations, and require no replication; for such an answer forms an issue, and whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some circumstance or fact not inconsistent with all such allegations, constituting a defense or counterclaim, and which could not be proved under a specific denial, are new matter and require a replication.' The rule appears to be, then, that if the facts stated in the answer could have been proved under a denial of the allegations in the complaint, they do not constitute new matter within the meaning of the Practice Act, and the failure to reply does not amount to an admission of the truth of the matters stated as against the plaintiff."

In Hanson Sheep Co. v. Bank, 53 Mont. 324, 163 Pac. 1151, this court said:

"Any evidence is admissible under a general denial which tends to controvert the allegations of the complaint. This includes evidence of any fact which is inconsistent with, and thus negatives, the plaintiff's cause of action."

The case of Chealey v. Purdy, 54 Mont. 489, 171 Pac. 926, is directly in point here, for there the court said:

Digitized by Google

"The defendant, under his general denial, may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from that alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein according to its terms, or any other fact which tends to destroy, not to avoid, the cause of action alleged."

[4] Here the averments of the answer do not "amount to an admission of the allegations of the complaint, and tend to establish some circumstance or fact not inconsistent with such allegations," but, on the contrary, they emphatically deny all of such allegations and set up facts "inconsistent with, and thus negative, plaintiff's cause of action." Under the above rules, every fact alleged in the answer could have been proved under either a general or specific denial of the allegations of the complaint, and no replication was therefore necessary.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

HOLLOWAY, HURLY, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

HERRICK v. BARZEE.

(Supreme Court of Oregon. May 25, 1920.)

1. Contracts ⟸126—Attorney may appear before legislative body to procure appropriation.

A contract for services to be rendered by an attorney before a Legislature, or the Congress of the United States, in securing the passage of a law providing for the payment of a just claim, is not unlawful and not against public policy, if it does not contemplate the use of improper means and if the services to be rendered are such as appeal to the reason of those whom it is sought to persuade.

2. Courts ⟸97(1)—Federal decisions followed in determining validity of contract affecting federal legislation.

In determining whether or not a contract for services to be rendered by an attorney before the Congress of the United States in securing the passage of a law is against public policy, decisions of the federal courts should be taken as a guide; federal legislation being concerned.

3. Contracts ⟸126 — Advice of attorney to petition legislators did not render contract to procure passage of law unlawful.

A contract for services to be rendered by an attorney before Congress in securing the passage of a law providing for the payment of a just claim was not rendered unlawful or contrary to public policy because it was attempted to be carried out in part by the claimants writing to the senators and representatives in Congress, upon the advice of the attorney; the United States Constitution securing to the people the right to petition the government for a redress of grievances.

4. Contracts ⟸126—Services of attorney under contract to procure legislation legalized by provision.

A provision attached to an act of Congress appropriating money to pay claimants, providing that no agent or attorney should receive more than 5 per cent. thereof for his services, legalized a contract between the claimants and an attorney agreeing to secure an appropriation to the claimants.

5. Attorney and client ⟸147—Provision fixing compensation attached to appropriation to pay claim supersedes express contract for compensation.

Where Congress in appropriating a certain amount to pay certain claimants named in the act attached a proviso to the effect that no attorney representing a claimant should receive more than 5 per cent. as compensation, such proviso superseded any express contract between attorney and claimants.

6. Trial ⟸143, 165 — Differences in inferences from evidence for jury; motion for nonsuit admits truth of evidence; "demurrer to evidence."

A motion to nonsuit is a "demurrer to the evidence" and admits the truth of the evidence and every reasonable inference of fact which the jury may infer from it, and, if different conclusions can be drawn from the facts, the case should be left with the jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Demurrer to Evidence.]

Bennett, J., dissenting.

In Banc.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Samuel Herrick against Charles W. Barzee. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This is an action to recover $380 for services of plaintiff, as an attorney for the defendant, in prosecuting a claim of the defendant against the United States for $1,900 before Congress and its committees, and securing an act of Congress reimbursing defendant in such sum for the loss of land in the "overlap" in Sherman county, Or.

Plaintiff alleges that he entered into a contract with the defendant in 1907, or 1908, to secure an appropriation to reimburse the defendant for the loss of his land, and that he was to receive 20 per cent. of the amount collected. The defendant alleges that he entered into the contract with the plaintiff in 1901, or 1902, and that the money was to be secured by 1907, or the contract then ceased.

Digitized by Google

The cause was tried before the court and a jury, and, at the close of the plaintiff's case in chief, the defendant moved for a judgment of involuntary nonsuit upon the grounds that the contract and the manner of its performance were contrary to public policy, and also for the reason that plaintiff was to receive a contingent commission. The nonsuit was granted, and plaintiff appeals.

The original contract was not introduced in evidence. A form of contract, which plaintiff states was in substance the same as the one executed, shows that—

> The defendant employed the plaintiff "to prosecute before the Interior Department, the Congress of the United States, and if necessary, the United States Court of Claims, his claim against the government for damages to him by reason of the opening to settlement of certain lands within the limits of the Dalles Military Road Grant, in the state of Oregon, including damages by reason of the loss of the use of the land and of the improvements for a number of years. In consideration for the said second party's professional services on this claim, the first party agrees to pay said second party the sum of 20 per cent. of the amount recovered from the government."

J. B. Ofner, of Portland (Charles J. Schnabel, of Portland, on the brief), for appellant.

A. M. Crawford, of Portland (C. L. Barzee, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). The defendant contends that the contract in question is a lobbying contract and therefore void. The testimony tended to show the following facts: On May 9, 1896, defendant made a timber and stone entry at The Dalles, Or., land office on the S. ½ S. W. ¼ section 21, township 1 N., range 17 E., W. M., in Sherman county, Or. The land office records disclosed that the land was subject to entry. The defendant took possession of the tract and made improvements thereon reasonably worth $1,900. Subsequently it was discovered that said land, having been granted to The Dalles Military Road, was not subject to such entry, and on June 11, 1901, Barzee's entry was canceled, as result of which the latter lost the value of his improvements and was thereby damaged in the sum of $1,900.

It is admitted that the defendant had a just claim against the United States for $1,900; that the plaintiff, Herrick, was employed to prosecute the claim before the proper tribunals for a compensation; that the claim was allowed by Congress on August 11, 1916, and defendant received payment of his claim. There is a conflict in the evidence as to the date of the execution of the contract and also as to the time of its termination and several other matters. In referring to the facts, it is not the intention to express any opinion in regard thereto, but only to mention those which the testimony tended in a measure to prove.

Plaintiff's evidence indicated that he had been an attorney in Washington, D. C., since 1901; that he continued to serve defendant in the matter from the time the contract of employment was made, about 1909, until after the claim was paid in 1916; that he obtained data in regard to the claim of defendant and 67 other similar claims and prepared two or three different bills which were introduced and passed the United States Senate but failed to pass the House of Representatives; that he worked in the preparation of memoranda used before a committee, and appeared as attorney for claimant before a committee and made argument in favor of the claims before the Interior Department and the General Land Office, to which the bill was referred, and was recognized as attorney for Barzee; that in August, 1916, the bill allowing the claims was passed by both branches of Congress, and defendant received the amount of his claim, $1,900. As above stated, we do not pass on the sufficiency of this testimony.

[1] The rule of law appears to be that any person whose interests may be in any way affected by any public or private act of a legislative body has an undoubted right to present and urge his claims by arguments, either in person or by counsel professing to act for him, before legislative committees. A contract for services to be rendered by an attorney before the Legislature or the Congress of the United States, in securing the passage of a law providing for the payment of a just claim, is not unlawful if it does not contemplate the use of improper means and if the services to be rendered are such as appeal to the reason of those whom it is sought to persuade. Drafting the petition to set forth the claim, collecting facts, preparing and submitting arguments either orally or in writing to a committee or other proper authority, and other services of like character, are within the category of professional services. They rest on the same principle of ethics as professional services rendered in a court of justice and are no more exceptionable. Services of such nature are separated by a broad line or demarkation from personal solicitation and similar means and appliances. 6 R. C. L. p. 734, § 139; 13 C. J. p. 432, § 368; 15 Am. & Eng. Ency. Law (2d Ed.) 970; Hyland v. Oregon Hassam Paving Co., 74 Or. 1–11, 144 Pac. 1160, L. R. A. 1915C, 823, Ann. Cas. 1916E, 941; Stanton v. Embrey, 93 U. S. 549, 23 L. Ed. 983; Nutt v. Knut, 200 U. S. 12, 26 Sup. Ct. 216, 50 L. Ed. 348.

A valid distinction is made between lobbying services in procuring the passage of legislation and strictly legitimate professional services of an attorney directed to that end, it being held that a contract for contingent compensation for services of the latter kind is legal and enforceable. Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053, 107 N.

Digitized by Google

W. 125, 4 L. R. A. (N. S.) 212, 121 Am. St. Rep. 713; see note, 6 Ann. Cas. 219; Chesebrough v. Conover, 140 N. Y. 382, 35 N. E. 633; Davis v. Commonwealth, 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213.

If Barzee had a just claim against the United States, he had a right to employ an attorney to render proper professional services. The attorney may receive a compensation consisting of a contingent fee, even where the services are to be performed before Congress. Such a case comes within the well-recognized exceptions to the general rule. Wright v. Tebbitts, 91 U. S. 252, 23 L. Ed. 320; Stanton v. Embrey, supra; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; Brown v. Brown, 34 Barb. (N. Y.) 533; Nutt v. Knut, supra; McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955.

It is stated in 9 Cyc. 483:

"As the habits, opinions, and wants of a people vary with the times so public policy may change with them. * * * It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts, and agreements therefore are not to be held void as being contrary to public policy, unless they are clearly contrary to what the Legislature or judicial decision has declared to be the public policy, or they manifestly tend to injure the public in some way."

[2] The contract in question is not void upon its face. There was some competent testimony that it was a valid, lawful, and enforceable contract. It is identical in all its features with the contract before the Supreme Court of the United States, in the case of Nutt v. Knut, supra, in which a commission amounting to about $20,000 was recovered. As federal legislation is concerned in the present case, we think the cases above referred to before the United States Supreme Court should be taken as our guide.

The act of Congress (39 Stat. 1354) appropriating $94,648.13 to pay the defendant and other claimants named in the act has attached a proviso as follows:

"Provided, that no agent, attorney, firm of attorneys, or any persons engaged heretofore or hereafter in preparing, presenting, or prosecuting this claim shall, directly or indirectly, receive or retain for such service in preparing, presenting, or prosecuting such claim, or for any act whatsoever in connection therewith an amount greater than five per centum of the amount allowed under this bill to the person for whom he has acted as agent or attorney."

In Stanton v. Embrey, supra, where an attorney's fee for the prosecution of a claim against the United States before the officials of the Treasury Department, the services were rendered upon a contract for a contingent remuneration. The instruction of the trial court to the jury which was approved upon appeal to the Supreme Court of the United States was in part as follows:

"Where an attorney in the exercise of his ordinary labor and calling, and with the instrumentalities of his professional learning and industry, undertakes to work out a desired result for his client, not through personal influence, but through the instrumentalities of the law—by persuasion, as distinguished from influence—such an undertaking is not an unlawful one, or contrary to public policy."

A judgment for over $9,000 was affirmed. In 2 R. C. L. p. 1041, § 122, we read:

"In contracts between attorneys and clients the usual test would seem to apply that if a contract can by its terms be performed lawfully, it will be treated as legal, even if performed in an illegal manner; while, on the other hand, a contract entered into with intent to violate the law is illegal, even if the parties may, in performing it, depart from the contract and keep within the law."

Public policy and sound morality demands that courts should put the stamp of their disapproval on every act and declare void every contract the ultimate or probable tendency of which would be to affect the integrity or misguide the judgment of those to whom the trust of legislation is confided. All legislators should act from high regard of public duty. Borrowing the language of the Ruling Cases:

"It is not the law that all contracts dependent upon future legislative action are against public policy, nor is it true that all contracts to secure legislative action are unenforceable. It is correct to say that the law guards the processes of legislation against improper influences with jealous care, and will not lend its aid to the enforcement of any contract which expressly or impliedly contemplates the employment of corrupt or otherwise improper methods to influence the official conduct of legislators, or others charged with public duty. But it would be a perversion of this salutary rule to say that it forbids all efforts of interested persons or classes to secure the adoption of desired legislative measures. The courts do not condemn the attempts to secure legislation for legitimate purposes and in a legitimate manner. Citing Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487 [117 N. W. 746, 18 L. R. A. (N. S.) 1161], 16 Ann. Cas. 846 and note, 18 L. R. A. (N. S.) 1661 and note; Long v. Battle Creek, 39 Mich. 323, 33 Am. Rep. 384; Stroemer v. Van Orsdel, 74 Neb. 113 [103 N. W. 1053, 107 N. W. 125], 121 A. S. R. 713 and note, 4 L. R. A. (N. S.) 212 and note; Houlton v. Nichol, 95 Wis. 393 [67 N. W. 715], 57 A. S. R. 928, 33 L. R. A. [166]. * * * But as the law does not presume that a person intends to violate its provisions, the general principle controlling the construction of a contract to influence legislation when the contract itself does not in terms stipulate for improper means seems to be that it will be upheld, unless the use of such means appears by necessary implication. The test is, does the contract, by its terms or by necessary implication, require the preference

Digitized by Google

of acts which are of a corrupt character or which have a corrupting tendency?" 6 R. C. L. p. 731, § 137.

The question arises in the present case: Did the services of the attorney require the performance of any corrupt act, or any act which has a corrupt tendency? The terms of the contract do not call for any corrupt or wicked act. In order to portray the tenor of the correspondence between the attorney and United States Senators and members of Congress, we produce a portion of the correspondence found in the record as follows; first quoting a letter from Mr. Herrick to Senator Chamberlain.

"December 8, 1909.

"Hon. George E. Chamberlain, U. S. Senate, Washington, D. C.—My Dear Senator: Referring to my recent interview with your private secretary relative to the claims of settlers in Sherman county, Oregon, I beg to advise as follows:

"All these settlers made homestead entry of what was then supposed to be public land and a large number of them were given patents by the department upon the theory that the land grant of The Dalles Military Road Company had not attached because the land was situated in the overlapping limits of the Northern Pacific grant. But in suits in the court culminating in Wilcox v. Eastern Oregon Land Company (176 U. S. 51), and Messinger v. Eastern Oregon Land Company (176 U. S. 58), it was held that the wagon road grant attached and thereupon the patents to the settlers were set aside and the title to the land confirmed in the Eastern Oregon Land Company. The settlers were dispossessed and either compelled to remove or accept leases under the land company.

"The act of Congress approved February 26, 1904, 33 Stats. 51, directed the Secretary of the Interior to ascertain as to the amount of damages sustained by the various settlers, etc., and accordingly claims were submitted to Special Agent Neuhausen and incorporated by him in a report to the department which was subsequently referred to Congress. In this connection see also Senate Resolution of June 7, 1900, Senate Document No. 8, of the 56th Congress, Second Session, and Doc. No. 240 of the 57th Congress, First Session.

"The claims are still pending before Congress unacted upon, and upon behalf of the settlers, a large number of whom I represent, I write to request that you will look into the matter and endeavor to secure favorable action. In view of the investigation and report of the Interior Department it would seem that Congress could appropriate a sum of money to compensate these settlers for the loss of their lands and improvements, or that at the very least the claims could be referred to the Court of Claims under an act of Congress conferring jurisdiction upon that court to determine the amount of damages.

"I should be glad to call upon you personally in regard to the matter or if necessary appear before the Public Lands Committee. But it would seem necessary to introduce a bill at the present session to bring the matter before this Congress.

"Hoping to hear from you and with expressions of esteem, I am

"Very truly yours,"

Together with an answer from the senator:

"United States Senate, Committee on Printing.

"December 9, 1909.

"Samuel Herrick, Esq., Westory Bldg., City—My Dear Sir: I am in receipt of your favor of the 8th inst. in reference to the claims of the Sherman settlers. I will be glad to confer with you in reference to this matter and to take such steps as may assist in having the government do justice to these men. I can learn better the status of the matter by a talk with you than from statements of the settlers.

"I have the honor to remain,

"Yours very respectfully,"

Also a letter from Senator Bourne, apparently in answer to the same kind of a letter:

"United States Senate, Committee on Fisheries.

"December 10, 1909.

"Mr. Samuel Herrick, Westory Bldg., Washington, D. C.—My Dear Sir: I am in receipt of yours of December 8th in regard to claims of settlers in Sherman county, Oregon, in which you informed me that the Secretary of the Interior has made a report upon the claims and that they should now be referred to the Court of Claims. I shall secure and study the Senate documents referred to by you and take such action as may seem best to secure justice for the claimants.

"Yours very truly,"

In this correspondence, as well as in the great mass of letters and documents found in the record, we find nothing indicating a corrupt motive, or tending in any way to improperly influence legislation. The senators and representatives from Oregon during the time the matter was pending, nearly all of whom were lawyers of high standing, and all eminent gentlemen of the highest standing and integrity, whose judgment in a matter of ethics in legislation should not be overlooked or ignored, seem to have viewed the efforts and services of plaintiff as attorney for the claimants as perfectly proper. If any improper conduct had been attempted by the attorney, we believe it would have been shown; and that Congress would not with the sanction of our delegation practically have allowed the attorney 5 per cent. of the claims provided for in the act.

Can there be any doubt as to the propriety of the attorney conferring with Senator Chamberlain at the latter's request and informing him of anything in regard to the claims? A conference with any of the federal legislators at the instigation of the attorney would be governed by the same law, for it would not be consistent with duty for an attorney advancing the claim of his client to wait at all times for an invitation before

Digitized by Google

approaching the officials having authority to act in the premises.

[3] It is contended by the learned counsel for defendant that the contract is void for the reason it was attempted to be carried out in part by the claimants writing to the senators and representatives in Congress, upon the advice of their attorney.

The Constitution of the United States secures to the people the right to petition the government for a redress of grievances. It may be easy for an advocate to paint such correspondence in a high color and term it "bombarding," but the writer sees no wrong in these settlers in an informal way petitioning their senators and representatives. To deny this right is to deny a constitutional one. Neither did the senators or representatives appear to think there was any impropriety in the claimants so addressing them. If they had the right to lay their matters before Congressmen, of necessity it follows that it was proper for the attorney to so advise them of such right. When much of the correspondence took place, apparently the matter had not reached a committee before whom the attorney could appear. Naturally the first effort was to get the matter before a committee. The only way seen by which the contract can be condemned as unlawful is to presume that improper means were intended to be used, which were not stipulated by the contract.

[4, 5] As before suggested, the services of the attorney were legalized by the provision above quoted regulating the compensation. Where such legislation has been enacted, it withdraws from the court the question of reasonable value of such services, and also supersedes an express contract to pay. 6 C. J. p. 753, § 333; Mullan v. Clark, 4 Idaho, 186, 38 Pac. 247; Lynch v. Pollard, 26 Tex. Civ. App. 103, 62 S. W. 945; Ball v. Halsell, 161 U. S. 72, 16 Sup. Ct. 554, 40 L. Ed. 622; Tanner v. U. S., 32 Ct. Cl. 192. It is apparent that the members of Congress directly interested in the passage of the act had cognizance of the efforts of Mr. Herrick, as attorney for the defendant and other claimants, and it was undoubtedly with a view of settling the matter of his compensation that the proviso, above quoted, was incorporated in the law. Plaintiff, according to his claim, was instrumental in procuring the enactment of this law with the proviso. It would seem that he should be satisfied with the result of his labor. There is also testimony indicating that he assented to the condition and waived any compensation in excess of that provided for in the act. It is unnecessary for us to say whether such waiver is within the issues made by the pleadings, as there will be an opportunity to apply to amend the same.

It does not appear as a matter of law that any "lobbying" or any improper methods were resorted to by the attorney or those whom he represented, or that the same was contemplated. These claimants, who had lost their land and who had a just claim against the United States for compensation therefor, had the right to petition, by letter or otherwise, to their senators and representatives in Congress, and either in person or by their attorney, to present and urge their claims before the proper congressional committees and before the department where the bill was referred. It was a purely business transaction. We find no improper means adopted or contemplated in this respect. The case differs, as night from day, from the case of Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275. Some of these settlers spent years of the best part of their lives making a home upon the land which they lost, and all appear to have been making an honest effort to obtain compensation therefor through their employed attorney working openly and above board and in so far as we can discover in perfectly legitimate ways.

[6] A motion for nonsuit is a demurrer to the evidence and admits the truth of the evidence and every reasonable inference of fact which the jury may infer from it, and, if different conclusions can be drawn from the facts, the case should be left with the jury. Jackson v. Sumpter Valley R. Co., 50 Or. 464, 93 Pac. 356; Peabody v. O. W. R. & N. Co., 21 Or. 121, 136, 26 Pac. 1053, 12 L. R. A. 823; Brown v. Oregon Lumber Co., 24 Or. 317, 33 Pac. 557; Barr v. Rader, 33 Or. 376, 54 Pac. 210; Perkins v. McCullough, 36 Or. 147, 59 Pac. 182; Watts v. S. P. & S., 88 Or. 192, 171 Pac. 901.

It was conceded upon the reargument, by counsel for plaintiff, that he was bound by the provision for a commission of 5 per cent. on the amount allowed by the act of Congress. The testimony upon the issues was sufficient to carry the case to the jury, and the trial court erred in granting the nonsuit.

It follows that the judgment of the lower court must be reversed, and the cause remanded for such further proceedings as may be deemed necessary, not inconsistent herewith. It is so ordered.

BENNETT, J. (dissenting). This is an action brought by the plaintiff, an attorney at Washington, D. C., to recover a contingent fee of 20 per cent. of the amount of a claim allowed by Congress to the defendant.

The defendant's claim against the government arose out of an overlap between the grant of land to the Northern Pacific Railroad (forfeited) and the grant to the state of Oregon, afterwards transferred to The Dalles Military Road Company, for the construction of a wagon road from The Dalles to Canyon City, Or.

The grant to the Northern Pacific Railroad for a branch line down the Columbia river to Portland was made in 1864, and gave the Northern Pacific Company the al-

Digitized by Google

ternate or odd section for 40 miles on each side of the proposed road.

Three years afterwards in 1867 Congress made another grant to the state of Oregon, which was afterwards transferred to The Dalles Military Road Company, of a strip three sections in width on each side of a proposed wagon road where the land "had not been otherwise disposed of."

The lands in question, and out of which Barzee's claim arose, were within the limits of both grants.

These lands were at one time withdrawn from settlement by the government, as part of the Northern Pacific land grant. The branch line down the Columbia river, however, was never constructed. On September 29, 1890, Congress forfeited the same, and the lands covered thereby were restored to entry.

The land department took the view that the lands within the overlap were "disposed of" by the grant to the Northern Pacific Railroad, and therefore did not pass to The Dalles Military Road Company, under its later grant, and that, when the Northern Pacific grant was forfeited, these lands became subject to entry under the homestead and other laws.

This position was contested by the successors of The Dalles Military Road Company, who claimed that no rights had vested in the Northern Pacific Railroad Company at the time of their grant in 1867, and that they therefore took the same. There was a long-continued litigation in relation to the matter, which finally reached the Supreme Court of the United States. While this suit was pending, settlers were filing upon the lands in the United States land office, and their filings were being accepted by the government.

Finally, in the case of Wilcox v. Eastern Or. Land Co., 176 U. S. 50, 20 Sup. Ct. 269, 44 L. Ed. 368, submitted November 15, 1897, but not decided until January 8, 1900, the Supreme Court held that the map of the general line of the Northern Pacific Railroad Company, which had been filed with the department in 1865, did not amount to a definite location, and that therefore the land was still subject to disposition by the government at the time of the grant to the state of Oregon in 1867, and passed by said grant to the state of Oregon and afterwards to the Military Road Company and its successors.

In the meantime Barzee and many other settlers had settled upon their respective tracts and improved the same.

After their filings were canceled, they made the claim that the government should reimburse them for these improvements. In 1904 Congress ordered an investigation of these claims, and T. B. Neuhausen, an agent of the government, was sent out by the department to make such investigation. He made a careful and detailed investigation and filed his report about October 15, 1904, showing the details of each man's claim and the value of the improvements placed upon the land.

Up to this time the plaintiff does not claim to have had anything to do with the matter.

However, in 1908 or 1909, he claims to have made a written contract with these settlers, including the defendant Barzee.

The contract, as claimed by the plaintiff, was substantially as follows:

"The said party of the first part hereby employs the said party of the second part to prosecute before the Interior Department, the Congress of the United States, and if necessary, the United States Court of Claims, his claim against the government for damages to him by reason of the anullment or cancellation of his patent issued by the government, covering certain land in the state of Oregon, including damages by reason of the loss of the land and the loss of the improvements. In consideration for the said second party's professional services on this claim, the first party agrees to pay said second party the sum of twenty per cent. (20%) of the amount recovered from the government. Said sum to be due and payable within thirty days after the first party receives warrant or draft from the government covering the amount allowed him by Congress or the Court of Claims.

"The second party hereby contracts and agrees to prosecute said claim before Congress, and, if necessary, the Court of Claims, promptly and diligently, and with all reasonable expedition, and without further compensation than the amount specified to be paid him in the first section of this agreement, after the allowance of said claim and the issue of the warrant or draft to the first party."

The terms of this contract were clearly broad enough to cover either legitimate or illegitimate and lobbying services.

Thereafter the plaintiff continued to perform services in the matter of expediting these claims before the different Congresses. Numerous bills were introduced, and some of them passed the house and some passed the senate, but none of them passed both houses and became laws until the Sixty-Fourth Congress in 1916.

Mr. Sinnott, whose home was in the immediate vicinity of these lands, became a member of that Congress and succeeded in obtaining the passage of a bill recompensing some of these settlers, including the defendant, in a sum amounting in the aggregate to about $90,000. This act of Congress contained the following provision:

"Provided, that no agent, attorney, firm of attorneys, or any persons engaged heretofore or hereafter in preparing, presenting, or prosecuting this claim shall * * * receive or retain for * * * prosecuting such claim, or for any act whatsoever in connection therewith an amount greater than five per cent. of the amount allowed under this bill to the person for whom he has acted as agent or attorney." 64 Congress, vol. 39, p. 1355.

Digitized by Google

The services, which plaintiff claims to have performed under the contract, were largely in the nature of personal solicitation of individual congressmen, and the organizing of influence and pressure to be brought to bear upon them in order to induce favorable consideration of the measure allowing the claim. The plaintiff, however, claims to have also appeared before committees and before the department at different times between 1908 and 1916 in an effort to induce favorable consideration.

The cause was tried before the court and a jury, and at the end of plaintiff's case the defendant moved for a nonsuit and dismissal, on the ground that the contract was a lobbying contract, and that the services performed by the plaintiff thereunder, according to his testimony, were lobbying services, for which the plaintiff could not be permitted to recover. The court granted the motion for a nonsuit, and from the order granting the same the plaintiff appeals.

The sole question on this appeal is whether or not, on his own showing, the services rendered by the plaintiff under the contract, or a portion thereof, were of such a nature as to render the contract void, as against public policy and prevent the enforcement of the same.

It seems to be entirely settled that where a party contracts for a contingent fee to secure the passage of a measure in Congress, or any legislative body, and in pursuance of such contract attempts to secure its passage by private solicitation of individual congressmen or legislators, or by bringing influence to bear upon them, the contract is rendered void and will not be enforced by the courts. Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275; Hyland v. Hassam Paving Co., 74 Or. 1, 144 Pac. 1160, L. R. A. 1915C, 823, Ann. Cas. 1916E, 941; Trist v. Child, 88 U. S. (21 Wall.) 441, 22 L. Ed. 623; Clippinger v. Hepbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; Harris v. Roofs, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Marshall v. B. & O. R. R. Co., 16 How. 314, 14 L. Ed. 953.

In Sweeney v. McLeod, supra, there was a contract for services before the Legislature. The court had been asked by the defendant to instruct the jury:

"That if it was the understanding between the plaintiff and defendants that plaintiff should attend at the session of the Legislature, and there privately importune, converse with, and persuade members of the Legislature in the interests of the defendants, against any measures pending before the Legislature antagonistic to the taking of salmon fish by means of fish wheels, he cannot recover."

The refusal of this instruction was held error, and Judge Strahan, delivering the opinion of the court, said:

"A person may without doubt be employed to conduct an application to the Legislature as well as to conduct a suit at law, and may contract for and receive pay for his services in preparing and presenting a petition, or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing or making an oral or written argument; provided all these are used, or designed to be used, either before the Legislature itself, or some committee thereof as a body; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them out of the legislative halls in favor of or against any fact or subject of legislation."

And again, quoting from Clippinger v. Hepbaugh, supra:

"It matters not that nothing improper was done or expected to be done by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to the use of an extraneous, secret influence over an important branch of the government."

And again:

"When there is a single contract, and the services contracted for and rendered are partially those of an attorney, and partially those of a lobbyist, and blended together as part and parcel of a single employment, the entire contract is vitiated. That which is bad destroys that which is good and they perish together."

This opinion is squarely in point. There, as here, the lobbyist was working to further the honest interests of the defendant before the Legislature, and there was just as much reason to believe the ultimate purpose was a good one, there as here; and there, as here, the action of the legislative body was favorable to the claim advocated. The only difference is, here the claim of the defendant was affirmative, and there it was negative. There can be no distinction in that regard, and it seems perfectly clear that the above case is controlling, unless it is to be overruled.

In Hyland v. Hassam Paving Co., supra, there was a contract to pay a commission of 3 per cent. on all contracts secured from the city council of the city of Portland. The opinion was by Mr. Justice Ramsey, who collated the authorities upon the subject at great length, and reached the conclusion that the contract was void, although the contract did not call for any improper services or private solicitation, and there seems to have been no evidence that there was anything of that kind. The court quoted with approval from Weed v. Black, 9 D. C. (2 MacArthur) 268, 29 Am. Rep. 618, as follows:

"If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services substantially performed sanctify an unlawful contract."

Digitized by Google

It is strongly urged on behalf of the plaintiff and appellant that the same rules do not apply to proceedings before Congress, as before a city council or a state Legislature, but there does not seem room for any such a distinction and none seems to be recognized by the authorities.

Indeed, in the case of Trist v. Child, already cited from the Supreme Court of the United States, the contract was almost exactly like the present one, and was for services in the matter of presenting a claim against the government, growing out of a treaty; and the matter was presented before Congress in much the same way as was the claim in this case.

The court, after setting forth that an agreement for purely professional services, like drawing petitions and appearing publicly before committees, would be enforceable, said:

"But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

"The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Mont. Sp. L. 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. * * *

"The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

"If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

"If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

"It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

"We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void. We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, potior conditio defendentis. Where there is turpitude, the law will help neither party.

"The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons."

Digitized by Google

It seems that the principles of law announced by this court in the Sweeney Case are not only supported by the vast weight of authority, but they are salutary and should be upheld and enforced, unless we wish to weaken the protection the law has thrown around legislative bodies, and sanction and judicially approve the army of paid lobbyists around our legislative halls, who are already a disgrace and a menace to our institutions.

It will be a sorry day for our government, or for any democratic government, when the courts encourage the employment of such lobbyists working for a contingent recompense, to secure favorable action before a legislative body, by private personal solicitation of the individual members, and bringing to bear the pressure of organized influence upon the legislators.

It will be noted that, in nearly all the cases from which we have quoted, it has been held that if part of the services rendered under the contract were valid and legitimate, as by the appearance before committees, etc., and part of them were illegitimate and in the nature of personal solicitation and influence, then the whole contract was vitiated and the plaintiff could not recover; at least, upon the contract.

It is urged that the dividing line between what is proper and what is improper should be drawn between "influence" on the one hand and "persuasion" on the other, without regard to the privacy or secrecy of the so called persuasion. It seems difficult to find much difference between influence and persuasion. The dictionaries give them as synonymous words. To influence is to persuade, and to persuade is to influence. Either one may be entirely honest and either may be corrupt. "Influence" may be derived from the most lofty qualities, and money or other bribery, is sometimes very "persuasive." If it is meant by the supposed distinction that, if the efforts of the lobbyist are corrupt and in the nature of bribery, then it is "influence," and, if honest, it is "persuasion," and that private solicitation for a contingent fee is not unlawful unless actually corrupt, then such a distinction seems to find no single authority to support it, and it is in the face of the opinion in the Sweeney Case, in which it is said:

"It matters not that nothing improper was done or expected to be done by the plaintiff."

It would be equally in the face of Trist v. Child, supra, in the Supreme Court of the United States, where it is said:

"The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee [plaintiff] is said to be equally worthy. This can make no difference."

Indeed, all the authorities unanimously repudiate any claim that there must be any actual attempt at corruption to make a lobbying contract void.

If proof of actual corruption and dishonesty were necessary in any given case, the rule would destroy itself. The mere fact that the solicitation was private and individual, would render it so. If the legislator is corrupted, he will not be likely to disclose the fact, and the person who corrupted him will be as little likely to do so. If these contracts were recognized and enforced, it would encourage a great horde of professional lobbyists to hang around the halls of the Legislature and of Congress, to bring influence and pressure to bear upon the members whenever large money interests were involved.

The rule inhibiting such contracts is not based upon actual corruption. It is based rather upon the opportunity for corruption; the temptation to corruption, the inducement for corruption. It rests in its insidious character—in its lack of publicity, in the opportunity for wrongdoing, which such private solicitation of the paid lobbyist gives. It is a modified form of the protection which the law throws around the courts, although by no means so complete.

It would not be tolerated for a monent, if a lawyer should go privately to a judge, and solicit thus a favorable decision, or privately argue his case, or arrange with a great number of clients to bring their influence and the influence of their friends to bear upon him, or to organize a system of bombarding him with private letters.

On account of the conditions and necessities of the case, the rule is not entirely so strict as to members of a legislative body. The rule is relaxed, but some of its elements still remain. Some appeals can be made to members of a legislative body, which would not be tolerated as to a judge. But there are still some things, which the law will not countenance or approve even as to legislators. Even the legislator is not always fair game for the lobbyist.

The important elements in determining whether the acts of a paid lobbyist were legal are:

(1) Was his action open and public—as before Congress or a committee—or was it in the nature of a private and secret solicitation of the individual congressman?

(2) Was he acting for a contingent fee?

(3) Did he attempt to organize a pressure to be brought to bear upon members of the legislative body?

If any of these exist, it puts the contract in the doubtful class. If all concur, it is conclusive against the legality of the transaction.

It is true that it has been held by the United States Supreme Court that a contingent fee is not always conclusive, against a lobbying contract, and that such a contingent

Digitized by Google

fee may be legal, if it is solely for work openly performed before a department or a committee. But all the courts, including that high tribunal, agree that the contingent character of the fee has an important bearing in deciding whether a contract for such services is an unlawful lobbying contract or not. Burke v. Child, 88 U. S. (21 Wall.) 441, 22 L. Ed. 623; Clippinger v. Hepbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; Richardson v. Scotts Bluff, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. Rep. 682; Bermudez v. Critchfield, 62 Ill. App. 221. The fact of a large contingent fee tends to enhance the temptation and increase the danger, and is therefore one element to be considered.

The only remaining question is whether or not all or any part of the services performed by the plaintiff in this case come within the prohibited category.

In Trist v. Child, already quoted from, the ground upon which the contract was held void was a letter written by the attorney to his client, in which he said:

"Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote."

This was held sufficient to show that the contract was a lobbying contract.

In the case at bar the plaintiff, according to his own testimony, was trying to get the measure through by personal solicitation of individual congressmen, and by bringing influence to bear upon them. He says in one place:

"I took the matter up with Senators Bourne, Chamberlain and Lane of Oregon, with Congressman Ellis, Hawley and Sinnott of Oregon, and with a number of other senators and congressmen from the different states."

At another place:

"I remember especially conferring with Senator Kittridge of South Dakota and Congressmen Burke and Martin of South Dakota, all of them from my state, and all of them influential members of the national Legislature."

At another place:

"When Congressman Sinnott came to Washington I conferred with him about relief for the Sherman county claimants, and both previously and afterwards, urged all my clients to write him and get his assistance, so I believe he was largely stirred to activity by this correspondence which I had caused to be directed to him."

At still another place he says:

"I had various claimants bombard their senators and congressmen with letters and also had their friends in other states write different members of Congress who might be of assistance."

And again, at another place, referring to Senators Lane and Chamberlain:

"After having interviewed them jointly on that date and requested them to use their best efforts in furthering the passage of the relief measure."

Another witness called by plaintiff testified:

"Mr. Herrick got in touch and kept in touch with every person whose influence he deemed might be useful in securing favorable action by Congress on these claims."

If all this did not constitute "lobbying" and the organization and exercise of "influence" upon Congress, then it would seem that we shall have to radically change the accepted meaning of the words.

In short, the endeavors in this case seem to have been of exactly the same nature as those held improper by the Supreme Court of the United States in Burke v. Child, which decision has never been modified or even doubted and is still the law, as declared by that court.

The case of Nutt v. Knutt, 200 U. S. 12, 26 Sup. Ct. 216, 50 L. Ed. 348, which is strongly relied upon by the plaintiff, does not seem to relate at all to the contention here. There the question of the validity of the contract came up in a suit in equity, and the court below had, of course, to pass upon the facts. The evidence as to whether the plaintiff had made any private or personal solicitations of individual congressmen was in direct conflict, and there was just one witness each way. The plaintiff testified that he had made no such appeal, and the defendant testified that he had. Under these conditions, the Mississippi court held that the burden to show such lobbying acts was upon the defendant, and found as a fact that the burden had not been sustained. 83 Miss. 365, 35 South. 686, 102 Am. St. Rep. 452. When the case reached the Supreme Court of the United States, it simply accepted the finding of fact of the court below, without even commenting upon the law, as to this question, at all.

The case of Stanton v. Embree, cited by plaintiff from 93 U. S. 549, 23 L. Ed. 983, was a case where the services were performed before the Treasury Department, and there was no evidence—not even a claim—that there was any private solicitation or lobbying of any kind.

Neither of these cases modify the rule established in Burke v. Child in the slightest; but, on the contrary, both cite the latter case with entire approval.

The quotation from 6 R. C. L. § 137, p. 731, which appears in the opinion of Mr. Justice Bean, should, it seems, be read with section 138, immediately following, which is as follows:

Digitized by Google

"The distinction between valid and invalid contracts to further legislation, appears to be that in the former the services or the result thereof are used, or designed to be used, either before the legislature itself or some committee thereof as a body, while in the latter a person is employed to exert his personal influence, whether great or little, with individual members, or to labor privately in any form with them, out of the legislative halls, in favor of or against any act or subject of legislation. There are, it is true, a few cases holding that personal solicitation of the members of the Legislature in behalf of a pending bill, does not render the contract of employment invalid when no deception has been practiced, but these cases are so opposed to the great weight of authority that they cannot be considered as changing the general rule. * * * As already stated, public policy requires that such a contract should be held void though there is no actual corruption in the particular case. Notwithstanding the fact that the contract does not expressly provide for personal solicitation, it will be declared illegal if it appears that in carrying out the contract it is necessary to resort to 'lobbying.' It is enough that such is the tendency of the contract."

It is apparent, therefore, that in order to uphold the contract in this particular case, and declare it valid as a matter of law, it would be necessary for us to overrule the decisions of this court in Sweeney v. McLeod and Hyland v. Hassam Paving Co., supra, and to disregard the opinion of the Supreme Court of the United States in the Burke Case; and the overwhelming weight of authority, as collated by this court in the Hyland Case, and by the author of Ruling Case Law as quoted.

It may be that the question as to whether the services were in the nature of influence and private personal solicitation was one of fact for the jury, and in this view the case should be sent back to be submitted to a jury, under proper instructions; but I cannot agree that we should hold as a matter of law that the personal solicitation in this case was not lobbying, or that we should in any way repudiate the doctrine so carefully declared by this court in Sweeney v. McLeod.

HORN v. ELGIN WAREHOUSE CO.

(Supreme Court of Oregon. June 1, 1920.)

1. Witnesses ⟸275(2)—In action for breach of warranty of seed wheat, plaintiff can be asked on cross-examination how much he paid.

In an action for breach of warranty of the variety of seed wheat, where the purchase of any wheat was in issue under the pleadings, plaintiff can be cross-examined as to how much he paid for the wheat in question; since payment of the purchase price is an element of the consummated sale of the wheat.

2. Sales ⟸440(4)—Evidence that variety of seed sold would have produced crop next year admissible in mitigation.

In an action for breach of warranty that wheat purchased for seeding was a spring wheat, whereas in fact the wheat delivered was a winter wheat, evidence that, if the wheat was of the variety claimed by plaintiff, it would have produced a crop next year, was admissible in mitigation of damages under the general issue.

3. Evidence ⟸150—Admitting evidence of experiments rests largely in court's discretion.

In an action for breach of warranty of variety of wheat sold as seed for spring planting, defendant's evidence that another purchased and planted some of the same lot of wheat and it produced no crop was evidence of an experiment, the admission of which rested largely in the discretion of the trial court to determine whether the conditions of the experiment were similar to those of the case in issue.

4. Evidence ⟸155(1)—Excluding plaintiff's evidence of unsuccessful planting held proper, though defendant showed successful planting.

In an action for breach of warranty that wheat purchased for seed was a spring wheat variety, evidence that plaintiff's witness purchased some of the same lot of wheat, and it produced no crop, was properly excluded, because the conditions were not shown to be the same; though defendant's testimony that others sowed some of the wheat, and it produced a crop of the variety specified, was admissible.

5. Sales ⟸52(3)—Evidence that defendant's foreman purchased wheat for another held admissible to show alleged agency.

In an action for breach of warranty of wheat sold for seed, where defendants alleged that they sold the wheat merely as agents for a disclosed principal, evidence by defendant's foreman that he bought the wheat for the account of the alleged principal was admissible.

6. Trial ⟸349(2)—Submission of special issues is discretionary.

Whether particular questions of fact shall be submitted to the jury for their finding in addition to the general verdict is within the discretion of the trial court.

7. Trial ⟸349(2)—Submission of special issues held not abuse of discretion.

In an action for breach of warranty of wheat sold for seed, where defendant pleaded a sale as agent for a disclosed principal, it was not an abuse of the trial court's discretion to submit special questions whether the sale was made as agent and whether the agency was disclosed to plaintiff.

8. Trial ⟸359(1)—General verdict controls unless special finding is inconsistent.

Under L. O. L. § 155, providing that a special finding inconsistent with the general verdict shall control, the general verdict must prevail unless the special finding is inconsistent.

Digitized by Google

9. Sales ⟸441(2)—Evidence held not to show express warranty of variety of seed wheat.

In an action for breach of warranty of the variety of wheat sold for seed, plaintiff's testimony that he knew defendant was not selling the wheat as seed wheat under the restrictions of law *held* to warrant the jury in finding there was no warranty of quality or variety, so as to render the rule of caveat emptor applicable.

10. Sales ⟸270—Warranty of variety of wheat seed held not implied where buyer inspected it.

Where wheat was sold for seed without any express warranty of quality or variety, and the buyer had opportunity to inspect it before he purchased it, a warranty of variety cannot be implied, though the buyer was unable to determine the variety by inspection, in the absence of showing that the seller knew of such inability or practiced fraud on the buyer.

11. Sales ⟸447—General verdict for defendant sustained, notwithstanding finding of undisclosed agency.

A finding by the jury on special issues that defendant's agency for another was not disclosed to plaintiff does not warrant judgment for plaintiff, notwithstanding a general verdict for defendant, where there was evidence from which the jury could find that there was no warranty of the variety of seed wheat for breach of which plaintiff brought his action.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by J. A. Horn against the Elgin Warehouse Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff, engaged in farming certain described lands in Union county, says in substance that on or about the ——— day of April, 1919, at Elgin, Or., he ordered of the defendant five sacks of Red Chaff club wheat, a spring wheat suitable for spring seeding, to be used as seed and sown for the purpose of raising a crop upon said premises during 1919, all of which was communicated to the defendant. He further says:

"That the defendant then and there sold and delivered to the plaintiff five sacks of wheat, for a valuable consideration, and then and there, as part of the contract of sale, represented and warranted the same to be of the variety ordered, viz., Red Chaff club wheat."

He states that he did not know and could not tell from inspection whether it was that kind of wheat or some other variety, but confided in and relied solely upon the representations and warranty of the defendant as alleged. He goes on to say that, relying upon the representations and warranty of the defendant, he sowed the wheat on his premises, but in truth and in fact the grain was not of the Red Chaff club variety, but was a winter wheat, by reason of which it did not produce a crop during the summer of 1919, all to his damage in the sum of $500. The answer consisted solely of a denial of the complaint, except the statement of the corporate character of the defendant.

At the trial, the defendant claimed that the wheat belonged to the Kerr-Gifford Company and that it conducted the sale solely as the agent of that concern, all of which it avers was disclosed to the plaintiff at the time. There was a dispute in the testimony on that subject. The court submitted to the jury two special interrogatories in relation to that matter. After hearing the charge of the court at the close of the trial, the jury retired and later returned the following verdict:

"We, the jury in the above-entitled action, find for the defendant.

"J. E. Reynolds, Foreman.

"Q. Did the wheat delivered by the defendant company to the plaintiff belong to the defendant or to Kerr-Gifford Company? A. Kerr-Gifford Company.

"Q. If you find that the wheat belonged to the Kerr-Gifford Company, was plaintiff informed at the time that he purchased the wheat that Kerr-Gifford Company was the owner thereof? A. No.

"J. E. Reynolds, Foreman."

On the reception of this verdict the plaintiff moved the court for judgment in his favor notwithstanding the general verdict, and that the plaintiff's damages be assessed. This motion was denied and judgment was rendered for the defendant. The plaintiff appeals.

L. Denham, of Elgin, for appellant.

R. J. Green, of La Grande, for respondent.

BURNETT, J. (after stating the facts as above). [1] It appears that the court allowed the defendant to ask the plaintiff on cross-examination how much he paid for the wheat in question, and the plaintiff predicates error on this matter. An issue in the case was whether or not the plaintiff had bought the wheat at all. One possible element of a consummated sale is the payment of the purchase price. Hence it was legitimate cross-examination of him on that subject to ask the question as stated.

[2] The plaintiff's contention was to the effect that the wheat actually delivered was of the variety called "Fortyfold." In cross-examining his witnesses the defendant was permitted to ask them whether Fortyfold would not have lived over the year 1919 and produced a crop in 1920. This testimony was admissible in mitigation of damages under the general issue as tending to show that the plaintiff's loss was not total, but that he might expect belated returns from his venture.

There was testimony to the effect that the wheat in question was grown on the farm of

Digitized by Google

Luther Hindman, and that it was stored in the defendant's warehouse in a separate pile in sacks. The plaintiff called one Smith as a witness, asked him if he sowed any grain "this spring," which being answered affirmatively, this question was propounded: "Upon your land—where did you get the seed?" The defendant's objection that this question was immaterial was sustained. The plaintiff then made this offer of proof:

"I want to know where he got the wheat, to be followed by the question what kind of wheat it was, expecting to prove that he got it from the Elgin Warehouse Company; that he ordered Red Chaff club wheat and sowed it as such, and that it sprouted up above the ground, and there it died—failing to produce a crop."

On the other hand, in support of its case the defendant produced the testimony of witnesses to the effect that they got some of this same Hindman wheat which they sowed during the season of 1919, and that it produced Red Chaff club wheat.

[3] All these matters about planting wheat were in the nature of proof of experiments and, as stated by Mr. Justice Lord in Leonard v. Southern Pacific Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221:

"In all cases of this sort, very much must necessarily be left to the discretion of the trial court; but when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case at issue, its discretion ought not to be interfered with."

[4] The offer made by the plaintiff in reference to the Smith seeding does not show that the conditions under which the experiment was made were the same as those affecting the planting made by the plaintiff. Necessarily the growth of seed is influenced by the nature and moisture of the soil and climatic conditions, as well as by cultivation. In the offer nothing is stated except that Smith ordered Red Chaff club wheat from the defendant, sowed it as such, and failed to produce a crop. All other ingredient conditions are omitted from the proposal. It is essential to its admissibility in evidence that the experiment relied upon be substantially similar to the one in issue. At first blush, one would say that the court did not hold the scale of justice at an even balance in refusing the plaintiff's offer of proof and at the same time allowing the defendant to show that the same kind of wheat sown by other parties produced a crop of Red Chaff wheat. It is a law of nature that men do not gather grapes of thorns, or figs of thistles. Hence, when it appears that planting the wheat obtained from the defendant produced Red Chaff club wheat, all conditions of soil, climate, and cultivation are merged in the ultimate result. The court was well within its discretion in allowing the result of the experiments offered in proof by the defendant and in excluding the negative experiment offered by the plaintiff. The former savored of demonstration, while the latter did not show that it was grounded on the same or similar conditions that spelled failure for the plaintiff. On the general subject of experiments, reference is made to Kohlhagen v. Cardwell, 93 Or. 610, 184 Pac. 261, where it is discussed by Mr. Justice Bennett.

[5] Another complaint on appeal is:

"That the court erred in overruling the plaintiff's objection to the question propounded by the defendant to the witness Harlan Huffman, as to how the warehouse company paid Hindman for the wheat sold by him to the warehouse company."

Huffman was the foreman or manager of the defendant's warehouse. The object of his testimony was to show that he purchased the wheat from Hindman for the account of Kerr-Gifford Company, and it was permissible for him to narrate the manner in which the purchase was made.

[6] Finally, the plaintiff complains of the submission by the court of special interrogatories to the jury, and in overruling his motion for judgment in his favor on the special verdict. In Herrlin v. Brown, 71 Or. 470, 142 Pac. 772, it is said:

"Submission of the particular question of fact to be answered by the jury in addition to their general verdict in the case at bar was a matter wholly within the discretion of the trial court, and will not be reviewed on appeal"—citing Swift v. Mulkey, 14 Or. 59, 12 Pac. 76; Knahtla v. Oregon S. L. R. Co., 21 Or. 186, 27 Pac. 91; Wild v. Oregon S. L. R. Co., 21 Or. 159, 27 Pac. 954; White v. White, 34 Or. 141, 50 Pac. 801, 55 Pac. 645; Palmer v. Portland R. L. & P. Co., 62 Or. 539, 125 Pac. 840.

[7] It was admissible under the general issue to show that the transaction occurred between the plaintiff and the Kerr-Gifford Company, operating through the defendant as the known agent of that concern. If true, this would refute the charge of the plaintiff that he dealt directly with the defendant as a principal party. Apropos of that issue it was competent to prove that the wheat was the property of Kerr-Gifford Company. It was equally appropriate to determine whether or not the agency of the defendant was disclosed to the plaintiff. The interrogatories were proper on that issue, and we cannot say that the trial judge abused his discretion in calling for a special verdict on that branch of the case. From the special verdict all that can be deduced is that the agency of the defendant was not disclosed to the plaintiff at the time of the transaction.

[8] It is said in section 155, L. O. L.:

"When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

Digitized by Google

The plain import of this section is that the general verdict must prevail unless the special finding of fact shall be inconsistent therewith. The jury might well have found in this case, as indicated by its special verdict, that the defendant dealt with the wheat in question as its own without revealing to the plaintiff that the property was that of another; and, notwithstanding all this, might have found that the defendant made no warranty respecting the variety of the wheat or its fitness for seed.

[9] On this branch of the case we here insert an extract from the plaintiff's own testimony on cross-examination respecting the transaction with the foreman of the defendant:

"Q. You don't remember him saying anything about that—that he did not have seed wheat for sale? A. Oh, well; now I know well enough they wouldn't sell me what you would call seed wheat, if I had went there to buy seed wheat. I would have had to take it to the mill and had it cleaned. I went there to buy some spring wheat that was suitable for seed wheat. If it had oats, wild oats, in it, I expected to take it to the mill just as I did and have it taken out, and have it prepared for seed.

"Q. You knew they were not selling you seed wheat? A. Well, I knew they were not selling it under the seed law.

"Q. And that they were not guaranteeing it as seed wheat, didn't you? A. All I know, I went there and asked him if he had any little club, and he said he had none. I went there with the expectation of taking my chances on the wheat as to whether it would grow or not—as to whether it was clean or not. I was going to avail myself of that, after I had this talk with him and have it cleaned; and when he said he didn't have any little club, but he said he had some Red Chaff club there that would be suitable for spring seed—spring wheat, that is.

"Q. You are familiar with the business of the Elgin Warehouse Company, and they told you they would not sell, or guarantee any wheat, seed wheat? A. I knew that they would not guarantee any wheat for seed under the laws of the state, what the law requires them to go through in order to sell seed wheat.

"Q. So you figured you were taking a large chance on your end of it, didn't you? A. Yes, I had bought seed wheat there before."

The jury was justified in believing that there was no warranty of the quality or variety of the wheat. It is instructive to consider the doctrine of Barnard v. Kellogg, 10 Wall. 388, 19 L. Ed. 987, quoted thus by Mr. Justice Lord in Morse v. Union Stock Yard Co., 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157:

"'No principle of the common law,' said Mr. Justice Davis, 'has been better established, or more often affirmed, both in this country and in England, than that [in] sales of personal property, in the absence of an express warranty, where the buyer has an opportunity to inspect the goods, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor applies.'"

[10] The testimony does not disclose any express warranty. All that could be derived from it under any view of the case would be an implied warranty, such as was discussed in Morse v. Union Stock Yard Co., where the contract was made by correspondence in which the plaintiff ordered the defendant to "get two carloads of good beef cattle." There, the plaintiff had no opportunity to inspect the animals. They were shipped to him by railroad after he had paid for them, and the court held in substance that where goods or chattels are sold by description there is an implied condition that the goods or chattels delivered shall correspond to that description, and that in such a sale by description, when the buyer has not inspected the goods and has had no opportunity therefor, there is a condition precedent that the goods or chattels shall answer the description, and an implied warranty that they shall be fit for the particular purpose to which they shall be applied, when that purpose is known to the vendor. The case at bar is of a different sort. The plaintiff had the opportunity to inspect the wheat and to determine for himself its variety and quality. That the plaintiff was unable through want of skill or otherwise to distinguish between Red Chaff wheat and other kinds does not affect the case as stated in the complaint, for it is not averred that the defendant knew that he was deficient in ability to classify grain as to its variety, or that the defendant practiced any fraud upon him on that account. The jury properly might have considered that it was a case falling within the doctrine of caveat emptor, although the parties were dealing as if the wheat were the property of the defendant and as if the question of agency or property in the Kerr-Gifford Company were not involved.

[11] The general verdict for the defendant is not impeached by the special verdict. It is consistent with what the jury legitimately found to be the case, that there was no warranty of the wheat, either express or implied.

For these reasons the judgment is affirmed.

Digitized by Google

CHANCE et al. v. WESTON et al.

(Supreme Court of Oregon. May 25, 1920.)

1. Trusts ⇐17, 18(5) — Oral agreement to hold land subject to conveyance when directed held void.

Where land was conveyed in trust for a woman under an agreement that the trustee should convey to her or as directed by her, and she orally directed the trustee to convey to her daughters, the power thereby given the trustee was void under the statute of frauds (L. O. L. §§ 804, 7398), as the trust was for her benefit, and no trust could be created by parol for the benefit of the daughters.

2. Trusts ⇐61(2) — When testamentary in character, could not be executed after death of donor.

Where a woman for whose benefit land was conveyed in trust, under an agreement that the trustee should convey to her or as directed by her, directed the trustee to convey to her daughters, and the attempted trust in favor of the daughters was testamentary in character, it could not be executed after her death, and the trustee's conveyance pursuant to such direction after her death was void.

3. Estates ⇐5—"Estate in fee" defined.

An "estate in fee" is every estate which is not for life, for years or at will (citing 3 Words and Phrases, First Series, p. 2706).

4. Curtesy ⇐9(1) — Exists in equitable estate notwithstanding statute; "fee."

L. O. L. § 7315, as amended by Laws 1917, p. 687, giving widowers the right as tenants by the curtesy to the use for life of one-half of the lands of their wives, provided that any man entitled to curtesy may elect in lieu thereof to take the undivided third part of his wife's land in his individual right in "fee," does not abolish the right of curtesy in equitable estates as previously existing, as the word "fee" is used as meaning simply an estate of inheritance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fee.]

5. Curtesy ⇐9(1)—Depends on character of wife's title.

A husband's right to curtesy depends on the character of the estate which the wife had in her lifetime, and not on the estate which her heirs would take by descent or the source of her title.

6. Curtesy ⇐11(3)—Husband not barred by conveyance in trust for wife.

Where husband and wife conveyed land in trust for the wife, and the wife died intestate as to such land, the husband was not barred by such conveyance of his right of curtesy in the land.

7. Curtesy ⇐11(6) — Dower ⇐49(2) — Contracts between husband and wife are void.

Husband and wife cannot contract with each other regarding any estate growing out of the marriage relation, and conveyances between them intended to cut off or relinquish curtesy or dower are void.

Department 2.

Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Suit by Marion T. Chance and others against Edward Weston and others. From the decree, the named plaintiff appeals, and defendants file a cross-appeal. Modified.

Plaintiffs instituted this suit to obtain a decree declaring plaintiff Marion T. Chance entitled to curtesy in certain land described in the complaint, and that subject to such right plaintiff Addie Schmelzer be declared to be the owner in fee of an undivided one-fourth interest in the land as one of the four heirs of Laura I. Chance, deceased, the other heirs being defendants Rachel Weston, Myra Goeres, and Georgia Tinnerstett.

Plaintiff Marion T. Chance appeals from that part of the decree denying his right of curtesy. The defendants filed a cross-appeal from the part of the decree canceling the deed from the defendant Tillamook County Bank to the above last-named defendants, and declaring plaintiff Addie Schmelzer entitled to a one-fourth interest in the land.

The decree was rendered by the circuit court on the pleadings, which show, in substance, the following facts: On March 7, 1918, plaintiff Marion T. Chance and Laura I. Chance, now deceased, were husband and wife, and together conveyed by warranty deed to the defendant Tillamook County Bank, a corporation, the tract of land in suit. On the same date the grantors delivered with the deed the following written instructions to the defendant bank:

"To the Tillamook County Bank:

"The undersigned are this day executing and delivering to you a warranty deed conveying the following described real property, situated in Tillamook county, Oregon, to wit: [Here follows description of real property].

"This conveyance is being made without any actual consideration, and with the understanding and agreement that the legal title thereto is to be held by you in trust for Laura I. Chance, and that you shall convey the legal title to the said property to the said Laura I. Chance, or as directed by her, at any time when she shall request you so to do; all necessary expenses to be paid by her. Dated this March 7, 1918. Marion T. Chance.
"Laura I. Chance."

On the same day the Tillamook County Bank in writing acknowledged the receipt of the conveyance, and declared that the legal title was to be held by it in trust, and conveyed in accordance with the provisions of the foregoing delaration.

It is alleged in the answer, in effect, that the conveyance was executed in the settlement of property rights between the husband and wife in contemplation of divorce proceedings by Laura I. Chance, and that certain other personal property was transferred

Digitized by Google

to plaintiff Marion T. Chance. No divorce suit was ever instituted.

On August 20, 1918, Laura I. Chance died. The defendant bank still held the legal title to the land in question in trust for the use and benefit of Laura I. Chance, the deed therefor having been placed of record immediately after its delivery. The bank, however, asserted that Laura I. Chance had given it oral instructions, about ten days before her death, to convey the land to three of her daughters, namely, defendants Rachel Weston, Myra Goeres, and Georgia Tinnerstett.

On August 30, 1918, the defendant bank conveyed the land to the above-named three daughters of the deceased, the deed being duly recorded. Laura I. Chance, deceased, although making a will, died intestate as to the land which was not mentioned in the will. Therefore the land descends to the heirs at law of the deceased. Prior to her death she made no disposition of the real property by any writing.

On the date of the deed to the bank Mr. and Mrs. Chance executed an agreement, dividing their personal property, she giving her interest in certain personal property on the farm to him, and he giving his interest in certain personal property thereon to her. It is recited in the agreement that the farm and personal property were then leased for a term ending January 1, 1919. It was agreed that the rent of the real and personal property should be equally divided between them until the end of the term of the lease. It was further agreed thereby that the contract and conveyance constituted a full settlement of all property rights between the parties.

Johnson & Handley, of Tillamook, for appellant.

H. T. Botts, of Tillamook (Geo. P. Winslow, of Tillamook, on the brief), for respondents.

BEAN, J. (after stating the facts as above). The trial court concluded that the conveyance from the Tillamook County Bank on August 30, 1918, to defendants Rachel Weston, Myra Goeres, and Georgia Tinnerstett was not effective to invest the title to the real property in the grantees named therein, because the conveyance was not executed and delivered prior to the death of Laura I. Chance, and the authority of the defendant Tillamook County Bank to execute such conveyance to said grantees ceased upon the death of Laura I. Chance; and that said conveyance should be canceled of record. The appeal of the defendants from this portion of the decree raises the first question for determination.

It is the contention of the defendants that, when the Tillamook County Bank, the trustee, received oral instructions from Laura I. Chance on August 10, 1918, to convey the land to Mrs. Chance's three daughters above named, the bank, as trustee, was bound by the trust agreement to convey the property according to Mrs. Chance's instructions, and the trustee thereafter held the property in trust for the grantees named by Mrs. Chance, and the execution of the trust, even though nonenforceable by the grantees, cannot be questioned. They cite and rely upon the case of Richmond v. Bloch, 36 Or. 590, 60 Pac. 385. That was a case where a husband conveyed land by absolute deed to his wife on the verbal agreement that she should hold it in trust for their children. Her conveyance of the land to the children was upheld as against her creditors.

The death of Laura I. Chance having occurred before the conveyance by the bank to her three daughters, there was nothing at the time of her death upon which this new alleged trust could rest other than the oral instructions of Mrs. Chance. No other power was given to the defendant bank to convey the land. Section 804, L. O. L., provides inter alia that no trust or power concerning real property can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law. Section 7398, L. O. L., is as follows:

"Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent, lawfully authorized shall be void."

[1, 2] The power, if any, given to the defendant bank to convey the real estate to the three daughters was given by parol, and was void under the statute of frauds. The deed executed by the bank to three of the defendants after the death of Laura I. Chance was executed without authority. A trust in real estate cannot be created by parol. De Vol v. Citizens' Bank, 92 Or. 606, 179 Pac. 282, 181 Pac. 985; Riggs v. Adkins, 187 Pac. 303; Doran v. Doran, 99 Cal. 311, 33 Pac. 929; Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; Annis v. Wilson, 15 Colo. 236, 25 Pac. 304. The trust created by the conveyance to the bank was admittedly for the benefit of Laura I. Chance, deceased, and no trust thereafter could be created by parol for the benefit of the defendants. If any such trust was attempted by Laura I. Chance during her lifetime, the same was testamentary in character, and therefore could not have been executed after her death. Stone v. Ladd, 40 Or. 606, 67 Pac. 413; Rose v. Oliver, 32 Or. 447, 52 Pac. 176; Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455. It is stated in 1 Mechem on Agency (2d Ed.) § 652, p. 462:

Digitized by Google

"It is therefore the general rule that the authority of an agent, not coupled with an interest, is instantly terminated by the death of the principal, even though it may have been irrevocable in his lifetime; and that any attempted execution of the authority after that event is not binding upon the heirs or representatives of the deceased principal."

That part of the decree annulling the deed from the bank is affirmed.

The next question for consideration is as to the right of curtesy of plaintiff Marion T. Chance in the land. It is contended by counsel in behalf of plaintiff Marion T. Chance that he is entitled, as tenant by the curtesy, to the use during his natural life of one-half of the land described in the complaint.

It is contended by counsel for defendants that Marion T. Chance is barred from any right of curtesy by virtue of the deed executed to the bank and the contract of settlement of property rights between him and his wife. Also that under the statue of 1917, he is not entitled to curtesy in an equitable estate of his deceased wife. Section 7315, L. O. L., as amended by chapter 331, General Laws of Oregon 1917, p. 688, reads as follows:

"The widower of every deceased person shall be entitled, as tenant by the curtesy, to the use, during his natural life, of one-half of all the lands whereof his wife was seized of an estate of inheritance at any time during the marriage, although such husband and wife may not have had issue born alive, unless he is lawfully barred thereof. (Provided, however, that any man entitled to curtesy, may, at his election, take in lieu of such curtesy, the undivided third part in his individual right in fee of the whole of the land whereof the wife was seized of an estate of inheritance at any time during the marriage, unless he is lawfully barred thereof. And provided further, that when a widower shall be entitled to an election under this section, he shall be deemed to have elected to take the undivided third of such lands unless within one year after the death of his wife he shall commence proceedings for the assignment or recovery of his curtesy.) Estates by the curtesy, may be admeasured, assigned and barred in the same manner that dower may be admeasured, signed [assigned] and barred; and, as far as practicable, all other laws of this state applicable to dower shall be applicable in like manner and with like effect, to estates by the curtesy."

The amendment of 1917 added that portion of the section above quoted which is included in parentheses.

It was held by the trial court that under the amendment of 1917 "curtesy, or the interest of the husband in the lands of the wife, should attach only to an estate of inheritance of which the wife was seized at any time during marriage, and that an estate of inheritance as so used would include only fee-simple estates." This was because of the provisions that the widower should have an election to take an undivided one-third of such lands in fee, and there could be no fee in an equitable estate.

The main reliance of defendants is upon the opinion in Jenkins v. Hall, 26 Or. 79, 37 Pac. 62. In that case the husband was about to abandon and desert his wife, and, in consideration of her joining with the plaintiff in conveying other real estate belonging to him, conveyed the land to her by deed which contained the following clause:

"This deed is made by the party of the first part, and accepted by the said party of the second part, in compliance with a mutual contract for the separation and segregation of the lands, properties, and effects of and belonging to the said parties, or either of them, so that the same may be hereafter held in severalty by each, without any claim thereon by the other; and the said party of the first part hereby covenants with the second party, her heirs and assigns, that neither he nor his heirs, executors or administrators shall or will, at any time in the future, make or claim any right, title, or interest of, in, or to the said lands or premises hereby conveyed, or any part thereof."

We find no such covenant in either the deed executed by Marion T. Chance and wife nor in the contract between them relating to the personal property. As a general rule the husband is tenant by the curtesy of the wife's equitable estates of inheritance as well as her legal estates, if the requisites exist which would entitle him to curtesy in the latter. 17 C. J. p. 424, § 26; 12 Cyc. 1010; 8 R. C. L. p. 396, § 8; Jackson v. Printing Co., 86 Ark. 591, 112 S. W. 161, 20 L. R. A. (N. S.) 454; Dugan v. Gittings (Md.) 43 Am. Dec. 306.

Under the curtesy statute in force until 1907, the courts of this state held that in Oregon the right of curtesy was governed by precisely the same rules as at common law, except the right did not depend upon the birth of a child alive. Farnum v. Loomis, 2 Or. 29; Whiteaker v. Vanscholack, 5 Or. 113; Runyan v. Winstock, 55 Or. 202, 104 Pac. 417, 105 Pac. 895; Beam v. United States, 162 Fed. 260, 89 C. C. A. 240; Parr v. United States (C. C.) 153 Fed. 462. In 1907 (Laws 1907, p. 152) the statute was amended to read as in section 7315, L. O. L., before the amendment of 1917. In 1919 (Laws 1919, p. 622) the Legislature again amended section 7315 so that the same reads as it did before the amendment of 1917. This last amendment does not affect the present case.

[3] An estate in fee is every estate which is not for life, for years, or at will. 3 Words and Phrases (1st Series) p. 2706, where we read:

"* * * In modern English tenures a fee signifies an estate of inheritance, and a fee simple imports an absolute inheritance, clear of any condition or limitation whatever, and, when not disposed of by will, descends to the heirs

Digitized by Google

generally. There are also limited fees: (1) Qualified or base fees; (2) fees conditional at the common law."

Fee simple is defined in Bouvier's Law Dictionary as:

"An estate of inheritance. Cole, Litt. 1b; 2 Blackstone, Comm. 106. * * * It is the largest possible estate which a man can have, being an absolute estate in perpetuity. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate. Plowd. 557; Atkinson, Conv. 183; 2 Sharswood, Blackst. Comm. 106."

The terms "fee" and "fee simple" are often used as convertible terms. 3 Words and Phrases (1st Series) p. 2706; 12 Am. & Eng. Enc. of Law (2d Ed.) 890.

[4] In the amendment of 1917, we think the word "fee" taken in connection with the whole section means simply an estate of inheritance. Otherwise it would contradict the former portion of the law declaring a widower entitled to curtesy or one-half part of all the lands whereof his wife was seized of an estate of inheritance.

The amendment of 1917 does not indicate a legislative intent to change the character of the title of estates to which the right of curtesy attaches. Had the Legislature intended to change the long-established rule entitling a husband to curtesy out of the wife's equitable estate of inheritance, it would have been very easy to have expressed it thus. We cannot believe that the amendment abolished the right of curtesy to an equitable estate.

[5, 6] The next question is, Was the plaintiff, Marion T. Chance, barred by virtue of the conveyance executed to the bank? The right of the husband to curtesy depends on the estate which the wife had in the property in her lifetime, and not on the estate, which her heirs would take by descent. It is not important whence or by what means the wife acquired her title. The tests to be applied relate to the character of the title, and not to its source. Hence the right of curtesy of a husband exists, though the property was acquired by her through a conveyance from him to a third person, who subsequently conveyed it to his wife. 8 R. C. L. p. 395, § 7. It is also stated in section 8 thus: "The authorities are practically agreed that curtesy may exist in lands in which the wife has an equitable estate of inheritance" (citing, among other authorities, Ogden v. Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151, wherein the court held that a husband was entitled to curtesy in lands conveyed by him to his wife; such a conveyance vesting her with an equitable estate only). See, also, 17 C. J. page 423, section 22. In 8 R. C. L. p. 399, § 12, we read:

"*Wife's Separate Estate.*—It is clear that at common law it was not competent in a grant to a woman of an estate of inheritance to exclude her husband from his right of curtesy, and the fact that he was not entitled to receive the rents and profits did not defeat his right; and while a husband is entitled to curtesy in the equitable separate estate of his wife, there is no doubt but that such an estate may be so limited as to give a wife the inheritance and at the same time to exclude and deprive the husband of curtesy by words clearly denoting that intention."

The same principle is stated in 17 C. J. p. 424, § 24, and page 425, § 27, where it is declared that the right of curtesy is favored in the law, and a husband will not be excluded from rights in property springing from the marital relation except by words that leave no doubt of the intention so to do, nor will he be excluded by words of restraint, limitation, proviso, or condition; and it has been held broadly in England that the husband cannot be excluded from curtesy in the wife's separate estate.

The great weight of authority is that where a husband conveys property to his wife in such manner that it becomes a part of her separate estate he is entitled to curtesy therein, unless an intent to the contrary clearly appears. 8 R. C. L. p. 399, § 11.

[7] In Oregon neither husband nor wife can contract with the other regarding any estate growing out of the marriage relation, and conveyances between married persons intended to cut off or relinquish such estates as curtesy or dower are entirely void. Jenkins v. Hall, 26 Or. 79, 37 Pac. 62; House v. Fowle, 20 Or. 163, 25 Pac. 376.

A contract between a wife and her husband for the elimination by him of his curtesy estate in her property the right to which is given by section 7315 and by section 7318, as amended by chapter 331, Laws of 1917, which provides that, "A married woman may, by will, dispose of any real estate held in her own right, subject to any rights which her husband may have as tenant by the curtesy or his election thereunder," is held to be entirely void both at law and in equity, as being against the public policy of the state of Oregon. McCrary v. Biggers, 46 Or. 465, 81 Pac. 356, 114 Am. St. Rep. 882; Potter v. Potter, 43 Or. 149, 72 Pac. 702.

Plaintiff Marion T. Chance, as the widower of Laura I. Chance, deceased, is entitled as tenant by the curtesy to the use during his natural life of one-half of the land described in the complaint. The decree of the lower court is modified accordingly. Neither party will recover costs or disbursements herein.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Digitized by Google

TILLAMOOK COUNTY v. JOHNSON et al.*

(Supreme Court of Oregon. June 1, 1920.)

1. Eminent domain ⟸103—Owner entitled to damages for constructing and maintaining fences made necessary.

Where by condemning a road lands were divided, so that it was necessary for the owner to fence both sides, he is entitled to damages not only for the expense of constructing the fence but for maintaining the same.

2. Eminent domain ⟸195—In condemnation proceeding defendant must specify the damages which he seeks to prove.

In proceeding to condemn land for public road, defendants should specify in their answer the damages which will result, and evidence of damage not so specified is inadmissible.

3. Eminent domain ⟸262(5)—Instruction limiting damages to that specified in the answer held harmless.

In eminent domain proceedings, instruction which limited the damages to that specified in the answer was harmless, though erroneous; evidence of damages not specified having been received.

4. Appeal and error ⟸995—Opinion evidence as to value of attorney's services not binding.

In reviewing an award of attorney's fees, opinion evidence as to the value of attorney's services is not binding on the appellate court.

Department 2.

Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Condemnation proceedings by Tillamook County against Frank Johnson and others. From the judgment, defendants appeal. Affirmed.

The plaintiff, a municipal corporation, seeks to condemn a strip of land 60 feet in width, lying 30 feet on each side of the center line of the coast highway survey, through the land of the defendants Frank and Marie Johnson in Tillamook county, Or. The county court of that county duly adopted a resolution declaring it necessary to acquire the strip for road purposes. The complaint states that the county court has been unable to agree with the defendants upon the price, and that the damages to said defendants for the taking thereof do not exceed $700. The state land board held a mortgage on the property involved, and for such reason its officers were made defendants.

The answer of the Johnsons admits the material allegations of the complaint except as to the amount of damages, and as a further and separate defense alleges their ownership of the land, possession of which the plaintiff had taken and held by force and arms, and declares that the land so taken, including the timber thereon, has a value of $950. This pleading further alleges:

"That the said strip of land seized and held by the plaintiff so divides and severs the lands of the defendants, contiguous and adjacent thereto, incumbers the said lands with additional burdens, casts thereon timber débris and waste taken from the strip aforesaid and thrown upon said contiguous and adjacent lands, that the last mentioned are depreciated in value by reason of the plaintiff's said acts in the sum of $750.

"That in order that the defendants shall at all times have the use and enjoyment of the said land contiguous and adjacent to the said strip of land seized by the plaintiff, it will be necessary for the defendants to build two fences along each side of the strip of land taken and seized as aforesaid by the plaintiff, at an expense of not less than $450.

"That it will also be necessary for the defendants to maintain gates and passageways from one portion to the other of said adjacent and contiguous land to the defendants' further damage in the sum of $500.

"That $500 is a reasonable attorneys' fee for defending this action."

The answer concludes with a prayer for judgment for $2,650, together with $500 as attorneys' fee, and costs.

The reply admits the ownership of the premises as alleged, but "denies each and every other allegation" of the answer.

A trial was had, and the jury, after viewing the premises, returned a verdict to the effect "that the defendants Johnson are entitled to damages herein in the sum of $775, the cash market value" of the land actually taken, and to the further sum of $150 as reasonable attorney's fee, but that they should not recover on account of any other damage. Thereupon judgment was entered that—

"Upon the payment of such damages and attorney's fee the land should be condemned and appropriated by the plaintiff for a county road."

The Johnsons appealed, claiming that the trial court erred in charging the jury in effect that the maintenance of fences to be constructed by them along the boundary line of the road through their premises was not an element of damage to be considered by the jury, and in refusing to give defendants' requested instruction No. 5. They also insist that there is no evidence upon which a jury could make a finding of less than $300 as attorney's fee.

Thomas B. Handley, of Tillamook (Johnson & Handley, of Tillamook, on the brief), for appellants.

T. H. Goyne and Webster Holmes, both of Tillamook, for respondent.

JOHNS, J. (after stating the facts as above). [1] It appears from the bill of exceptions that the length of the strip of land

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied June 29, 1920.

Digitized by Google

sought to be condemned is 2,561 feet; that it would divide the lands of the appellants; that it would be necessary to fence each side of the strip; and that the cost of constructing the fences and gates would be approximately $400. After such evidence had been offered, Elmer Hall, as a witness for the defendants, testified over the objection of the plaintiff that when the fences were constructed the yearly cost of maintaining them would be about $50. In the first portion of its charge, the court instructed the jury that—

In arriving at the amount of appellants' damages, it might "consider the necessity of the improvements and expenditure of money and labor which the defendants will be required or compelled to make on account of the appropriation or construction of the highway in order to enjoy reasonably such lands to the same extent as before the appropriation, such as the building and maintaining of fences and gates, the reopening or restoring of the passageways upon the land in going to and from one part to another."

Thereafter, upon the question of resulting damages, the court told the jury that the defendants would be entitled to recover "the reasonable cost of the construction of a reasonable fence on each side of the right of way, as part of the damages."

When the court had given its charge and before the jury had retired, the following dialogue occurred between the court and counsel for the appellants:

"Counsel: The court instructed the jury that they are entitled to consider the cost of the construction of the fence, but there was nothing said about the maintenance of the fence after it was constructed.

"Court: I do not think the maintenance of the fence would be an element of damages. I think the cost of construction is an element of damages, but not the maintenance.

"Counsel: We except to the court's refusal to instruct the jury that the cost of maintenance of the fence, after construction along the right of way, would be an element of damages in the case. And to the instruction of the court that it would not be an element of damages."

The first portion of the charge was correct. 2 Lewis on Eminent Domain, § 498, says:

"Where, by taking a part of a tract, additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land; then the burden of constructing and maintaining such fence in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages. * * * It is a question of damage to the land, as land. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence, as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it."

The effect of the second instruction and the subsequent proceedings between court and counsel was to nullify the first instruction and take from the jury consideration of the cost of maintaining the fences. Under proper pleadings, this would have been reversible error.

[2, 3] It devolved upon the appellants to make proper allegations in their answer as to how and why they would suffer damages, and to prove their claim by competent testimony. Although in a part of their answer above quoted they allege "that, in order that the defendants shall at all times have the use and enjoyment of the said lands contiguous and adjacent to the said strip," it will be necessary for them to build fences along each side of the strip at an expense of not less than $450, it will be noted that there is no allegation concerning the cost of maintaining such fences. Testimony regarding this cost was received over the plaintiff's objection, which, under the pleadings, should have been sustained. Hence, although instructions upon that point were erroneous, as a matter of law, they were not prejudicial.

[4] The appellants contend that there was no testimony which would sustain a verdict for any less amount than $300 as attorney's fee. In Wright v. Conservative Inv. Co., 49 Or. 177, 89 Pac. 387, this court held that the amount of an attorney's fee is not within the discretion of the court, but should be determined from the evidence; and that, where the only testimony fixed $50 as a reasonable fee, a finding of $30 was not supported. That principle was modified and in legal effect overruled by the opinion in Lockhart v. Ferrey, 59 Or. 179, 115 Pac. 431, which held that on appeal this court is not bound by opinion evidence as to the amount of attorney's fee to be allowed on a contract. Here, the only evidence on the subject before this court is the testimony of Attorney Mannix, incorporated in the bill of exceptions, based upon which the jury found that $150 was a reasonable fee. After a careful reading of the record, we cannot say as a matter of law that there is no evidence to support that finding.

The judgment is affirmed.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Digitized by Google

MASSACHUSETTS BONDING & INS. CO. v. LOS ANGELES R. CORPORATION.
(L. A. 5324.)

(Supreme Court of California. May 19, 1920. Rehearing Denied June 17, 1920.)

1. **Master and servant ⟸410—Charge allowing subrogated compensation insurer to recover damages to sons of deceased employé held erroneous as not supported by pleading and evidence.**

In an action by an insurance company, which became subrogated to the rights of the widow and heirs to recover against a stranger for the death of an employé by paying compensation to her, where the only damage pleaded and supported by the evidence was the damage to the widow, an instruction, authorizing recovery of damage to the two sons of deceased as well as to the widow, was erroneous.

2. **Master and servant ⟸389—Insurer paying compensation to employé's widow held subrogated to rights of sons also.**

Where a deceased employé left a widow and two sons, but only the widow claimed compensation and received payment from the insurer, the insurer nevertheless was subrogated to the right to recover damages to the sons as well as to the widow.

3. **Master and servant ⟸410—Admission by counsel held not to justify charge authorizing subrogated insurance carrier to recover damages not pleaded.**

An admission by defendant's counsel that the right of the widow and heirs to recover for the death of deceased vested in the insurer who paid the compensation does not warrant a charge authorizing the insurer to recover damages to the sons of deceased, where it pleaded and proved only damage to the widow.

4. **Appeal and error ⟸302(2)—Right to complain of error in record not lost by failure to assert in motion for new trial.**

The right to complain of an error which appears by the record is not lost by failure to call specific attention to it in motion for a new trial.

Department 1.

Appeal from Superior Court, Los Angeles County, Curtis D. Wilbur, Judge.

Action by the Massachusetts Bonding & Insurance Company against the Los Angeles Railroad Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondent.

OLNEY, J. This is an appeal from a judgment for plaintiff in an action for damages sustained by the death of one, Ogan, through the alleged negligence of the defendant. At the time of his death Ogan was employed by a corporation known as Bowles Bros. Company, and in the course of his employment was driving a wagon westerly on Pico street in Los Angeles. The defendant operates a two-track electric street railroad on the street, the tracks occupying the middle of the street. Ogan was on the northerly or right-hand side of the street as he was going, and off the tracks. On approaching the intersection of South Union street he turned to the left or south across the tracks as if to turn into South Union street. He was driving slowly, and apparently turned without any signal of his intention and without looking back. His wagon was struck by one of the defendant's cars coming up behind him; he was thrown from the wagon and sustained injuries from which he died. He left a widow and two adult sons. His widow made claim against his employer under the Industrial Compensation Act (St. 1913, p. 279), and the claim was allowed, and was paid by the plaintiff as the insurance carrier for the employer. The plaintiff then brought the present action as subrogated by the Industrial Compensation Act to any right of action against the defendant for Ogan's death.

There seems to be little doubt but that Ogan was guilty of contributory negligence in turning as he did across the defendant's tracks without signal and without looking back. Counsel for the plaintiff do not contend to the contrary. The case was tried for the plaintiff in the lower court chiefly upon the theory that after Ogan had turned and had placed himself in a position of peril, his peril was observed and realized by the motorman of the approaching car in time for him, acting with reasonable promptness under the circumstances, to stop the car and avoid the accident, and he did not do so. It is upon this theory alone that it is sought here to justify the verdict for the plaintiff. If the evidence be sufficient to sustain the verdict upon this ground it is at best but little more than sufficient for that purpose. It is not a case of which it can be said that a verdict for the plaintiff is certainly a just one or that a new trial would reasonably result in another such verdict. In other words it is not a case where it can be said with any certainty that substantial justice has been done and that the result should therefore not be disturbed because of errors which may have occurred in reaching it. There was one substantial error which did occur and which under these circumstances requires a reversal and new trial.

The plaintiff's complaint alleged the fact of Ogan's death through the negligence of the defendant; that he left a widow and two sons of whom the widow was dependent on him for support; that the plaintiff by reason of its payment of the claim of the widow against Ogan's employer had been subrogated to any right of action for his death,

Digitized by Google

and then, as the only allegation of damages suffered, alleged that by reason of Ogan's death, his widow had been damaged in the sum of $10,000. There was no allegation of damage to the sons nor of facts from which such damage might be inferred. The complaint, also, in alleging the right in the plaintiff by way of subrogation to maintain the action alleged it to be to maintain an action for all damages suffered by the widow without mention of any damages to the sons. At the trial no evidence was introduced of any relation between Ogan and his adult sons who were not living with him, which showed any pecuniary damage on their part.

[1] In this condition of the pleadings and the evidence the jury were charged that the action was one prosecuted by the plaintiff to recover damages alleged to have been sustained by the widow and sons of Ogan; that the right of the widow and heirs to recover for his death had vested in the plaintiff; that if the jury found for the plaintiff the measure of the recovery which should be allowed was the amount of damages suffered by the heirs; that the jury in fixing damages might consider the relation of the widow and children to their deceased husband and father; and that the fact that the widow and children had been and would be deprived of the comfort, society, and protection of the defendant might be considered in arriving at the pecuniary value of the life of Ogan to his widow and children.

In other words, while the complaint alleged and the evidence showed only damage to the widow, the case was unequivocally submitted to the jury as one wherein their verdict, if they found for the plaintiff, should be for the amount of damages suffered by the adult sons, as well as by the widow. The error in so instructing the jury is manifest.

[2] In this connection it may be well to note a claim made by the defendant. It is that since only the widow made claim against Ogan's employer and was alone paid by the plaintiff, the plaintiff's right by way of subrogation was limited to a recovery of the damages suffered by her alone. This is not correct. The making of a lawful claim for compensation under the Industrial Compensation Act works a subrogation of any right of action to recover for his death, whether the person making the claim be the exclusive beneficiary for whom such action would lie or not. Western States, etc., Co. v. Bayside Lumber Co., 187 Pac. 735. The plaintiff, therefore, was entitled to maintain an action for any damages suffered by the sons, as well as by the widow. But the point is that it did not bring such an action. The action it brought was only for damages suffered by the widow. The jury, nevertheless, were instructed that the action was one for damages suffered by the sons, as well as by the widow, and that if they found for the plaintiff they should determine the amount of the verdict accordingly.

[3] The only answer made by plaintiff's counsel to the defendant's claim of error in the respect under discussion is: First, that it appears that the trial court in charging the jury stated, "It is admitted by counsel that for the purpose of this litigation the right of the widow and heirs to recover for the death of the deceased husband and father have vested by operation of law in the plaintiff corporation"; and, second, that attention was not called to the point in argument on motion for a new trial when, in fairness, it should have been. It is argued that, in view of the statement in the charge as to admission by counsel, it must be presumed that such admission was made, even though there be, as there is, nothing in the record showing such admission. We need not decide whether such statement in a charge to the jury proves itself, so to speak, without anything in the record to substantiate it, for, assuming that an admission was made as stated, it was plainly no more than an admission of the subrogation worked by law. It was not an admission that the plaintiff was entitled to recover for damages suffered by the sons, as well as by the widow. The language quoted itself shows that it was not this question, but the matter of subrogation which was in the mind of the court as that which was admitted, and a reading of the balance of the instruction confirms this view.

[4] As to the second contention of plaintiff's counsel, that attention was not called to the point in the argument on motion for a new trial when, in fairness, it should have been, suffice it to say, both that this fact does not appear from the record, but only from counsel's statement, and also that it cannot be said that the right to complain of an error appearing on the record is lost by a failure to call specific attention to it in presenting a motion for a new trial.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

Digitized by Google

Ex parte WILLIAMS. (Cr. 2290.)

(Supreme Court of California. May 20, 1920.)

1. Criminal law ⟸252(1)—Complaint essential to jurisdiction of police court.

It is essential to the jurisdiction of a police court to put a person on trial for public offense that there should be on file a complaint charging such person with the commission of such offense.

2. Habeas corpus ⟸85(1) — Parol evidence held not to show lack of complaint in police court.

On habeas corpus to procure discharge after conviction in police court, parol evidence introduced *held* not sufficient to show that no complaint was filed against petitioner in the police court, though there was no record of any complaint.

3. Habeas corpus ⟸85(1)—Evidence held to show trial.

Evidence that a police officer had testified against petitioner for habeas corpus at the proceedings in police court *held* to show that there was a trial in such court, notwithstanding petitioner's testimony showing such summary proceedings as would not amount to trial.

4. Habeas corpus ⟸85(1)—Burden is on prisoner to show lack of trial.

Where petitioner for habeas corpus seeks discharge because there was no trial in the police court before his conviction, the burden is on him to show such lack of trial; errors or insufficiency of the evidence at the trial not being reviewable on habeas corpus proceedings.

5. Criminal law ⟸251—Constitutional rights of accused must be preserved in police courts.

The constitutional rights of one accused of a crime should be preserved even more strictly in a police court than in higher courts, because of the summary nature of its proceedings, since accused in those courts generally have no counsel to protect their rights.

Lawlor, J., dissenting.

In Bank.

Application by Earl Williams for a writ of habeas corpus to be directed to the Sheriff of the City and County of San Francisco to secure discharge from custody after conviction of vagrancy. Writ discharged, and prisoner remanded.

See, also, 186 Pac. 610.

Raine Ewell, of San Francisco, for petitioner.

Isadore Golden, of San Francisco, for respondent.

PER CURIAM. This is a proceeding in habeas corpus.

The prisoner was confined in the county jail of the city and county of San Francisco under a commitment from the police court showing his conviction therein of vagrancy, and a judgment based thereon of 30 days' imprisonment. The writ of habeas corpus was issued by us upon a petition alleging that no complaint was ever filed against petitioner in said court, that no trial was had and no evidence introduced in said court in support of any charge against him, and that he was denied all opportunity to obtain witnesses to disprove any claim that he was guilty of vagrancy.

[1, 2] It goes without saying that it is essential to the jurisdiction of a police court to put a person upon trial for a public offense that there should be on file therein a complaint charging such person with the commission of such offense. Prisoner's case in this behalf rests solely upon the fact that no complaint charging him with a public offense can be found, or, indeed, that any such complaint has been seen, so far as the evidence shows, at any time since the day on which he was convicted. It appears that it is the practice in the police court to there hold the complaint until the case is disposed of, and then to deliver the same to a department of the county clerk's office where it remains as a part of the files of the office. Apparently no record whatever is kept of the fact of the filing of a complaint, which usually is sworn to before the police judge and delivered by him to the clerk of the court, a deputy county clerk, who thereupon endorses the same as filed. If perchance the complaint is subsequently abstracted or lost, no record of there having been any complaint whatever remains. In a matter involving the personal liberty of individuals, the practice is, to say the least, not to be commended. However, as against the failure to show the complaint itself, or any record thereof or record of the fact of the filing thereof, there is parol evidence tending to show that a complaint was in fact filed in the prisoner's case. The prisoner was arrested without a warrant and booked at the city prison for vagrancy. A daily docket sheet of the arrested persons assigned to a department of the police court is made up and delivered to the deputy clerk of that department, and on this sheet, which apparently constitutes the record of the court for the day, but which is made up and delivered to the clerk entirely regardless of whether any complaint has been filed in any of the cases enumerated thereon, the clerk notes the disposition of each case. The case of the prisoner was shown upon such a sheet, this record showing conviction and judgment. The deputy clerk testified positively that in all cases in which no complaint is ever filed, which sometimes happens when the arrested person is dismissed without trial, a note to that effect is made, and that the fact that no note was here made as to the absence of a complaint shows positively that there was

Digitized by Google

a complaint on file. He further testified that he would not have delivered a commitment in this case unless there had been a complaint filed prior to the delivery of the commitment. The police judge testified substantially that he had no independent personal recollection of this particular case. He further testified substantially that in accord with the practice obtaining in his court a complaint would have been duly sworn to and filed before the trial. The arresting officer testified positively that in this particular case he swore to a complaint before the police judge in open court on the morning of the trial, leaving the same with the judge, and the clerk of the court testified that he saw such a complaint. In addition there is, of course, a presumption that official duty has been duly performed. In view of all the circumstances we do not feel warranted in holding that no complaint was filed in this case.

[3, 4] As to the alleged want of trial, failure to introduce any evidence, and denial of opportunity to procure witnesses on his own behalf, the evidence is conflicting. The prisoner who had been out on bail testified substantially that all there was to his so-called trial was that his name was called and the judge asked him substantially if he had anything to say and he told him that he was working for the "News" (a daily newspaper), that the judge then said that would do and it would be 30 days; and that he then asked the judge to give him time to obtain witnesses who would testify that he was working, and the judge told him that if he said another word he would make it 60 days. He is corroborated to some extent by certain witnesses. Of course, whatever a proceeding of this kind might be styled it would not be the "trial" to which every accused party is entitled, and it could not be tolerated by any respectable court. On this matter, however, the burden of proof was necessarily on the prisoner. Unquestionably the arresting officer went upon the witness stand, and it sufficiently appears that he gave the judge some information about the case. He testified here that he was duly sworn before giving his testimony. We cannot in this habeas corpus proceeding enter into an inquiry as to the sufficiency of his testimony to support a finding of guilt. That was a matter available to the prisoner on an appeal to the superior court. The police judge testified before us and denied each and all of the claims of the prisoner in regard to the proceedings on the trial. The testimony in this regard is not such as to satisfy us that there was in fact no trial.

[5] It was suggested on the argument that somewhat summary methods of disposing of business in the police court are essential to a dispatch of the great number of cases coming on daily therein. This may be conceded, and it might be admitted also that in all courts it should be the aim to dispose of business as quickly as is consistent with the proper and careful administration of justice. But however summary the methods adopted in any court there are certain rights guaranteed by our Constitution to one charged with any crime, entirely regardless of his station in life. These rights are as sacred and inviolable in the police court as in the highest court of the land, and must necessarily be observed therein. Indeed, when we consider the greater opportunity for the disregard of those rights in the police court of a large city dealing in large part as it does with cases of individuals who by reason of their lack of means, friends, and lack of knowledge, are almost entirely dependent upon the court for impartial investigation and disposition of their cases, a greater measure of care on the part of the judge of such a court to see that every right of the defendant is carefully guarded is essential than in a higher court where the defendant is represented by counsel who can ordinarily be relied upon to protect his rights.

It was because the prisoner alleged facts tending to show a disregard of some of those rights and a denial of due process of law that we issued the writ. But the showing before us is not sufficient to convince us that the proceedings in the police court were actually as alleged, and without a convincing showing we are not justified in avoiding what purports to be the result of a regular judicial determination.

The writ is discharged and the prisoner remanded.

ANGELLOTTI, C. J., and SHAW, LENNON, OLNEY, and WILBUR, JJ., concur.

LAWLOR, J. I dissent. Did the police court acquire jurisdiction by the filing of a complaint against the petitioner? If none was filed, the proceeding was wholly void, and concededly the petitioner should be discharged. It is admitted that no complaint could be found at the time of the hearing. Parol evidence was, however, introduced to the effect that prior to the case being called a complaint had been filed. Police Officer William J. Harrington, who arrested the petitioner, testified that a complaint was drawn in the office of the bond and warrant clerk; that he swore to it before the judge in open court; and that he left it on the judge's desk. The judge's testimony on this point was that he had no independent recollection of a complaint, and the official who, it is claimed, framed the pleading, was not produced as a witness. The clerk of the court testified that he had seen a complaint during the proceedings, although in another part of his examination he stated: "I don't remember of no complaint except what is on the

Digitized by Google

calendar sheet." I have reached the conclusion that the clerk was not speaking from recollection, but based his testimony on the custom followed in the police court. This witness called attention to the absence from the loose "docket sheet" of the notation, "no complaint filed," which he said was customarily stamped opposite the title and number of the cause, as they appeared on such sheet, whenever a complaint had not been filed. But, however that may be, the fact remains that no entry of a complaint appeared on the "docket sheet"—which represented the only "minutes" kept by the clerk. Officer Harrington further testified that he saw a complaint in the superior court during the hearing of a similar writ, but that he did not "know what the custom is, whether to bring the original or a copy." He was finally asked whether, so far as he knew, the last time he saw the complaint was not when he swore to it and placed it on the judge's desk, and he answered: "Yes, sir." Attached to the return of the chief of police in the superior court is a printed form of complaint purporting to charge the petitioner with the commission of each of the eleven acts denounced as independent crimes in section 647 of the Penal Code. The names of the petitioner, the complaining witness, and the judge of the police court, and the date it is alleged the specified offenses were committed, are filled in in typewriting. This paper is not certified by the county clerk, the ex officio clerk of the police court, and the custodian of its records. The return does, however, contain this language:

"* * * A copy of which complaint is hereunto annexed and the original thereof produced and exhibited to this court."

But no one, who, having knowledge whether an original complaint or a copy thereof was actually "produced and exhibited" in the superior court, was called to testify, nor was any attempt otherwise made to confirm or negative Officer Harrington's testimony in that regard. It may be mentioned in passing that the cases of nine other men were before the court at that time, and that no complaint was produced in any of them.

The prevailing opinion relies in part on the presumption that "official duty has been duly performed." This is a disputable presumption which, unless overcome by other evidence, must prevail. Subdivision 15, § 1963, Code Civ. Proc. But has this rule of presumption any application where the jurisdiction of a court of inferior or limited jurisdiction is called in question? In this respect a distinction is to be drawn between the acquiring of jurisdiction and the proper exercise thereof. The rule of evidence where the jurisdiction of inferior courts is questioned is thus stated in 15 Corpus Juris, at page 832:

"The mere exercise of jurisdiction by courts of inferior, limited, or special jurisdiction, does not raise a presumption of the existence of the requisite jurisdictional facts, for nothing is presumed to be within the jurisdiction of such courts."

It is also said in the same volume, at page 842:

"There being no presumption in favor of the jurisdiction of a court of inferior, limited, or special jurisdiction, it is usually considered necessary, in order to sustain the proceedings of such a court, that the record should affirmatively show that the court had jurisdiction."

Among the cases cited in support of the above text is Ex parte Kearny, 55 Cal. 212, wherein the petitioner was discharged on habeas corpus on the ground that the complaint did not state facts sufficient to constitute a public offense. It was said in that case at page 214:

"The police court of the city and county of San Francisco is an 'inferior court' of limited jurisdiction, whose powers are conferred, and whose duties and mode of procedure are prescribed, by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant, and over the subject-matter."

The same rule would, of course, apply where there is no complaint at all. The respondent sets up in his return a "commitment"—which purports to be a "copy," although it is not certified—but, as the issuance of a commitment is an act in the exercise of jurisdiction, and jurisdiction must be affirmatively shown in the case of a court of inferior or limited jurisdiction, it must affirmatively appear that jurisdiction was conferred by the filing of a complaint. Section 1426, Pen. Code. In my opinion, where the jurisdiction of such a court, particularly where life or liberty is involved, is in issue, and especially where it is sought to establish that jurisdiction by parol, the proof must be of the clearest and most convincing character. The law requires, justice demands, and the courts should see to it that the individual is not put to trial unless it plainly appears that the court has jurisdiction to act. In the determination of this question it is not enough that the evidence may tend to show that a complaint was filed or that it may be involved in conflict. We must carefully weigh the evidence and give to it the force to which it is entitled. Speaking as one of the triers of the fact, I am convinced from the evidence, upon whichever side the burden of proof may rest, that the petitioner was sentenced by a court which had never acquired jurisdiction by the filing of a complaint.

I am also convinced from the evidence that the proceedings in the police court did not, either in form or substance, constitute a trial, "according to prescribed forms, and in ac-

Digitized by Google

cordance with the general rules for the protection of individual rights." Kalloch v. Superior Court, 56 Cal. 229, 240. In reaching this conclusion I have not failed to observe the distinction between the absence of a trial which would involve a violation of constitutional guaranties, and the erroneous exercise of jurisdiction in the course of a trial the remedy for which would be by appeal. Nor have I considered whether the prisoner was guilty of any or all of the eleven acts specified in the printed form of complaint already alluded to.

The police court of the city and county of San Francisco is the creation of the municipal charter thereof, but also has jurisdiction in crimes prescribed by the state. The Legislature, in title XI of the Penal Code, has provided a special form of procedure in criminal offenses in justices' and police courts: "Police courts" include "police judges' courts." Section 1461. Jurisdiction is acquired by the filing of a complaint. Section 1426. The minutes of the action and proceedings must be kept in a docket. Section 1428. In arraigning the accused, and in the receiving and recording of the plea, the same procedure is required as in the case of an indictment. Section 1429. If a jury is not waived, the charge must be tried by jury, otherwise by the court. Sections 1430 and 1435. Either party may, upon good cause shown, have a reasonable postponement. Section 1433. After a plea or verdict of guilty the court must appoint a time for rendering judgment, which must be not more than two days or less than six hours after the plea or verdict, unless the defendant waive the postponement. Section 1449. "At any time before judgment, defendant may move for a new trial." Section 1450. The judgment must be entered in the minutes of the court. Section 1453. A certified copy of the judgment must be delivered to the sheriff. Section 1455.

The petitioner should have been tried, therefore, under the above procedure, and yet there was a palpable disregard of practically every one of the foregoing provisions. I shall find it necessary, in order adequately to describe the proceedings, to state what was done in the cases of the nine other men —which were before the court and were disposed of at the same time—for the reason that, if it could be said there was an attempt to conduct a hearing, there was at most a single hearing. What happened was this: The petitioner had been released on $25 cash bail and was in the body of the courtroom when the proceedings began. The other nine men were brought from the dock and lined up before the judge. Officer Harrington was sitting in a chair "right alongside" the judge's desk. To my mind the weight of the evidence is against the testimony of Officer Harrington that he was sworn as a witness. The judge did not remember and the clerk was not questioned as to whether Officer Harrington or any one else was sworn. Charles T. Kelley, who was present, testified that Officer Harrington was not sworn, and Wells Fadden, one of the nine men, stated: "When I come up I don't know whether he was sworn." It was not testified that any other witness was sworn in any of the ten cases. We shall hereafter have occasion to refer to the "docket sheet," wherein petitioner is designated as a witness. At any rate, while the nine men were standing in the presence of the judge, and while the petitioner was making his way to take his place in line—his name being the last called, the judge asked Officer Harrington: "What about these men?" The substance of the reply was that they were vagrants and had been "hanging around Third and Market." The judge thereupon proceeded to ask each man successively: "What have you to say for yourself?" Wells Fadden answered that he was employed by the Santa Fé, but it does not appear that any of the others made a reply to the judge's questions, and it is not claimed that any further inquiry was made into the question of their guilt or innocence. Eight of the men were given "24 hours to leave town," and Wells Fadden was convicted. As already noted, petitioner's case was the last called, and there is some conflict in the testimony as to what was done. Charles T. Kelley testified that the petitioner did not take his place with the others until after eight of the cases had been disposed of; that he did not hear Officer Harrington "say anything after the first review of the men that was brought up"; that Officer Harrington gave no testimony after the petitioner had taken his place at the bar; that no other testimony was taken in any of the ten cases; and that in answer to the judge's question:

"What have you to say for yourself?" "The petitioner said he was working. * * * Then the judge gave him 30 days, and petitioner said to him, 'I am working on the Daily News,' and the judge said, 'If you say anything more, I will make it 60 days,' and the incident was closed."

The petitioner gave this version:

"The judge asked me what I was doing when I was arrested. I told him I was on my way to work, and he said, 'That's enough, 30 days.' I said, 'If you will give me till to-morrow morning, I can get witnesses here to prove that I am working,' and the judge said, 'If you say anything more. I will give you 60 days. Sit down there.' * * * Not to my knowledge, Harrington didn't say anything while I was up. * * * I can't say positively, but I didn't hear him. * * * The charge was not explained to me."

When Wells Fadden was asked: "What happened in the case of Earl Williams?" he answered:

Digitized by Google

"They called his name. He come up, and the officer testified. * * * He said he was a vagrant and had been hanging around Third and Market. That is all I heard. Q. What happened? A. 'I find you guilty. County jail, 30 days.' * * * Williams asked the judge if he could put the case over until he could consult with his employer, and the judge says, 'If you say anything more, I will give you 60 days,' and he sat down."

This is Officer Harrington's testimony:

"Q. Were you sworn as a witness? A. Yes, sir. * * * I said to the judge that I had arrested this man previously on six different occasions; that I had a complaint from my captain about him begging on Third street, and that he was a dope user, and I had arrested him several times with fiends in the Southern district, and it seems that before this time I had no special complaint about him, but this time I had a complaint by a business man on Third street."

The judge's testimony was as follows:

"So far as the facts of the case and the trial are concerned, I do not remember them. * * * Q. Do you recall whether or not you administered an oath to Mr. Harrington before he testified in the case? A. As far as that as an independent fact I do not recall, except that I administer an oath when a witness goes on the stand. Q. Do you recall Officer Harrington testifying in that case? A. I do. I recall very distinctly, but as to all his testimony, I don't remember. Q. Do you recall anything as to his testimony about this man Williams? A. * * * I will have to say no, I don't. * * * Q. The statement made yesterday of what happened was this in substance: That ten cases of vagrancy were called, and the case of Earl Williams was the last on the list; that nine of these men were in the dock while Earl Williams was in the audience, having been released on bail; that as nine of the ten cases were called nine men came out of the dock and were lined up in front and Earl Williams was making his way out of the audience up to join them; that you went through the list of these men and discharged all but one, who was sent back into the dock convicted; that no testimony whatever was asked for in connection with Earl Williams as he got before you, and you asked him what he had to say for himself, and he replied in substance that he was employed on the Daily News, and you said, according to the testimony here: 'That is enough to hear from you, 30 days. Now let's see what the News can do for you?' And he said, 'Judge,' something to the effect that might he have an opportunity to show that he was employed on the News, and you said to him that if he said anything more it would be 60 days, and that practically all this took place in the courtroom as far as this particular case was concerned. * * * A. I say that is absolutely not true, because I have never convicted men on such evidence. It is not my custom down there, and I have never convicted men on any such testimony."

If it is to be insisted that what took place in the police court constituted a trial according to the law of the land, then, in my opinion, it may justly be said that there is very little left of our boasted constitutional guaranties that one accused of crime shall have a full and fair hearing before being deprived of life or liberty. I do not think that any one of the constitutional requirements of a trial was observed in this case. The petitioner was not asked whether he had counsel, if he desired the aid of counsel, or if he was ready to proceed to trial. No complaint was produced, there was no arraignment, no taking of a plea—unless the inquiry of the judge as to what petitioner had to say for himself can be said to call for a plea, and, except for what appears in the "docket sheet," no "minutes" of proceedings on arraignment were entered. Petitioner was not asked if he waived a trial by jury—one of his fundamental rights—and it is not pretended that it can be ascertained from the records of the police court whether he was proceeded against—if proceeded against at all—alone or in conjunction with the other men. If the former, he was entitled to a separate trial, and it does not appear whether a separate trial was demanded. He was not asked if he was ready to proceed to judgment, and no time was appointed therefor. He was not arraigned for judgment, and no inquiry was made whether he had any cause to show why judgment should not be pronounced upon him. On a charge of vagrancy evidence as to employment is always admissible, and yet petitioner's request for a postponement, in order—as he claimed—to produce his employer as a witness, was denied. Whatever the judge said to the petitioner in this connection—and undoubtedly he made some remark after sentence was pronounced—I am satisfied that in no true sense was the petitioner given a "trial."

If it be proper to hold in this connection that the testimony on behalf of the respondent may be aided by a presumption of regularity based on the record of the police court, nevertheless the only evidence of a record is the "minutes" in the "docket sheet," which is a printed, unbound page with certain captions, opposite which appear the following entries:

"Offense: Vagrancy.
"Released or in custody: $25.00 bail.
"Plea: Not guilty.
"Arresting officers: Harrington and posse.
"Proceedings: Guilty.
"Witnesses: Defendant and Harrington.
"Judgment: 30 days."

Clearly this record cannot be said to contain any "minutes" of the required statutory steps which I have enumerated, and it cannot be determined therefrom what did take place during the proceedings. The loose "docket sheet" may have some merit as a work-saving device, but it could have no other virtue.

Digitized by Google

If petitioner were relying here on any one of the indicated departures from the prescribed mode of trial, it might be held that the police court merely erred in the exercise of jurisdiction, and that relief must be sought by appeal. But, in my opinion, even if the police court had acquired jurisdiction by the filing of a complaint, the failure to observe so many essentials of a trial would cause the jurisdiction to lapse and leave the police court without jurisdiction to render a judgment.

It might be assumed from the proceedings that in the case of a "drug addict" or "vagrant" it is not necessary to observe the constitutional requirements of a trial. There is no such discrimination in the law. Indeed, the greater the demoralization of the accused, the more need there is, it would seem, to conserve his rights. I do not think these proceedings should be given our sanction or be accepted as a sufficient compliance with constitutional mandates. It is not enough to moralize on the showing that has been made before us; the proceedings should be condemned as a perversion of law.

I am strongly of the opinion that the petitioner should be discharged on the grounds, first, that no complaint had been filed, and, second, that there was no trial before judgment.

In re MORO'S ESTATE. (S. F. 9125.)

(Supreme Court of California. May 21, 1920. Rehearing Denied June 17, 1920.)

1. Wills ⇐123(3) — Substantial compliance with statutory requirements as to execution essential.

A substantial compliance with the requirements of Civ. Code, § 1276, for the execution of a will, including the requirement that the witnesses must sign at the end of the will, is essential to the validity of any will other than an olographic or noncupative will.

2. Wills ⇐121—Attestation on separate sheet after blank space does not invalidate.

The fact that the attestation clause was on a separate sheet from the concluding provisions of the will and the signature of testator, though there was a sufficient blank space on that sheet, does not invalidate the will, where the sheets were fastened together in proper order so that the attestation clause was upon the sheet immediately following that containing the end of the will.

3. Wills ⇐121—Attestation clause must follow testator's signature so as to occur at "end of the will."

Civ. Code, § 1276, subd. 4, requiring the attestation clause to be at the end of the will, requires that it shall follow the last clause of the will and the testator's signature in such manner that it is apparent from an inspection of the will, without reference to any other evidence, that it was the purpose to attest the will at the end thereof.

Lennon, J., dissenting.

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

In the matter of the estate of Giovanni Moro, also known as John Moro, deceased. Appeal from an order admitting a purported will to probate. Affirmed.

Rehearing denied in bank; Lamar, J., dissenting.

Arnold C. Lackenbach, of San Francisco, for appellant.

W. H. Early, of Petaluma (Fred S. Howell, of Petaluma, of counsel), for respondent.

ANGELLOTTI, C. J. This is an appeal from an order admitting a purported will to probate as the will of deceased, and denying the petition of appellant for letters of administration. The sole contention of appellant is that the purported will was not executed in the manner required by law.

The only alleged defect in the matter of execution is that the signatures of the two attesting witnesses are not "at the end of the will" as required by subdivision 4, § 1276, Civil Code. The purported will was typewritten on three separate sheets of paper approximately 8½ inches wide by 13 inches long, which, with a cover sheet, indorsed as the will of deceased, were fastened by eyelets at the top. The typewriting commences a little over 2 inches from the top of the first sheet, consumes the entire page, continues on the second sheet, commencing a little over 2 inches from the top, and ends a little over 3½ inches from the top of the second sheet, with, "In witness whereof I have hereunto set my hand and seal this 25th day of June, 1917." The signature of the deceased was placed immediately after this on a line left for that purpose. There are no other signatures on the page, there being a blank space of about 8½ inches to the bottom thereof. On the third sheet or page the typewritten attestation clause commences about 2 inches from the top, occupying about 3 inches, and the signatures of the attesting witnesses are written directly beneath the attestation clause, on lines provided for that purpose, with their respective places of residence stated in typewriting. The third sheet is not numbered at the bottom, the others being numbered at the bottom respectively "1" and "2." The evidence at the hearing was such that there is no pretense that the instrument was not executed and attested in the precise form and order of sheets in which it was filed for probate. The attestation clause and signatures of witnesses follow the signature of

Digitized by Google

the testator, which was properly appended immediately after the last sentence of the will. Looking at the instrument as a whole, it has every appearance of careful preparation and genuineness, and of being in exactly the condition in which it was at the time the various signatures were appended.

The whole claim of appellant is that because of the blank space between the signature of the testator and the commencement of the attestation clause, and the fact that such attestation clause and the signatures of the witnesses are on the succeeding sheet or page instead of on the sheet or page on which appears the testator's signature, the two witnesses did not sign "at the end of the will."

[1] It must be conceded, of course, that substantial compliance with the requirements of section 1276, Civil Code, is essential to the validity of any will other than an olographic or noncupative will. That section requires in subdivision 1 that "it must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto," and in subdivision 4 that "there must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence." Whether there has been substantial compliance with this requirement as to the place of signature of the witnesses is a question that necessarily must be determined solely upon an inspection of the paper itself, assuming, as we must, in view of the circumstances, that the document when signed by the witnesses was in the same condition as when filed for probate. If the signatures are not in fact "at the end of the will" within the meaning of subdivision 4 of section 1276, Civil Code, that is an end of the matter, and it must be held that the will was not executed in the manner prescribed by law.

[2] We think, in view of the appearance of the document itself, that in the determination of this question the mere fact that the attestation clause and signatures of witnesses are on the sheet or page following that on which the testator appended his signature is altogether immaterial. As said in the Matter of Field, 204 N. Y. 448, 454, 97 N. E. 881, 883 (39 L. R. A. [N. S.] 1060, Ann. Cas. 1913C, 842):

"There is no statute forbidding the use of separate sheets or directing how they shall be joined together."

The instrument filed, consisting of the three sheets fastened together as already described, must be regarded as a completed whole, and so regarded each part, down to and including the signatures of the witnesses, follows a previous part naturally and in proper order, with the signatures of the witnesses and their places of residence the very last words of the instrument. The place of such signatures bears the required relation to the conclusion of the will proper, and obviously they were there placed for the sole purpose of legal attestation. If the words of the will itself with the signature of the testator had reached to the very bottom of the second sheet or page, no one could claim with any show of reason whatever that the fact that the attestation clause and signatures followed on another sheet or page instead of on the second sheet or page in any degree affected the question of sufficiency of execution. The real claim of appellant that the signatures of the witnesses are not "at the end of the will" is necessarily based on the fact of the blank space on the second sheet or page following the testator's signature, a space considerably more than sufficient in size to have permitted the insertion therein of the attestation clause and signatures of witnesses.

[3] What is meant by "the end of the will" with reference to the place of signature of testator and witnesses is a question that has received some consideration at the hands of the courts of New York, from which our statute was taken, as well as from this court; but in our opinion no case cited goes to the extent of warranting the rejection of the will here involved on the theory that there was not a substantial compliance with the requirement that the witnesses sign "at the end of the will." It is settled by the decisions that in view of the requirement no portion of the writing constituting the will proper may follow the signatures. This, of course, is clear. So where the purported signatures, whether of testator or witnesses, have been found in places preceding the end of the writing, the will has been rejected as not executed in accord with the imperative demand of the statute. Obviously, the end of the will cannot be at the beginning or in the middle or anywhere else except after the last provision of the instrument itself. The claim of appellant is that, to be "at the end of the will," the signature of the testator must immediately follow the close of the will, without any considerable intervening blank space, and that the signatures of the witnesses, or at least the commencement of the attestation clause, must immediately follow the signature of the testator, without any considerable intervening blank space. In this behalf reliance is placed on certain expressions in the "court" opinion in Estate of Seaman, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, where the purported signatures, both of testator and witnesses, were on the back of a folded will, under the printed words of endorsement, "The last will and testament of" under which the name "Henry Seaman" had been written, and a printed form for date of filing, certainly not a natural or

Digitized by Google

proper place for them, or a place bearing any proper relation to the concluding portion of the provisions of the will. While these signatures were subsequent in place to every provision of the will, it was held that the signature of the testator was not at the end of the will within the meaning of the statutory requirement, and that the end of the will "is not the foot or physical end of the sheet of paper upon which the 'will' is written, but is the physical termination of the testamentary provisions which constitute the will." Discussing the requirement as to the testator's signature, "the court" opinion said:

"The requirement that the name shall be subscribed 'at' the end of the will is not satisfied by having that name written *at any place* 'after' the termination of the written matter, *irrespective of the relation which such place bears to the concluding portion of the will.* This provision does not, however, of necessity require that it shall be in immediate juxtaposition with the concluding words of the instrument, *but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes.*" (The italics are ours.)

The court went on to say that the signature must in fact be placed in such proximity to the testamentary provisions as to constitute a substantial compliance with the statute, and that while a slight space, a single line "or even more," might be left blank, yet to leave blank an "entire page" would indicate a disregard of the statute which should prevent admission of the will to probate. In his concurring opinion Chief Justice Beatty said:

"The true test to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses [which were in the same place as the testator's], and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution."

In another concurring opinion by the writer of this opinion, concurred in by Justice Shaw, the test of Chief Justice Beatty was accepted as correct, with the further statement that the signature must be after the termination of the testamentary provisions, and that where so placed "the mere extent of space between such termination and the subscription ought not to affect the question as to whether the statute has been complied with, if the document on its face, disregarding the signatures of the witnesses and all evidence aliunde, fairly indicates that the name was so placed by the testator as a subscription and for the purpose of execution," and that "the extent of space is, of course, material upon the question as to what the document does indicate upon its face." It will be seen that the gist of these opinions is that as to the testator's signature it is not enough that the signature be in any place after the termination of the will proper, "irrespective of the relation which such place bears to the concluding portion of the will" (it being in that case on the back of the folded will and under the words of indorsement of the nature and character of the instrument), and that while it is not required that it shall be in immediate juxtaposition with the concluding words of the will, "it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes." This was the express test prescribed by "the court" opinion as regards the testator's signature, and it may here be assumed as suggested by the court, that the intervention of an "entire" blank page between the concluding portion of the will and the signature would require the rejection of the will as showing a material disregard of the provisions of the statute, for the reason that the instrument would not then on its face warrant the required inference. With relation to the signatures of the witnesses the same test would require that they be placed in such a position with relation to the concluding words of the will and so near thereto, and, of course, following the same, as to warrant a reasonable inference that they were placed where they appear solely for the purpose of attesting the execution of the will. If so placed, they are practically and substantially "at the end of the will" within the meaning of the statutory requirement. We consider this to be practically the ruling in Estate of Seaman, supra, and it commends itself to us as correct. In this case the inference to that effect arising upon an inspection of the instrument is irresistible, and we are satisfied that in the respect suggested there was a substantial compliance with the law in the matter of the execution of the will.

We think the distinction between the case at bar and the various cases relied on by learned counsel for appellant is so obvious as to render consideration of those cases unnecessary here.

The order appealed from is affirmed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

LENNON, J. I dissent. The will in question was not, in my opinion, executed in keeping with the requirements of section 1276 of the Civil Code. That section provides, among other things, that every written will, other than an olographic will, must be signed by two attesting witnesses who must affix their signatures at the end of the will.

The document admitted to probate as the last will and testament of Giovanni Moro

Digitized by Google

is typewritten and consists of three sheets of paper, 8½ inches wide and 13 inches long, fastened together at the top by staples. The dispositive clauses completely fill the first page. A concluding paragraph consisting of four lines appears at the top of the second page and is immediately followed by the signature of Moro. The remainder of the second page, a space of about 8 inches, is blank. The usual attestation clause followed by the signatures of the attesting witnesses appears at the top of the third page and occupies altogether a space of about 5 inches.

The Estate of Seaman, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, is the leading case in California on the question of what is meant by the words "at the end of the will" as they are used in section 1276 of the Civil Code. The decision in that case is fully in accord with the New York cases construing a similar statute. The law is stated by the court in that case as follows:

"The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The 'will' at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the 'end thereof' is not the foot or physical end of the sheet of paper upon which the 'will' is written, but is the physical termination of the testamentary provisions which constitute the will. * * * To say that where the name is there is the end of the will is not to observe the statute. That requires that where the end of the will is there shall be the name. It is to make a new law to say that when we find the name there is the end of the will. * * *' Sisters of Charity v. Kelly, 67 N. Y. 409; Matter of O'Neil's Will, 91 N. Y. 522; Matter of Andrews' Will, 162 N. Y. 1.

"The requirement that the name shall be subscribed 'at' the end of the will is not satisfied by having that name written at any place 'after' the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter, and the name without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which should prevent its admission to probate. See Soward v. Soward, 1 Duval (Ky.) 126."

In the Estate of Seaman, supra, as in the instant case, several New York authorities were urged upon the court by the proponent of the will. Of these Matter of Gilman, 38 Barb. 364, may be taken as representative. In the last-mentioned case the written matter of the will terminated four lines above the bottom of the page where the testator signed his name. The court said:

"An instrument is signed at the end when nothing intervenes between the instrument and the subscription. * * * The place named in the statute is the end. The end of an instrument, in writing, commences and continues until something else, or some other writing occurs."

Referring to the quoted words this court said:

"This language may have been appropriate to the will then before the court, but as a construction to be given to the statute it does not meet with our approval, and is moreover inconsistent with the construction given in the above cases cited from the Court of Appeals of that state [New York]. Particularly do we dissent from the definition of 'end' as given in the last sentence of the quotation." Estate of Seaman, supra.

Applying the reasoning of Estate of Seaman to the instant case, it is manifest that the attesting witnesses did not sign "at the end of the will" within the meaning of the statute. In that case the court opinion, which, of course, states the law of the case, distinguishes between the "will," or declarations of the testator, and the physical substance upon which the will is written. According to the reasoning of that opinion it is not sufficient for a signature to a will to be affixed at any place between the termination of the written matter and the physical end of the material substance which contains the writing; in order to be at the "end" of the will, the signature must be placed at the close of the testamentary provisions. The signature must be affixed in such relation to the place which bears the concluding portion of the will as to afford a reasonable inference that the signature was intended to indicate an authentication of the instrument as a completed expression of the testamentary purposes or, in the case of a witness, as an attestation of the execution of the will. But that alone is not sufficient. Irrespective of the indication of intent, it must appear that the signature was in fact placed in such proximity to the end of the testamentary provisions as to constitute a substantial compliance with the statute. A slight space might be left between the signature of the testator and the signatures of the witnesses, "such as a single line or even more," as stated in Estate of Seaman. Here, however, there is a space consisting of two-thirds of

Digitized by Google

a page, "a space considerably more than sufficient in size to have permitted the insertion therein of the attestation clause and signatures of witnesses." The signatures were placed at the top of a different and subsequent page. While the witnesses signed the last of several pages containing a will and there was no writing following the signatures of the witnesses, they did not sign at the termination of the testamentary provisions. Therefore, there has not been in fact an observance of the provisions of section 1276 of the Civil Code as that section has heretofore been interpreted by this court.

It is true that the question determined in the Estate of Seaman related to the position of the signature of the testator. But the requirement of the statute as to the position of the signatures of the witnesses and the signature of the testator is the same. Under the doctrine of the Seaman Case, we would be constrained to declare the will void had the signature of Moro been placed on the third page where the signatures of the witnesses appear. The same language in the same statute cannot be given two totally different interpretations.

"It is a requirement of the statute that both the testator and the witnesses must sign at the end of the will. Wherever the will ends there the signatures must be found, and one place cannot be the end for the purpose of subscribing by the testator and another place be the end for the purpose of signing by the witnesses." Estate of Hewitt, 91 N. Y. 261.

Although appellant does not rely upon any circumstance of fraud in the execution of the will, it may not be amiss to note that the will was not written upon a connected printed form but was typewritten upon several separate sheets of paper; the sheet containing the attestation clause having no connection, physical or otherwise, with the preceding sheets until it was stapled to them. It is not even numbered. It may be noted, moreover, that, while in the will itself the testator is referred to as Giovanni Moro, this being the name which is signed to the will, the testator is referred to in the attestation clause as John Moro. These circumstances are mentioned, not for the purpose of indicating the probability of fraud in this particular case, but to illustrate the undoubted possibilities of fraud, which it is the very purpose of the statute to prevent, should it be held that a will was duly executed where it appeared that the attestation clause and the signatures of the witnesses were placed upon a separate and independent sheet of paper, regardless of intervening space. For all that appears from the document itself, the paper containing the attestation clause may have been attached to the other sheets composing the document months after the signature of the testator was affixed.

Nor is it material that there may have been no fraud in fact in the instant case.

"It would have been wholly unavailing to show that this will was in other respects properly executed; that there was some excuse for not placing the names of the witnesses at the end of the will; that there was the absence of fraud; and that the transaction was attended with entire good faith and fairness. The proof offered would not tend to show that the place where the signatures were signed was the end of the will." Estate of Hewitt, supra.

JONES v. CALIFORNIA GROWERS & SHIPPERS, Inc. (L. A. 6048.)

(Supreme Court of California. May 18, 1920.)

1. Sales ⟸353(6)—Seller of growing crop, suing for price, need not allege delivery.

In action by seller of growing crop for balance of purchase price, brought while crop was still growing, it was unnecessary to allege delivery.

2. Sales ⟸12—Growing crops subject to absolute sale.

Growing crops are subject to absolute sale.

3. Pleading ⟸279 (4) — Installment of price due after action brought may be set up by supplemental complaint.

Nonpayment of balance of purchase price falling due subsequent to commencement of seller's action may be set up by supplemental complaint.

4. Costs ⟸260(4)—Buyer's appeal on ground that delivery was not alleged held frivolous.

In action by seller of growing crop for balance of purchase price, brought while crop was still growing, buyer's appeal from judgment for seller on ground that there was no specific allegation of delivery *held* frivolous and to warrant $100 penalty, in view of Const. art. 6, § 4½.

Department 2.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by H. T. Jones against the California Growers and Shippers, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

C. K. Bonestell, of Fresno, for appellant.

James W. Griffin, of Holtville, for respondent.

WILBUR, J. [1-4] Plaintiff recovered judgment for $2,600, being the balance of the purchase price of the entire crop of melons growing on his ranch, which was sold by him to the defendant for $4,600, payable $2,000 cash, $600 June 25, 1918, and $2,000 July 1, 1918. Suit was brought June 26, 1918, for $600. Payment of $2,000 having become due July 1, 1918, its nonpayment was set up by

Digitized by Google

supplemental complaint filed July 10, 1918. The findings and judgment being in favor of plaintiff, the defendant appeals upon the judgment roll alone, claiming that there is no specific allegation of delivery.

Appellant attempts to distinguish this case from that of Christensen v. Cram, 156 Cal. 633, 635, 105 Pac. 950, in which, on an appeal on the judgment roll alone, an allegation that the goods "sold" was held sufficient allegation of a completed sale, upon the ground that "in the case at bar the allegation is that the melons were still growing; therefore a delivery in future must of necessity have been contemplated, and the transaction was not a completely executed one." This position is not tenable. Growing crops, as well as other personal property, are subject to absolute sale. Hamilton v. Klinke (App.) 183 Pac. 675. See, also, Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Brown v. Anderson, 77 Cal. 236, 19 Pac. 487; Wong Foo v. Southern Pacific Co. (App.) 181 Pac. 823; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134, 136.

It was proper to set up the nonpayment of the $2,000 note by way of supplemental complaint. The judgment of the trial court was correct. In view of section 4½, art. 6, of the Constitution, the appeal is without semblance of merit, and a penalty for a frivolous appeal should be imposed. Johnson v. Dixon Farms Co., supra.

Judgment affirmed, with penalty of $100 for frivolous appeal.

We concur: LENNON, J.; SLOANE, J.

TIPPS v. LANDERS. (L. A. 6086.)

(Supreme Court of California. May 18, 1920.)

1. **Evidence ⟸383(8)—Book account, not kept in usual course of business, and not showing all the dealings, of no probative value.**

A book of account, showing on its face that it was not kept in the usual course of business and did not contain all the dealings between the parties, had no probative value above mere memoranda to use to refresh the memory.

2. **Payment ⟸67(1)—Check presumed payment of debt and not loan.**

Under Code Civ. Proc. § 1963, subd. 7, a check delivered by one party to an account to the other is presumed to be a payment on an indebtedness due the payee, and not a loan.

3. **Witnesses ⟸167—Plaintiff cannot testify as to correctness of book account against decedent.**

Under Code Civ. Proc. § 1880, subd. 3, making incompetent testimony as to matter or fact occurring before death of decedent, plaintiff, in an action against an executor, cannot testify that entries in a book concerning transactions with deceased are true and correct.

Department 2.

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by J. H. Tipps against Ida B. Landers, executrix of the estate of T. R. Landers, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

H. E. Gleason and Conkling & Brown, all of El Centro, for appellant.

James W. Glassford and J. J. Simmons, both of El Centro, for respondent.

WILBUR, J. This is an action to recover $15,485.47. The complaint is in two counts, each for the above amount, the first upon an "open, mutual and current book account," and the second upon an open, mutual current account, between the plaintiff and T. R. Landers. Plaintiff appeals from a judgment of nonsuit. Plaintiff testified that he kept a record of the transactions between himself and the deceased; that the entries were made by him at or about the time of the transactions, on pages 62 and 65 of an old book, from which the two pages 63 and 64 had been torn out, the credit entries to the plaintiff being on page 62 and those against the plaintiff on page 65. These pages were admitted in evidence over the objection of the defendant that no proper foundation had been laid for their introduction. These pages are as follows, to wit:

Page 62: Paid to T. R. Landers by Check On O

Decmbe 29	1909		1500
9/1	1910		100
11/28	1910		2000 Thurmar Mag
12/10	1910		626 28
12-23	1910		300
6/22	1911		5413 58 Margaes
12/30	1910	Check Moners Pd	1500
11/1	1911		106 50
12/6	1911		600
4/14	1912		1500
7/24	1912		1200 El Centro Bank
8/8	1912		684 49
9/13	1912		993 50
9/28	1912		800
1/13	1913		800
1/9	1913		500
4/1	1913		500
3/14	1914	Durant Mote	460
			50000 loned J. H. Conditt lone
—65—		Acct. with Landers	By Lene Mg. Corp. 24182 58
July 1	1910	Note for	$5692.00 Due July 1, 1915
" 1	"	Note for	$5000.00 Due " 1, 1916
Dec 13	1911		$4054.07 " " 1, 1915
April 10	1914	hogs	85
			$14,746.07
			85
			$14,831.07

The evidence shows that the entries were not a correct record made at the time of the transactions and in the usual course of business. The last item in the account of $85.00, dated April 10, 1914, was for eight hogs de-

Digitized by Google

livered on January 28, 1914, and was entered in the book on April 10, 1914. The plaintiff paid for these hogs by check on delivery. If the books had been correctly kept there should be a corresponding entry of this amount in favor of the plaintiff. The last item credited to the plaintiff is $50,000, dated March 14, 1914. Plaintiff claims that this item should be $5,000, and the date March 31, 1914, and claims only this amount in his bill of particulars. The item of $300, December 23, 1910, precedes the item of $1,500, December 20, 1910, and the item of June 22, 1911, precedes the item of December 20, 1910. The item of December 20, 1910, was thus entered more than six months after the transaction recorded. In proof of the correctness of the account, the promissory note of July 1, 1910, for $5,692.00 shown in the account, was introduced in evidence, together with the indorsements thereon. These indorsements were as follows:

Paid 9—1—1909	$ 100.00
11—29—1909	1500.00
	100
Paid November 28, 1910	2000.00
Paid 12—10—1910	300.00
Paid 12—23—1910	626.28
Pad 6—22—1915	4526.28

All Pade June 22, 1911.

[1, 2] A comparison of these payments with the account shows that the item of $100, paid September 1, 1909, was not entered in the account at all; that the item of $1,500, paid November 29, 1910, was entered in the account as made December 29, 1910; that the item of $300, paid December 10, 1910, was entered as made December 23, 1910. The $626.28, paid December 23, 1910, was entered as made December 10, 1910. The indorsement: "Pad 6—22—1915 $4526.28" is claimed by plaintiff to be so much of the item of the account, "6—22—1911, $5413.58," as was necessary to complete the payment of the note, the balance of the amount being applied to the $5,000 note executed at the same date. There are four difficulties with this explanation. First, the date of the indorsement is 1915 instead of 1911; second, the sum of all the items, including the item $4,526.28, exceeds by over $3,000 the amount due thereon June 22, 1911; third, the item $4,526.28 is the exact sum of all the previous payments (omitting the undated $100 item, for which there is no corresponding entry in the account). Fourth, the indorsement "All Pade June 22, 1911" is a much more appropriate indorsement, if made at the time the note was surrendered, as plaintiff testifies. Plaintiff testified to the transaction of June 22, 1911, in explanation of the item of $5,413.58 in the account, to the effect that this item consisted of a total of the amount of certain chattel mortgages executed to the plaintiff and by him transferred to the defendant in payment upon the notes as follows:

"P. E. Patterson, mortgagor, $967.50; T. White, mortgagor, $550.00; D. M. Kirklin, $526.00; E. S. McCollum, $1492.50; Louis Fechin, $355.00; Louis Fechin, $365.00; J. H. Stevinson, $1085.00."

The total would be $5,341. Further, at the foot of page 62 is $24,182.55. It is apparent, therefore, that the entry of $50,000 is a mistake, and the amount should be $5,000. This, however, does not tend to establish the correctness of the book. Furthermore, it also appears that all of the transactions between the plaintiff and Landers were not recorded in the book, Otis Tipps testifying in relation to the item of $85, when asked if any other hogs were sold under similar transactions, stated that there were such transactions, and that he was buying hogs all over the country for different parties, and that his father, the plaintiff, and the deceased had extensive business dealings together. The preliminary proof showed that it was not a book kept in the usual course of business, containing all the dealings between the plaintiff and others, nor did it show all the dealings between the plaintiff and T. R. Landers, nor was there sufficient evidence of the correctness of the account. These book entries, therefore, do not rise in probative value above mere memoranda used to refresh the memory of a witness, as they fail in the foregoing essentials as a book of accounts. Landis v. Turner, 14 Cal. 573, 576; Colburn v. Parrett, 27 Cal. App. 541, 544, 545, 150 Pac. 786. These entries should not be considered of any probative value in determining whether or not there was sufficient proof to establish plaintiff's claim. In discussing the account both parties seem to overlook the interest accruing upon the notes. Even without considering this interest respondent claims that the account shows a balance due the deceased of $3,885.52, on the theory that moneys shown by the account as paid to the defendant are presumed to be applied to some indebtedness, and that only the items indicated in the bill of particulars as having been "loaned," etc., are to be considered as credits in favor of plaintiff. Code Civ. Proc. § 1963, subd. 7. Appellant contends that, even on this theory, the total debits would be $26,575.87, and that "deducting the credits of $14,806.07 leaves a balance due appellant of $11,769.80." If we assume that at the time plaintiff and wife executed the notes of July 1, 1910, their total was the balance due to the payee, as seems reasonable, and credit plaintiff with all subsequent items claimed in his account, the balance would be in favor of T. R. Landers for $647.12, if we include interest. If we accept the testimony of the plaintiff, incompetent as it was, that the balance due the defendant on the notes after the payment of June 22, 1911, was $3,500, and credit him with all the subsequent items, the bal-

Digitized by Google

ance due the plaintiff would be $5,806.53. But this includes the item of March 14, 1914, and in view of the fact that this item was merely a deposit of plaintiff's check by Landers, the check would be presumed to be a payment on an indebtedness due Landers. Light v. Stevens, 159 Cal. 288, 113 Pac. 659. Ignoring this payment, we would have a balance in favor of the plaintiff of only $806.53. This balance is more than overcome by the fact that no proof other than the account itself was offered as to the items of "November 12, 1912, $600.00" and "January 9, 1913, $500.00"; and these items must therefore be disallowed. It remains to be determined whether there was sufficient evidence, other than the so-called account book, to establish a prima facie case. In addition to the indorsements upon the notes, it was established that certain checks drawn by plaintiff were deposited by Landers in his bank account. These transactions failed to establish any obligation to repay these amounts by reason of the presumption that money paid by one to another is due the latter. Subdivision 7, § 1963, Code Civ. Proc.; Light v. Stevens, supra.

[3] In the foregoing discussion we have mentioned evidence given by the plaintiff as a witness in his own behalf. He was, however, an incompetent witness either to establish the correctness of the account, or to testify with reference "to any matter or fact occurring before the death of" T. R. Landers. Section 1880, subd. 3, Code Civ. Proc. In Roche v. Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539, it was stated that plaintiff in an action against an executor could testify with reference to the keeping of books and their correctness. This statement as to the right to testify as to the correctness of the book was criticized in the later case of Stuart v. Lord, 138 Cal. 672, 72 Pac. 142, and shown to be dicta. In Colburn v. Parrett, supra, it was held by the District Court of Appeals, Second District, that in such a case the plaintiff could not testify that the entries were true and correct. We agree with this decision. An examination of the record satisfies us that the defendant did not waive her objection to the incompetence of the plaintiff as a witness, and that his testimony as to all the items and transactions should be therefore ignored by us in determining whether or not the plaintiff has shown any right of recovery against the defendant. Section 1880, subd. 3, Code Civ. Proc. Omitting the incompetent evidence improperly admitted, the judgment of nonsuit on the general ground of failure of proof was properly granted. Carter v. Canty, 186 Pac. 346.

In view of the foregoing conclusion it is unnecessary to determine whether the motion for nonsuit upon the ground that the plaintiff's claim was barred by the statute of limitations could be sustained where the bar of the statute is pleaded by section number only (337), and not by subdivision thereof. Wolters v. Thomas, 3 Cal. Unrep. 843, 32 Pac. 565. It may be observed, however, that the only subdivision of that section which could apply to the plaintiff's cause of action would be subdivision 2. In view of this conclusion it is also unnecessary to consider whether or not the account in question is either a mutual open and current account or a book account within the meaning of that subdivision. Therefore we do not decide that question.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

NEWMAN et al. v. E. E. OVERHOLTZER SONS' CO. (L. A. 6037.)

(Supreme Court of California. May 18, 1920.)

1. Municipal corporations ⇐706(5) — Evidence held to show that defendant was operating its ambulance at a negligent speed.

In an action for injuries arising out of a collision between plaintiffs' car and defendant's ambulance, evidence *held* to warrant finding that defendant was operating its ambulance at an excessive speed, and that such negligence was the sole proximate cause of the collision.

2. Appeal and error ⇐1001(1)—Verdict based on sufficient evidence not disturbed.

Where the evidence was sufficient to carry to the jury the question of defendant's contributory negligence, its verdict will not be disturbed on appeal.

3. Municipal corporations ⇐706(4) — Ordinance prescribing duties of drivers on approach of ambulance admissible.

In an action by motorists whose car was struck by an ambulance when they stopped the vehicle at a street intersection to allow the ambulance to pass, an ordinance, prescribing the duties of drivers on the approach of an ambulance, was properly admitted.

4. Appeal and error ⇐1053(3) — Defendant cannot complain of admission of ordinance where instructions construed it as he contended.

In an action by motorists for damages from collision with defendant's ambulance, where it appeared that motorists proceeding across a street intersection stopped on the approach of the ambulance, defendant cannot complain of the admission of a municipal ordinance requiring drivers to stop as near the right-hand curb of the street as possible on the approach of an ambulance, where the court charged that the driver of the ambulance was warranted in assuming the motorists would continue, and that, if the stopping was the cause of the accident, there could be no recovery.

Department 2.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Digitized by Google

Action by Frank Newman and Anna M. Newman, husband and wife, against the E. E. Overholtzer Sons' Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

G. P. Adams, of Los Angeles, for appellant.

Frank P. Doherty and Randall & Bartlett, all of Los Angeles, for respondents.

WILBUR, J. Plaintiffs recovered damages for personal injuries to Anna Newman and for injuries to a Ford automobile belonging to plaintiffs, resulting from a collision between the defendant's ambulance and plaintiffs' automobile at the intersection of Twenty-fifth and Main streets, Los Angeles. Main street is 69 feet between curbs at the intersection. The ambulance was empty until after the accident, and was not answering a call. It was a long, heavy machine, having a 149-inch wheel base and weighing 4,500 pounds. It was traveling in a northerly direction at a high rate of speed estimated at 35 to 40 miles per hour, straddling the east rail of the double-track street railway on Main street. The machine driven by plaintiff Frank Newman was proceeding westerly on Twenty-fifth street, and entered Main street, in low gear, at 6 miles per hour and was going across the intersection at that speed until near the east rail of the last track when, hearing the loud and insistent ringing of the ambulance gong, it was stopped when the ambulance was, as some witnesses testified, about 100 feet away and remained standing until the collision. The ambulance driver applied brakes, causing the hind wheels of the ambulance to skid to the point of collision. He swerved to the right in an endeavor to pass to the rear of plaintiffs' machine, but was unable to make the turn, either because of too great speed or because another automobile on his right was also passing. The ambulance struck the respondents' car at the rear wheel, swung it around, and stopped within a few feet.

Appellant claims that the decision of the lower court is erroneous for two reasons: First, that the accident occurred by reason of the sudden negligent stopping of respondents' car; second, that the court erred in admitting in evidence an ordinance of the city of Los Angeles containing the following section regulating the conduct of vehicles upon the approach of an ambulance, to wit:

"Upon the approach of any apparatus of the fire department or any police patrol wagon or any ambulance, the driver of any vehicle in or upon any street shall immediately stop such vehicle as near as possible to the right-hand curb of such street, and it shall be unlawful for any such driver to cause or permit such vehicle to be moved until such apparatus, police patrol wagon or ambulance shall have passed such vehicle."

[1, 2] As to the first claim it is sufficient to say that the jury were justified under the evidence in concluding that the appellant was operating its ambulance at an excessive rate of speed in approaching the intersection in question, and that such negligence was the sole proximate cause of the collision. As to whether or not respondents were negligent under the circumstances in stopping to avoid a collision, it is sufficient to say that the question as to whether such conduct was negligence, and, if so, was a proximate cause of the injury, was for the jury to determine, and we cannot interfere with its determination.

[3, 4] Second: It was proper to admit in evidence the ordinance of the city regulating the conduct of vehicles upon a street upon the approach of an ambulance as an element to be considered in determining the question of negligence of both parties. Appellant's principal attack upon the admissibility of the ordinance is that it does not purport to regulate the conduct of drivers of automobiles crossing the street upon which an ambulance is being operated, and therefore should not be construed to justify the stoping of respondents' automobile. The court instructed the jury in effect that the driver of the ambulance had a right to assume that the respondents' machine would "continue in its journey at approximately the same rate of speed and to govern himself accordingly" thus apparently adopting appellant's interpretation of the ordinance, and again with reference to the stopping of respondents' automobile:

"If you find that such stopping constituted negligence, and that it contributed proximately in the slightest degree to the injury, your verdict must be for the defendant."

These instructions were quite as favorable to the appellant as it was entitled to, and under the circumstances left the issue of defendant's negligence and plaintiffs' contributory negligence to the jury as a question of fact. Their verdict is conclusive upon this court.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

Digitized by Google

GUARANTY LOAN CO. et al. v. FONTANEL.
(S. F. 9238.)

(Supreme Court of California. May 20, 1920.)

1. Corporations ⟸283(1) — Statutes governing corporations in regard to notice of meetings construed.

Civ. Code, § 302, providing that the directors of a corporation must be elected annually by its stockholders, which election must be held on the first Tuesday in June if a different date has not been fixed by the by-laws, and that notice of such election unless waived by all stockholders in writing must be given as prescribed in section 301, is the general rule applying to all corporations, and is not to be applied as a special provision relating to notice to be given of the annual election of directors to the exclusion of section 303, providing that a corporation by by-law may provide for the time, place, and manner of calling and conducting meetings, and may dispense with notice of all regular meetings of stockholders or directors, and may provide for the qualifications and duties of directors, the time of their annual election, and the mode and manner of giving notice thereof.

2. Evidence ⟸22(2)—Court knows that regular meeting of stockholders is that at which directors are elected.

It is a matter of common knowledge that the only regular meeting of stockholders of 99 out of 100 corporations is a meeting held annually at which the directors of the corporation are elected.

3. Corporations ⟸283(1)—Notice of meeting for election of directors may be dispensed with by by-law.

Though under Civ. Code, § 303, subd. 4, a corporation may adopt a by-law prescribing the method of giving notice of the annual meeting of stockholders to elect directors, under subdivision 1 it may by by-law dispense with such notice.

4. Corporations ⟸289—Authority of directors de facto could not be questioned collaterally.

Though election of directors of a corporation was invalid for lack of notice, where persons elected exercised functions of directors, and there was no other set of men claiming to be such officers, if they were not a board de jure they were a board de facto, their authority could not be questioned collaterally, and their right to office could be tested only in a quo warranto proceeding, or under Code Civ. Proc. § 803.

5. Corporations ⟸193, 194 — Attendance at and participation in meeting by all stockholders waives objections as to call or place.

Attendance at and participation in meeting by all stockholders of a corporation is a waiver of any objection either to the regularity of the call for the meeting or to its place.

6. Corporations ⟸290—Secretary who wrongfully refused to transfer stock cannot claim meeting invalid for absence of stockholders.

Where a meeting was attended by all stockholders except three not present only because of the wrongful act of the secretary in refusing to transfer their shares on the books, such secretary, against whom mandamus is sought for delivery of property in his possession to his successor elected at the meeting, cannot take advantage of his own wrongful act by claiming the meeting was invalid because such stockholders were not present.

7. Corporations ⟸283(4) — Secretary who wrongfully refused to transfer stock cannot claim stockholders ineligible as directors.

The secretary of a corporation who wrongfully refused to transfer stock to persons elected directors of the company at a meeting cannot be heard to urge their ineligibility as directors on account of not owning stock, when mandamus is sought to require him to deliver property in his possession to his successor as secretary.

In Bank.

Application for writ of mandate by the Guaranty Loan Company and another against Louis Fontanel, secretary of petitioning corporation, to require him to deliver certain property in his possession to his successor as secretary. Writ granted.

Arthur Joel, of San Francisco, for petitioners.

Arthur H. Redington and Albert J. Dibblee, both of San Francisco, for respondent.

Fabius M. Clarke, of San Francisco, amicus curiæ.

The following opinion was prepared by Mr. Justice Kerrigan of the District Court of Appeal of the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice Melvin. It is adopted as the opinion of this court.

Application for a writ of mandate directed to respondent, Louis Fontanel, commanding him to deliver to petitioners the seal, books, records, and other personal property pertaining to the office of the secretary of the Guaranty Loan Company, a corporation, of which Bernard E. Tormey is alleged in the petition here to be the secretary.

The parties to this proceeding have stipulated as to the main facts of the case, and, so far as they are essential to a determination of the questions herein involved, they may be summarized as follows:

The Guaranty Loan Company is a corporation having an issued and outstanding capital stock of 324 shares. The Goewey Estate Company is also a corporation with an outstanding capital stock of 1,000 shares, one-fifth of which is owned by Charles Goewey. The estate company is what is commonly called a holding company, owning and holding all of the stock of the Guaranty Company with the exception of three shares which stand of record, one in the name of Charles H. Goewey, one in the name of Louis Fontanel, and the remaining share in that

Digitized by Google

of Richard P. Roberts. These last-mentioned shares were also actually owned by the estate company, but had been placed of record in the names of the persons mentioned for the purpose of qualifying them to hold office as directors of the Guaranty Company. The certificates of these three shares had prior to May 26, 1919, been indorsed by their respective holders, and delivered to the Goewey Estate Company.

The by-laws of the estate company provide that the annual meeting of the stockholders shall be held upon a given day in April of each year for the election of directors and such other business as may come before it. They also provide that no notice of such meeting need be given.

The annual meeting for the year 1919 was convened upon April 14th without any notice to the stockholders by publication or otherwise, and 600 of the 1000 outstanding shares were represented thereat. The meeting, however, was adjourned to April 17, 1919, at which time all of the stock of the corporation was represented either by the presence of its owner or by proxy. Upon the announcement by the presiding officer that the next business before the meeting was the election of directors to serve for the ensuing year the proxy for Charles H. Goewey entered a protest against the holding of the meeting upon the ground that no notice thereof by publication had been given. This protest being disregarded, said proxy withdrew from the meeting. The stockholders remaining in attendance thereupon unanimously elected Walter H. White, R. M. Briare, and B. E. Tormey as directors to succeed Charles H. Goewey, Herbert S. Goewey, and Ansen Herrick, directors at that time. There was also adopted a resolution ordering the newly elected directors to cause to be transferred on the books of the Guaranty Company the three shares of stock formerly held by and still standing on the books of the corporation in the names of Goewey, Fontanel, and Roberts, to White, Briare, and Tormey, one share to each. In accordance with this resolution, the new directors of the estate company did on April 20, 1919, demand of Louis Fontanel, as secretary of the Guaranty Company, that he make said transfer; but this Fontanel then and ever since has refused to do. On said 17th day of April, 1919, the new directors of the estate company having organized by the election of R. M. Briare as president and Walter H. White as secretary, also adopted a resolution directing its president and secretary, on behalf of said corporation, as a stockholder of the Guaranty Company, to call a meeting of the last-named corporation for the purpose of removing from office its board of directors and electing new directors in the event the old board was so removed. Thereupon and in pursuance of said resolution, said officers of the Goewey Estate Company, acting on behalf of the corporation as a stockholder of the Guaranty Company, prepared a call for a meeting of the stockholders of the Guaranty Company to be held on May 26, 1919, for such purpose, addressed it to Louis Fontanel, as secretary of the Guaranty Company, requesting that he give notice of such a meeting and of its purpose as required by law, with which request or demand Fontanel refused to comply. On the 23d day of May, 1919, the office of the Guaranty Company being at that time at room 606 Bank of Italy building, San Francisco, its directors, consisting of Messrs. Goewey, Roberts, and Fontanel, passed a resolution changing its meeting place to an office at No. 809 Kearny street.

The meeting of the stockholders of the Guaranty Company for the purpose of removing its directors was held without published notice thereof in the office of the company in the Bank of Italy building, and Charles H. Goewey had no notice thereof. The 321 shares owned by the estate company were represented thereat; and Briare, White, and Tormey, claiming to represent the remaining three shares of the outstanding stock of the company—the transfer of which to their names from the names of Goewey, Roberts and Fontanel had been refused by the respondent—were also present. At this meeting a resolution was adopted removing the board of directors, and thereupon White, Briare, and Tormey were elected as directors in their place. Immediately afterwards the new board of directors proceeded to organize by the election of Briare as president and Tormey as secretary. Three days thereafter at a meeting of the new board of directors, held, however, at a place other than the Bank of Italy building or 809 Kearny street, White resigned as director, and J. W. Treadwell was appointed by the other two directors to fill the vacancy. On June 25, 1919, the board of directors as thus constituted adopted a resolution changing the office of the company back to the old location in the Bank of Italy building.

Under the by-laws of the Guaranty Company the date for holding the annual meeting of stockholders fell on July 10, 1919, and a notice of this meeting was published by both the old and the new board of directors, the former designating 809 Kearny street as the meeting place, and the latter stating that it would be held at room 607 Bank of Italy building. A meeting was in fact held at each of these places. The one called by Fontanel lacked a quorum and adjourned for that reason. The meeting called by Tormey was attended by the proxy of the estate company appointed by its new board of directors, and there was thus represented at that meeting the 321 shares of stock standing of record on the books of the Guaranty Com-

Digitized by Google

pany in the name of the estate company. There were also present at the meeting Treadwell, Briare, and Tormey, and they were elected directors. Thereupon they organized, and the petitioner Tormey was chosen as secretary. Shortly thereafter Tormey made demand on Fontanel for the books and records of the Guaranty Company in his custody. With this demand Fontanel refused to comply, claiming that the property thus demanded was properly in his custody and control as secretary of the company.

The by-laws of the Guaranty Company provide that no transfer of stock shall be valid until recorded in the books of the corporation. They also provide that each director shall hold one or more shares of stock of record in his name on the books of the corporation.

Respondent, upon the facts as stated, contends that the annual meeting of stockholders of the Estate Company was invalid because no notice was given as prescribed by section 301 of the Civil Code, such notice not having been waived by all of the stockholders in writing, and that the election of directors which took place at that meeting was, therefore, void; that consequently such directors were without authority to call the special meeting of the Guaranty Company, which was therefore invalid, and for the further reason that Fontanel having refused to call it, and the alternative method for calling such a meeting prescribed by section 301, Civil Code, not having been followed, no proper or any notice thereof was given. He also claims that the annual meeting of the stockholders of the Guaranty Company held in the Bank of Italy building on July 10th was invalid, first, because it was not held at the office of the company, and second, because it was not held in response to a call of the company's secretary Fontanel. Finally the contention is made that the persons elected as directors at this meeting were ineligible to hold that office because they were not stockholders of record of the company.

We will first consider the asserted invalidity of the election of directors of the Goewey Estate Company at the Stockholders' meeting of April, 1919, upon the ground that the notice thereof required by section 302 of the Civil Code was not given.

That section provides that the directors of a corporation must be elected annually by its stockholders, which election must be held on the first Tuesday in June if a different time therefor has not been fixed by the corporation's by-laws. Notice of this election, unless waived by all the stockholders in writing, must be given as prescribed in section 301 of that Code, and which notice, generally speaking, is by advertisement in a newspaper. Having laid down this general provision, however, the Legislature by section 303 has empowered corporations to make by-laws governing various matters, among them being the time of the annual election of directors and the method of giving notice thereof, and also permits the adoption of a by-law dispensing with the necessity of giving notice of regular meetings of stockholders or directors. Part of the language of this section may with advantage be quoted:

"303. A corporation may by its by-laws, where no other provision is specially made, provide for:

"(1) The time, place and manner of calling and conducting its meetings, and may dispense with notice of all regular meetings of stockholders or directors. * * *

"(4) The qualifications and duties of directors, and also the time of their annual election, and the mode and manner of giving notice thereof. * * *"

Purporting to act under the authority conferred by this section, the Goewey Estate Company by its by-laws fixed the second Tuesday in April at 2 o'clock p. m. as the time for holding the annual election of directors at a meeting to take place on said day each year, and also dispensed with notice of regular meetings of stockholders and directors, and, accordingly, as we have seen, held its election of directors for the year 1919 at a meeting of stockholders in the month of April of that year. The respondent's contention that this election of directors was invalid is based upon a construction of these two sections which would hold that the by-laws of a corporation cannot provide for the method of giving notice of the annual election of directors, nor dispense with notice of the meeting at which such election is held, because of the presence in section 303 of the words "where no other provision is specially made." He contends that section 302 above referred to contains just such a special provision relating to the notice to be given of the annual election of directors of a corporation, and that such special provision is to be applied to the exclusion of anything contained in section 303.

[1] We cannot agree that this is the construction which should be given to the two sections, and for two reasons: First, that in the matter under consideration, namely, the time, place, and manner of holding the annual election of directors of a corporation, section 302 is plainly the general rule upon the matter, applying to all corporations, unless and until they take advantage of the provisions of section 303 and adopt by-laws covering the same matter in a different manner; and, second, that the construction contended for by the respondent would entirely nullify subdivision 4 of the last-mentioned section, and should therefore be avoided if possible.

[2, 3] While subdivision 4 provides that a

Digitized by Google

corporation may by its by-laws prescribe a method of giving notice of the annual election of directors different from the one found in section 302, subdivision 1 in the same section also provides that notice of all regular stockholders' and directors' meetings may be entirely dispensed with. The Goewey Estate Company having adopted a by-law dispensing with notice of such meetings, under which by-law it proceeded in the present instance, the question arises whether the annual meeting of the stockholders for the election of directors is a regular stockholders' meeting. In resolving this question we cannot ignore the fact that it is a matter of common knowledge that the only regular meeting of stockholders' of 99 out of 100 corporations is a meeting held annually at which the directors of the corporation are elected. Consequently, while under subdivision 4 of this section the corporation may adopt a by-law prescribing the method of giving notice of such annual election, under subdivision 1 thereof it may by like by-law dispense with notice. This is a procedure frequently followed; and while its wisdom may be doubted as tending to weaken the intimacy of stockholders with the affairs of corporations in which they have a pecuniary interest, it appears to be justified by the language of the Code provision under consideration.

[4] A further answer to the respondent's contention as to the invalidity of this election of directors is that, conceding for the sake of argument such invalidity, the persons elected exercised the functions of such directors, and there was no other set of men claiming to be directors. Under these circumstances, they were if not de jure certainly de facto the board of directors, and as such their authority could not be questioned collaterally, and their right to the offices claimed and exercised by them could only be tested in a quo warranto proceeding, or by the method provided by section 803, Code of Civil Procedure. Potomac Oil Co. v. Dye, 10 Cal. App. 534, 539, 102 Pac. 677; 2 Cook on Corporations, § 619.

If, as we hold, the election of directors of the Goewey Estate Company held at the stockholders' meeting of April, 1919, was valid, it follows that the other contentions of the respondent, in so far as they are based upon the alleged invalidity of such election, are untenable. Those contentions are that the following acts done by said board of directors, or by Tormey, their secretary, were void and without effect, namely, the appointment of Tormey as secretary; his demand, as such secretary, upon respondent as secretary of the Guaranty Company, upon presentation of the certificates of stock in the latter corporation duly indorsed by Goewey, Roberts, and Fontanel, to transfer the same into the names of White, Tormey, and Briare, and the demand upon Fontanel to call a special meeting of the Guaranty Company for the purpose of removing the board of directors thereof.

This leaves for consideration the contentions of the respondent that the special meeting of the Guaranty Company was not regularly called and that it was not held at the office of the company; hence that the ousting of its board of directors and secretary was ineffectual; that as to the annual meeting of stockholders of this company, at which Treadwell, Briare, and Tormey were elected and the latter appointed secretary, all its proceedings were void, since the said meeting was not held in response to the call of the secretary (Fontanel) and was not held at the office of the company, and that the directors elected thereat were not eligible to hold such office, not being stockholders of record.

[5] Admitting for the sake of argument the justness of respondent's criticisms of both the special and general meetings, those meetings were nevertheless valid if attended and participated in by all the stockholders of the company. Such attendance and participation would be a waiver of any objection, either to the regularity of the call or to the place of meeting. San Buenaventura, etc., Co. v. Vessault et al., 50 Cal. 534; Ann. Cas. 1916E, 1040. The question presents itself, therefore, as to whether or not these meetings were so attended.

The stipulation as to the facts in this case shows that the meetings in question were attended by all of the stockholders of the company of record with the exception of Fontanel, Goewey, and Roberts. As to these three, they were not the beneficial owners of the stock standing in their names, and a demand had previously been made upon the corporation through its secretary for a transfer of their stock into the names of three others, and these latter were present at the meetings. If the demand upon the company for the transfer of these shares of stock was a legal demand (and we have seen that it was), which should have been complied with by Fontanel, as its secretary, then the situation is that these meetings were attended by all stockholders entitled to be present thereat, and that where the stock of any person present was not of record in his name the lack of such record was due to the wrongful refusal of the respondent to make the transfer upon the company's books.

[6] Now, it is true that both by the provisions of the Code and the by-laws of this particular company it was not in general required to recognize as a stockholder any person who did not appear on the books of the company as such; but in this particular case, the refusal of the respondent to make the transfer being wrongful, the fact is that the three record owners of stock who were not

Digitized by Google

present at the meetings were such only because of the wrong of the respondent, acting as secretary of the company. To permit him under these circumstances to deny the validity of these meetings on the grounds now being considered would be to permit him to take advantage of his own wrong. This he cannot do. The case comes clearly within the equitable maxim that that will be considered as done which ought to have been done; so that as between the old board of directors and its secretary on the one side, and the three owners of stock whose demand for its transfer had been refused on the other, the case should be treated as if the latter were stockholders of record, since the fact that they were not is due solely to the wrongful refusal of an officer of the corporation to make them such.

[7] The objection of the respondent that the newly elected board of directors of the Guaranty Company were ineligible to that office is disposed of, we think, by applying to it the same principle to which resort has just been had. If those gentlemen were not stockholders of record of the company, it was because of the wrongful refusal of the respondent to comply with a legal demand for the transfer of stock to their names. He cannot therefore be heard to urge such ineligibility.

This disposes of the points made by the respondent. Let a peremptory writ of mandate issue, commanding said respondent, Louis Fontanel, to turn over to the petitioner the seal, books, papers, records, and other personal property pertaining to the office of secretary, or belonging to said corporation petitioner.

ANGELLOTTI, C. J., and OLNEY, SHAW, LENNON, WILBUR, LAWLOR, and SLOANE, JJ., concur.

LANG v. LANG. (S. F. 8651.)

(Supreme Court of California. May 18, 1920.)

1. Pleading ⟸214(3)—Demurrer admits allegation that property belonged to community.

The truth of the allegation of the complaint that the property sought to be partitioned, and alleged to have been acquired by the parties after their marriage, title being taken in defendant's name, was their community property, is admitted under a general demurrer.

2. Divorce ⟸255—Final decree by default on complaint raising no issue as to property not conclusive of property rights.

Final decree in divorce, in so far as setting aside property to the husband, the successful plaintiff, no question of property being put in issue by the complaint, no disposition thereof being prayed, and judgment being by default, is not conclusive on the wife thereafter seeking partition.

3. Homestead ⟸158 — Partition ⟸12(3)—Homestead community property subject to partition after divorce making no disposition of it.

The husband on the granting of a divorce ceasing to be the head of a family, there being no minor children, and none of the persons mentioned in Civ. Code, § 1261, living with him, so that the qualities of the homestead estate were destroyed, the homestead which was carved out of the community property, and of which no proper disposition was made by the divorce decree, and in which the parties thereupon became tenants in common, is subject to partition.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action for partition by Carrie B. Lang against James A. Lang. From interlocutory decree for plaintiff, defendant appeals. Affirmed.

W. P. Thompson, of Fresno, for appellant.

Everts & Ewing and W. E. Simpson, all of Fresno, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court:

This is an appeal from an interlocutory judgment decreeing a partition and sale of certain real property situate in the county of Fresno. The decree was made and entered after the demurrer of the defendant had been overruled and his default entered for failure to answer the complaint. The only question here presented relates to the sufficiency of the complaint to state a cause of action.

[1] The pleading recites that the parties to the action intermarried, and subsequently became the owners of certain real property, which forms the subject of this litigation. The defendant herein took title to the property in his own name, but it is alleged in the complaint that such property was the community property of the parties herein. The truth of this allegation, of course, is admitted under the general demurrer. After the acquisition of the property the wife executed and recorded a declaration of homestead thereon. Thereafter the defendant herein, the husband, filed a complaint against his wife, praying for a divorce on the ground of desertion. The complaint contained no allegation either to the effect that there was or was not any community property belonging to the parties, and no mention, either directly or indirectly, was made of this or any property whatsoever. The prayer for relief

Digitized by Google

in the complaint for divorce was simply that the marriage existing between the parties be dissolved and that each of them be released from all the obligations thereof. Summons was served in that action on the defendant, plaintiff herein, and she having failed to appear her default was entered. This divorce action came on for trial, and the prayer of the husband was granted. The court signed and filed its findings and conclusions of law, but nothing therein contained made any reference to the existence of any community or any other property owned by the parties. The interlocutory decree entered in that action made no mention of or any reference to the existence of any community or other property. After the expiration of one year from the entry of the interlocutory decree a final decree was entered by the court. This final decree, however, set apart to the husband the homestead above referred to. Thereafter this action to partition the property so set aside was brought by the wife, and it is from the decree entered in her favor that this appeal is prosecuted.

From the foregoing state of facts two questions are presented to us for determination: First, whether the final decree of divorce which attempted to set aside the property to the defendant in the divorce action is conclusive against the plaintiff here; second, whether community property which has once been impressed with the character of a homestead retains that character after the marriage on which the homestead depended has been dissolved, and for that reason is not a proper subject for partition.

[2] Upon the first question it is contended by the appellant that the final decree of divorce constitutes a conclusive judgment disposing of the community property of the parties to that action, and that such judgment is not subject to attack at the instance of the plaintiff herein. In support of this argument the appellant relies upon the numerous decisions of our appellate courts declaring the general rule that a judgment is conclusive, not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated. This rule, while generally true, is not always applicable literally. Brown v. Brown, 170 Cal. 1-6, 147 Pac. 1168.

"What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint." Concannon v. Smith, 134 Cal. 14-18, 66 Pac. 40, 42. Accordingly it has been held that a finding made by a court of a fact upon which there is no issue in the case before it, and which does not enter into or form the basis of the judgment rendered in the action is not admissible in another action between the same parties, either as an admission or by way of estoppel. Bank of Visalia v. Smith, 146 Cal. 398, 81 Pac. 542. As long as matters are not tendered as issues in the action they are not affected by it. Brown v. Brown, supra.

Here, in the divorce action between the parties the question of the community homestead was not presented as an issue in the case. The complaint contained no allegation with reference to it, and the court made no finding as to the existence or nonexistence of community or other property; no disposition was attempted to be made of it under the interlocutory decree; and, except for the order in the final decree, it does not appear from the record in the divorce action that the parties thereto owned any property, community or otherwise. The court was therefore without jurisdiction to make any order with reference to the property rights of the parties, such question not being before it. The only relief sought in the divorce complaint was a dissolution of the marriage tie. The defendant in that action (plaintiff here) had the right to assume that the judgment which would follow a default on her part would embrace only the issues presented by the complaint and the relief therein prayed.

Appellant further argues, and cites us to cases, to the effect that the court having had jurisdiction of the divorce case, it had jurisdiction to err, and however erroneous the judgment might be that the only remedy was by appeal. The vice of this argument is that it assumes that the court had jurisdiction of the res. As above pointed out, the status of the parties was the only issue before the court.

Parties to an action for divorce may submit to the court the simple issue of their right to a divorce without reference to their property. Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844. This being so, where a complaint in divorce contains no allegation with reference to property rights, a defaulting defendant should be entitled to assume that the only matter which will be determined by the court is the matter of divorce, and that the question of property rights will be left for consideration and determination in another and separate action. In addition thereto, it is a well-established rule that in a default case the relief granted cannot exceed the prayer. Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073; Mudge v. Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17. And where relief is given beyond the scope of that asked for, it is a nullity, and may be attacked collaterally, or its effect avoided under the doctrine that it is not res judicata. See note to Sache v. Gillette, 11 L. R. A. (N. S.) 804. From what we have said upon this subject it follows that the judgment in the divorce case was not conclusive upon the plaintiff herein as to her property rights growing out of her marriage relation with defendant.

Digitized by Google

Upon this question the respondent presents the additional argument that the proper time and place for the determination by the court of the property rights of the parties was at the time of the entry of the interlocutory decree, and not under the final decree. The conclusion we have reached upon this question makes it unnecessary to further discuss this branch of the case.

[3] Upon the second contention counsel for appellant argues that this case falls within the rule that a homestead cannot be made the subject of an action for partition. In this behalf it is contended that property once impressed with a homestead continues ever to be a homestead until abandoned in accordance with the provisions of the statute in relation thereto. Authority can be found to the effect that where the rights of children are concerned the homestead is not affected by the divorce where the decree is silent upon the question. Redfern v. Redfern, 38 Ill. 509; Holcomb v. Holcomb, 18 N. D. 561, 120 N. W. 547, 21 Ann. Cas. 1145; and Byers v. Byers, 21 Iowa, 268. The cases to this effect are based upon the theory that there is still a head of a family within the meaning of the homestead acts, and that the children's rights cannot be affected by the quarrels of their parents. 2 Bishop, Marriage, Divorce and Separation, § 1210. Here, however, the rights of minor children are not involved. The only issue of the marriage was a son, who at the date of the entry of the final decree was an adult. It is not contended that defendant had residing with him upon the property in question any of the persons mentioned in section 1261 of the Civil Code upon which a claim could be based that he was the head of a family. No such questions are presented by this appeal.

Defendant complains of the judgment for the reason that it gives to plaintiff a forced sale of the homestead, by reason of the fact that she voluntarily and without cause abandoned her home—a right denied her had she remained a dutiful wife. As against this claimed hardship resulting from the judgment it might be mentioned that so far as the record shows plaintiff herself is not without cause for complaint. It appears therefrom that she had been the wife of defendant for over 22 years and the decree made no provision whatever for her support and maintenance. However, this may be, the law has made provision for the disposition of the homestead upon the dissolution of a marriage under which the rights of the parties may be equitably adjusted. Civ. Code, § 146, subd. 3. For reasons not disclosed by the record defendant failed to avail himself of this provision, for he raised no such issue in his divorce action. While as a general proposition a homestead cannot be made the subject of an action for partition, the principle has no force when applied to the instant case. Here the family was severed by the decree of divorce, and the qualities of the homestead estate were thereby destroyed. Rosholt v. Mehus, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239; Bahn v. Starcke, 89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40. Such a decree is as effectual in producing this result as would be a declaration of abandonment, for where, as here, the homestead having been carved out of the community property, and no proper disposition having been made of it by the decree, the parties became tenants in common thereof, and this being so each had the right to sever their joint ownership. De Godey v. Godey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; Kirschner v. Dietrich, 110 Cal. 505, 42 Pac. 1064; Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; and Shoemake v. Chalfant, 47 Cal. 432. Under the circumstances of this case defendant upon the granting of the divorce ceased to be the head of a family, and he was no longer entitled to a homestead exemption of the character here involved. Zanone v. Sprague, 16 Cal. App. 333, 116 Pac. 989. No family, no homestead. Waples on Homestead Exemptions, p. 70. The homestead being destroyed, the parties as tenants in common could convey or sever their relative interests therein. Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167; Grupe v. Byers, 73 Cal. 271, 14 Pac. 863; and Brown v. Brown, supra; 13 Ruling Case Law, p. 679.

For the reasons given, the judgment is affirmed.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, LENNON, and LAWLOR, JJ., concur.

GILLONS v. TURNER OIL CO.
(Civ. 2735, L. A. 6521.)

(District Court of Appeal, Second District, Division 1, California. March 19, 1920. Opinion of Supreme Court in Bank Denying Hearing, May 19, 1920.)

1. Brokers ⟸65(1)—Representations of broker as to quality of oil to be produced mere statement of opinion.

A statement made by a broker to his principal that oil to be taken from a well would contain less than 2 per cent. of nonpetroleum substance could be no more than an opinion which could not have deceived the principal.

On Hearing in Supreme Court.

2. Brokers ⟸65(1)—Principal not deceived by representations disregarded by him.

A principal was not deceived by a representation of his broker that oil to be taken from a well would not contain 2 per cent. of

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

nonpetroleum substance, where the contract entered into between the principal and the seller disclosed no provision to the effect that the oil to be delivered therein should not contain more than 2 per cent. of nonpetroleum substance; it clearly appearing therefrom that such oil would contain substance in excess of such per cent. in contemplation of which the contract provided that in estimating net quantity nonpetroleum substance in excess of 2 per cent. should be deducted, and it being apparent that the representation was disregarded by principal.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by George H. Gillons against the Turner Oil Company. Judgment for plaintiff, and defendant appealed. Judgment affirmed in District Court of Appeal, and hearing denied in Supreme Court.

William H. Fuller and Earl L. Wisdom, both of Los Angeles, for appellant.

Bordwell & Mathews, of Los Angeles, for respondent.

SHAW, J. Action to recover a commission as broker for services rendered to defendant in procuring an oil contract.

Judgment went for plaintiff, from which defendant appeals.

The material facts, as they appear from the verified complaint, are: That defendant, on January 31, 1917, made a written contract with the Graham-Loftus Oil Company for the purchase of certain crude oil to be delivered in monthly quantities during the year ending January 31, 1918, as therein specified. On the same date with this contract defendant made and delivered to plaintiff the contract herein sued upon, wherein, after reciting the making of the contract with the Graham-Loftus Oil Company and that plaintiff had rendered certain services to defendant in obtaining the same, it promised and agreed in express terms to pay him six cents per barrel for all the crude oil delivered to defendant by the Graham-Loftus Oil Company under and pursuant to the contract therefor, which payments were to be based upon and determined by monthly settlements had between defendant and the Graham-Loftus Oil Company for oil so delivered; that between the 1st day of August and the 28th day of September, 1917, the defendant, as shown by statements rendered, received from said Graham-Loftus Oil Company 19,808.45 barrels of crude oil, delivered to it by the Graham-Loftus Oil Company pursuant to the terms of said oil contract, for which it made payment; that by reason whereof defendant became obligated under its agreement with plaintiff to pay him $1,188.50, all of which sum remains due and unpaid; none of which material facts are denied by the answer.

As a defense, the answer affirmatively alleged that plaintiff and his partner, one Treat, represented to defendant that the oil to be delivered by the Graham-Loftus Oil Company pursuant to the contract therefor did not and would not when delivered contain more than 2 per cent. of nonpetroleum substance, whereas all the oil so contracted to be delivered by the vendor contained more than 5 per cent. of such substance, which, and the fact that said oil would contain such substance in excess of 2 per cent., was well known by plaintiff at the time of the execution of the contract made by defendant to pay him the commission, but that, with intent to deceive defendant, he fraudulently concealed such knowledge from it, who, believing and relying upon the representations so made, was thereby induced to make the contract to pay him said commission.

The court sustained plaintiff's objections to proffered testimony in support of these allegations, and this ruling constitutes appellant's chief ground of complaint. Respondent argues: First, that plaintiff was not the vendor of the oil, but was defendant's broker in procuring the contract from the Graham-Loftus Oil Company; that the contract made with him recites the making of the oil contract; and that as such broker he had rendered services to defendant in procuring this particular contract, for which, with full knowledge of the terms and conditions thereof, it without qualification agreed to pay him the commission; that the oil contract attached to and made a part of the complaint discloses no provision to the effect that the oil to be delivered thereunder, in quantities of 10,000 barrels per month and covering a period of 12 months, should not contain more than 2 per cent. of nonpetroleum substance, but, on the contrary, it clearly appears therefrom that such oil would contain substance in excess of said percentage, in contemplation of which the contract provides that in estimating the net quantity of oil delivered each car should be inspected and in ascertaining the net quantity all nonpetroleum substance in excess of 2 per cent. should be deducted therefrom. And hence it is apparent that the representations, if made, were disregarded by defendant. Second, that the alleged representations by plaintiff, assuming them to have been made, were not as to existing facts, but were expressions of opinion as to a commodity to be produced in the future, the quality of which must have necessarily depended not only upon the character of the oil, as and when extracted from the bowels of the earth, but upon the treatment thereof by the vendor prior to its delivery.

[1] We deem it unnecessary to discuss the first proposition, since, in our opinion, respondent's second contention must be sustained. It appears from the contract made be-

Digitized by Google

tween the Graham-Loftus Oil Company and defendant that the oil made the subject thereof was not then produced, but was oil which the vendor as lessee was to receive as royalty during the period covered by the contract from its lessee and to be produced and extracted from wells upon certain lands described in the contract. The representation alleged to have been made by plaintiff was that the oil so to be produced in the future "did not and would not, when delivered to defendant, contain 2 per cent. nonpetroleum substance"; and that Charles H. Treat, alleged to have been a partner of plaintiff, represented to defendant that said oil "so sold and to be delivered was and would be at time of delivery clean and free from sediment or other nonpetroleum substance that might interfere with or prevent the refining thereof through the equipment and under the process and method then in use in the refining plant of said defendant"; and that said Treat further represented to defendant "that he knew that none of said oil as and when delivered to defendant under the terms of the proposed contract of purchase would contain more than 2 per cent. of nonpetroleum substance."

In so far as the representations applied to the then present condition of the oil to be extracted from the sands underneath the surface of the earth, it is apparent that no one could tell with any degree of certainty from day to day or month to month what its quality as produced would be as to content of water and other nonpetroleum substance. Defendant, who was engaged in the purchase of oil, must be deemed chargeable with notice of this obvious fact; and thus knowing that plaintiff and Treat were without means of information enabling them to make the representation as an existing fact, it could not, from the nature and physical circumstances of the case, be calculated to deceive it. Therefore defendant was not justified in considering the statement other than as the expression of belief and opinion that the oil in place was of the quality stated. The alleged statement made by Mr. Treat was to the effect that the oil when delivered would not contain more than 2 per cent. of nonpetroleum substance. This was the expression of an opinion in the nature of a prediction based upon what he believed was the quality of the oil in place or what he believed would be done by the vendor of the oil in extracting nonpetroleum substances therefrom before delivering the same. The alleged representation did not purport to be a statement of an existing fact, but one in the nature of a promise as to the character of oil which the vendor would deliver, and this depended not only upon the purity of oil to be produced from the wells, but also upon the care and process of treatment given it prior to its delivery. Fraud in avoidance of a contract cannot be predicated upon such statements; and from the fact that defendant, in purchasing the oil from the Graham-Loftus Oil Company, contracted for oil containing in excess of 2 per cent. of nonpetroleum substance, it is clear that it did not rely thereon in making its contract to pay plaintiff the commission.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] Without expressing any opinion upon the question of the correctness of the conclusion of the District Court of Appeal that fraud in avoidance of a contract cannot be predicated upon such statements as were alleged to have been made by Gillons and Treat, we are entirely satisfied that the judgment must be affirmed upon what is styled in the opinion the first proposition of the respondent in support of the judgment.

The application for a hearing in this court is denied.

All concur.

GILLONS v. TURNER OIL CO. (Civ. 3304.)

(District Court of Appeal, First District, Division 1, California. March 22, 1920. Hearing Denied by Supreme Court May 20, 1920.)

1. Appeal and error ⇐110—Appeal from order denying motion for new trial dismissed.

In view of Code Civ. Proc. § 963, an appeal from a motion for a new trial is unauthorized and will be dismissed.

2. Brokers ⇐65(1)—Principal having independent knowledge could not rely on false representation.

A principal purchasing through a broker oil to be taken from a well could not, in a suit by the broker for commissions, assert that he relied on a representation of the broker that the oil would not contain more than 2 per cent. of nonpetroleum substance, where he made an independent investigation and had full knowledge as to the quality and character of the oil before the purchase.

3. Trial ⇐397(5)—Finding on ultimate fact makes other findings unnecessary.

In an action by a broker for commissions, where defendant set up a counterclaim for damages in excess of the commissions claimed, on ground that contract entered into with the third person was procured by broker's fraudulent misrepresentations, a finding for plaintiff on all the allegations of his complaint, and that

Digitized by Google

plaintiff made no misrepresentations or gave any warranty as claimed by defendant, disposed of all material issues in the case, and it was not necessary to make a finding as to the damage alleged to have been suffered by defendant, which was urged as a counterclaim and in support of which evidence was admitted.

4. Appeal and error ⟸1079—Points not argued in brief not considered.

Where appellant in its brief states, "There are many other errors specified in defendant's specifications or errors, but we submit the court's attention has been called to sufficient error to reverse the cause, and without waiving any of the other errors will not further discuss them," the points so presented will not be considered.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by George H. Gillons against the Turner Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

William H. Fuller and Earl L. Wisdom, both of Los Angeles, for appellant.

Bordwell & Mathews, of Los Angeles, for respondent.

WASTE, P. J. [1] Plaintiff brought this action to recover the sum of $1,889.59, together with interest, alleged to be due as commission, for negotiating a contract for the purchase of crude oil. Defendant appeals from the judgment in favor of plaintiff, and from an order denying motion for a new trial. The latter appeal was unauthorized and is dismissed. Section 963, Code Civ. Proc.

The complaint sets out in full a contract in which it is agreed that the defendant will pay a commission to the plaintiff, at the rate of six cents a barrel, for his services as broker, in procuring a contract between the appellant and the Graham-Loftus Oil Company, for the purchase of a quantity of oil. It also sets forth a contract, between the appellant and the latter company, under which it is further alleged the appellant purchased the oil on which plaintiff claims to be entitled to the commission. Defendant filed an answer and counterclaim in which it alleged, as a defense to the action, and as a basis for the recovery of damages, that the contract to pay the commission was procured through fraud, deceit, and misrepresentations made by the plaintiff, and one Charles H. Treat, who is alleged to be the partner or agent of plaintiff.

In support of its claim defendant alleges that plaintiff and Treat represented to it and warranted that the oil, which defendant contracted through plaintiff to purchase from the Graham-Loftus Oil Company did not, and would not, when delivered to defendant, contain a greater average amount than one per cent. of nonpetroleum substance, and that no part of said oil would contain a greater amount than 2 per cent. of the same material, whereas, in truth and fact, it is averred, all of the oil so purchased under the contract and delivered to the defendant, contained an average quantity of 6 per cent. of nonpetroleum substance, which facts were well known to plaintiff, but were concealed by him for the purpose, and with the intent to wrong and defraud defendant and to induce it to enter into the contract with plaintiff for the payment of the commission. It is further alleged that defendant was unable with its refining plant and equipment to properly refine the oil so purchased, by reason of the excess of nonpetroleum substance, in such manner as to obtain the profit therefrom which it could have obtained had said oil contained less than the specified 2 per cent. of such matter. Defendant placed its loss by reason of the alleged acts of the plaintiff at $53,700.

The court found in favor of the plaintiff on all the allegations of his complaint. On the issues tendered by the answer it found that neither plaintiff nor Treat at any time made the representations or gave any warranty, as claimed by defendant, but made no finding as to the damage alleged to have been suffered by defendant and which was urged as a counterclaim, and in support of which evidence was admitted. Because of these findings the defendant seeks a reversal of the judgment upon two grounds, which we will consider in reverse order from that in which they were presented.

[2] Appellant's contention that the contract sued upon was obtained through fraud, and is therefore void, is disposed of by the court's findings. The execution of the contracts, set out in the complaint, was admitted, as was the receipt of the given quantity of oil and the nonpayment of plaintiff's claim. The defendant is engaged in refining crude oil, and its president is, by occupation, an oil refiner. Prior to the time the defendant entered into the contract with the Graham-Loftus Oil Company, its president made an independent investigation, together with Treat, as to the quality and character of the oil, particularly the amount of water and sediment the oil contained. He was given the "run sheets" of the Graham-Loftus Oil Company, showing the percentage of water and sediment, in the oil produced from the lease of that company, as varying from 1 to 56 per cent. Disinterested witnesses testified as to other facts, clearly establishing that the defendant had full independent knowledge of the character of the oil before it signed the contract for its purchase. Both the plaintiff, and Treat, denied making the statements charged by the defendant. The

Digitized by Google

evidence therefore, amply supports the findings of the trial court that no fraud was practiced in the inception of the contract, and that the alleged misrepresentations were not made.

[3] Appellant asserts that in omitting to find the facts, presented by the allegations in support of its counterclaim for damages, the court failed to find upon a material issue, requiring a reversal of the judgment. We are not prepared to so hold. The ultimate fact in the case is whether or not the defendant is indebted to the plaintiff. Defendant has tendered, as a defense that the contract, under which plaintiff claims, was procured by false and fraudulent misrepresentations, made with intent to induce it to enter into the agreement, is void and affords no basis upon which plaintiff can recover. It therefore denies and puts in issue the indebtedness. All the other contentions revolve around the issue thus presented. Although the defendant may have been damaged by reason of its inability to refine the crude oil purchased by it from the Graham-Loftus Oil Company, the court's findings declare, in effect, that the detriment has occurred through no fault of plaintiff. The court has found, with ample support in the evidence, that no improper act of plaintiff entered into the transaction, that the defense interposed by the defendant cannot avail, and that the defendant is indebted to the plaintiff in the amount prayed for. This was a finding upon the ultimate fact, the amount, if anything, due from the defendant to plaintiff (Jacobs v. Ludemann, 137 Cal. 176, 178, 69 Pac. 965), and necessarily concluded the whole controversy. Tower v. Wilson, 188 Pac. 87.

As the findings disposed of all the material issues in the case, and necessarily defeated the defendant's right of recovery, it was unnecessary that they should go further. Smith v. Dubost, 148 Cal. 622, 624, 84 Pac. 38; Black v. Harrison Home Co., 155 Cal. 121, 132, 99 Pac. 494. The failure to do so was not an error requiring a reversal of this judgment.

[4] Appellant, in its brief, says:

"There are many other errors specified in defendant's specifications of errors, but we submit the court's attention has been called to sufficient error to reverse the cause, and without waiving any of the other errors will not further discuss them."

Points thus presented will not be considered by us. Dore v. Southern Pacific Co., 163 Cal. 182, 199, 124 Pac. 817; Duncan v. Ramish, 142 Cal. 686, 689, 76 Pac. 661.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

GREER-ROBBINS CO. v. INSURANCE CO. OF STATE OF PENNSYLVANIA.
(Civ. 3300.)

(District Court of Appeal, First District, Division 1, California. April 10, 1920.)

1. **Insurance ⟸327—Removal of goods from one compartment of a building to another held not to violate fire policy.**

Where goods insured were located in a building divided into two compartments by a fire wall having automatic fire doors, the fact that the goods were moved from one compartment to the other, which act decreased the risk, *held* not to violate the terms of the policy.

2. **Insurance ⟸146(3)—Policy construed in favor of insured.**

Where the language and terms of insurance policies are framed and formulated by the insurer, ambiguities therein are to be resolved in favor of insured.

3. **Insurance ⟸327—Ambiguities in policy as to removal cleared by proofs.**

The ambiguities in a fire policy, insuring goods described as located in a brick building, etc., "situate in the rear of" a given street number, which policy was claimed to have been violated by removal of goods from one side of fire wall to the other, were cleared away by proofs showing that the building was a single brick structure, and that the goods at the time of insurance were not in the rear of such structure.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Greer-Robbins Company against the Insurance Company of the State of Pennsylvania. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Hindman, of Los Angeles, for appellant.

James, Smith & McCarthy, of Los Angeles, for respondent.

RICHARDS, J. This was an action upon an insurance policy issued by the defendant to plaintiff on September 23, 1916, covering certain auto supplies and sundries of merchandise belonging to the plaintiff, and being at the time of their destruction by fire in the plaintiff's building at the northeast corner of Flower and Twelfth streets in the city of Los Angeles. The policy in question was a California standard form of fire insurance policy, and the terms thereof, in so far as they relate to the description and location of the property insured, read as follows:

"In consideration of the stipulations herein made, and of $37.50 premium, does insure Greer-Robbins Company, Incorporated * * * to an amount not exceeding $2,500.00 to the following described property while located and

Digitized by Google

contained as described herein and not elsewhere, to wit: $2,500.00 on merchandise, materials, sundries, spare and extra parts * * * all while contained in or attached to the brick building, in basements or under sidewalks thereof, and its additions, situate in the rear of No. 1158 South Flower street, being the northeast corner of West 12th street."

Upon the date of said insurance policy the goods in question were located in a rear room of the plaintiff's building and place of business on the corner of South Flower and Twelfth streets in the city of Los Angeles, but were subsequently moved to a front room of said building, where they were at the time of their destruction by fire. It is the appellant's contention that by the terms of the policy above quoted the obligation of the insurer was to insure said goods only so long as the same were located in the room in the plaintiff's said building in which they were at the time of their insurance, and that their removal to another part of said building terminated the liability of the insurer.

Upon the trial of the cause it appeared that the building and place of business of the plaintiff at the time of the insurance of said property, and also at the time of the destruction thereof by fire, was a single two-story brick building having a frontage of 80 feet on South Flower street and 155 feet on Twelfth street; that a fire wall had been constructed in accordance with a building ordinance of the city of Los Angeles across said building near the middle thereof, through which there were two automatic fire doors connecting the front and rear compartments of said building created by the construction of said fire wall. The trial court found from these facts that the rear portion of the building in which said goods were stored at the time of their insurance did not constitute a separate building or addition, and could not be held to be in any sense a rear or detached building from the plaintiff's main structure, and the court therefore held that the provision of the policy above quoted must be construed as insuring the goods in question while they were contained in any portion of the plaintiff's said building, and hence that the plaintiff, under the terms of said policy, had a right to move and relocate said goods in any portion of its said building without violating the terms of said insurance policy. And the court further found that by the plaintiff's removal of the goods from the rear to the front room of its said building the risk or hazard was decreased. From these findings the trial court drew the conclusion that the plaintiff had not violated the terms of its insurance policy by the change in location of said goods in its said building, and rendered judgment accordingly in plaintiff's favor.

[1, 2] We are entirely satisfied that the court in so doing correctly construed the terms of the insurance policy above set forth. It is true that there is some ambiguity in the language of the policy; but it is well settled that, since the language and terms of insurance policies are framed and formulated by the insurer, whenever ambiguities occur therein they are to be resolved in favor of the insured. Pacific, etc., Co. v. Fire Ins. Co., 158 Cal. 367, 111 Pac. 4; Raulet v. Insurance Co., 157 Cal. 215, 107 Pac. 292; Rankin v. Insurance Co., 89 Cal. 209, 26 Pac. 872, 23 Am. St. Rep. 460.

[3] The ambiguities in the present policy were practically cleared away by the proofs in the case, which showed that the plaintiff's building was a single brick structure, and that the goods at the time of their insurance were not in the rear of such structure as the uncertain terms of the policy would seem to indicate, but were actually within the plaintiff's said building at all times, and were simply moved from place to place therein for the convenience of the plaintiff's business. This being so, we are of the opinion that the trial court correctly held that the terms of the plaintiff's policy were not violated by the removal of the goods in question from one part of plaintiff's building to another.

Judgment affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

DE BAIROS v. BARLIN.

BARLIN v. E. B. & A. L. STONE CO. et al.

(Civ. No. 3253; S. F. 9062.)

(District Court of Appeal, First District, Division 2, California. March 22, 1920. Opinion of Supreme Court in Banc, Denying Hearing, May 21, 1920.)

1. **Vendor and purchaser ⇐113—Variance between actual and represented description of land held to warrant rescission.**

Deficiency of 2½ feet in a represented frontage of 80 feet *held* material, and to warrant rescission by the purchaser under Civ. Code, § 1690.

2. **Vendor and purchaser ⇐34—Vendor, misrepresenting frontage of lot without fraudulent intent, guilty of constructive fraud.**

A vendor of land, representing a frontage to be 80 feet, without any actual fraudulent intent, was guilty of constructive fraud, where the frontage was only 77½; it being a vendor's duty to inform himself correctly regarding the boundaries of the land he is seeking to sell, in view of Civ. Code, § 1573.

3. **Vendor and purchaser ⇐107—Motive of vendee in rescinding not inquired into.**

The motives of a vendee in rescinding a contract of sale of land may not be inquired into, when he has a legal reason for rescinding.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

4. Appeal and error ⟸877(6)—Cross-defendants, appealing as group, could not complain of decree affecting respective rights.

Where plaintiff and others, as cross-defendants, joined in one answer, and did not ask the court to litigate the matter of their rights as against each other, and, on judgment for defendant, joined in a notice of appeal, argument cannot be made on appeal that the rights of cross-defendants were not properly adjusted among them, since a cross-defendant, considering himself aggrieved, should have appealed therefrom, making the other cross-defendants respondents.

On Hearing in Supreme Court.

5. Vendor and purchaser ⟸95(2), 101—Acceptance of overdue installments does not eliminate provision that time is of essence.

Acceptance of overdue installments of the price on an executory contract for the sale of land waives any right to declare a forfeiture on account of the previous failures to pay when due, but alone does not change the terms of contract as to forfeiture for future failures, nor eliminate a provision that time is of the essence of the contract, though there may be conduct and acquiescence by a vendor sufficient to justify the inference by a court as a matter of fact that the vendor has waived the condition regarding a forfeiture, in which case the condition may be revived by notice to the vendee.

6. Vendor and purchaser ⟸118—Vendee in default may rescind contract for fraud or mistake.

A vendee's right to avoid and rescind a contract of sale for fraud of vendor in procuring its execution, or for mistake inducing its execution, is not lost by his default on payments due on the contract.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Bernardino De Bairos against Jacob J. Barlin, who filed cross-complaint against E. B. & A. L. Stone Company and others. From a judgment in favor of defendant, the plaintiff and cross-defendants appeal. Judgment affirmed by the District Court of Appeals, and hearing denied in the Supreme Court.

Raymond Perry, of San Francisco, for appellants.

W. E. Rode, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff and cross-defendants from a judgment against them in an action by which Bernardino De Bairos, as assignee of the other cross-defendants, sought to recover from the defendant $1,069.65, the sum of unpaid installments under three contracts for the sale of real property. Under these contracts, cross-defendants E. B. & A. L. Stone Company and Jennie F. Stone are vendors, and the defendant is the vendee, of a parcel of land in a subdivision of Stonehurst, Brooklyn township, Alameda county, Cal. Title to said property was not to be transferred until all of the payments provided by the contracts had been made.

Defendant answered, denying that the installments were due, and alleged that by mutual mistake of fact there was a deficiency of 2½ feet in the total frontage called for by the three contracts, and that he had rescinded the contracts. He also alleged that, because of said deficiency in said lots, plaintiff could not convey in accordance with the contracts, and that the contracts were not fair, just, and equitable in their terms, but, on the contrary, the purchase price provided therein was grossly in excess of the reasonable and fair value of the lots. He also alleged that plaintiff was suing for the balance due upon the full purchase price of the lots, and had never tendered a deed to defendant. In his cross-complaint, defendant set up the same facts regarding the mistake in the frontage on Pearmain street, and alleged actual fraud and fraudulent representations, as well as a want of consideration, predicated upon said facts, and, in an additional count, prayed for a return of the money paid under the contracts as money had and received by the cross-defendants. The cross-defendants answered, admitting an error in the description, creating a deficiency of 2½ feet, denied knowledge of this at the time of the sale, denied fraud and want of consideration, denied defendant's right to rescind, and offered to allow such rebate as the court might deem equitable on account of the deficiency of 2½ feet.

The court found that the three contracts sued upon constituted a single transaction. The contracts were entered into on June 10, 1910. The vendors had been the owners of an entire tract, including the lots sold to the defendant, and had platted and subdivided this tract into lots. Prior to the sale to defendant, plaintiff's assignors had had two surveys and plats made of this tract. These maps or plats were introduced in evidence. It appears that they are alike in the general platting—the difference between them being that on the first map Plum street (also called 107th avenue) is shown as 2½ feet southeast of its location on the second map, so that the block of land, of which defendant's purchase formed a part, is 2½ feet longer on the first map than on the second map, and lots Nos. 84 and 85 of said tract (being the lots at the corner of Plum and Pearmain streets) are shown with a frontage of 80 feet on the first map and 77½ feet on the second map.

One Hundred and Seventh avenue, or Plum street, was laid out, and the street work and gutters, curbs, etc., were placed, in accordance with the second map. This work, including the cement walks, extended up to the property line and was almost com-

Digitized by Google

pleted on June 10, 1910, when the defendant entered into his contracts. The difficulty arises by reason of the fact that the vendors had arrows stamped in the cement walks as monuments indicating the lot lines, and these arrows were stamped in accordance with the first map. The result was that lots 84 and 85, purchased by defendant, were shown by the arrows placed in the sidewalks to have a frontage of 80 feet on Pearmain street. Neither of the maps were recorded. The description of the property in the contracts was by courses and distances, and, on its face, conveyed 80 feet on Pearmain street. The testimony of the surveyor was, however, that, if this description were followed, it would lead to a point 2½ feet across the line of 107th avenue. The testimony of the defendant and his wife is that, when they went to look at the property with the agent of the vendor, they were shown the arrows in the cement walk, which indicated that the property had a frontage on Pearmain street of 80 feet by a depth of 100 feet along 107th avenue; the depth being indicated also by an arrow.

With respect to the finding that the three contracts were entered into as one transaction, there appears the testimony of defendant's wife that they bought the entire property (supposedly 80 feet) as one piece, and then asked the agent if he would divide it up in the contracts, so that one lot would have 30 feet frontage, and the other two would have a frontage of 25 feet each, and could be held by them for their sons who were at that time children. The boys had nothing to do with the purchase, and never paid any part of the consideration, and it was merely the idea of the mother, after the purchase had been decided upon, that portions of the land should be held by the father for the boys. The testimony of the defendant was to the same effect. Both testified, also, that they really wished a larger lot than the one they thought they were purchasing, but, not being able to secure an additional 5 or 10 feet, took what was represented to them as 80 feet. They testified that the lots scarcely would be large enough to meet their requirements if they were as represented, and that they would not have purchased them if they had known that they were only 77½ feet in the aggregate.

[1] Of course, the question of what is a material difference between the actual and represented description of land is a question of fact, and varies with the circumstances and the uses of the land and the size of the parcel being sold. There was some evidence in the record which, appellants insist, indicates that the discrepancy was not material in the present case, because of the use of the land contemplated by the defendant. There are other considerations, however, which evidently weighed with the trial court in making its findings upon this point. The defendant testified that he thought the lots were in a section which would develop and improve rapidly, that the agent so stated to him, and that the agent also stated that in a short time trains would run every hour from East Fourteenth street to Stonehurst station. The use to which such a lot may be put in the future is uncertain. The defendant may have had an idea at the time of purchasing of using the place as a home, but he was not bound by that intention. It was his privilege to use the lot in any manner that might be most profitable at any later date, or to sell the same for use by others.

There might be many uses to which an 80-foot lot could be put, which would not be equally well met by a 77½-foot lot. The sale value of such a lot might be materially different if it contained 80 front feet than it would be if it contained only 77½ feet, and the difference in value, we think, would not be a matter of exact measurement. The appellants' main argument upon this question is that, because the defendant testified that he thought when he got old he might build a home on the lot and have a garden and chickens, therefore it appears that the smaller lot would serve such purpose as well. The value of one's property certainly cannot be fairly estimated, without taking into consideration the ever-present possibility of sale. We think, therefore, that the finding of the court that the deficiency was material, is warranted under all the facts and circumstances in evidence. From the direct evidence of the defendant and his wife that they would not have bought less than 80 feet; that the lots were too small, even at that measurement, the court was justified in concluding that this was a material inducement for entering into the contract. We think the deficiency was not capable of exact and entire compensation, and the right of the defendant to rescind under such conditions is recognized in section 1690, Civil Code.

[2] The court found that the vendors had been guilty of fraud in misrepresenting the frontage of the lots. Constructive fraud is defined by our Code as:

"Any breach of duty which without an actually fraudulent intent, gains an advantage to the person in fault * * * by misleading another to his prejudice." Section 1573, Civ. Code.

It was certainly a breach of the vendor's duty not to inform himself correctly regarding the boundaries of the land he was seeking to sell. Furthermore, it appears that the vendor had in its possession at that time the two maps, which gave different measurements for this property, and it was its duty to become aware of this fact, and to investigate and ascertain the truth, before making any representations in regard there-

Digitized by Google

to. It had at hand the means of ascertaining the truth, and defendant did not have, because the maps were not recorded. Furthermore, it appears in the record, by the testimony of R. P. Macdonald, secretary of E. B. & A. L. Stone Company, that the two maps were made, and that there was a change in the second map, and that the attention of the company was called to this about two years later, at which time the company wrote to the surveyor, asking for an explanation. They received no reply and evidently nothing more was done about it. Thereafter, for several years, with actual as well as constructive knowledge of the discrepancy, the vendors continued to demand payment of the full purchase price from the defendant and to receive partial payments thereon, and made no allowance for, or explanation of, the discrepancy, and charged interest and compound interest upon their books against the defendant upon the entire purchase price. Indeed, the vendors made no attempt in any way to remedy the mistake until the defendant discovered the facts and rescinded the contracts, which was after the commencement of the present action, by which it was still sought to enforce the payment of the purchase price agreed upon for 80 feet of land.

Another question argued by appellants is that the defendant may not rescind because he was delinquent in his payments due under the contracts at the time of the attempted rescission, and that he must fully perform his part of the contract in order to come into equity with clean hands. It appears that the vendors accepted overdue payments from time to time under the contracts, and thus waived the provision that time was of the essence of the contracts. They have not terminated the contracts because of defendant's default, but, on the contrary, they have considered the contracts as in full force and effect, and have sued to recover the installments due thereunder. If they keep the contracts alive by their own election, they must keep them alive for all purposes, and bear their burdens as well as accept their benefits. If the contracts were in full force and effect, and a mistake had been made in a material fact, which was their inducement, they could be rescinded. The evidence is that defendant rescinded promptly after discovery of the misrepresentations.

[3] Appellants urge that the real reason why the defendant desires to rescind is that at this time he has not the money necessary to make his payments. The courts have held that the motives of the vendee in rescinding may not be inquired into, when he has a legal reason for rescinding and relies thereon. Cabrera v. Payne, 10 Cal. App. 675, 678, 103 Pac. 176; Crim. v. Umbsen, 155 Cal. 697, 702, 103 Pac. 178, 132 Am. St. Rep. 127.

[4] The deed from Stone Company, by which the plaintiff acquired his interest in the property in controversy, was introduced in evidence. The court found this deed to be in fact a mortgage. This finding was based upon the following clause in the deed:

"This deed is given to secure cash advances of $761.72, the amount of the consideration hereinbefore named on the property hereinbefore named."

There were also in evidence assignments of the contracts sued upon, which assignments recited that the interest of the assignors in the contracts and in the property covered thereby were transferred to the assignee, the plaintiff here. Appellants contend that, even though the above-quoted clause in the deed may have raised a doubt as to the character of the deed, the assignments nevertheless conveyed the title to the property absolutely, and that a consideration of both instruments together leaves no doubt as to the intention of the parties that the full and indefeasible title, subject to the contracts of purchase, should be conveyed. The holding of the court that the deed was in reality a mortgage only affects the rights of the cross-defendants among themselves. It does not affect the rights of the defendant and cross-complainant, who is the respondent here. The Stone Company is objecting because it asserts that it has by this deed transferred title to the property in controversy to the other appellant, De Bairos, and that by the decree of the court, the contracts being rescinded, De Bairos will have the title to the property, free of the lien of the contracts, and Stone Company will be compelled to return to the defendant the money paid by him, and thus Stone Company will be out both property and money. But the appellant Stone Company, for these very reasons, should not object to a finding of the court which is consonant with the protection of what it asserts are its rights: for, under the holding of the court that this deed was merely a mortgage, the equity in the property would be in Stone Company, and upon the payment of the advances made by De Bairos, Stone Company would have the full and free title.

Argument cannot be made upon this appeal that the rights of the cross-defendants are not adjusted among themselves in the decree. The cross-defendants joined in one answer and did not ask the court to litigate the matter of their rights as against each other. They joined in their notice of appeal from the judgment for the defendant. Their respective rights are matters in which the respondent is not concerned in any way. The cross-defendants should have asked, if they desired, a determination of their respective rights among themselves, and the one considering himself aggrieved by such determination should have appealed there-

Digitized by Google

from, making the other cross-defendant a respondent. The respondent here has no interest in defending the right of either against the other. In so far as the judgment affects the respondent it is proper. He recovers his money from the parties to whom he has paid it; his contracts are rescinded, and the title of the property, which never vested in the defendant, is left either where it was before the contracts were entered into, or where the cross-defendants by their own conveyances have placed it since that time.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing in this court is denied.

The opinion of the District Court, in answer to the appellants' proposition that the defendant was not entitled to rescind the contract while he was himself in default by nonpayment of installments due on the purchase price, says that—

"The vendors accepted overdue payments from time to time under the contracts, *and thus waived the provision that time was of the essence of the contracts.*" (Italics ours.)

The language we have italicized is not a correct statement of the law without further qualification.

[5] Acceptance of overdue installments of the price, on an executory contract for the sale of land, waives any right to declare a forfeiture on account of the previous failures to pay when due. But such acceptance alone does not change the terms of the contract as to forfeiture for future failures, nor eliminate the provision that time is of the essence of the contract. There may be conduct and acquiescence by the vendor sufficient to *justify the inference by a court* as a matter of fact that the vendor has waived the conditions of a contract regarding a forfeiture, which he afterward claims the right to enforce, and when, in such a case, the waiver has continued until after all installments are due, the condition cannot be revived, except by notice to the vendee. Boone v. Templeman, 158 Cal. 296, 110 Pac. 947, 139 Am. St. Rep. 126; Stevinson v. Joy, 164 Cal. 285, 128 Pac. 751; Hayt v. Bentel, 164 Cal. 684, 130 Pac. 432; American, etc., Co. v. Butler, 165 Cal. 519, 133 Pac. 280, Ann. Cas. 1916C, 44; Myers v. Williams, 173 Cal. 304, 159 Pac. 982. But none of these cases holds that such waiver is absolute, or that the provision cannot be revived and a forfeiture produced by a notice requiring performance within reasonable time.

[6] The true answer to the proposition of appellants, above stated, is that the rule it invokes applies only to cases where a rescission is sought or claimed by one party to an executory contract on the ground of a breach of the contract by the other party. All the cases to that effect are of that character. State v. McCauley, 15 Cal. 458; Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 273, 110 Pac. 951; Duncan v. Jeter, 5 Ala. 604, 39 Am. Dec. 342; Hatton v. Johnson, 83 Pa. 222; Myers v. Gross, 59 Ill. 436; Seymour v. Bennett, 14 Mass. 266. We know of no case which holds that such rule applies to a case where the vendee, in default on payments due on the contract, seeks to avoid and rescind it for fraud of the vendor in procuring its execution, or for mistake inducing its execution. Payment by the vendee, after discovery of the fraud or mistake, might tend to show a waiver thereof, and thus defeat an attempted rescission, but a refusal to pay would be entirely consistent with the right of the vendee to rescind for such cause.

ANGELLOTTI, C. J., and SHAW, LENNON, LAWLOR, WILBUR, SLOANE, and OLNEY, JJ., concur.

AMERICAN BOND & MORTGAGE CO. v. LINDSAY et al. (Civ. 3163.)

(District Court of Appeal, Second District, Division 2, California. April 14, 1920.)

1. Corporations ⟸110—Defendant, to whom stock was issued, but who transferred it, proper party to company's suit to cancel.

In action by corporation to cancel treasury stock as issued in exchange for other stock, in contravention of permit granted by commissioner of corporations under the Investment Companies Act, or Blue Sky Law, defendant *held* neither a necessary nor a proper party, so far as the relief sought by the company was concerned; he having transferred to another defendant, who had full notice and knowledge of all facts affecting its validity.

2. Appeal and error ⟸1073(3)—Error in judgment against defendant, not a proper party, prejudicial as to costs.

Error in judgment against a defendant, who was neither a necessary nor a proper party, was prejudicial in so far as the judgment held such defendant liable for costs.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the American Bond & Mortgage Company, a corporation, against L. Lindsay and others. From the judgment for plaintiff, defendant Lindsay appeals. Reversed as to such defendant, and cause remanded, for modification of judgment in accordance with the opinion.

Digitized by Google

A. L. Abrahams, of Los Angeles, for appellant.

Clark & Pierson and Denis Loewenthal, all of Los Angeles, for respondent American Bond & Mortgage Co.

FINLAYSON, P. J. This is an action by a California corporation to cancel an issue of certain of its shares of treasury stock—shares that it had issued to the four defendants, Lindsay, Corbaley, Maescher, and McKinney, in exchange for certain shares that they owned of the capital stock of the State Investment Company. The theory of the complaint is that the issue of plaintiff's stock in exchange for stock of the State Investment Company was in direct contravention of a permit that had been granted by the commissioner of corporations, and that therefore, under the provisions of the Investment Companies Act, commonly known as the Blue Sky Law (St. 1913, p. 715), the issue was a nullity. The appeal is by the defendant Lindsay.

The case, as presented by the complaint and found by the court, is substantially as follows: At a time when plaintiff's board of directors was dominated and controlled by one Pearson, the latter, for his own illegal profit and gain, caused 57,226 shares of plaintiff's treasury stock to be issued to the four above-named defendants in exchange for 71,532 shares of the capital stock of the State Investment Company, that theretofore had been issued to and were then owned by these four defendants. Of the 57,226 shares of plaintiff's treasury stock so issued, 19,944 were issued to defendant Lindsay. Previous to the issue of the 57,226 shares, and pursuant to the act commonly known as the Blue Sky Law, plaintiff, whose capital stock was divided into 2,000,000 shares of the par value of $1 each, had made application to the commissioner of corporations for authority to sell its corporate stock. A temporary permit was issued by that officer, whereby plaintiff was authorized to issue not exceeding 1,000,000 of its shares "in exchange for property, the fair and reasonable net market value of which * * * shall * * * equal or exceed 110 per cent. of the par value of the shares issued therefor."

It is alleged in the complaint and found by the court, in substance and effect, that the value of the State Investment Company's shares, that the four defendants transferred to plaintiff in exchange for its 57,226 shares of treasury stock, did not exceed 63 per cent. of the par value of plaintiff's capital stock. Wherefore plaintiff, which, since the exchange, has come under the control of a board of directors by whom the whole transaction has been repudiated, seeks to rescind the exchange and to cancel the issue of its treasury stock as a void issue under the Blue Sky Law, section 5 of which reads:

"It shall be unlawful to issue any security to which this act is applicable unless a certificate or a temporary permit authorizing the issue thereof shall first have been received from the commissioner of corporations as provided in this act."

The complaint alleges, and the court finds, that before the action was commenced the 19,944 shares of plaintiff's treasury stock that it had issued to Lindsay in exchange for shares of the State Investment Company had been transfered by Lindsay to John R. Gardiner, who, though made a party defendant, was not served with summons and did not appear in the action. It further is found by the court that, at all times since the transfer to Gardiner, the 19,944 shares have stood in his name on plaintiff's books. The complaint also alleges that Gardiner acquired the stock from Lindsay with full knowledge of all the facts affecting the validity of its issue. Plaintiff's evidence showed without conflict that, when the action was commenced, Lindsay had no interest whatever in the stock; he having theretofore transferred all his interest therein to Gardiner, as we have stated. For this reason Lindsay moved for a nonsuit. The motion was denied.

After finding the facts substantially as we have stated them, judgment was entered against the four defendants, Lindsay, Corbaley, Maescher, and McKinney, whereby the court, in substance, decreed: (1) That the issue of the shares of plaintiff's treasury stock, which, of course, included the 19,944 that had been issued to Lindsay and by him transferred to Gardiner, was and is void; (2) that plaintiff cancel said issue on its records; (3) that defendant Lindsay, as well as his codefendants Corbaley, Maescher and McKinney, deliver to plaintiff the certificate or certificates evidencing the issuance of the 57,226 shares, and this notwithstanding Lindsay had transferred his shares to Gardiner, in whose name the stock then stood of record on plaintiff's books; and (4) that plaintiff recover its costs. From that judgment Lindsay has taken this appeal.

[1] The appeal presents a number of interesting questions arising under the Blue Sky Law, which, however, it will not be necessary to consider, since appellant was neither a necessary nor a proper party defendant, and for that reason alone the court should have adjudged that plaintiff take nothing as against Lindsay and that he recover of plaintiff his costs. The stock certificate that evidenced the issue of the 19,944 shares to Lindsay was not a negotiable instrument; and, moreover, Gardiner, according to plaintiff's complaint, took the shares, as the transferee of Lindsay, with full knowledge of all the facts affecting the validity of the issue. Gardiner, therefore, cannot possibly have any cause of action against Lindsay for damages, or for reimbursement, based on the fact, if it

Digitized by Google

be a fact, that Lindsay never acquired title to the stock. Gardiner's knowledge of the facts precludes any possible claim that his vendor, Lindsay, impliedly warranted the title. 35 Cyc. 386; Dreisbach v. Eckelkamp, 82 N. J. Law, 726, 83 Atl. 175; Libby v. Pelham, 30 Idaho, 614, 166 Pac. 575, concurring opinion of Justice Morgan. Appellant's presence, therefore, as a party defendant, was not necessary to a determination of any controversy there might be between Gardiner and himself. There was no basis for any controversy between them.

[2] So far as the relief sought by plaintiff is concerned, appellant was neither a necessary nor a proper party defendant. Plaintiff asked that the issue of the stock be canceled. For that purpose (in so far as the shares issued to Lindsay are concerned) it was necessary to have Gardiner only before the court. Plaintiff and Gardiner are the only parties interested in those shares. Appellant had no possible interest in the controversy; there was nothing that he could do, or be compelled to do, that could effect a cancellation of the invalid issue of plaintiff's treasury stock; and his presence as a party defendant was therefore neither necessary nor proper. Topping v. Van Pelt, Hoff. Ch. (N. Y.) 545; Wright v. Day, 59 Misc. Rep. 76, 111 N. Y. Supp. 1105; Fairgate Realty Co. v. Drozda (Mo.) 181 S. W. 398; Campodonico v. Grossini, 66 Cal. 358, 5 Pac. 609. For this reason, appellant's motion for a nonsuit should have been granted. However, it will not be necessary to remand the case for a new trial, since the findings themselves, because they disclose that Lindsay had transferred all of his shares to Gardiner, show that it was error to render judgment against appellant; and that error, at least in so far as the judgment adjudges appellant liable for costs, is prejudicial.

The judgment is reversed as to the defendant Lindsay, and the cause remanded, that the judgment may be modified in accordance with what is here said.

We concur: SLOANE, J.; THOMAS, J.

FAIRMONT CREAMERY CO. v. LOS ANGELES ICE & COLD STORAGE CO.
(Civ. 3354.)

(District Court of Appeal, First District, Division 2, California. April 13, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Appeal and error ⇐1097(1)—Decision on former appeal law of case.

A decision on a former appeal of the same action between the same parties is binding as the law of the case on retrial in so far as the facts on retrial correspond with those on the first trial.

2. Factors ⇐52—Pledge of goods by broker valid though bill of lading not negotiable.

Where an owner of eggs shipped a car to a broker, who, on obtaining possession, placed them in defendant's warehouse and obtained a loan on pledge of the eggs, the owner cannot defeat the pledge which was valid against it under Civ. Code, § 2991, there being nothing to indicate that the broker did not have title, on the ground that the bill of lading was nonnegotiable, for, even if defendant pledgee had examined the bill of lading, it would not have disclosed the broker's lack of title.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Fairmont Creamery Company against the Los Angeles Ice & Cold Storage Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Henry K. Norton and Roy V. Rhodes, both of Los Angeles, for appellant.

Sidney J. Parsons, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from the judgment against it rendered in an action for conversion of a carload of eggs. When the action was first tried, judgment was rendered for the plaintiff, from which judgment the defendant appealed. Upon the appeal the judgment was reversed. The decision upon the first appeal is reported in 33 Cal. App. 414, 165 Pac. 553. The case was then retried, resulting in a judgment for the defendant, from which judgment this appeal is prosecuted.

The important facts, as stated on the first appeal, also appear from the present record and are as follows:

On June 17, 1913, one Fred F. Lambourn was engaged in business at Los Angeles as a broker selling merchandise on behalf of consignees and also as a dealer in merchandise on his own account. He had been in business for several years. In August, 1913, he was adjudged a bankrupt. The plaintiff was engaged in the produce business at Omaha, Neb., and had been doing business with Lambourn as a broker since April, 1911. On June 5, 1913, Lambourn telegraphed plaintiff that he had sold a car of eggs. The telegram was as follows:

"Sold car candled current receipts fifty-three and over small dealers eighteen cents track. Wire car number and when can ship."

On June 7, 1913, the plaintiff shipped the carload of eggs thus ordered and made the consignment directly to and in the name of Lambourn. The car arrived at Los Angeles on June 17, 1913. When the merchandise was shipped from Omaha a bill of lading therefor, showing the shipment from plaintiff to Lambourn, was received from the railroad company, and was mailed by the plaintiff to Lam-

Digitized by Google

bourn. According to the testimony of plaintiff's sales manager, this was done that Lambourn "might obtain possession of the eggs for the purpose of making delivery to the various parties to whom he had sold as our broker." At the same time the plaintiff forwarded through the Omaha National Bank to that bank's correspondent in Los Angeles a draft on Lambourn for $2,160, the purchase price of the eggs. The draft was not paid. On June 17, 1913, Lambourn informed the superintendent of the defendant that he had a car of eggs and wanted a loan upon it. The eggs were taken into the possession of the defendant and placed in its warehouse, and defendant issued to Lambourn a warehouse receipt therefor. Thereupon, on the same day, the defendant loaned to Lambourn $2,300, taking his note therefor, together with an agreement pledging the car of eggs to the defendant as collateral security for the payment of the note and any other liability or liabilities of Lambourn to the defendant, "due or to become due or that may be hereafter contracted." In making this loan the defendant made no special inquiry as to the ownership of the merchandise and did not see, or ask to see, the bill of lading. It simply accepted Lambourn's statement that he owned the car of eggs. It had no knowledge concerning the ownership of the property. On September 10, 1913 (after the bankruptcy of Lambourn), the defendant sold the eggs for $2,880. On September 24, 1913, the plaintiff made a demand for the same upon the defendant, claiming to be the sole owner, and offered to pay storage charges on the eggs. Upon these facts (the statement of which is taken from the opinion rendered upon the first appeal), all of which also appear clearly from the record now before us, the District Court of Appeal for the Second Appellate District, on April 14, 1917, decided that Lambourn was a factor, and as such had ostensible authority to deal with the goods of the principal as with his own in transactions with persons not having notice of the actual ownership. Civ. Code, §§ 2026, 2369. The appellate court also decided that section 2991 of the Civil Code was applicable to the facts shown; that the eggs were consigned to Lambourn to be transferred by him to the purchaser of the same; and that "in the meantime they could not be identified as belonging to any purchaser, and the property remained in possession of Lambourn for the purpose of making those transfers." The opinion upon the first appeal continues further:

"Counsel for respondent further suggests the fact that the defendant did not inquire of Lambourn as to the form of the bill of lading, and never saw that document until the day of the trial. Therefore, they say, that as to them Lambourn had mere possession, and that appellant cannot in any sense be said to be a pledgee who received the property in good faith in the ordinary course of business. We think that it was not necessary for appellant to examine the bill of lading. By acting upon the assumption that Lambourn had such bill of lading and without examining the same for itself, appellant took the risk that he might not have any such document in his possession. But since he did have it, the case is the same as if appellant had examined it and relied upon the evidence obtained by its own inspection."

[1] In so far as the facts are substantially the same upon the second appeal as upon the first appeal the decision upon the first appeal is the law of this case. However, appellant urges upon our attention two additional points in the evidence upon the second trial. It states them to be:

"(1) That Lambourn had a bond up with the railroad company so that he might obtain cars without showing a bill of lading and going through the usual course of business.

"(2) Lamoreaux, superintendent of cold storage for the defendant, testified that the board of directors of the L. A. Ice & Cold Storage Company had adopted a policy of transacting business, such as was done in this case with Lambourn, with only regular customers and not with strangers. And further he testified to the effect that the reason that they did not call for the bill of lading or some indicia of ownership in taking these goods as pledge for the loan, was because they relied upon the fact that they were dealing with an old customer."

[2] It is contended that, as the bill of lading was not made "to order" and was not negotiable, therefore this fact would have put the defendant upon notice if it had examined the same. We find no merit in this contention. The plaintiff consigned the goods directly to Lambourn, and the bill of lading designated him as the consignee. It is true that, as between the plaintiff and Lambourn, this bill of lading transferred only the right to the possession of the goods and not the full title, but it is this very possession for the purpose of transferring title to others which is the basis of a pledgee's rights under section 2991 of the Civil Code. It is true that because the bill was nonnegotiable Lambourn was obliged to wait until he secured possession of the goods before pledging them. If the bill had been negotiable, he could have dealt with it before the goods arrived and cut off all equities; but he did not attempt to do this. He did not negotiate the bill. He waited until the goods arrived and properly secured possession of them, because the eggs were billed to him. If the defendant had examined the bill of lading, it would have discovered nothing which would have militated against its rights under section 2991, Civil Code. The bill of lading merely showed that Lambourn was entitled to the possession of the eggs. The limited purpose of the possession did not appear from the bill of lading, and was enforceable only as between the plaintiff and Lambourn, or parties having knowledge of the facts. The plaintiff could

Digitized by Google

have protected itself fully by attaching the bill of lading to the draft which it sent to the bank for collection. It did not choose to do this.

The matter of the effect of the nonnegotiability of the bill of lading is argued by appellant in several connections, but the discussion herein disposes of the matter in its various applications. The other matter urged by the appellant we consider to be without merit.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

ZARTARIAN v. ZARTARIAN. (Civ. 3184.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1920.)

1. **Divorce ⟸37(6)—Decree cannot be based on cross-complaint for cause of action not accrued.**

No divorce can be based on defendant wife's cross-complaint for desertion where such cause of action had not accrued, under Civ. Code, § 107, either at the time of the filing of plaintiff husband's complaint or of the wife's cross-complaint.

2. **Divorce ⟸93(3)—Complaint or cross-complaint must allege effects of cruelty.**

A complaint or cross-complaint for divorce for cruelty must, under Civ. Code, § 94, allege either that the cruelty resulted in bodily harm, or injury to health, or in a reasonable fear of one or the other.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Markar H. Zartarian against Agavnie Zartarian. From judgment for plaintiff granting divorce, defendant appeals. Reversed.

Florence L. Stephens, of Los Angeles, for appellant.

A. M. Astor, of Los Angeles, for respondent.

THOMAS, J. In this action plaintiff sought a divorce from the defendant on two grounds —cruelty and desertion. Defendant by her answer denied the material allegations of the complaint.

Defendant also served and filed a cross-complaint, in which it is alleged, among other things, that for a long time after the marriage of the parties hereto they lived together in Boston, Mass., during which time plaintiff carried on and maintained a prosperous shoe-repairing business in that city; that during such time plaintiff upon several occasions ran away and left defendant, and that he finally sold the business for $1,500, and, taking such sum, together with some $3,000 which he had in the bank at that time, left "and came to California, city of Los Angeles," at which place he bought out a grocery business; that some time after plaintiff's departure from Boston, defendant, learning his whereabouts, "followed the plaintiff to the city of Los Angeles about November 15, 1915, and there effected a reconciliation, and lived with said plaintiff up to the very day of February 12, 1916, in the city of Los Angeles"; that plaintiff and defendant carried on said grocery business together, but finally determined that it was not paying, whereupon they decided to sell out, at which time it was understood that both of them would return to Boston; that at plaintiff's persuasion defendant preceded plaintiff to Boston, leaving Los Angeles on February 12, 1916, in accordance with the understanding arrived at, fully believing that she would be followed by her husband as soon as he sold out the business; that the business was in fact subsequently sold by plaintiff, and that plaintiff did not go to Boston as agreed, but remained in Los Angeles, there opening up a shoe-repairing business; that defendant took sick while in Boston after so returning to that city from Los Angeles, and that she, "being without means, was unable to return to Los Angeles, and was compelled to remain in Boston"; that later money was furnished her by friends, and, so aided, she returned to Los Angeles in December, 1916, but that "on November 11, 1916, while the defendant was in the city of Boston, waiting for plaintiff to come on, the plaintiff herein filed a suit for divorce, in the city of Los Angeles, against the defendant herein, on the grounds of desertion." Then follows a recitation of facts showing that plaintiff's net earnings from his shoe-repairing business were "about $50 per week," and "that by their united efforts they had acquired about $5,000 in cash before coming to Los Angeles," but that the whole amount thereof was in plaintiff's charge. It is further shown by the cross-complaint that the issue of the marriage of the parties hereto "was one daughter, eight years old"; that while defendant was sick in Boston, having no money with which to provide for said daughter, she sent the child, through the assistance of a mutual friend, to plaintiff herein in Los Angeles, to be cared for by him, and that plaintiff placed the said child in the Orphanage Home at Santa Monica, Cal. Cross-complainant, in conclusion, alleges that she is wholly dependent upon her own labor and the charity of her friends for support; that plaintiff, since defendant's return to California upon recovery of her health, has refused to inform her of the child's whereabouts, and refuses to live or cohabit with her; and that he has threatened her life, and refuses to provide for her in any way or to allow her to return to his house. Then follows a prayer for judgment on the cross-complaint, asking: (1) for a division of

Digitized by Google

the common property; (2) that plaintiff be restrained from disposing of or in any way incumbering the said shoe-repairing business, or the said $5,000, and from taking away the said child; (3) $15 per week permanent alimony for the separate maintenance of herself and child; (4) for support during the pendency of the action, as the court might deem proper; (5) attorney's fees and costs; and (6) for general relief.

Plaintiff, by his answer to defendant's cross-complaint, denies some of the material allegations, and sets up the defense that "he is now and has been working for his brother for $9 per week," and that that is all he earns.

On the issues thus presented the case was tried. Findings were specifically waived by the parties. There is some doubt as to whether this can be legally done; but that point is not before us, and we therefore refrain from any discussion thereunder. Omitting formal parts, the following judgment was entered:

"Therefore it is ordered, adjudged, and decreed that a decree of divorce be granted to the defendant against the plaintiff; that when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered, granting a divorce herein, wherein and whereby the bonds of matrimony existing between said plaintiff and said defendant shall be dissolved, and at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action. It is further adjudged that the minor child of the parties, named Alice Zartarian, shall, until the further order of the court, be in the custody of the plaintiff, and the plaintiff is directed, until the further order of the court, to keep and maintain said child at the Los Angeles Orphans' Home, at 815 El Centro Ave., Los Angeles, Cal."

The appeal is on the judgment roll alone, and "from that part of the interlocutory judgment rendered by the above-named court in the above-entitled action, and herein entered on the 10th day of December, 1917, which ordered, adjudged, and decreed that a decree of divorce be granted to the defendant herein against the plaintiff herein, but denied the the prayer of the defendant herein for alimony and separate maintenance of herself and minor child, and which further adjudged that the custody of said minor child, named Alice Zartarian, be given to plaintiff."

[1, 2] Three grounds are urged by appellant for the reversal of the judgment: (1) That the judgment is not supported by the pleadings; (2) that the court erred in granting relief inconsistent with the case made by the pleadings and embraced within the issues; and (3) that the court erred in rendering a judgment for divorce in favor of the defendant.

Appellant urges in support of the first point that, the trial court having found from the evidence that plaintiff was not entitled to a divorce from defendant, "but in the face of the allegations of defendant's cross-complaint and the issues raised by the answer thereto and the relief sought by the defendant the court adjudged and decreed that a decree of divorce be granted to the defendant against plaintiff"—granting custody of the child to plaintiff—the only pleadings pertinent to this appeal, since plaintiff was denied relief on his pleadings, are defendant's cross-complaint and plaintiff's answer thereto, as well as the interlocutory judgment. It also is urged that the cross-complaint does not state a cause of action "on the ground of desertion, or any ground."

With this view we are in full accord. If the cross-complaint is intended to allege facts upon which to base a cause of action for desertion or willful neglect, and even though we concede, without so holding, that it does, yet it conclusively appears upon its face that no divorce can be based thereon, because such cause of action had not accrued, either at the time of the filing of plaintiff's complaint or defendant's cross-complaint. Section 107, Civ. Code. On the other hand, if the facts alleged in the cross-complaint be true—and for our present purposes we must so assume—still we are of the opinion that the cross-complaint fails to allege facts sufficient to constitute a cause of action against the plaintiff for extreme cruelty, as contemplated by section 94 of the Civil Code.

"The particular facts relied on as constituting cruelty should be set forth in detail; it is not sufficient to allege cruelty in general terms, as in the language of the statute. However, every act complained of need not be specifically described; it is enough if sufficient facts are alleged to establish legal cruelty as a ground for divorce. * * * The acts of cruelty should be alleged with reasonable certainty as to time and place. However, the exact day and place of the occurrence of each particular act need not be alleged; and where the conduct complained of is continued and not confined to any particular time or locality, a specific allegation of time and place is impracticable and should not be required. * * * Since, to constitute a ground for divorce, cruelty must result either in bodily harm or injury to the health or a reasonable fear of one or the other, *either one or the other of these effects of the misconduct on the complainant must be alleged.*" (Italics ours.) 14 Cyc. 667 et seq.; Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330; MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Smith v. Smith, 124 Cal. 651, 57 Pac. 573; Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099; Ryan v. Ryan, 33 Mont. 406, 84 Pac. 494; Claunch v. Claunch (Tex. Civ. App.) 203 S. W. 930.

There is nothing in the cross-complaint now under consideration which brings it within the provisions of the rule just quoted, and particularly does it contain no allegation bringing it within the portions which we have italicized. There being no such allegation, then it is clear that no evidence could legally

Digitized by Google

be received, even if offered, in support of such contention.

Nothing is contained in the judgment roll before us upon which the judgment appealed from may find support. This being true, it becomes unnecessary to discuss any other point raised.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

DIBBLE v. SAN JOAQUIN LIGHT & POWER CORPORATION et al.
(Civ. 3317.)

(District Court of Appeal, First District, Division 1, California. April 14, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Negligence ⟸134(1) — Evidence held to make prima facie case for owner of grain destroyed by fire.

In an action for destruction of grain by fire, evidence *held* to make a prima facie case for plaintiff calling upon defendants to rebut the necessary inferences arising from the testimony.

2. Master and servant ⟸330(3) — Evidence held to show relationship of principal and agent between defendants and workmen who set fire.

In an action for destruction of grain by fire, evidence *held* to make a prima facie showing of the existence of the relationship of principal and agent between the corporate defendants and the workmen on their power line who started the fire, adequate in the absence of evidence to the contrary to support findings that such relation existed.

3. Master and servant ⟸6 — Performance of work for another prima facie evidence of employment.

The fact that one is performing work and labor for another is prima facie evidence of employment, and supports the presumption that such person is the employé of such other, in the absence of evidence to the contrary.

4. Negligence ⟸134(10) — Evidence held to show that fire was communicated from power companies' right of way.

In an action against power companies for destruction of grain by fire set on their right of way, evidence *held* sufficient to justify finding that the flames were communicated by a fire which originated on the companies' right of way, and which had origin in some instrumentality used by their employés.

5. Negligence ⟸21—Employés of power companies negligent in not extinguishing fire on right of way.

The employés of power companies were guilty of gross negligence in not properly controlling and extinguishing a fire on the right of way occupied by a power line in proximity to a field of ripened grain when their attention was directed by a passerby to the probability of its spreading.

6. Appeal and error ⟸996—Appellate court cannot set aside findings supported by inferences from facts proved.

It is not within the power of the appellate court to disregard or set aside findings of the trial court supported by inferences founded on facts proved.

7. Assignments ⟸22—Chose in action arising from violation of property right or from obligation or contract assignable.

Under Civ. Code, § 954, a chose in action arising out of either the violation of a right of property, or out of an obligation or contract, is assignable.

8. Negligence ⟸106—Insurer of grain destroyed by fire not necessary party to owner's action against parties at fault.

It was not necessary that the insurance company which paid an owner of grain for its destruction by fire through the negligence of power companies should have been joined in the owner's action against the companies either as plaintiff or defendant.

9. Pleading ⟸11—Reassignment by insurer of rights under subrogation to owner of standing grain destroyed did not need to be pleaded.

The owner's insurer has merely a cause of action arising by subrogation or equitable assignment through settling a loss, by fire occasioned by negligence of another, and such assignment and the reassignment by the insurer to the owner are probative matters having no place in the owner's complaint against the wrongdoer.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by A. L. Dibble against the San Joaquin Light & Power Corporation, a corporation, and the Midland Counties Public Service Corporation, a corporation. From judgment for plaintiff, defendants appeal. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellants.

Goodfellow, Eells, Moore & Orrick and Geo. K. Ford, all of San Francisco, for respondent.

WASTE, P. J. This is an appeal by the defendants from a judgment awarding plaintiff damages for the destruction by fire of certain grain belonging to him, caused through the negligence of the defendants. The case was tried before the court without a jury. It was stipulated that, if judgment went against one of the defendants, it might be entered against both of them. At the conclusion of plaintiff's case, the defendants moved for a nonsuit. The motion was denied, whereupon the defendants declined to offer any evidence. The findings of the trial

Digitized by Google

court followed the allegations of the complaint. In seeking a reversal of the judgment the appellants urge two grounds: First the insufficiency of the evidence to justify the findings, and the judgment based thereon; and, second, that the plaintiff is not the real party in interest in this action, at least to the amount of $3,025.60.

It is admitted that the plaintiff was the lessee of certain lands upon which he had grown a crop of wheat and barley. The defendants owned and maintained a right of way, adjacent to the land of plaintiff, over which it operated a power line. From the testimony of Mr. McCabe, who was called as a witness on behalf of the plaintiff, it appears that on the afternoon of June 8, 1915, he was passing along the county road, which was located a few feet westerly from the power line. Two men, Schultz and Moore, were at that time in view. One of them was in the act of descending from one of the poles, supporting the power line, while the other was on the ground near the foot of the pole. A team and wagon, which McCabe identified as belonging to the defendant power corporation, was standing nearby. A small fire, three or four feet across, was then burning in the tall, thick, dry grass which extended to plaintiff's field, a distance of about 200 feet, and in which plaintiff's grain was standing and ready for the harvest. The wind was at that time blowing from the fire in the direction of plaintiff's field. About 20 feet from the place where the fire was burning, and so situated that the wind would carry sparks from it toward the fire, McCabe observed a fire pot, with what seemed to be coals of fire in it. What appeared to be a torch, such as is used by plumbers, was lying just where the blaze was starting. The fire at this time could have been readily extinguished. When McCabe approached, the two men were standing near it with sacks or cloths in their hands. McCabe said, "Boys, if you ain't careful, you will have a big fire here on your hands," to which one of the men replied, "Never mind, partner, we will attend to the fire." Neither of the men, however, made any attempt to extinguish, or stay, the spread of the flames, which, owing to an increasing wind, almost immediately spread rapidly until they reached and consumed plaintiff's grain.

[1] It is the contention of the appellants that this evidence was wholly insufficient to prove that the fire in question was started by the negligence of the defendants, or that it was permitted to spread and reach the grain upon plaintiff's land, because of any carelessness whatever on the part of defendants, or either of them. We are of the opinion, however, that the plaintiff made out such a prima facie case as called upon the defendants to rebut the necessary inferences arising from the testimony, and that the motion for a nonsuit was properly denied.

[2, 3] Appellants first argue that as there was no direct testimony that either Schultz or Moore were employed by the defendants, and no evidence as to the kind of work they were doing at the time of the fire, they may have been strangers to the defendants and not in any way connected with them. This contention cannot be upheld. The men appeared to be engaged in some kind of work connected with the business of the defendants. They were working on the right of way of defendants' power line. One of them was descending from one of the power line poles. The other was close at hand. No other men were in sight. The implements for their work were scattered about. The fire pot, the torch, and the wagon and team, were all indicia of their employment. The facts were sufficient, in our judgment, to make a prima facie showing of the existence of the relationship of principal and agent between the corporation defendants and the workmen, which, in the absence of evidence to the contrary, was ample to support the findings of the trial court that such relation existed at the time of the fire. 1 Labatt, Master and Servant, § 22, pp. 69, 73. The fact that one is performing work and labor for another is prima facie evidence of an employment and supports a presumption that such person is the servant and employé of the other, in the absence of evidence to the contrary. King v. Hercules Powder Co., 178 Pac. 531; Indiana, etc., Railways v. Adamson, 114 Ind. 282, 15 N. E. 5; Waaler v. Great Northern Railway Co., 22 S. D. 256, 117 N. W. 140, 18 L. R. A. (N. S.) 297; Robinson v. Doe, 224 Mass. 319, 112 N. E. 1007; Bush v. Southern Railway Co., 63 S. C. 96, 40 S. E. 1029; Howell v. Mandelbaum & Sons, 160 Iowa, 119, 140 N. W. 397, Ann. Cas. 1915D, 349.

[4, 5] Appellants also claim that there is no evidence to show that the employés in question either started the fire, or failed to extinguish it, or that they negligently permitted it to spread. While it is true there is no direct evidence as to the origin of the fire, the trial court had the right to make any logical, reasonable deduction, which the admitted facts, and the undisputed testimony of the witness McCabe permitted. Davis v. Hearst, 160 Cal. 143, 176, 116 Pac. 530. It is a fair inference that the flames which destroyed plaintiff's property were communicated thereto by the fire, which originated on the right of way of defendants, and which had its origin in one or other of the instrumentalities used by defendants' employés in their work. Reuter v. San Pedro, etc., Co., 37 Cal. App. 277, 283, 174 Pac. 927; St. Paul Fire, etc., Co. v. Southern Pacific Co., 30 Cal. App. 140, 142, 157 Pac. 247; Fay v.

Digitized by Google

Cox, 188 Pac. 623; Toledo, etc., Co. v. Fenstermaker, 163 Ind. 534, 72 N. E. 561, 562; Roundtree v. Mt. Hood, etc., Co., 86 Or. 147, 168 Pac. 61. It is equally clear to us that the employés of defendants were guilty of gross carelessness in not properly controlling and extinguishing the fire when their attention was directed by McCabe to the probability of its spreading. It was burning in tall, dry grass near the adjacent fields of stubble and grain, and it should not have required any warning to apprise them of this imminent danger.

[6] The deductions drawn by the trial court are not illogical, or inherently unsound, either as to the employment of Schultz and Moore or as to the origin and source of the fire. Whether or not the workmen were the servants of the power company was so peculiarly within the knowledge of the defendants that the plaintiff was not required to make as strong showing in that regard as might have been otherwise required. As against the deductions drawn by the trial court, which seem eminently reasonable, no other inferences founded on facts proved in the case find support. It is not within the power of this court to disregard, or set aside, the findings thus supported. Ryder v. Bamberger, 172 Cal. 791, 799, 158 Pac. 753; County of Alameda v. Tieslau, 186 Pac. 398.

On cross-examination of the plaintiff it was developed that the grain was insured against fire in the Hartford Fire Insurance Company, which paid plaintiff $3,025.60, the amount due under its policy. On redirect examination plaintiff established that, before the commencement of the action, the insurance company assigned to the plaintiff all rights and causes of action against the defendants, arising out of the loss or damage occasioned by the fire. A written assignment was admitted in evidence over the contention of the defendants, the objection being that the cause of action was not assignable and that the assignment had not been pleaded. The defendants then made application to the court to amend their answer by setting up a further defense, which, in substance, was that the action had not been brought, and was not being prosecuted, in the name of or by, the real party in interest.

The court denied the application to amend.

[7] Appellants complain of the act of the court in admitting the assignment in evidence and its further action in refusing permission to file the amendment to the answer. Their contention, first, is that the insurance company, upon the payment of the loss of the plaintiff, was subrogated to plaintiff's rights, and became the real party in interest to the extent of its payment, and that the cause of action which the insurer had, because of its subrogation to the rights of plaintiff, was not assignable. Appellants seek to invoke the rule of law relating to actions for death or personal injuries, and for damage to property under statutes different from ours. Section 954 of the Civil Code has effected a change in the common-law rule of the nonassignability of choses in action. One arising out of either the violation of a right of property or one arising out of an obligation or contract may now be transferred. Stapp v. Madera Canal & Irrigation Co., 34 Cal. App. 41, 46, 166 Pac. 823.

[8, 9] The next point urged by appellants is that the insurance company should have been joined in the action, either as plaintiff or defendant. We find no merit in this contention. It was not necessary even that the assignment by the insurance company to the plaintiff should have been pleaded. The insurer merely had a cause of action arising by way of subrogation or equitable assignment. Caledonia Insurance Co. v. Northern Pacific Railway Co., 32 Mont. 46, 49, 79 Pac. 544. This assignment by operation of law, and the reassignment by the company to plaintiff, left the claim as it was originally and invoked probative matters that had no place in the pleading. Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373, 377, 114 Pac. 1026. The action was therefore properly commenced by the plaintiff alone.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

PEOPLE v. GUTIERREZ. (Cr. No. 699.)

(District Court of Appeal, Second District, Division 2, California. April 14, 1920.)

1. Infants ⟹19—Evidence held insufficient to show that infants had no parent or guardian.

In a proceeding to take from their father the custody of infants, evidence *held* insufficient to establish that they had no parent or guardian capable of exercising proper parental control over them.

2. Infants ⟹19 — To justify taking infants from custody of parent, facts specified in statute therefor must be averred and found.

To take from the father the custody and control of infants, under Juvenile Court Law, § 9b, providing that no ward of the juvenile court shall be taken from the custody of his parent or legal guardian without the consent of such parent or guardian, unless the court shall find such parent or guardian to be incapable of providing, etc., proper maintenance, training, and education, or unless such person has been convicted of a felony, or the court shall find that the welfare of such ward requires his custody to be taken from the parent or guardian, averments of facts specified must be made in

Digitized by Google

the petition, and findings thereof must appear of record to support an order divesting the parent or guardian of control.

3. Infants ⇐16—Custody of infants cannot be taken from parent under Juvenile Court Law because others might better provide for and train them.

The custody of infants cannot be taken from their parent and natural guardian under the Juvenile Court Law, and given to another because it is deemed the infants may be better provided for and trained as wards of the state, and interference with the natural relations of parent and child is justified only where there is demonstrated incapacity or something akin to criminal neglect.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Proceeding by the People of the State of California, on behalf of Guadalupe and Elvira Gutierrez, alleged wards of the Juvenile Court. From an order taking them from the custody and control of their father Tomas Gutierrez, he appeals. Order reversed.

E. F. Du Fresne, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SLOANE, J. This is an appeal from an order of the superior court of the county of San Diego, sitting as a juvenile court, declaring Guadalupe and Elvira Gutierrez, minors, to be wards of said court, and taking them from the custody and control of their father, Tomas Gutierrez, appellant herein.

The only averment upon which jurisdiction could be maintained to declare these minors wards of the court is contained in the following allegation of the petition: "That said Guadalupe and Elvira Gutierrez have no parent or guardian capable of exercising proper parental control." The court, in its order committing the minors to the care of their grandmother, under the custody of the probation officer, finds that all of the allegations of the petition are true. In the hearing on writ of habeas corpus in this same matter, we held that this finding was sufficient to sustain the order. On this appeal the issue is presented on the sufficiency of the evidence to support this finding. We think the evidence is insufficient.

[1, 2] It was shown by the testimony, without dispute, that at the time of commencing this proceeding the minors, who are girls aged respectively one and three years, were in the custody of their father. The mother is dead, and the children had for some time been in the immediate care of the maternal grandmother, with the father's consent, and under an arrangement whereby he paid for their keep. Some two or three months prior to this proceeding the father took them from the grandmother, owing to some personal differences which had arisen between the two. He at first kept them at his home, with the help of a woman he employed, but later sent for and paid the transportation of a brother and his family, who lived in New Mexico, to come to San Diego and live with him and make a home for himself and the children. They were all living together under this arrangement when this proceeding was commenced. It is undisputed that the father is an industrious man, earning good wages, affectionate with the children, spending his money freely to provide for them, and able and willing to care for them. There is nothing to indicate that the care and custody given these minors by their father is not as good as ordinarily falls to the lot of families in the same station in life. There was some evidence tending to show that the children were well and affectionately cared for by the grandmother, and that she was so situated as to given them better attention and more wholesome surroundings than they were likely to receive under the arrangements made by the father. It is quite evident from the remarks of the trial judge, shown in the transcript of the proceedings, that it was this circumstance that influenced his decision to take the children from the father and place them in the custody of the probation officer under the immediate care of the grandmother. But there is neither any allegation in the petition nor finding in the order of commitment to justify depriving the father of the custody of his children on the ground that their welfare demanded that the father be deprived of their custody. Section 9b of the Juvenile Court Law (St. 1915, p. 1233) provides that—

"No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of a crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

The findings thus required are necessary to support the order of commitment, and must regularly appear of record. In re Brodie, 33 Cal. App. 751, 753, 166 Pac. 605. As has already been pointed out, the only finding in this matter is that the minors "have no parent or guardian capable of exercising, proper parental control"; and we have held that this finding is not supported by the evidence.

[3] Moreover, we question if the evidence presented in the record is sufficient to justify

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

a finding that the welfare of the minors requires that their custody be taken from the father, if such an allegation had appeared in the petition, or such finding had been made. The Juvenile Court Law certainly does not contemplate the taking of children from their parents and breaking up family ties merely because; in the estimation of probation officers and courts, the children can be better provided for and more wisely trained as wards of the state. Probably from mere considerations of healthful and hygienic living and systematic education and training this would be true in the cases of thousands of families of wealth and respectability. We think it is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child.

Notwithstanding we are fully satisfied that the juvenile court was actuated by its desire that these children should have a better home than the father was likely to provide, we are convinced that neither the law nor the facts in the case justified the order appealed from.

The order is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

SEARCY v. SUPERIOR COURT OF HUMBOLDT COUNTY et al. (Civ. 2182.)

(District Court of Appeal, Third District, California. April 14, 1920. Hearing Denied by Supreme Court June 10, 1920.)

Venue ⇐78—Order transferring cause to other county deprived court of all jurisdiction.

In view of Code Civ. Proc. § 949, under section 399, when the superior court of Humboldt county made its order transferring a divorce action to the superior court of the city and county of San Francisco, it lost all jurisdiction of the action for all purposes, and could not allow plaintiff wife alimony for support, and counsel fees on defendant husband's appeal from the order; jurisdiction to do so was in the superior court of San Francisco county.

Application for writ of prohibition by C. L. Searcy against the superior court of the county of Humboldt and Hon. Denver Sevier, judge thereof. Writ granted.

Henry L. Ford and J. T. Fraser, both of Eureka, and V. A. McGeorge, of Sacramento, for petitioner.

E. L. Webber, of Napa, for respondents.

PREWETT, Presiding Judge pro tem. This is an application for a writ of prohibition to restrain respondents from proceeding further with certain orders and proposed orders in a divorce action wherein one Mary Louise Searcy is the plaintiff and above-named petitioner is defendant. Said superior court on the 9th day of January, 1920, on due proceedings had in that behalf, made and entered its final order, changing the place of trial of said action from said county of Humboldt to the city and county of San Francisco. On the same day the petitioner appealed from said order, and his appeal is now pending.

Notwithstanding said change of place of trial, said superior court, respondent herein, upon the usual notice and motion, proceeded to make its further order, allowing to said plaintiff Mary Louise certain sums by way of alimony for her support and also as counsel fees on appeal.

The petitioner insists that said orders are in excess of the jurisdiction of the court. Said court is about to take proceedings against petitioner looking to the enforcement of said orders.

1. When the court made its order transferring the cause to the superior court of the city and county of San Francisco, it thereby lost, for all purposes, all jurisdiction of the action. Chase v. Superior Court, 154 Cal. 789, 99 Pac. 355; Hatch v. Galvin, 50 Cal. 441, and People v. Suesser, 142 Cal. 354, 75 Pac. 1093. In the first of these cases the court uses the following language:

"We are of the opinion that the action was transferred to Santa Clara county when the order was finally made and entered in the superior court of the city and county of San Francisco. There must be a moment of time when the court transferring the case loses jurisdiction, and the court to which it is transferred acquires jurisdiction. When the court to which the action is transferred acquires jurisdiction, the court which made the order transferring it has no power to make any further order in the premises."

In the Hatch Case the court says:

"The order thus entered * * * vested jurisdiction in the court of said Abner C. Squire, and necessarily put an end to the jurisdiction of the defendant over the case."

To the same effect are the following cases from other jurisdictions: State v. Lay, 128 Mo. 609, 29 S. W. 999; Cunningham v. Current, etc., 165 Mo. 270, 65 S. W. 556, and Fatt v. Fatt, 78 Wis. 633, 48 N. W. 52.

It is provided in section 399 of the Code of Civil Procedure that:

"The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein."

Therefore in the absence of an appeal there exists no doubt that the respondents lost all jurisdiction and power of every sort in the premises.

2. It is insisted by the learned judge of

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

the court below that, in the ordinary divorce action, the power of the court to make further allowances pending an appeal is fully recognized, and in support of this position he cites the following cases: Reilly v. Reilly, 60 Cal. 626; Ex parte Winter, 70 Cal. 292, 11 Pac. 630; and Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732. Without quoting from these cases at length, they may be summed up as holding that the lower court, in case of an appeal, retains sufficient jurisdiction to order further payments of alimony and counsel fees. While the authorities are far from uniform in other states, this doctrine in this state is too well settled to be open to question. This principle does not, however, obtain in a case wherein the place of trial has been changed. It is not to be doubted that some court has or retains the power to order additional alimony and counsel fees, but not the court from which the venue has been changed.

In the ordinary case, the entire jurisdiction in case of an appeal remains apportioned between the trial court and the appellate court. In the absence of a stay of proceedings all the powers which do not pass to the appellate court as appertaining to the disposition of the case on appeal remain with the lower court, and may be exercised by it. One of these powers is the right to award additional alimony and counsel fees.

But in the case now under examination the court made its unconditional order changing the place of trial. This order, as we have seen, operated, eo instanti, to change the jurisdiction to the new court. There is no provision for a stay of proceedings in case of a change of place of trial. Section 949 of the Code of Civil Procedure, so far as pertinent, reads as follows:

"And except, also, where the order grants or refuses to grant a change of place of trial of the action."

An interval of time ensued between the making of the order changing the place of trial and the taking of the appeal. And hereat is found the crux of the whole matter. During this interval it is manifest that the only court having any powers in the premises was the San Francisco court. It could during that interval have granted additional allowances and have proceeded in every way with the trial or other disposition of the case. The appeal which was subsequently taken did not reinvest the Humboldt court with any of the powers which had already passed to the new court. A part of the order complained of provides for alimony for the support of the wife. In every view of the matter the San Francisco court, by the order of transfer, acquired jurisdiction to make or modify similar orders. Such coordinate and coequal jurisdiction cannot have existed at the same moment of time in each of the two courts.

The conclusion of the court is that the order of transfer vested the entire jurisdiction in the San Francisco court, and that this order became operative immediately upon its entry. All subsequent proceedings in the Humboldt court are null and void.

Let a writ of prohibition issue as prayed for.

We concur: BURNETT, J.; HART, J.

ROBINSON v. CLEMONS. (Civ. 2066, L. A. 5449.)

(District Court of Appeal, Third District, California. March 22, 1920. Hearing Denied by Supreme Court May 20, 1920.)

1. Highways ⟸184(2) — Evidence held to show that defendant's vehicle approaching intersection was not under control.

In an action for damages resulting from a collision between automobiles at an intersection of highways, evidence *held* sufficient to sustain a finding that the speed at which defendant was traveling was not such as to keep the car under his control, so as to permit vehicles on his right to pass, as required by a statute enacted in 1913.

2. Highways ⟸184(2) — Evidence held to show ordinary care by plaintiff automobilist at intersection.

In an action for damages resulting from a collision of automobiles at a crossroads, evidence *held* sufficient to sustain a finding that there was no want of ordinary care on the part of the plaintiff, independent of statute, in approaching the crossing at 12 to 15 miles per hour.

3. Highways ⟸177 — Automobilist about to cross intersection may assume car will not approach at excessive speed.

An automobilist reaching an intersection when another automobile on the intersecting street was 100 to 150 feet away could properly assume that such other car was not violating rules of prudence by excessive speed and that he had plenty of time to cross, and act accordingly.

On Hearing in Supreme Court.

4. Highways ⟸177—Violation of speed law does not prevent recovery unless contributing to accident.

A violation of the Motor Vehicle Act of 1913 (St. 1913, p. 639), regulating the speed of an automobile on approaching an intersecting way where the view of the road traffic is obstructed, will not prevent a recovery for damages caused by a collision, where such violation could not have contributed to the accident.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

Action by L. F. Robinson against H. B. Clemons. Judgment for plaintiff and defendant appeals. Affirmed by the District Court of Appeal, and hearing denied by Supreme Court.

Earl E. Moss, of Ventura, for appellant.

John A. Galvin, of Fillmore, for respondent.

ELLISON, Presiding Judge pro tem. This is an appeal from a judgment in favor of plaintiff in an action for damages resulting from a collision between an automobile he was driving with one that was being driven by the defendant. The accident occurred at the town of El Rio, Ventura county, at about 8 o'clock of the morning of December 24, 1915. At that time the plaintiff was driving in a southerly direction on a crossroad towards the city of Oxnard and the defendant was driving in a westerly direction on the state highway towards Ventura.

We gather from the record that these two roads do not cross each other at a right angle. The highway runs somewhat in a northwesterly direction; the northeast corner of the intersection being at an obtuse angle and the northwest corner an acute angle. The plaintiff was driving at a speed of between 12 and 15 miles per hour. As he reached the north line of the state highway, he observed the defendant coming towards him at a distance of from 100 to 150 feet. The plaintiff proceeded across the highway a distance of about 35 feet when his car was struck by the defendant's, broken and injured, and himself hurt. The defendant's car was also damaged somewhat.

It is the claim of the appellant that the plaintiff was guilty of contributory negligence that brought on the injury. Thus, negligence is predicated on the claim that the state law then in force provided:

"That in any event no person shall operate * * * a motor * * * on any public highway * * * at a greater rate of speed than ten miles an hour when the operator's * * * view of the road * * * is obstructed, either upon approaching an intersecting way or in traversing a crossing or intersection of ways."

This charge of excessive speed against the plaintiff by the defendant does not come with very good grace from him, when we consider the speed with which he himself was traveling. The evidence shows that while plaintiff was traveling 35 feet the defendant traveled 100 or 150 feet. If the plaintiff, with a speed of 15 miles per hour, traveled 35 feet, while the defendant, approaching a crossing, traveled 100 feet, then the defendant was traveling at the rate of 42.9 miles per hour. If the distance covered by the defendant was 150 feet, while the plaintiff was going 35 feet, as is probable from the evidence, then his rate of speed was 64.2 miles per hour. But from other considerations the appellant's position is untenable.

1. The Motor Vehicle Act of 1915 did not go into effect until after this accident. By its terms it was not to be in effect, as to such matters as are here involved, until December 31, 1915. Stats. 1915, § 22, subd. d, p. 410. The act of 1913 (St. 1913, p. 639) was in force, but it did not contain any provision similar to the above in the act of 1915. It merely provided:

"Vehicles approaching an intersecting road," etc., "shall be under control of the operator thereof so as to permit vehicles on the right of the vehicles approaching to first cross such intersecting road."

[1] The defendant violated this provision of the act of 1913. The court could well find from the evidence that the speed he was traveling was not such as to keep the car under his control so as to permit vehicles on the right to pass, and he violated it in not giving the plaintiff, who was to his right, the right of way and permitting him to cross in safety. As to the plaintiff, the court was justified in finding that his speed of from 12 to 15 miles per hour did not cause the car to be "not under his control." Again, the plaintiff's rate of speed did not bring on the collision and injury:

The Civil Code, § 1714, in defining negligence and contributory negligence, uses this language:

"Every one is responsible, not only for the result of his willful acts, but also for all injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

[2, 3] Did the plaintiff, by want of ordinary care, bring the injury upon himself? The court was justified by the evidence in making a finding that there was no want of ordinary care on the part of the plaintiff in approaching the crossing at 12 to 15 miles per hour. The judge of the lower court stated that he was thoroughly familiar with the scene of the accident. This being so, he knew the width of the intersecting roads, the angle at which they crossed each other, and the presence or absence of obstructions to view, and it was for him to decide whether a speed of from 12 to 15 miles per hour at that particular place was an exhibition of a want of ordinary care on the part of the plaintiff. Any one, the most careful, about to cross a highway and observing another vehicle approaching at a distance of from 100 to 150 feet, would not deem it necessary to stop or to do any particular thing to avoid a collision. He would properly assume and have a right to assume that the other car was not violating all rules of prudence by excessive speed; that he had plenty of time to

Digitized by Google

cross and act accordingly. This would be the attitude of any reasonable man under the circumstances, and therefore the plaintiff was not guilty of a want of ordinary care in pursuing his journey. His speed of from 12 to 15 miles per hour did not cause the trouble. It may be that the slowness of his driving did. Perhaps, if he had been traveling 20 miles an hour instead of 15, the accident would have been avoided.

We have examined the evidence and are of the opinion that the findings of the court as to the amount of the damages sustained by the plaintiff have sufficient evidence to support them. We are also of the opinion that there was no failure to find upon any material issue raised by the pleadings.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The statement in the opinion that there was no provision in the Motor Vehicle Act of 1913 similar to that contained in the Motor Vehicle Act of 1915, regulating the speed on approaching an intersecting way where the view of the road traffic is obstructed, is apparently erroneous. However, it sufficiently appears that any possible violation of this provision by plaintiff did not contribute to the accident.

The application for a hearing in this court is denied.

All concur.

PEOPLE v. GILMAN. (Cr. 693.)

(District Court of Appeal, Second District, Division 2. California. April 14, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Criminal law ⟸371(12)—Evidence of assault on another subsequent to killing held admissible to show motive.

In a trial for murdering an officer, the defense being resistance to unlawful arrest, testimony regarding accused's assault on a woman immediately after the killing *held* competent, as tending to show accused's motive was anger growing out of the previous quarrel, in which they had all participated, and not resistance to his arrest.

2. Homicide ⟸272—Question of resistance of illegal arrest held for jury.

In trial for murder of an officer, the defense being resistance of an unlawful arrest, the question of illegal arrest *held* for the jury on the issue whether accused was disturbing the peace so that deceased was authorized in arresting him under Pen. Code, §§ 836, 837, without a warrant.

3. Homicide ⟸55—Resistance of illegal arrest reduces killing to manslaughter.

Where in resistance to an illegal arrest the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter.

4. Homicide ⟸55—For murder to be reduced to manslaughter on ground of resistance of illegal arrest actual resistance must appear.

For killing an officer to be reduced from murder to manslaughter on the plea of resistance of illegal arrest, there must be evidence, not only of an illegal arrest, but also that the killing was done in actual resistance to the act of making the arrest or in maintaining the illegal custody of accused, and a person merely formally restrained by a verbal notice that he is under arrest for a misdemeanor cannot respond by shooting to death the officer, and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint.

5. Homicide ⟸55—Resistance to illegal arrest not shown by facts.

Where accused, placed under arrest by an officer, had gone into his own house ostensibly to get his hat and coat, and, instead of asserting his freedom by refusing to return to the officer's custody, armed himself, and, returning to where the officer waited, for the purpose, as he himself declared, of ordering the officer from the premises, shot him down, without giving him a chance to leave or waiting for any overt act in attempted furtherance of the alleged illegal arrest, accused's claim that the killing was reduced to manslaughter as having occurred in the resistance of illegal arrest could not prevail.

6. Homicide ⟸348—Failure to give instruction not reversible error, where absence of such instruction probably not prejudicial.

Under Const. art. 6, § 4½, in a murder trial, refusal of instruction as to resistance of illegal arrest as reducing the killing to manslaughter *held* not reversible, even if technical error, where the circumstances shown in the evidence were such as to render it extremely improbable that the absence of such instruction was in any way prejudicial to accused, or at all affected the jury's verdict.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Lewis H. Gilman was convicted of first degree murder, and appeals. Affirmed.

Shreve & Shreve and George H. Shreve, all of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SLOANE, J. The defendant and appellant was convicted before a jury in the superior court of the county of San Diego of murder in the first degree.

The circumstances leading up to the tragedy were substantially as follows: The defendant and his wife, on the morning of May

Digitized by Google

17, 1919, were in the kitchen of their house on the outskirts of the village of La Mesa. Just across the street lived a family by the name of Parks. One Miller, the brother of Mrs. Parks, on the occasion in question, fired his shotgun at a rabbit in the distance. The defendant and his wife, startled by the shot, and appearing to think the shot was aimed in their direction, ran out of the house, and, approaching Miller, who had fired from the Parks' grounds, accused him of shooting in the direction of and into defendant's house. The parties thereupon engaged in an altercation over the matter; Miller disclaiming shooting in the direction of the house. Different members of the Parks family came upon the scene, and the testimony is to the effect that defendant became much excited and very abusive. During the altercation the decedent, Fay, who was a special deputy sheriff, came upon the scene of action. He announced that he was an officer. The defendant demanded the arrest of Miller for unlawful shooting. Miller then explained that he had been shooting at a rabbit, and pointed out to Fay the place from which he shot, the location of the rabbit, and the direction of the shots. Miller's statement, according to the testimony of the people's witnesses, greatly angered defendant, and he applied a number of very offensive, vulgar, and opprobrious epithets to Miller and other members of the Parks family, in the presence and hearing of Fay and the women and children of the Parks family. The language and conduct, as testified to on the part of the people, clearly constituted a breach of the peace. Fay then ordered Gilman from the premises, and apparently took him into custody, leading him away toward defendant's own home. On approaching the house, defendant went in advance of Fay and defendant's wife, who had accompanied them back from the scene of the altercation, and entered the house, while Fay remained on the porch or just in front of the steps on the outside. In a very short time defendant reappeared with a revolver in his hand, and immediately opened fire upon Fay, shooting him twice and killing him instantly. He then, without stopping, hurried across the street toward the Parks' home, where Mrs. Parks and her mother and the children were standing outside. He fired the pistol, and the women and children ran. He overtook Mrs. Parks, tried to shoot her, but she diverted the shot by grasping his arm. He then threw her to the ground and beat her over the head with the pistol. She was rescued by Miller, her brother, who sprang upon the defendant from a window, held him down upon the ground, and beat him into submission; and he was then again taken into custody.

[1] Subject to two assignments of error presented on this appeal, there is no question that the conviction of the defendant for murder in the first degree was amply justified under the law and evidence of the case. One of the grounds of error relied on is the admission in evidence, over the objection of defendant's counsel, of the testimony regarding the assault upon Mrs. Parks by the defendant immediately after the killing of Fay. It is claimed that this was a subsequent and independent offense, not a part of the res gestæ, and the testimony thereof extremely prejudicial to defendant. The general rule that evidence of another offense cannot be introduced for the purpose of indicating a likelihood that the defendant is guilty of the crime charged is undisputed. The exception to the rule, as pointed out in People v. Edwards, 13 Cal. App. 551, 110 Pac. 342, is where the evidence of other acts is so connected with the original transaction as to be part of the res gestæ, or to show the motive and intent of the act charged. In this case the only justification suggested for the shooting of Fay was that it was done in resisting an illegal arrest. We think the fact that the defendant, without a moment's hesitation or delay, rushed from the scene of the first shooting, in an attempt upon the lives of members of the Parks family, was competent evidence tending to show that the motive which impelled him in both instances was anger and resentment growing out of the previous quarrel and altercation in which they all had participated; and that it was not in resistance to an arrest, but in resentment at the part that the deceased and the members of the Parks family had taken against him, that he entered upon his murderous purpose. The facts in People v. O'Bryan, 165 Cal. 59, 130 Pac. 1044, present a closely analogous case, where the court says:

"There was no error in permitting the people to prove the assault upon Molina, following the firing of the shot that killed Avila. The general rule is, of course, that evidence of offenses other than the one for which the defendant is on trial is not admissible. But where the two offenses are part of a single transaction, 'every element of defendant's conduct in that transaction could be shown to the jury for the purpose of illustrating his motive and intent in committing the act which was the basis of the charge against him' (People v. Manasse, 153 Cal. 10 [94 Pac. 92]; People v. Walters, 98 Cal. 141 [32 Pac. 864]; People v. Craig, 111 Cal. 468 [44 Pac. 186]; People v. Teixeira, 123 Cal. 298 [55 Pac. 988]; People v. Suesser, 142 Cal. 363 [75 Pac. 1093]). It was the theory of the prosecution—and the theory was entirely reasonable under the evidence—that the shooting of Avila and the assault on Molina were parts of one attack upon the two, perpetrated in pursuance of a single scheme to terrorize or injure them because they were working for the Llewellyn Iron Works. Whatever was done in the course of that attack was proper as throwing light on the motive and intent of O'Bryan and his companions."

[2-4] The other exception taken by appellant is to the ruling of the trial court in re-

Digitized by Google

fusing an instruction in behalf of defendant to the effect that where the evidence shows that a homicide is committed in resisting an unlawful arrest, the ground of conviction is limited to manslaughter. Defendant, corroborated to some extent by the testimony of his wife, denied that he was guilty of any tumultuous or offensive conduct, or used any vulgar, profane, or indecent language in the presence of Fay and the other persons present at the time of the arrest. As Fay was only a special officer, he was without official authority to make arrests without a warrant, and under the authority of Penal Code, §§ 836, 837, could only have legally arrested defendant for a breach of the peace committed in his immediate presence, either in official capacity or as a private person. While the evidence on this matter is such as to render it extremely unlikely that the jury entertained a reasonable doubt that defendant was disturbing the peace at the time of his arrest, the evidence to the contrary was such as to make the question of an illegal arrest one for their consideration. It cannot be doubted that the doctrine contended for by appellant, and stated in the opinion of the court in People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064, that "where, in resistance to an illegal arrest, the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter," finds support in a well-recognized line of authority. Ross v. State, 10 Tex. App. 455, 38 Am. Rep. 643; Briggs v. Commonwealth, 82 Va. 564; Wharton's Crim. Law, vol. 1, § 136, and citations. To admit, however, the application of this doctrine there must be evidence, not only that there was an illegal arrest, but that the killing was done in actual resistance to the act of making the arrest or maintaining the illegal custody of the defendant. It cannot be admitted that a person who is merely formally restrained by a verbal notice that he is under arrest for a misdemeanor can respond by shooting to death the officer, and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint. 2 R. C. L. p. 474; Roberson v. State, 43 Fla. 156, 29 South. 535, 52 L. R. A. 751; State v. Meyers, 57 Or. 50, 110 Pac. 407, 33 L. R. A. (N. S.) 143; Porter v. State, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730.

[5] In this case the arrest was effected by notifying defendant that he was under arrest, and perhaps by the further placing of hands upon him to direct him from the premises. Had he at that time resisted, and, in a struggle to regain his freedom, killed the arresting person, there might be room for the application of the doctrine contended for. But the homicide here occurred some time after the arrest, while the defendant was out of the physical control of the officer. Defendant had gone into his own house, ostensibly to get his coat and hat. Instead of asserting his freedom by refusing to return to the custody of the officer, he armed himself, and, returning to where the officer waited, for the purpose, as he himself declares, of ordering him from the premises, shot him down, without giving him a chance to leave or waiting for any overt act in attempted furtherance of the alleged illegal arrest. The testimony of the defendant and his wife as to the alleged act of Fay in making a movement and reaching out his arm toward the defendant, who was approaching him with a gun in his hand, presents too trivial a circumstance to in any way justify the shooting. At the time of the homicide the deceased was using no force or show of force toward the defendant. In People v. Bradley, 23 Cal. App. 44, 136 Pac. 955, where a special policeman in plain clothes arrested a man on suspicion, without revealing his identity as a peace officer, and the prisoner, while walking with the officer to the jail, suddenly turned into an alley and shot the officer, it is held that the killing was not justifiable, nor was the act reduced from murder to manslaughter. The court says:

"We are satisfied that the evidence is amply sufficient to support the verdict of the jury finding the defendant guilty of a willful and malicious murder. Not even the semblance of a legal excuse is shown for the killing of the deceased. It may be conceded that the evidence does not show that the arrest of the defendant was authorized, and that therefore it was a trespass against the person of the defendant, which might have been rightfully resisted with the same degree of force employed in making the arrest. The evidence, however, affirmatively shows that no force or show of force was resorted to by the deceased at any time. The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest, but such facts alone were wholly inadequate either to justify the killing of the deceased or to reduce such killing from murder to manslaughter. People v. Pool, 27 Cal. 573; Keady v. People, 32 Colo. 57, 66 L. R. A. 353, 74 Pac. 893."

[6] The instruction asked by appellant and refused by the court was as follows:

"The court instructs you that if you find from the evidence that the decedent, Fay, was attempting to make an unlawful arrest of the person of the defendant, Gilman, and that the killing occurred while the defendant was resisting such unlawful arrest, it will then be your duty to acquit the defendant of the charge of murder, both of the first and second degree, and consider only the question of whether or not he be guilty of manslaughter."

We are satisfied that there was no sufficient evidence before the jury that the shooting was done in resisting an arrest to justify the instruction. Even if technically a proper instruction, the circumstances of the shoot-

Digitized by Google

ing, as shown in evidence, were such as to render it extremely improbable that its absence was in any way prejudicial to the defendant, or at all affected the verdict of the jury; and the error, if there was such, might be disregarded under section 4½ of article 6 of the Constitution.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

TYLER v. J. I. METROVICH BLDG. CO., Inc., et al. SUNSET LUMBER CO. v. SAME. HENRY COWELL LIME & CEMENT CO. v. SAME. (Civ. 3256.)

(District Court of Appeal, First District, Division 2, California. April 10, 1920. Hearing Denied by Supreme Court June 7, 1920.)

1. Action ⇐59—Allegations of complaints in consolidated actions may be taken together to remedy defects.

Actions having been consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading; the allegations in one complaint remedying the defects or omissions in another.

2. Fraud ⇐50—Must be proved.

The presumption is always against fraud, which can be put in issue only by direct and positive allegations, and must be proved.

3. Mechanics' liens ⇐229—Claimant entitled to judgment of foreclosure, irrespective of amount due contractor from owner, who did not file bond.

When no bond to satisfy materialmen and laborers, with good and sufficient sureties, has been filed by the owner in compliance with Code Civ. Proc. § 1183, a lien claimant is entitled to judgment to foreclose his lien on the land of the owner, irrespective of the amount due from the owner to the contractor.

4. Mechanics' liens ⇐226—Where bond filed, court must restrict recovery from owner to amount due contractor.

Where a bond to satisfy laborers and materialmen, with good and sufficient sureties, in compliance with Code Civ. Proc. § 1183, is filed by the owner, if it is equitable to do so, the court must restrict a lien claimant's recovery to the aggregate amount found due the contractor.

5. Mechanics' liens ⇐271(1)—Claimant must allege that statute relative to owner's bond has not been met.

To entitle a lien claimant to foreclose on the property irrespective of the amount due from the owner to the contractor, it is essential to allege that the terms of Code Civ. Proc. § 1183, relative to bond to be given by the owner to satisfy laborers and materialmen, have not been met.

6. Election of remedies ⇐3(2)—Lien claimants cannot enforce bond against sureties, and set up invalidity to enable them to go against owner.

A party cannot denounce a contract as void, and at the same time demand enforcement of its provisions favorable to him, so that mechanic's lien claimants cannot enforce against the sureties bond given by the owner, and at the same time seek recovery against the owner on the theory of the invalidity or insufficiency of the bond.

7. Mechanics' liens ⇐223—Bond need not be filed personally by owner or contractor.

Code Civ. Proc. § 1183, does not require that the bond to satisfy materialmen and laborers shall be personally filed for record either by owner or contractor.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Consolidated actions by G. L. Tyler, doing business under the name and style of G. L. Tyler Company, the Sunset Lumber Company, and the Henry Cowell Lime & Cement Company, respectively, against the J. I. Metrovich Building Company, Incorporated, Adolph D. Grabstein, Max Grabstein, and others. From a judgment for plaintiffs, defendants Grabstein appeal. Reversed.

R. N. Wolfe, of Pittsburgh, and J. E. White, of San Francisco, for appellants.

Ralph H. Wight, of Martinez, for respondent Tyler.

C. L. Colvin, of Oakland, for respondent Sunset Lumber Co.

G. G. Hatch, of San Francisco, for respondent Henry Cowell Lime & Cement Co.

Creed, Jones & Dall, of San Francisco, for respondent Contra Costa Bank and others.

NOURSE, J. This is a joint appeal from a judgment in favor of the plaintiffs in three consolidated cases, brought to foreclose their several liens for services and materials furnished to the contractor under a written contract for the construction of a building on the lands of the defendants Grabstein, the owners, and to recover deficiency judgments against the contractor and the sureties upon his bond. Judgment was rendered as prayed in the several complaints, and the owners alone appealed.

The allegations of the complaints relating to the execution of the contract, the filing of the liens within due time, the furnishing of the labor and material, and the amounts due the respective plaintiffs therefor were all admitted. The three actions having been duly consolidated and coming on regularly for trial, a stipulation was made that certain allegations of the complaints were true, and that a bond in proper form was filed, but it was left open to the court to determine "whether the bond is sufficient in law." No other evi-

Digitized by Google

dence was offered by the plaintiffs, and thereupon the defendants Grabstein moved for a nonsuit, upon the ground that there was no evidence to sustain a judgment against them to enforce a lien upon their real property. This motion was denied, and the defendants declined to offer any evidence, whereupon judgment followed in favor of the plaintiffs as above stated.

There is but one point presented by the record, and that is: Upon whom rests the burden of proof that the sureties on the bond filed under section 1183, Code of Civil Procedure, are good and sufficient? The question of the sufficiency of the sureties upon this bond was not put in issue by any of the three complaints. In the Tyler complaint it was alleged that neither the owners nor the contractor filed a bond. But it was affirmatively alleged that one Cornelius did file a bond, and at the trial it was stipulated that such bond was in due form. The theory of this respondent was that the bond should have been personally filed for record by either the owner or the contractor. In the complaint of the Sunset Lumber Company it was alleged that a bond was duly executed, and was thereafter, before the commencement of the work under said contract, filed with the county recorder. A similar allegation appears in the complaint of the Henry Cowell Lime & Cement Company, with the additional allegation that said bond was so made and executed for the purpose of complying with the laws of the state of California. In each of the actions a copy of the bond was made a part of the complaint, the contractor and the sureties upon the bond were made parties defendant, and deficiency judgments were rendered against the contractor and these sureties.

[1-5] The actions having been consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading; the allegations in one complaint remedying the defects or omissions in another. Olson-Mahoney Lumber Co. v. Dunne Investment Co., 30 Cal. App. 332, 351, 159 Pac. 178. Hence, if the bond was made and executed for the purpose of complying with the laws of the state of California, as alleged in the complaint of the Henry Cowell Lime & Cement Company, it is to be presumed that the defendants did not commit a fraud by filing a "straw" bond, as argued by respondents. The presumption is always against fraud. It can be put in issue only by direct and positive allegations and must be proved. When no bond has been filed, with good and sufficient sureties, in compliance with section 1183, the lien claimant is entitled to a judgment to foreclose his lien upon the land of the owner, irrespective of the amount due from the owner to the contractor. But where such a bond is filed, and it is equitable to do so, the court must restrict recovery from the owner to the aggregate amount found due from the owner to the contractor. In order to entitle the lien claimant to a foreclosure upon the property irrespective of the amount due from the owner to the contractor, it is essential to allege that the terms of this section have not been met.

[6] Furthermore, it is elementary that a party cannot denounce a contract as void, and at the same time demand enforcement of its provisions favorable to him. Here all the plaintiffs assumed that the bond was good and joined the sureties as parties defendant, and the court gave judgment against each of the sureties in accordance with the prayers of the complaints. They thus put in issue the bond in its entirety, without any allegations in their complaints sufficient to apprise defendants that at the time of the trial they would attack its validity.

[7] On behalf of the respondent Tyler it is argued that the requirements of section 1183, Code of Civil Procedure, were not met, because the bond was actually filed for record by one Cornelius, who appears to have been the architect for the owner. But the section does not require that either the owner or the contractor shall personally file the bond for record.

For the reasons given the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

Ex parte GILLETT. (Cr. 719.)

(District Court of Appeal, Second District, Division 2, California. April 13, 1920.)

1. Arrest ⇐29—Affidavit for arrest, on ground that defendant was guilty of conversion as agent, insufficient.

An affidavit for arrest, made by the assistant secretary of a corporation, setting forth that property described was that of the corporation until the fraudulent conversion of money arising from the sale thereof by defendant, with whom the property was placed as the corporation's agent, etc., is insufficient to warrant an arrest under Code Civ. Proc. § 479, subd. 2, authorizing arrest in case of embezzlement by an agent; the remainder of the affidavit alleging that the defendant at times actually unknown, but believed to be on or about two years next preceding the bringing of the suit, did unlawfully, wrongfully, and fraudulently convert to his own use and sell the described property, etc., for it did not appear that the fiduciary relation existed at the time of the misappropriation.

2. Arrest ⇐27—Affidavit on information and belief, and not stating facts, held insufficient.

Where an affidavit as a whole, made by an officer of a corporation seeking the arrest of a defendant, under Code Civ. Proc. § 479, subd.

Digitized by Google

4, on the ground that he had fraudulently converted property of the corporation, showed that the officer had no personal knowledge of the transaction, and the facts on which information and belief was founded were not given, such affidavit is insufficient, under section 481, notwithstanding many of the averments as to fraudulent misappropriation, taken by themselves, did not appear to be made on information and belief.

3. Arrest ⇐29—Affidavit should set forth more than mere conclusion of fraud.

An affidavit seeking defendant's arrest, under Code Civ. Proc. § 479, subd. 4, providing for arrest in case of fraudulent conversion, etc., which merely set forth that defendant had fraudulently misappropriated property, without averring the circumstances, is insufficient to justify an order of arrest, in view of the fact that such averment would not support a judgment in a civil action.

Application by F. F. Gillett for writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County, to secure release from custody. Petitioner discharged.

M. M. Meyers, of Los Angeles, for petitioner.

W. C. Smith, of Los Angeles, for respondent.

SLOANE, J. The petitioner is seeking under this writ to secure his discharge from the custody of the sheriff of Los Angeles county. The sheriff justifies the detention of petitioner under an order of arrest issued by the superior court of Los Angeles county by virtue of the provisions of section 479 of the Code of Civil Procedure for arrest and bail in civil actions. It is contended by petitioner that the affidavit under which the arrest was ordered is not sufficient to give the court jurisdiction to make the order.

The affidavit purports to be in pursuance of subdivisions 2 and 4 of said section 479. Under subdivision 2 it is apparently sought to charge the defendant with having converted to his own use and embezzled money or property belonging to the plaintiff while the same was in defendant's custody in a fiduciary employment as agent of plaintiff, and in the course of his employment as such agent. Under subdivision 4 it is attempted to charge the defendant with fraud in concealing or disposing of the property for the detention or conversion of which the action is brought. At any rate, if the affidavit does not state facts bringing the matter within these provisions of the subdivisions named, it is wholly and hopelessly futile.

[1] The matters alleged in the affidavit, so far as they are material in determining the objections to its sufficiency, are as follows:

"R. H. Chappel, being first duly sworn, deposes and says: I am the assistant treasurer of the Standard Scale & Supply Company, a corporation, plaintiff herein; that at all of the times herein alleged the property hereinafter described was the property of plaintiff herein, until the fraudulent conversion of the money arising from the sale thereof by defendant, with whom all of said personal property was placed by plaintiff, as plaintiff's agent; * * * that defendant herein, at times actually unknown to affiant and plaintiff corporation, but believed to be on or about two years next preceding the bringing of the suit herein, did unlawfully, wrongfully, and fraudulently convert to his own use and dispose of and sell the hereinbefore described personal property, with the intent to cheat and defraud plaintiff of said personal property and the value thereof; that defendant has received the full value of said property in money, and has unlawfully, wrongfully, and fraudulently refused to pay to plaintiff, or account to plaintiff, for said money, and no part of the money so received therefrom by the defendant has ever been delivered to or paid to plaintiff. * * *"

It is apparent that an essential of an affidavit, to justify the order of arrest under subdivision 2, is that the misappropriation or conversion of the property occurred in the course of the defendant's employment as agent of plaintiff. The fact that he was at any time such agent is only impliedly stated, by referring to the defendant as one "with whom all of said property was placed by plaintiff, as plaintiff's agent." This averment, such as it is, refers to the time when the property was intrusted to defendant. The time when the alleged misappropriation took place is expressly declared to be unknown to affiant or plaintiff, and it is nowhere intimated that the fiduciary relation existed at that time, or that the acts complained of were in the course of his employment.

[2] As to the averment charging fraudulent conversion under subdivision 4 of the section, it may be said to be substantially in the language of the statute. It has been held that an affidavit charging the acts substantially in the language of the statute is sufficiently specific, if the allegations are made upon affiant's own knowledge of the facts. Matter of Caples, 26 Cal. App. 786, 148 Pac. 795; In re Keene, 34 Cal. App. 263, 167 Pac. 194. In the latter decision the court says:

"The affidavit upon which an order of arrest in a civil action is asked need not state the evidentiary facts upon which the principal fact rests, if instead thereof the affidavit follows the statute and declares in positive terms that such principal fact exists."

But it is further added in the opinion that—

"This is subject, of course, to the qualification that, if the facts stated in the affidavit show that necessarily affiant is acting only on information and belief other than actual knowl-

Digitized by Google

edge, then the evidentiary facts must be stated."

The affiant in this case describes himself as the assistant treasurer of the plaintiff corporation, as of the date of the affidavit. It does not appear how far back his connection with the plaintiff company extended, or whether he had any personal knowledge of its transactions, and, as already pointed out, he expressly avers that the alleged wrongful acts of defendant occurred "at times actually unknown to affiant and plaintiff corporation, but believed to be on or about two years next preceding the bringing of the suit herein." How long prior to the date of the affidavit the suit was begun does not appear. In any event, it must be apparent that affiant had no personal knowledge of how or why or when, if at all, defendant disposed of plaintiff's property. It is at least a fair presumption that, if he had no knowledge during a period of more than two years after the happening of the event that there had been a conversion of plaintiff's goods, he was not in a position to testify on his own knowledge of the manner and nature of the conversion. Such presumption was entertained in Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 728, where it is said:

"Several of the statements of fact are made expressly on information and belief, while many others, although not so stated in terms, are of a character which could in their nature only have been so made, whereas the facts upon which such information and belief are founded are in no instance given. In this the affidavit fails to comply with one of the express * * * requirements of the statute" (Code of Civil Procedure, § 481).

[3] It is difficult to understand how, even on the most positive statement of personal knowledge, the bare averment that the act was done fraudulently can be accepted as a statement of fact in support of an order of arrest, whereby in a civil action a defendant is deprived of his liberty, when the same statement would constitute an insufficient averment of the fraud in the complaint to recover the money or property claimed to be misappropriated. Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016; Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26. Fraud is the gist of this proceeding. Its existence should be determined from the evidence stated, and not as a conclusion of the affiant.

"Where no prosecution for perjury would lie against the affiant, predicated upon the falsity of any of the matters set forth in the complaint, it is radically insufficient." Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135.

In Ex parte Fkumoto, supra, the court, while impliedly conceding that allegations of fact made in the words of the statute are sufficiently stated, in discussing the requisite proof of fraud under an affidavit in arrest and bail, says:

"It is not enough to assert such fraudulent intent in general terms. Like the statement or proof of a cause of action for fraud, the specific facts relied on must be shown, that the court itself may deduce the fraud, and not leave the question of the sufficiency of his facts to be passed upon by the party. Morris v. Talcott, 96 N. Y. 107. If this is so in cases not involving the liberty of a citizen, a fortiori is it demanded in a proceeding such as this. Otherwise the party is constituted the arbiter of his own rights." "A warrant of arrest cannot be issued on hearsay, nor upon any statement, however positive, founded upon hearsay." Lay v. Superior Court, 11 Cal. App. 558, 105 Pac. 775.

It may be added that such warrant of arrest cannot be made upon the mere statment of a conclusion of law.

In this case the defendant, petitioner here, seems to have come lawfully into the possession of the property involved. It does not appear when it was delivered to him, but it is admitted that for a period of two years or upwards the plaintiff corporation had had no knowledge of its condition or whereabouts, or the circumstances under which the petitioner disposed of it. It would be the establishment of a dangerous precedent to permit the petitioner here to be deprived of his liberty upon the bare statement of a conclusion or opinion of the assistant treasurer of the company that there was a fraudulent conversion of the goods.

The petitioner is discharged.

We concur: FINLAYSON, P. J.; THOMAS, J.

BAYLESS v. REED et al. (Civ. 3186.)

(District Court of Appeal, Second District, Division 2, California. April 16, 1920.)

1. Appeal and error ⟸1175(2) — Appellate court cannot render judgment for amount due plaintiff to save expenses of another trial.

Under Const. art. 6, §§ 4, 4½, the appellate court, in an action on a claim against a decedent's estate, cannot find for plaintiff the amount due him to avoid the expense and necessity of another trial in the case.

2. Husband and wife ⟸259—Wife's earnings held community property.

The earnings of a wife for her services as nurse, sought to be recovered by her husband in an action against a decedent's estate, are community property.

3. Witnesses ⟸143(5)—Wife not incompetent as assignor of husband in his action against decedent's estate to recover for wife's services.

Where a husband is suing for services rendered by his wife to a person since deceased,

Digitized by Google

his claim is not derived from his wife, since he is entitled to the value of her services by virtue of his marital rights; hence she is a competent witness for him, her testimony not being excluded by Code Civ. Proc. § 1880, subd. 3, excluding testimony of parties or assignors of parties in such cases.

4. Witnesses ⟸138—Statute excluding testimony in action against decedent's estate applies only to parties and assignors.

Code Civ. Proc. § 1880, subd. 3, excluding the testimony of parties or assignors of parties in actions against a decedent's estate, was not intended to extend the disqualification to any other persons except parties or assignors of parties.

5. Witnesses ⟸140(9)—Wife not incompetent because of interest in husband's action against decedent's estate to recover for her services.

In an action by a husband against a decedent's estate to recover for his wife's services, the fact that should plaintiff recover the wife would be interested in the result, the fruits of such recovery being community property, does not make her an incompetent witness under Code Civ. Proc. § 1880, subd. 3.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by C. R. Bayless against J. F. Reed and another, as executors of the last will of Edwin Ferris, deceased. Judgment for defendants, and plaintiff appeals. Reversed.

H. W. Scheld, of San Diego, for appellant.

Ward, Ward & Ward, of San Diego, for respondents.

THOMAS, J. By this action plaintiff seeks to recover $2,354.92 from the defendants, executors of the estate of Edwin Ferris, deceased, for work, labor, and services performed and supplies furnished to said Ferris, at his special instance.

The answer of defendants to plaintiff's third amended complaint, after admitting formal parts only, denied each and every material allegation thereof, and set up an alleged agreement under and by virtue of which plaintiff performed the work and furnished the materials, etc., for which he now seeks pay, asserting that said decedent, Ferris, had paid plaintiff in full for all said service. We think it unnecessary to recite in detail the terms of this alleged agreement. The case was tried by the court without a jury. Findings were expressly waived. Judgment went for plaintiff in the sum of $102.92. There was no motion for a new trial. The appeal is from the judgment, by the so-called "alternative method."

We have read the entire record, consisting, as it does, of the clerk's transcript and reporter's transcript, also appellant's opening brief and respondents' answering brief, from which it appears that both parties hereto seek a reversal of the judgment.

[1] Appellant in his brief says:

"Under section 4½ of the Constitution of the state of California, and when it appears from the whole of the record in a case on appeal that substantial justice should be done, the appellant asks this appellate court, without having to undergo the expense and necessity of another trial herein, that this court find for plaintiff the amount which is justly due him in this case."

Much as we might desire to comply with the foregoing interesting request, the answer is that the court is without jurisdiction to grant it. Section 4, art. 6, Const. A large portion of the amount claimed by plaintiff as aforesaid was for the services of his wife as nurse for deceased at the latter's special instance and request, and in order to prove the allegations of his complaint as to such services, plaintiff offered his wife, Minnie E. Bayless, as a witness in his behalf, whose testimony, if received, would have tended to show such allegations to be true. To the testimony of this witness the following objection was interposed:

"We object to this witness testifying as to the transactions had with the decedent on the same ground, that of section — subdivision 3 of section 1880 of the Code of Civil Procedure. This witness is not, of course, the nominal party, but the section is broader than to exclude nominal parties; it excludes not only parties or assignors of parties, it also includes—excludes persons in whose behalf the action is prosecuted. Now, of course the testimony has not progressed far enough to show, but the pleadings indicate so clearly, the nature of the claim being presented against this estate, it is for services rendered, a larger part is a claim for services of this witness, as a member of the community of which she and the plaintiff are members, and by the same reasoning and on the same theory the testimony of this witness is also incompetent."

This objection was at first overruled, but later, and after the witness had testified fully, the ruling, so far as it relates to that portion of the witness' testimony in reference to plaintiff's claim for her services as nurse, was set aside, and the objection thereupon sustained. It is claimed by appellant that this ruling was erroneous, and we think the contention must be sustained.

[2, 3] That the earnings of the wife in such a case as this are community property is too well settled to require the citation of authorities. Such being the case, we think that where a husband is suing for services rendered by his wife, his claim is not derived from her, since he is entitled to the value of her services by virtue of his marital rights, and she, therefore, is a competent witness for him. 40 Cyc. 2295; Porter v. Dunn, 131 N.

Digitized by Google

Y. 314, 30 N. E. 122; Hopkins v. Clark, 90 Hun, 4, 35 N. Y. Supp. 360; Hiskett v. Bozarth, 75 Neb. 70, 105 N. W. 990; Parker v. Wells, 68 Neb. 647, 94 N. W. 717; Miller v. Miller, 7 Ariz. 316, 64 Pac. 415; Cullen v. Bisbee, 168 Cal. 695, 144 Pac. 968.

[4] Nor do we think that it is intended by this section to extend the disqualification to any except parties or assignors of parties. Todd v. Martin, 4 Cal. Unrep. Cas. 805, 37 Pac. 872.

[5] If it be contended in this case that should plaintiff recover, the wife would by that fact be interested in the result because of the fruits of such recovery being community property, the answer, as we see it, is that in legal contemplation she would not be invested with any legal interest therein. In the case of Lucas v. McDonald, 126 Iowa, 678, 102 N. W. 532, the Supreme Court of Iowa held that while the statute provided that "no party to an action, or the wife of such party, shall be examined as a witness in regard to any personal transaction between such witness and a person since deceased, as against the administrator of such deceased person," still, it not appearing that the wife had any part therein, in such a case she was a competent witness. Such cases as we have found holding to the contrary are predicated upon statutes differing in various respects from ours.

For these reasons we think the ruling referred to was prejudicial.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

WOODSTONE MARBLE & TILE CO. v. DUNSMORE CANYON WATER CO. et al. (Civ. 3249.)

(District Court of Appeal, Second District, Division 1, California. April 12, 1920.)

1. Corporations ⟸122—Buyer at execution sale of stock of mutual water corporation does not necessarily acquire title.

The rule that a buyer of corporate stock at a sale under execution acquires absolute title, if the stock stood on the corporate books in the name of the judgment debtor and the buyer had no notice of the claim of another, does not apply to stock of a mutual water corporation not organized for profit but merely to supply water to stockholders.

2. Waters and water courses ⟸154(1)—Water right held appurtenant to land, though represented by stock in mutual company.

Where the owners of water rights appurtenant to their several tracts of land formed a mutual corporation and transferred their water rights to the corporation in exchange for stock representing the right to water, the water right remained appurtenant to the land notwithstanding the formal change in ownership and passed to a mortgagee of the land and appurtenant water rights as against a subsequent execution buyer of the stock which still stood on the corporate books in the name of the mortgagor.

3. Appeal and error ⟸909(1)—Compliance with statute making water stock appurtenant to land presumed to support judgment.

In the absence of anything in the record, it will be presumed that a water corporation complied with the requirements of Civ. Code, § 324, to make its stock appurtenant to the lands, if that is necessary to support the court's conclusion that the stock was appurtenant.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Woodstone Marble & Tile Company against the Dunsmore Canyon Water Company, William Garland, and others, in which William Garland was the only defendant who appeared and answered. Judgment for defendant Garland, and plaintiff appeals. Affirmed.

Barstow, Rohe & Jeffers, of Los Angeles (C. E. Spencer, of Los Angeles, of counsel), for appellant.

Hunsaker, Britt & Cosgrove, Le Roy M. Edwards, and G. Harold Janeway, all of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought a decree adjudging it to be the owner of ten shares of stock in the Dunsmore Canyon Water Company and an order requiring said company to issue to it a certificate for the same.

The Dunsmore Canyon Water Company, together with Mrs. John Leenhouts and her husband, who were made parties defendant, suffered default. Defendant Garland filed an answer, and the result of the trial was a judgment against the plaintiff, from which it appeals on the judgment roll, claiming that it is entitled to have judgment in its favor entered upon the findings.

The facts as disclosed by the findings, are in substance as follows: In 1886 one Briggs, being the owner of 900 acres of land and the right to use thereon $^{90}/_{110}$ of all the waters of Dunsmore Canyon, subdivided the same into 90 ten-acre parcels under the name of Crescenta-Canada tract, which parcels he sold and conveyed, together with the right to $^{1}/_{110}$ of the said waters of Dunsmore Canyon as an appurtenance to each of said ten-acre parcels of land. In 1908 Mrs. Leenhouts, by mesne conveyance, acquired lot 1, block K, of this subdivision, with which there was conveyed to her as an appurtenance thereto $^{1}/_{110}$ of all the waters of Dunsmore Canyon, which supply of water, in the cultivation of said land and the irrigation of the same in growing fruits and other

Digitized by Google

crops, was used thereon from 1886 to the bringing of this action, and without which said land would be of little or no value for the growing of crops thereon. In the year 1908 certain owners of these ten-acre tracts of land and the rights to the waters of Dunsmore Canyon so acquired as appurtenant thereto, organized a mutual water company, designated the Dunsmore Canyon Water Company, the purpose of which was to facilitate the collection, management, and distribution of the waters of said canyon to the owners of said lands in proportion to their respective rights to said waters; that thereupon Mrs. Leenhouts, as owner of said lot 1, block K, in said tract, and other property owners likewise having interest in the waters of said canyon, conveyed the same to the said corporation, and, as consideration for such conveyance, immediately received shares of the capital stock of said company in proportion to their original rights to the waters of Dunsmore Canyon which had theretofore been conveyed to them as an appurtenance to their lands, there being issued to Mrs. Leenhouts the ten shares of stock in controversy; that said water company is a mutual water company, and, without payment of dividends or profits, distributes the waters to its stockholders in proportion to the number of shares possessed by each; that defendant Garland acquired title to said lot 1, block K, by purchase at a sale duly made upon the foreclosure of a mortgage executed by Mrs. Leenhouts as owner, whereby she mortgaged to him said lot, consisting of ten acres of land, "together with all and singular the * * * water and water rights, pipes, flumes and ditches thereunto belonging"; that at the time of the execution of said mortgage and the sale so made under foreclosure, followed by the execution of a deed to said property, the ten shares of stock in question stood upon the books of said company in the name of Mrs. Leenhouts, and no mention of the stock as such was made in the mortgage and no transfer or delivery thereof was made to the mortgagee. In an action brought against Mrs. Leenhouts by plaintiff, it caused the stock of which she, as shown by the stock books of said company, appeared to be the unconditional owner, to be attached, and, upon judgment being obtained, purchased the shares at sale under an execution issued upon said judgment, all of which acts were had and taken without notice to plaintiff that any one other than Mrs. Leenhouts had any claim, right, or title to the stock. As ultimate facts the court found:

"That at the time of the execution and delivery of said mortgage to the said William Garland, all right of Mrs. John Leenhouts to receive water from the said Dunsmore Canyon Water Company was a right appurtenant to the aforesaid lot 1 in block K of the Crescenta-Canada tract, and formed a part of the property mortgaged at said time to the said defendant William Garland; and that the said William Garland * * * is now, and has been at all times since, the owner and holder of said lot * * * together with all water rights, pipe lines and appurtenances thereunto belonging, or in any wise appertaining"; and that "said William Garland is the owner and holder of, and entitled to the possession of, the aforesaid ten shares of the capital stock of the Dunsmore Canyon Water Company, standing in the name of the defendant Mrs. John Leenhouts, and all of the right, title, and interest of the said Mrs. John Leenhouts therein and thereto, and is entitled to have the said stock transferred upon the books of said corporation into his own name." And, further, "that the said William Garland is the only person who has any right, title or interest in or to said ten shares of stock, and that the plaintiff has no right, title or interest in or to said ten shares of stock, or any part thereof."

[1] Upon these facts appellant invokes the well-recognized rule that where one at a sale under execution, and in the absence of facts shown which charge him with notice that another has an interest therein as owner or pledgee, buys shares of corporate stock standing upon the books of a corporation in the name of the judgment debtor, he acquires absolute title thereto. Farmers' etc., Bank v. Wilson, 58 Cal. 600; Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171. Conceding the general application of this rule to purchases of stock so made in a corporation conducted for profit and distributed to its shareholders as dividends, it is, both upon principle and authority, inapplicable to the facts found to exist in the instant case.

[2] That prior to the formation of the Dunsmore Canyon Water Company Mrs. Leenhouts, by virtue of a deed of conveyance, was, as owner of the ten-acre tract of land, entitled to $1/110$ of the flow of water in said Dunsmore Canyon as an appurtenance thereto, admits of no controversy, and appellant concedes that neither the deed nor the appurtenance would be the subject of a separate levy and sale, since the right to the water for use upon the land must, upon such facts, be deemed part of the real estate. This being true, how could the ownership be terminated or the appurtenance severed by the mere substitution of the stock for the deed as evidence of ownership? The right to the flow of water was in no wise changed and the use thereof was identically the same after the issuance of the stock as it was prior thereto. The corporation was not created for profit and to pay dividends to the stockholders, but solely and alone for the convenient and more economical management of a common source of water in the distribution of and from which, according to their respective rights, the owners of these

Digitized by Google

several tracts of land were entitled to a supply of water for use thereon. While it is true that one owning a water right appurtenant to his land may, as held in Gould v. Stafford, 91 Cal. 146, 27 Pac. 543, convey it separate from the land and thus sever the connection, nevertheless the mere exchange of one muniment of title to the water right for another cannot be deemed a severance thereof from the land to which it was concededly appurtenant. As said in Estate of Thomas, 147 Cal. 236, 81 Pac. 539, where the facts were substantially the same as those here involved:

"There was a formal conveyance of the legal title of the several water rights to the corporation, but simultaneously the grantors received certificates of stock which constituted them the beneficiaries of everything so conveyed in the proportion of their original interests. As stockholders they became entitled to receive their proportionate share of all that the company was authorized to divide. It had nothing but water to divide, and of that they received the same share and in the same manner and order in which they had received it before the conveyance. And the successive owners of the six-acre tract applied it after the conveyance to that tract as they had done before. All that happened was that a right which they had held and exercised under one title before the conveyance was held and exercised under a (formally) different title afterwards. There was in fact no moment of time when they lost the right to use the water, and there was no cessation of its use on the particular tract. Neither the corporation nor any other persons acquired any right to divert it to another use. And the question whether a water right is appurtenant to a particular tract does not depend in the least degree upon the source of title to the water right; it is made appurtenant to the land by use on the land for its benefit, and here the undisputed right of the Fullers and the decedent to receive eight hours' run of all the company's water out of every three hundred and sixty hours was made and continued appurtenant to the six-acre tract by use on the land in the irrigation of trees that greatly increased its value, and would perish without it. In view of these facts it is clear that the water right remained appurtenant to the land, that it would have passed by conveyance of the land, and, if so, that it passed by the devise to respondent (Civ. Code, § 1311), and did not fall into the residue distributable to the appellant."

The water right in question evidenced by the stock was an appurtenance of the land. The deed followed the foreclosure of a mortgage duly recorded long before plaintiff attached the stock and wherein the owner of the land mortgaged the same, "together with all water rights, pipe lines, ditches and appurtenances thereunto belonging." Hence it follows that Garland acquired title to the water right, and his ownership thereof is in no wise affected by any omission as to delivery or transfer of the stock prior to plaintiff's levy and sale thereof made subsequent to the execution and recording of the mortgage.

[3] Moreover, section 324, Civil Code, provides that a corporation organized for supplying water for irrigation purposes and domestic use may in its by-laws provide that such water shall only be sold and distributed to the owners of its capital stock, and that such stock shall be appurtenant to the lands, when described in the certificate issued therefor, provided such by-law be recorded in the office of the recorder of the county in which the lands are situated, and in such case the shares of stock so located on such land shall only be transferred therewith and pass as an appurtenance thereto. Now, while it appears the Dunsmore Canyon Water Company was a corporation of the description stated in said section, the record is silent as to whether it had complied with the provision in regard to adopting and causing to be recorded a by-law that the stock should be deemed appurtenant to the lands described in the certificate therefor. Nevertheless, conceding the ultimate finding, to the effect that Garland was the exclusive owner of the stock, depended solely upon a showing of compliance on the part of the corporation with the provision referred to, we must, in the absence of evidence to the contrary or anything appearing in the probative findings which negatives such fact (and there is nothing), assume, if necessary in support of the judgment, that proof of compliance was in fact made and the court based its conclusion thereon. In United States Film Co. v. United States Fidelity & Guaranty Co., 186 Pac. 364, this court said:

"Where an appellant complains of errors committed by the trial court, it devolves upon him to produce a duly authenticated record affirmatively showing the alleged error; otherwise the court on appeal must, if under any circumstances the ruling could be deemed correct, assume that such condition or circumstance was made to appear."

To the same effect are Escondido High School District v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401, and Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659.

Hence, for this reason alone, it cannot be said upon the record that the court erred in making the finding of ultimate fact upon which the judgment rests. If such compliance was not shown, then, in order to avail itself of the point, appellant should have brought up a record disclosing the want thereof.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

Digitized by Google

BRUSH v. SOUTHERN PAC. CO. et al.
(Civ. 3310.)

(District Court of Appeal, First District, Division 1, California. April 9, 1920. Hearing Denied by Supreme Court June 7, 1920.)

1. Evidence ⟸243(4)—Declaration of agent as to past event not part of res gestæ inadmissible against principal.

Declaration of agent that a bridge was faulty from the manner in which it had been constructed, not being made in regard to a transaction in the course of his agency depending at the time, so as to make the declaration a part of the res gestæ, is inadmissible against his principal.

2. Limitation of actions ⟸55(7) — Only on storm waters being backed by faulty construction of bridge does statute run.

Building of bridge by defendants not being a nuisance in itself or an invasion of plaintiff's rights, but becoming so only when, because of faulty construction, it diverted storm waters and débris from the channel onto plaintiff's land, the statute commenced to run only on the receipt of such consequential injuries.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Albert L. Brush against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants.

Bradner W. Lee, Kenyon F. Lee, and Bradner W. Lee, Jr., all of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action, alleging that the defendants so negligently constructed, and maintained, a bridge over a waterway, or "wash," extending from the San Dimas Canyon in the Sierra Madre Mountains, that during an unusually heavy rainfall, in the months of January and February, 1914, large quantities of trees, rocks, orchard cuttings, railroad ties, planks, and other débris were carried by the water, and accumulated against and between the piling of said bridge, clogging up the waterway, causing the water to dam up for a distance of 800 feet back of the bridge, destroying 75 orange trees, and injuring 500 others; also causing gravel to be deposited over about six acres of plaintiff's land, to a depth of one to three feet. Judgment was entered for the plaintiff for the sum of $7,200, after a verdict for that amount by a jury, and the defendants appeal.

In defense of the action the defendants set up that the lands described in plaintiff's complaint were as a matter of fact, part of the natural course and bed of the San Dimas wash, which the plaintiff set about to reclaim; that, by reason of the construction of a retaining wall by the plaintiff, along the natural line of the bank of the wash, in said work of reclamation, the water was prevented from following its natural course; and, further, that the bridge was of substantial construction, erected in 1884, permanent in its nature; and that any cause of action against the defendants by reason of the faulty erection of the bridge was barred by the statute of limitations. Defendants also alleged an unprecedented amount of rainfall as the cause of the excessive flow in the waterway.

[1] The judgment must be reversed. After the overflow W. H. Whalen, division superintendent of the Los Angeles division of the defendant Southern Pacific Company, made an examination of the bridge. Over the objection of the defendants, witness Carlson was permitted to testify that upon the occasion of this inspection Whalen stated that the bridge was not properly constructed because of the piling being driven diagonally across the stream. The purpose of the introduction of this testimony was to show that the bridge was an obstruction to the stream. The admission of this testimony was error. The conversation not being part of the res gestæ was inadmissible as a declaration by the employé against his employer. Silveira v. Iversen, 128 Cal. 188, 191, 60 Pac. 687. The bridge was constructed many years before the division superintendent became in any way connected with defendant, and the declaration, if made by him concerning it, was inadmissible as not made in regard to a transaction in the course of his agency, depending at the very time of the declaration. Beasley v. San Jose Fruit-Packing Co., 92 Cal. 388, 28 Pac. 485; Umstead v. Automobile Funding Co. of America, 185 Pac. 1011.

Respondent seeks to justify the admission of this testimony upon the theory that it was alleged in the complaint, and denied in the answer, that the defendants knew, or could have known by the exercise of ordinary diligence, that it was necessary for them to keep said bridge open, and free and clear of all débris, in order that the natural flow, and free passage, of rain and storm water, and such débris, would not be prevented. It is also urged that Whalen's declaration should not have prejudiced defendants, because they themselves developed that the wooden pile bridge had been removed and a steel span bridge suspended, after the damage. Whalen was, himself, called to the stand and denied Carlson's testimony. Respondent argues, therefore, that it was for the jury to decide which of the two men to believe. None of these contentions remove the testimony from the application of the rule adhered to in the foregoing authorities.

Digitized by Google

[2] Appellants contend that the cause of action of the plaintiff is barred by the statute of limitations, not having been begun within either two or three years following the erection of the bridge which was proved to be a permanent structure. They take the position that the limitation period for injury to land, under such circumstances, begins to run from the completion of the structure, although the injury may occur during periods of high water, during successive years thereafter. Appellants have misconstrued the nature of the present action. It is not one to recover for an injury, direct and resulting immediately, from the construction of the bridge, but relates to damages which were an after-result from the erection of that structure. In other words, the action for damages for the injury to the plaintiff's land, caused by the obstruction of the storm waters in San Dimas Canyon, as the result of the construction of the bridge by the defendants, is not for a trespass upon real property, but it is in the nature of an action upon the case at common law for a consequential injury. Daneri v. Southern California Railway Co., 122 Cal. 507, 55 Pac. 243; Hicks v. Drew, 117 Cal. 305, 309, 49 Pac. 189.

The true rule as to the application of the statute of limitations in such cases is stated by Mr. Redfield, in his work on Railways (6th Ed., vol. 1, p. 595), as follows:

"The general rule in regard to the time of the accruing of the action is that when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act; but where the act is injurious only from its consequences, as the undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury."

The case at bar falls within the decision of St. Louis, etc., Co. v. Biggs, 52 Ark. 240, 244, 12 S. W. 331 (6 L. R. A. 804, 20 Am. St. Rep. 174), where the Supreme Court of Arkansas said:

"Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original, and may be, at once, fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. Railway Co. v. Morris, 35 Ark. 622; Railway Co. v. Chapman, 39 Ark. 463. But when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of. [Citing cases.]"

The building of the bridge by the defendants was not of itself a nuisance or an invasion of plaintiff's rights, but became so only when, by reason of its alleged faulty construction, it diverted the storm waters and debris from the usual channel, upon plaintiff's land. International & G. N. R. Co. v. Kyle, 101 S. W. 272; St. Louis, I. M. & S. Ry. Co. v. Hoshall, 82 Ark. 387, 102 S. W. 207; Texas & P. Ry. Co. v. Ford, 54 Tex. Civ. App. 312, 117 S. W. 203; Hill v. Empire, etc., Co. (C. C.) 158 Fed. 881. Suit in the instant case having been commenced within two years after the receipt of these consequential injuries by plaintiff, his causes of action were not barred by the statute of limitations. Daneri v. Southern California Railway Co., 122 Cal. 507, 55 Pac. 243; Hicks v. Drew, 117 Cal. 305, 309, 49 Pac. 189.

The authorities relied upon by appellants to the contrary deal with cases where injuries caused by permanent structures infringed immediately upon plaintiff's rights. Such instances are, where water is permanently polluted, streams immediately caused to flow back on adjacent land, and currents of a river turned aside by permanent dikes, at once begin to cut into the opposite bank. They do not deal with cases similar to the one at bar, where a permanent and lawful structure has, for many years, existed without any consequential injury resulting from its construction.

The appellants complain of the giving of certain instructions and of the refusal of the trial court to give others. Taking the charge as a whole, we think the jury was properly instructed.

The judgment is reversed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

BLEDSOE v. STUCKEY. (Civ. 2540.)

(District Court of Appeal, Second District, Division 2, California. April 13, 1920. Rehearing Denied May 12, 1920.)

1. Account stated ⟸4—Execution of note was stating of account.

Execution of a note was the stating of an account between the parties.

2. Evidence ⟸469—Payments on note prior to execution inadmissible as varying writing.

In an action to recover a balance due on a note and to foreclose a chattel mortgage securing it, evidence of payments prior to execution of the note applying towards its satisfaction was inadmissible as varying the terms of the instrument by parol.

3. Payment ⟸21, 67(1) — Receipt of check, though not payment, presumptively so where check not returned.

The mere receipt of a check by the creditor from the debtor does not operate as payment,

Digitized by Google

but where the creditor fails to return it, or to make any protest of nonpayment, and in no way questions the transaction, he will be presumed to have collected the money.

4. Set-off and counterclaim ⟸29(1)—Overpayment held proper matter for counterclaim.

In action to recover balance due on promissory note and to foreclose chattel mortgage securing it, facts alleged by defendant in his cross-complaint as to overpayments, all growing out of a transaction of which the note sued on was a part, *held* to constitute proper matter of counterclaim, under Code Civ. Proc. § 438, subd. 2.

5. Pleading ⟸148—Cross-complaint for overpayments insufficient without averment of demand or failure to repay.

In action for balance due on a note and to foreclose chattel mortgage securing it, cross-complaint by defendant for certain overpayments made by him *held* insufficient, in the absence of allegation of either demand for or failure to repay.

6. Appeal and error ⟸1170(3)—Overruling of demurrer to cross-complaint harmless.

In an action to recover a balance on a note and to foreclose chattel mortgage securing it, overruling of plaintiff's demurrer to defendant's cross-complaint for certain overpayments on the note, insufficient in the absence of an averment, *held* harmless to plaintiff, and to be disregarded by the appellate court under Const. art. 6, § 4½.

7. Pleading ⟸403(2)—Omission from complaint may be aided by answer despite erroneous overruling of demurrer.

An express denial by answer of matter omitted from the complaint cures the omission—a rule which applies even though a demurrer to the sufficiency of the complaint has been erroneously overruled.

8. Interest ⟸47(1)—Maker of note cross-complaining for overpayments not entitled to interest before filing cross-complaint.

In absence of showing that payee of note willfully or wrongfully received overpayments from the maker, in absence of demand upon him for repayment by maker prior to filing of maker's cross-complaint in payee's action on the note for a balance due, the maker was not entitled to interest on any amount of his recovery under his cross-action prior to the date of filing his cross-complaint.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by James B. Bledsoe against L. C. Stuckey. From judgment for defendant, plaintiff appeals. Reversed.

Bledsoe & Phipps, of San Bernardino (Leonard, Surr & Hellyer, of San Bernardino, of counsel), for appellant.

A. C. Galloway, of Los Angeles, for respondent.

SLOANE, J. This action was brought to recover an alleged balance of $313.30 on a promissory note for $2,675, and to foreclose a chattel mortgage securing the same. Defendant by his answer pleaded payment of the note in full, and by cross-complaint seeks to recover from plaintiff the sum of $546, which defendant claims to have paid by mistake in excess of his indebtedness on the transaction. The judgment was that plaintiff take nothing by his action, and that the defendant recover the amount of overpayment alleged in his cross-complaint. The main contention on the appeal is as to the application of two payments, aggregating $700, made by defendant to the plaintiff prior to the execution of the note sued on.

The transaction out of which the entire controversy grows was substantially as follows: In May, 1911, an agreement was entered into between the parties whereby the plaintiff sold to the defendant a lot of cattle and all of plaintiff's interest under a certificate of purchase from the state of California in 280 acres of land in Kern county. The price to be paid for the land was $400, as a fixed sum, with a further payment of $600 if plaintiff's interest in a portion of the tract should be confirmed by the courts in pending litigation with certain adverse claimants. The number of head of live stock purchased was not specified in the original agreement, further than that defendant was to take all of plaintiff's cattle at $22.50 per head, excepting some 15 or 20 head, which plaintiff reserved. There is conflict in the evidence as to how many head of cattle were actually sold and delivered to defendant. The evidence taken on the trial shows that at the date of the original agreement defendant paid to appellant on account of the transaction $200, and in December of the same year the further sum of $500. Subsequently, on January 15, 1912, by way of an adjustment of his indebtedness, defendant executed the promissory note sued on for the principal sum of $2,675, and a chattel mortgage securing the same on 120 head of the cattle purchased from plaintiff and 100 additional cattle of his own. The defendant testified that he only received 120 head of cattle from the plaintiff, and that this note and mortgage for $2,675 covered the price he was to pay for them. It is conceded that the land litigation was determined later in plaintiff's favor, and that defendant, subsequent to the execution of the note, became liable for the additional $600 agreed to be paid for the land, making a total liability on the entire transaction, according to defendant's contention, and as the court found, of $3,675. Defendant claims credit on this amount for the two payments aggregating $700 made prior to the note and mortgage, which, if allowed, with the subsequent payments shown in evidence, would leave the balance in de-

Digitized by Google

fendant's favor as claimed under his cross-complaint. Plaintiff's testimony is to the effect that there were at least 140 head of cattle sold to defendant, besides one or two horses; that the entire indebtedness was several hundred dollars in excess of $3,675; and that the $700 paid prior to the execution of the note and mortgage left a balance of $2,675 for which the note was given, besides the contingent balance of $600 on the land.

[1, 2] If the only question involved was the sufficiency of the evidence to sustain the findings of the court, we would be compelled under this conflict in the testimony to uphold the findings under the contention of defendant that his total indebtedness amounted to only $3,675, and that he was entitled to credit thereon for the $200 and $500 payments made prior to the execution of the note. But it is contended on behalf of appellant that the admission of evidence of these prior payments as applying toward the satisfaction of the note was error. This testimony was objected to by appellant on the ground that it was an attempt to dispute the terms of a written contract; that by the terms of the note, executed long after these payments were made, it was stipulated and agreed that at the date of the execution of the note defendant was indebted to plaintiff in the sum of $2,675; and that an attempt to reduce the amount by credits arising from previous transactions between the parties was varying the terms of a written instrument by parol evidence. We do not see how this conclusion is to be avoided. The execution of this note was the written declaration, in the most decisive manner, of a present indebtedness of $2,675. It was, moreover, a stating of account between the parties. Kinley v. Thelen, 158 Cal. 175, 183, 110 Pac. 513. There is no attempt to avoid it by any allegation or showing of fraud or mistake; and we do not see on what theory defendant could be permitted to say that the amount of his liability was not what the note called for, but $700 less than that sum. It cannot be shown by parol that the sum to become payable under the terms of the note is different from that specified, nor that a certain prior account was to be deducted from the note. Daniel on Neg. Insts. § 81. Parol evidence cannot prove a contemporaneous condition which might reduce a specified sum payable on the note. 2 Parsons on Bills and Notes, p. 506. In Eaves v. Henderson, reported in 17 Wend. (N. Y.) 190 the defendant sought to set off on a suit upon his promissory note certain amounts due him on account with the plaintiff prior to the execution of the note. The court held this to be an attempt to contradict the amount expressed in the note, and that the evidence was inadmissible, even though in that case it was claimed that at the time the note was executed it was agreed by the payee that the items of the account should apply on the note.

If it be argued that if these disputed payments of $200 and $500 should be held to be not applicable in reducing the amount due under the note sued on they at least represent a liability for money had and received by the plaintiff without consideration, and hence recoverable by cross-complaint in this action, the answer to this is the plea of the statute of limitations set out in plaintiff's answer to the cross-complaint; these payments having been made upwards of four years prior to the filing of the cross-complaint. Of course, the payments made after the execution of the note, and properly applicable as payments thereon, to which plaintiff also pleads the statute of limitations, are not subject to the bar of the statute, for the reason that they applied as payments as of the date of their receipt by plaintiff. We think, too, in further bar of the claim that these two payments are applicable in reduction of the amount of the note and mortgage, that paragraph 2 of defendant's cross-complaint is in effect an admission of a balance of indebtedness owing to plaintiff at the time of the execution of the note and mortgage of $2,675. This indebtedness being evidenced at a date long after the payments were made, they clearly cannot be allowed in reduction of the amount so admitted to be owing by the cross-complaint and by the note itself.

Our conclusion on this point is, therefore, that on January 15, 1912, defendant's indebtedness to plaintiff was fixed, beyond evasion by parol evidence, at the sum of $2,675, as shown by the note of that date. It also appears by undisputed evidence that subsequently, by a favorable termination of the litigation on the land, the further contingent sum of $600 became due from defendant to plaintiff. This last amount, as the admitted facts show, was increased by certain accruals of interest and installments on the land to the sum of $692. This sum was paid on April 19, 1915, however, thus disposing of that item. It only remains to be seen what payments are properly to be credited on the promissory note, and to any overpayment which defendant may be entitled to recover.

[3] From June 12, 1911, to October 27, 1914, payments were made in an aggregate amount of $3,000, which, it clearly appears, are rightly credited to defendant. In addition to proof of these payments, defendant introduced a letter from plaintiff of date August 24, 1914, in which the latter acknowledges the receipt, on or about that date, of another check from defendant for $300. None of the witnesses seemed to have a very distinct knowledge as to this check, and the check itself, canceled or otherwise, was not produced. Defendant had no definite recollection regarding it, and stated that he did

Digitized by Google

Appeal from Superior Court, Kern County; Howard A. Pearis, Judge.

Action by Charles F. Stern, substituted for W. R. Williams as Superintendent of Banks of the State of California, against Ronald McDonald and others, and Sarah L. Conner, executrix of the last will and testament of C. L. Conner, deceased. From a judgment for plaintiff, the defendants first named appeal. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellants.

Raymond Benjamin, of San Francisco, for respondent.

KNIGHT, Judge pro tem. The superintendent of banks of California, on behalf of the Kern Valley Bank, an insolvent corporation, obtained a judgment against the above-named defendants, severally, in amounts aggregating $85,000, from which all of said defendants appeal except the defendant Sarah L. Conner, the executrix of the last will of C. L. Conner, deceased. The action is based upon a promissory note, dated October 15, 1909, drawn in favor of said Kern Valley Bank for the aggregate sum of $105,000, payable in the amounts and in the manner following: Ronald McDonald, $40,000; C. L. Conner, $20,000; P. L. Jewett, $10,000; S. Wright Jewett, $10,000; L. P. St. Clair, $20,000; George W. Price, $5,000. All of the payors named therein signed the note except L. P. St. Clair. The plaintiff alleges that the payment of said note was secured by a pledge of 95 bonds, of the par value of $1,000 each of the Sunset Road Oil Company, a corporation, and prays judgment against the payors, severally, for the amounts for which they respectively obligated themselves on the note, and that "said bonds be sold according to the usual course and practice of this court, and that the proceeds thereof be applied to the payment of said promissory note."

C. L. Conner died prior to the commencement of suit, and his executrix was made a party defendant. She filed no answer. The other defendants joined in an answer, in which they urged the defenses of no consideration, fraud and estoppel. The court found against the defendants on those issues, and further found that said note was given in payment of the purchase price of the bonds which had been pledged as security for the payment of the note, and which the court found had been previously sold to the defendants by the bank. The judgment made no disposition of the pledged bonds. At the time of the execution of the note all of the payors were directors and principal stockholders of said Kern Valley Bank, and Conner and McDonald were, respectively, its president and cashier, and S. Wright Jewett and George W. Price were its assistant cashiers. On May 12, 1911, the bank became insolvent, and W. R. Williams, as superintendent of banks, took possession. The note in question and the pledged bonds were among the bank's assets.

The record discloses abundant evidence to support the findings and judgment. It shows that immediately prior to October 15, 1909, said Sunset Road Oil Company bonds, of which the bank owned a large number, had depreciated in value to the extent that the bank's capital had become impaired; that Alden Anderson, then superintendent of banks, demanded that defendants, who, as above stated, were the directors and principal stockholders of the bank, pay $105,000 into the bank, in cash or its equivalent, and directed that this should be done by means of a sale from the bank to the defendants of 95 bonds of said Sunset Road Oil Company, at par and accrued interest, and stated that the joint and several promissory note of defendants, properly secured by the bonds so purchased, would be accepted in payment of said bonds. Anderson informed defendants that unless this arrangement was carried out he could not allow the bank to continue business. The transaction was consummated in accordance with Anderson's directions, except that a several note was executed and delivered to the bank instead of a joint and several note, and that St. Clair did not sign the note, thereby reducing the aggregate amount of the note from $105,000 to $85,000. Subsequently one J. W. Harper, a bank examiner, acting under the direction of Anderson, visited the bank, and verified the fact that the note had been executed and the bonds pledged. Harper at that time was informed that St. Clair had not signed the note because he was out of town, but that he would do so upon his return. Across the bottom of the note was indorsed, in the handwriting of the defendant McDonald:

"Secured by 95 bonds of $1,000, being bonds No. 645 to 740, inclusive, of the Sunset Road Oil Co."

These bonds were afterwards listed by the defendants, as officers of the bank, in the bank's reports as pledged bonds, and the interest on the note was paid monthly by defendants up to and until one month before the bank closed, in May, 1911.

[1, 2] The evidence above narrated clearly shows a legal sale of said bonds from the bank to the defendants, and that said sale constituted a valid consideration for the note. The conceded purpose for which the sale was made and the note given was that the bank might be allowed to continue business. There was an impairment of the bank's assets, for which the bank could have been closed, and in order to relieve that embarrassment and to insure the bank's continuance in business the directors, at the direction of the superintendent of banks, purchased said bonds and executed said

Digitized by Google

note. This was done to bring up the amount of the bank's depreciated capital to the standard fixed by the superintendent of banks. That of itself constituted a valuable consideration for the note. It has been held by numerous authorities that a note or bond, executed by the directors of a bank to make good an impairment of the bank's assets, so that the bank may continue in business, is based upon a valid consideration. Skordal v. Stanton, 89 Minn. 511, 95 N. W. 449; First Nat. Bk. v. Felt, 100 Iowa, 680, 69 N. W. 1057; Hurd v. Kelly, 78 N. Y. 588, 34 Am. Rep. 567; Murphy v. Gumaer, 18 Colo. App. 183, 70 Pac. 800; Nat. Bk. of Salt Lake City v. Nelson, 38 Utah, 169, 111 Pac. 907.

[3, 4] The defense of fraud urged by defendants is based upon certain representations claimed to have been made by Anderson to the defendants at the time of the execution of the note, to the effect that one W. S. Tevis would also purchase a like number of bonds, and in payment thereof would execute a similar note, but that he had failed to do so, and that defendants were unaware that he had not done so until after the bank had been closed in May, 1911. This defense is insufficiently pleaded, for the reason that there are no allegations made by defendants that they relied upon said representations, or that they believed them to be true. However that may be, a consideration of this defense seems quite unnecessary, for the reason that both Anderson and Harper denied that any such representations were made, and the court found that their testimony was true. Any evidence to the contrary would raise a mere conflict, and would not justify an interference with the findings of the trial court.

[5] The defense of estoppel is based upon an alleged rescission or repudiation of the sale of the bonds by Superintendent Williams. In this respect it is alleged and was proved that in an action independent from this one, commenced by the Mercantile Trust Company of San Francisco against the Sunset Road Oil Company, a corporation, involving the bonds of said Sunset Road Oil Company, Williams, as superintendent of banks, intervened, and filed a cross-complaint, alleging "that said Kern Valley Bank was the owner of the specific bonds here involved." The fact that he did so, however, utterly fails to prove rescission or repudiation. As holder of the pledged bonds it was his duty to protect them and to controvert any claim made by third persons claiming ownership or seeking to obtain possession of said bonds, and it was not necessary in such a proceeding that Williams should allege and prove that he held said bonds merely as a pledge. As pledgee he was vested with a special property in said bonds sufficient to maintain an action against third persons for the recovery of said bonds. 31 Cyc. 824; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Thompson v. Toland, 48 Cal. 99; Merced Bk. v. Price, 9 Cal. App. 177, 98 Pac. 383. Therefore the allegations of Williams in that action that the bank was the owner of said bonds was in accordance with the law and the facts.

[6] Appellants' contention that said note was invalid because it was not a joint and several note, as Anderson had directed it should be, is also without merit. Appellants knew of the purpose for which the note was given, and as officials of the bank they were presumably familiar with the form of the note signed by them. They afterwards recognized the validity of the note by listing it among the bank's assets and by paying interest on it monthly for a year and a half. Furthermore, it is not apparent wherein appellants have been prejudiced by the execution of a several note. If it had been a joint and several note the individual defendants under the law could have been called upon to pay the full amount of the note. If anybody has suffered by the oversight it is the bank's creditors and not the appellants.

[7] Appellants also claim that the sale of the bonds was not valid because it was not authorized by a resolution of the board of directors, but that it was made merely upon an order issued by the superintendent of banks, in whom, it is claimed, the power to authorize such sale was not vested. The answer to that is that it does not appear from the record whether or not such a resolution was in fact passed, but, assuming that it was not passed, it does not lie with the defendants to take advantage of the point, for the reason that as payors of the note the law will not allow them to relieve themselves of their obligation to the bank because they, as directors of the bank, in dealing with the bank, may have willfully or otherwise exceeded their lawful authority.

[8] Appellants' final point is that the judgment is erroneous because it merely provides for the recovery of the note without reference to the security. It is contended that the judgment should direct that the security be sold and the proceeds applied to the payment of the note. The authorities, however, do not support appellants' contention. It has been repeatedly held that in the absence of statute or stipulation to the contrary, the possession of pledged property does not suspend the right of the pledgee to proceed personally against the payor for his debt without selling the pledge, for the reason that the security is only collateral Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532, wherein the authorities are reviewed.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Digitized by Google

OAKDALE IRR. DIST. v. BEARD et al.
(Civ. 2099.)

(District Court of Appeal, Third District, California. April 12, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Waters and water courses ⇐228½, New, vol. 10A Key-No. Series—Evidence held to sustain finding of damages in amount of bond to irrigation district from improper work.

In an action by an irrigation district against its contractor and the surety on his bond, evidence of improper performance of the work and as to damages *held* to sustain judgment for plaintiff district for $10,000, coincidently the exact amount of the bond.

2. Waters and water courses ⇐228½, New, vol. 10A Key-No. Series—Defects in irrigation district contract not defense to contractor and surety sued on bond.

Though there were certain defects in the steps leading up to an original contract by an irrigation district for certain work, and though the law was not complied with in all respects, such defects are no defense to a suit on the bond securing the work by the district against the contractor and his surety.

3. Estoppel ⇐22(3) — Waters and water courses ⇐228½, New, vol. 10A Key-No. Series—Recitals of second bond evidence that contractor had not performed.

If the contractor with an irrigation district had fully performed his original contract, he was entitled to be paid the agreed amount without giving a new bond that he would complete it, and the recitals of a second bond signed by him and his surety that certain parts of the work were unsatisfactory to the directors and engineer of the district are conclusive, or at least very strong, evidence that when it was executed the contractor had not performed.

4. Principal and surety ⇐138 — Compliance with arbitration clause of the contract not condition precedent to action on bond.

It was not necessary that an arbitration clause in a contract be complied with as a condition precedent to bringing of an action on the contractor's bond, the bond containing no arbitration clause, and not being worded to oust the courts of right to entertain the case.

5. Arbitration and award ⇐8 — Arbitration clause not construed to oust courts of jurisdiction where it can be avoided.

An arbitration clause of a contract will not be construed as ousting the courts of jurisdiction unless such construction is inevitable, so that, unless the clause is made a condition precedent by express words or necessary implication, it will be construed as merely collateral to the liability clause and is no bar to an action without an award.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by the Oakdale Irrigation District against T. K. Beard and the Ætna Accident & Liability Company. From judgment for plaintiff, defendants appeal. Affirmed.

L. L. Dennett, of Modesto, Redman & Alexander, of San Francisco, and Dennett & Zion, of Modesto, for appellants.

Griffin, Carlson & Boone, of Modesto, for respondent.

ELLISON, Presiding Judge pro tem. The plaintiff brought this action to recover a money judgment upon a bond executed by the defendant T. K. Beard, as principal, and the defendant Ætna Accident & Liability Company, as surety therein.

The record shows that on the 25th day of February, 1913, the defendant Beard entered into a contract with the plaintiff in and by which he agreed to construct for the plaintiff certain ditches, pipes, etc., as part of an irrigation system belonging to the plaintiff. The work referred to was the building of the Paulsell canal, Paulsell laterals, the Orange Blossom laterals, the Grey laterals, the Clavey siphon and Booster plant, the River road siphon, and the South lateral siphon, according to plans and specifications prepared by George L. Dillman, engineer for plaintiff. The defendant Beard agreed to do said work in a workmanlike manner and to the satisfaction and approval of said engineer and of the board of directors of plaintiff "in conformity in all respects with the annexed specifications, which are hereby made a part of this contract." The specifications are quite full and complete, and are annexed to the contract. The defendant Beard was to receive for performing the work specified in such contract a sum of money estimated to be about $85,616. Before entering upon the work he was to give a bond, to be approved by the board of directors of the plaintiff, in an amount estimated in the contract, based upon a percentage of what the work would cost as per the specifications. Having executed the contract and the bond, the defendant Beard proceeded with the construction work agreed to be done by him, and continued therein until on or about the 15th day of May, 1914. At that time he appeared before the board of directors of the plaintiff and expressed his desire to have the large bond which he had been carrying canceled and a new bond given in lieu thereof in the sum of $10,000 and an additional payment made to him of $10,000, it being claimed by him at the time that there was something more than that amount due to him for the work performed. This proposition was accepted by plaintiff, and a new bond executed with the defendant Ætna Accident & Liability Company, as surety. The $10,000 requested was paid over to him and the old bond released. The new bond, and the one upon which this suit is brought, stated quite fully the mutual understanding of the parties

Digitized by Google

as to the conditions then existing. It recites that there is now due from the plaintiff to the defendant Beard on the contract, dated February 25, 1913, the sum of $11,280; that such portions of said work as had been tested are unsatisfactory to the board and its engineer, because of small leaks that had developed; that Beard desired a payment of $10,000 be made to him, the balance of said contract price to be held by plaintiff until Beard should complete said work in a workmanlike manner to the satisfaction and approval of the engineer of said district and the board of directors of plaintiff "in all respects in conformity with the specifications in the original contract." It recited that plaintiff was willing to make said payments of $10,000 upon the defendant Beard giving a new bond in the sum of $10,000 "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said contract at the earliest possible moment, and that said concrete pipes will all be constructed and repaired within three months after the time of said test." The bond was to be void if the defendant Beard complied with the terms and conditions of a certain resolution of the plaintiff's board of directors, passed May 5, 1914, otherwise to remain in full force and effect. The resolution referred to provides for the payment of the $10,000 upon the execution of the bond conditioned as subsequently on the bond stated. Thereafter, this action was brought upon the bond last referred to; it being alleged in the complaint with much fullness that the defendant Beard had failed to perform his contract and failed to complete said work to the satisfaction of the board or of its engineer, and failed to complete it in accordance with the terms and specifications of the original contract. The defective construction was alleged to be in that part of the work designated as the Clavey siphon and Booster plant.

The court finds that this work had not been completed in accordance with the contract and the specifications attached thereto, and that by reason of such failure plaintiff had been damaged in the sum of $10,000 and that it would cost the plaintiff at least $10,000 to complete said Clavey siphon and Booster plant according to the specifications annexed to said contract, and entered judgment against both defendants for that amount. This appeal is from the judgment.

[1] 1. The appellant claims that the court accepted the amount of the bond as the measure of damages, and that in doing so it committed a very serious error. An examination of the record convinces us that this contention cannot be sustained. It is true the judgment is for the same amount the bond was given for, but an examination of the record shows that this is merely a coincidence. The court could not render any valid judgment against the surety company for more than the penal sum of the bond. The finding of the court that it would cost the plaintiff at least $10,000 to complete the work according to the specifications has evidence to support it. The witness Finney testified:

"Q. Now what in your opinion would be the value of the Siphon as it now stands? A. Well, it would be—I can't just state right now the exact cost for the reason that the pipe isn't doing its duty and as time goes on it will do less, so that in getting at the cost, about the only way that I could figure the value would be that there would have to be as much money spent on it as the original cost."

The total contract price for this part of the work was about $23,335.67.

The witness Burton Smith testified:

"The condition of the pipe is bad due to the fact that it has many leaks in it, and the fact that there is not a foot of the pipe but what—the length of it but what leaks."

He testified that, in his opinion, the present pipe could not be fixed:

"Q. You can't make any improvements in that pipe so it would carry the water without it costing as much as if you laid new pipe, or the original cost of the pipe? A. I think that it would be fully the original cost of the pipe. In my opinion it would be necessary for the district to put in a new pipe."

There is other evidence as to the defective condition of the pipe, in addition to what has been referred to, to show that the findings of the court as to the defective condition of the pipe and the amount it would cost to put it in good condition have evidence to support them.

2. Appellant claims that the original contract between the plaintiff and Beard is void. It is not clearly stated in the brief for what reason the original contract was void. This action is not brought upon the original contract, but upon the new bond. By its terms the plaintiff paid to Beard $10,000 upon his written promise to perform certain work, and his bond was that if he did not perform this work the bond should be good. He did not perform it, and therefore he and his bondsmen became legally obligated to make payment to the plaintiff. The original contract is referred to as containing a description of the work that the defendant Beard was to perform, and to this extent only it has a bearing upon the decision of the case.

[2] Conceding that there may have been certain defects in the steps leading up to the making of the original contract, and that the law was not in all respects complied with, still, such defects are no defense to a suit upon the bond involved herein.

The case of Peoples Lumber Co. v. Gillard,

Digitized by Google

136 Cal. 55, 68 Pac. 576, is decisive of this matter, wherein it is said:

"It appeared that after the bids were all in for the building it was found that they exceeded the money provided—to wit, $7,000—and the bids were all rejected, and the plans were then gone over and certain changes made to bring the cost down to $7,000, and Gillard and Leary agreed to build the structure for that sum without further advertising, and thereupon the contract in question was made and the sureties then signed the bond. As to these facts it is sufficient to say that they do not furnish any ground of defense. The bond was executed with reference to the contract annexed to it, and not with reference to any advertised proposals.

"If the board had no authority to make the contract without re-advertising for bids, that fact would not discharge the sureties from their obligations under this bond."

3. Appellants claim that Beard performed the conditions of the original contract, and that the finding of the court that he did not is not sustained by the evidence.

In the bond upon which this suit is brought (and the bond is signed by both defendants), it is recited that—

"Whereas of such portions of said contract as has been tested certain parts are unsatisfactory to the board of directors and the engineer of said district, because of the fact that small leaks have developed."

It is also in said bond recited that plaintiff is willing to pay Beard $10,000 if he will execute a bond "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said contract."

[3] If he had fully performed his original contract, as now claimed, he was entitled to be paid therefor the amount agreed upon without giving a new bond conditioned that he would complete it. The recitals of the bond signed by the defendants are conclusive, or at least very strong, evidence that at the time it was executed the defendant Beard had not constructed the work in accordance with the terms of the contract.

4. The original contract contained the provision:

"If in the execution of this contract there shall be any ruling of the engineer alleged by either party hereto to be erroneous or unfair, each party shall immediately appoint an arbiter, and the arbiters so appointed shall within four days after their appointment, unless such time is extended by mutual agreement of the parties hereto, render their written agreement in the premises."

Counsel claims that this clause in the contract must be complied with as a condition precedent to the bringing of an action. There are several answers to this contention:

[4] (1) This action is not brought on the contract, but the bond, and the bond contained no arbitration clause, and is not so worded as to oust the courts of the right to entertain the case. There are no express words making the submission to arbitration a condition precedent to the bringing of the suit and no language used therein from which such intent can be inferred.

[5] (2) In Ruling Case Law, vol. 2, p. 363, it is said:

"But the courts generally will not construe an arbitration clause as ousting them of their jurisdiction unless such construction is inevitable, and consequently when the arbitration clause is not made a condition precedent by express words or by necessary implication, it will be construed as merely collateral to the liability clause, and so no bar to an action in the courts without an award."

See, also, Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, where the same ruling is stated in very clear and strong language.

We have now noticed all the points raised by appellant upon which he claims a reversal of the judgment should be had, and it is our opinion that none of them is sufficient to justify a reversal of the decision of the lower court. The findings are supported by the evidence, and, no reversible error appearing in the record, the judgment is affirmed.

We concur: BURNETT, J.; HART, J.

CLARK LLOYD LUMBER CO. v. PUGET SOUND & C. RY. CO. (No. 15437.)

(Supreme Court of Washington. June 4, 1920.)

1. Appeal and error ⟸994(2), 1002 — Determination of conflict in evidence and credibility of witnesses for jury, and not Supreme Court.

The burden to determine a conflict in the evidence and the credibility of witnesses rests on and is peculiarly within the province of the jury, and not the Supreme Court.

2. Damages ⟸138—$5,750 for destruction of lumber company's boom site not excessive.

Verdict of $5,750 in favor of a lumber company against a railway for destruction of the contour of the bank of a river, and filling in with rock a cove where a sheer or fin log boom was located, *held* not excessive, in view of the evidence.

3. Trial ⟸72—Refusal to reopen case generally for admission of defendant's evidence not abuse of discretion.

In action by lumber company against a railway for destruction of its boom site by filling with rocks, action of the trial court, after permitting plaintiff to reopen the case to introduce certain rebuttal testimony, in refusing to

Digitized by Google

reopen the case generally for the admission of certain evidence for defendant, which was not surrebuttal, and was not in answer to the new testimony given by plaintiff's witnesses, was not an abuse of the trial court's discretion.

4. Appeal and error ⟹1064(1)—Instruction in action for destruction of log boom site harmless.

In action by lumber company against a railway for destruction of a boom site by filling with rocks, instruction that, if the site could be restored by removal of rocks plaintiff's damages on such element of case would be cost of removal *held* not reversible error, though testimony perhaps showed rock could be removed, and though charge insisted that defendant's obligation was to place site in such condition it would be safe and secure.

Department 2.

Appeal from Superior Court, Skagit County; Augustus S. Brawley, Judge.

Action by the Clark Lloyd Lumber Company against the Puget Sound & Cascade Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant.

Ryan & Desmond, of Seattle, and Coleman & Gable, of Mt. Vernon, for respondent.

BRIDGES, J. In and prior to July, 1912, respondent owned what it claimed was a valuable mill site on the banks of the Skagit river, in the state of Washington. This site consisted of land on the northerly bank of the river, on which its mill had been previously located, but which, in 1910 or 1911, had been destroyed by fire, and which has not been rebuilt. Its boom for holding logs and shingle bolts was located in the northerly portion of the river, and adjacent to the mill and mill site. This boom has been designated a "pocket boom." In order to catch the timber floating down the river from above the mill site it was necessary to have a "fin" or "sheer" boom. This sheer boom was located in a small cove on the southerly side of the river and opposite the mill site. One end of it was tied to the southerly bank, and the other end floated out in the stream, caught logs and bolts, and guided them to the other side of the river and into the mouth of the pocket boom. It is claimed that the mill site proper, the pocket boom, and the location for the sheer boom, all combine to constitute an excellent mill site. It appears that there was a point or ledge of rock extending out into the stream which protected the land end or head of the sheer boom from drifting, thus forming an unusually good location for a sheer boom. Respondent also owned the southerly shore of the river where its sheer boom was located. In 1912 the appellant, being desirous of constructing a railroad up the southerly bank of the river, purchased a right of way therefor from respondent at the point of and above and below the sheer boom. At about the same time an agreement was entered into between the parties which gave to respondent "a right to use and occupy all the shore line along the Skagit river for booming, logging or other purposes and shall have the right to keep its fin booms tied on the stumps it is now attached to or any other structure it may place on such shore line or lands; provided, however, that such occupancy of the shore line and tying and maintaining of said fin boom on said stumps shall not interfere with the construction, operation and maintenance of the railroad of said second party."

After the railroad was built respondent brought this suit against appellant, claiming damages because the latter had destroyed the contour of the southerly bank of the river and had filled with rock the cove where the sheer boom was located, and, in general, had destroyed the value of the whole mill site. Upon trial there was a verdict for the plaintiff. The defendant appealed to this court, where the various rights of the parties were interpreted and the case reversed and remanded for a new trial. Clark Lloyd Lumber Co. v. Puget Sound & Cascade Railroad Co., 92 Wash. 601, 159 Pac. 774; Clark Lloyd Lumber Co. v. Puget Sound & Cascade Railroad Co., 96 Wash. 313, 165 Pac. 94. The second trial resulted in a verdict in favor of the plaintiff in the sum of $5,750, for injury to the whole mill site. Defendant's motion for a new trial was denied, and it has again appealed. For a more complete recital of the facts we refer to the previous decisions of this court.

[1] It is first contended that the verdict is excessive, and was given under the influence of passion and prejudice. Appellant does not point out anything upon which to base the assertion that the verdict was rendered under the influence of passion and prejudice, except the size of the verdict. The case was very carefully and ably tried by both parties to the suit and by the court. A very large amount of testimony was taken; the jury visited the premises, both at the beginning and at the end of the trial, and the court's instructions were full and complete. The case seems to have been conscientiously and honestly tried by all parties concerned. When it was here the first time we held that if the rock could be removed from the cove and the fin boom location restored to its original efficiency, the measure of respondent's damages would be the cost of restoring such situation. But if the situation could not be restored, then the measure of damages would be the difference in the value of the property before and after the work was done. Respondent introduced the testimony of many witnesses on the theory that the situation

Digitized by Google

could not be restored, and also on the theory that the situation could be restored and the cost of so doing. All of this testimony was met by the testimony of many witnesses produced by the appellant. On the theory that there could not be a restoration of the situation, respondent's witnesses fixed the damage in excess of $10,000, while the witnesses of appellant contended that the mill site had become practically valueless because of a lack of timber and the inability of any person to successfully operate the property, and consequently the damage was practically nothing. On the restoration theory respondent introduced competent evidence showing the cost to be in excess of $10,000, while appellant's witnesses fixed such sum at less than $1,000. There was a sharp dispute as to the line and nature of the original contour of the bank of the river and as to the amount of rock and material which appellant had deposited in the cove and river near the location of the sheer boom. This situation brought about a decided conflict in the evidence, and the chief question was as to the credibility of the witnesses. That such burden rests upon and is peculiarly within the province of the jury, and not the court, has been too often decided by this and other courts to need citation of authorities.

In the case of Seattle & Montana Railroad Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864, in discussing the question now before us, this court said:

"We do not feel disposed to substitute our own judgment for that of the jury whose duty it is to assess the damage, simply because the amount may seem to us large, especially where there is abundant competent evidence upon which to base the verdict."

In Fogarty v. Northern Pacific Railway Co., 85 Wash. 90, 147 Pac. 652, L. R. A. 1916C, 803, it was said:

"The evidence on this point, however, was conflicting. Its weight and the credibility of the witnesses were for the jury. The trial judge was much better able to determine the weight and credence to be given to this evidence than we are. He refused to grant a new trial. An appellate tribunal should be extremely slow to override the judgment of both the jury and the trial court on a question of fact when there is any evidence to support it."

In Caldwell v. N. P. Ry. Co., 62 Wash. 420, 113 Pac. 1099, we said:

"The right of trial by jury being a constitutional right, the courts, in law actions, must not take questions of fact away from them and determine such questions for themselves merely because they do not agree with the jury's findings. While we have no doubt of our power to grant new trials where verdicts are excessive, yet it is a power which should be exercised within reason, and only where it is reasonably plain that justice will be promoted thereby."

[2] A careful reading of the record convinces us that there was amply sufficient evidence to support the verdict, and for us now to say that the verdict is excessive would be to usurp the province of the jury.

[3] During the trial the parties, acting through their attorneys, entered into a stipulation to the effect that either party might use certain of the testimony produced at the former trial. After the defendant had closed its case, the plaintiff sought to introduce in rebuttal the testimony of one of the witnesses at the former hearing concerning the amount of material which the defendant had thrown into the river at the cove where the sheer boom was located. The trial court held that such testimony was not proper rebuttal, whereupon the plaintiff moved to reopen the case for the purpose of introducing such testimony. The court permitted this to be done. At the time of so ruling the court announced that the defendant would be permitted to introduce any evidence in answer to this new testimony of the plaintiff. Thereafter the defendant asked the court to reopen the defense and permit it to introduce the testimony of three witnesses to the effect that they had examined the test hole which had been made previously on the southerly bank of the river, and examined the character of the earth and rock and found it to be solid rock. The court held that this testimony did not rebut that introduced by the plaintiff after the reopening of the case, and it refused to reopen the case generally for the admission of this testimony. The appellant now claims error on this account. That appellant's proffered testimony was not surrebuttal, and was not in answer to the new testimony given by plaintiff's witnesses, is clear to us. The only way appellant could put in this testimony was to have the case reopened for that purpose. This the court refused to do. It is manifest that these matters must be left largely within the discretion of the trial court. There cannot be any inherent right to have a case reopened, for if there were the trial might never come to an end. In the very nature of things it is and must be a permission, the granting of which rests in the sound judgment and discretion of the court. In this instance we cannot find that the court abused its discretion, or that it erred in its ruling.

Complaint is also made of that portion of the court's instruction No. 8 reading as follows:

"If the plaintiff has been damaged by the deposit of waste material then your first inquiry will be whether said waste material can be removed so as to return said indenture or cove to a condition which will afford a secure and safe place for the head of said fin boom so as to permit its maintenance and successful operation, and, if so, then plaintiff's damages on this element would be the cost of the removing of such waste material or débris."

Digitized by Google

[4] It is claimed that this instruction is erroneous because it left to the jury whether or not the rock which had been deposited in the river could be removed, whereas the testimony all showed that it could be removed. In the first place, if the testimony was as appellant contends, then certainly no harm could have resulted to it by leaving to the jury the question of whether or not the rock could be removed. However, we find that the plaintiff introduced some testimony tending to show that the rock could not be removed so as to restore the original situation, and it was therefore entirely proper for the jury to determine that question. Appellant further complains that this instruction imposes on it the duty to place the cove in such condition as that it would be "a safe and secure place" for the operation of the sheer boom, whereas it was only required to restore the premises to the condition they were in before the damage was done. Probably it would have been better if the court had instructed that it was a question for the jury whether the rock could be removed, and thus the premises restored to the condition in which they originally were. However, it is plain to us that the jury could not have been misled. The error, if any, is more of words than of substance. The appellant had deposited rock and other material in this cove, which it was claimed destroyed the use of the sheer boom. In the pleadings, in the testimony, and in the general charge of the court to the jury, the question was whether this material could be so removed as to restore the cove to its former condition and usefulness. At no time was it contended that appellant was under obligation to put the cove in better condition than it was before the damage was done. The question was concerning the removal of the rock which appellant had placed in the cove. And in this instruction, as well as in others, the court mentioned "deposit of waste material" in the cove, and whether "said waste material can be removed." Instructions Nos. 5 and 6 give the jury to understand that the question is whether, by the removal of this rock, the cove can be restored to its former condition and efficiency. Reading this instruction in the light of the pleadings, the testimony, the contentions of the parties, and all the instructions given by the court, we cannot conclude that there was any reversible error.

Appellant also complains that the court refused to give its requested instructions Nos. 1, 2, 7, and 8. We have carefully considered these assignments of error, but do not find any merit in them. All portions of the requested instructions proper to be given were, in substance, given by the court in his own words.

It is claimed that it was error for the court to instruct the jury as follows:

"You are instructed that under the terms of the deed of right of way and the contract executed by the plaintiff and defendant, the plaintiff as grantor having reserved the right to use and occupy the shore line of the river for booming and logging purposes and maintaining its then existing boom and anchorage, the defendant had no right to injure the boom and anchorage or change the shore line of the river."

The contract mentioned in this instruction is the one from which we have heretofore quoted. Appellant claims that under the terms of that contract the respondent was entitled to occupy the shore line, provided such occupancy did not interfere with the construction, operation, and maintenance of the railroad. But this contract was otherwise interpreted in the previous appeal. Clark Lloyd Lumber Co. v. Puget Sound & Cascade Railway Co., 92 Wash. 601, 159 Pac. 774, where we said:

"Appellant contends that, having a deed to the right of way, it had a superior right to construct its road in the manner in which it did, and that the rights of respondent are subservient and subordinate to it. The right to invade the property rights of the respondent is not given by the deed, nor does a fair construction of the contract sustain it. The right reserved by respondent was to use and occupy the shore line in the manner it was then used. It would have had this right without any contract. This right is not destroyed by the further provision of the contract that such occupancy shall not interfere with the construction, operation, and maintenance of the railroad by appellant. The contract must be construed by reference to its whole context."

We do not find any material error, and the judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur.

BIG FOUR LAND CO. v. DARACUNAS et al.
(No. 15864.)

(Supreme Court of Washington. June 4. 1920.)

Brokers ⇐43(3)—Description of property in broker's employment contract held insufficient.

Broker's employment contract authorizing a broker to sell "property hereinafter described, to wit, 40 acres at Forest located in ———, for the sum," etc., *held* not to entitle broker to recover commissions on owner's refusal to perform by selling property to procured purchaser; the description being insufficient under the statute of frauds.

Department 2.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Digitized by Google

Action by the Big Four Land Company against Mike Daracunas and another. From an order sustaining a demurrer to a complaint and dismissing action, the plaintiff appeals. Affirmed.

W. W. Langhorne, of Chehalis, for appellant.

O. J. Albers, of Chehalis, for respondent.

MOUNT, J. This appeal is from an order of the court below sustaining a demurrer to the plaintiff's complaint and dismissing the action on the refusal of the plaintiff to plead further. The action was brought to recover a broker's commission under a written contract of employment entered into between the parties as follows:

"Big Four Land Co.

"In consideration of one dollar and valuable services by you performed, I hereby vest in you the exclusive authority to buy or sell for the term of 90 days from the date hereof and thereafter till the expiration of 10 days' written notice of withdrawal of the property hereinafter described, to wit, 40 acres at Forest located in ———, for the sum of $6,000, as follows: ———, cash; balance ———.

"I agree that in case a sale is made through you or your influence during the term of this contract or three months thereafter to allow you a commission 5 per cent. on the selling price and to convey or cause the same to be conveyed by a good and sufficient deed to the person or persons designated by you and to furnish a complete abstract of title to said property certified to date by a competent abstracter, and to pay all taxes due on said property up to date of sale.

"Dated at Chehalis, Wash., this 26th day of July, 1919. Mike Daracunas, Owner."

Then followed a description of certain personal property to be included in the sale.

The complaint alleged that the plaintiff found a purchaser; that thereafter the defendant canceled the contract, but within the time limited in the contract defendant sold the property for $5,400; that plaintiff demanded its commission amounting to $270.

It is apparent from a reading of the contract that the description therein contained of the property to be sold, "40 acres at Forest," is not sufficient to take the contract out of the statute of frauds. This court has held in a number of cases, where the description was more definite than the one here, that such description was insufficient. See Rogers v. Lippy, 99 Wash. 312, 169 Pac. 858, L. R. A. 1918C, 583. The appellant apparently concedes that the contract in this case is insufficient, but argues that here was a completed contract, and for that reason the appellant is entitled to the commission. He bases this contention upon what was said in the case of Henneberg v. Cook, 103 Wash. 685, 175 Pac. 313. In that case a recovery was permitted, but that was a case where the property had been sold and a part of the commissions paid and a promise of payment of the balance. In that case we distinguished our previous cases, and said:

"The rule established in the Rogers and Nance Cases, supra, should not be extended to cases where the services of a broker have been completed, all the parties to the sale contract have fully performed, a written promise to pay the broker for his service has been signed by the party to be charged, and there existed no necessity for specific performance to complete the sale."

If in this case the complaint had alleged that the respondent after the sale had paid a part of the commission and had agreed to pay the balance, then that case would control. But there is no such allegation in the complaint, and the fact is, as shown by the complaint, that the contract here sued upon was not completed. The land was sold at a less price than named in the contract, and the appellants are now seeking to recover upon a contract for commissions which under our many decisions is insufficient under the statute of frauds.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., and FULLERTON, BRIDGES, and TOLMAN, JJ., concur.

AMES et al. v. DUFF & YOUK et al.
(No. 15876.)

(Supreme Court of Washington. June 7, 1920.)

Costs ⟸238(1)—Respondents not appearing not allowed costs.

Where a judgment is affirmed, but respondents have made no appearance in the Supreme Court, they will not be allowed costs.

Department 2.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by A. P. Ames and another against Duff & Youk, copartners, and others. From a judgment of dismissal, the plaintiffs appeal. Judgment affirmed.

J. W. A. Nichols and Browder Brown, both of Tacoma, for appellants.

MOUNT, J. This action was brought to recover $2,325 as damages alleged to have been suffered by the plaintiffs because of a fraudulent conversion of plaintiffs' property by the defendants. Upon issues joined the case was tried to the court, without a jury, and resulted in a judgment of dismissal. The plaintiffs have appealed.

Digitized by Google

The respondents have not appeared in this court. The facts as shown by the record may be briefly stated as follows: In April of 1918 the appellants were the owners of about 30 acres of land in Lewis county. The respondents were real estate brokers in the city of Tacoma. The appellants listed their little farm in Lewis county with the respondents for sale or exchange for property in Tacoma. The list price was $3,500 for the farm, including household goods, farm implements, and live stock. A day or two later respondents stated to appellants that they had 35 lots, with a little bungalow thereon, listed for sale by one J. A. Hannah; that these lots were worth $3,500, and that they thought they could arrange for a trade. Appellants were agreeable to the trade. Thereafter respondents saw Mr. Hannah, and suggested a trade for the Lewis county farm owned by the appellants. Mr. Hannah stated to the respondents that he did not want the household goods or personal property; that he wanted cash for his lots in Tacoma; that he would be willing to accept $500 in cash and the balance, $850, by a mortgage upon the Lewis county farm. Thereupon the respondents stated to the appellants that they might retain the household goods, pay $500 in cash, give a mortgage upon their farm for the balance, $850, make a deed in blank, and the respondents could use this deed in order to get their commission. It was understood between Mr. Hannah and the respondents that the purchase price of the 35 lots was to be $1,350 net to Mr. Hannah, and that respondents might receive the balance of what they could obtain for the lots as their commission. The trade as finally consummated was made in that way, namely, the appellants agreed to take the 35 lots and the building thereon for their farm in Lewis county without the household goods. They thereupon executed a mortgage for $600 upon the 35 lots, obtained the money therefor, $500 of which was paid to Mr. Hannah along with the mortgage for $850 upon the Lewis county farm. A deed to the farm was executed by the appellants in blank, and delivered to the respondents.

[1] After the trade was completed, deeds exchanged, and the appellants took possession of the 35 lots in Tacoma, the respondents traded the equity in the 30-acre farm to one Reman in Tacoma for the house and two lots. Mr. Reman took the farm subject to the $850 mortgage, which he assumed and agreed to pay, and respondents took a house and lot exchanged to them by Mr. Reman, subject to a mortgage of $450, which they agreed to pay. The appellants then brought this action, alleging that they did not know of any agreement by which the respondents were to receive the equity in the farm; that the respondents were their agents, and should have informed them fully of the conditions of the trade, and that, by reason of the fact that the respondents acquired an interest in the farm without their knowledge, they were entitled to the proceeds of the farm received by the respondents, which they allege is $2,325.

The appellants in their brief concede that if they knew and consented to the deal between Hannah and the respondents they are not entitled to recover. The trial court, on seeing the witnesses and hearing all of the evidence upon that question, found as follows:

"That the plaintiffs examined the Tacoma property they were taking title to before the transaction was consummated, that the plaintiffs knew that the defendants, as agents for Hannah, had to give net to their client the sum of $1,350, and that they took the deed and bill of sale in blank for the purpose of working out and realizing their commission from their client, Hannah, and that the plaintiffs knew at all times that the deed and bill of sale were made in blank for the purpose above stated. That no material fact was withheld by the defendants from the plaintiffs, and that there was no deceit or fraud practiced, nor was there a secret profit made by the defendants from the plaintiffs, nor were they deceived in any way."

We have examined both the statement of facts and the abstract of the evidence in this case carefully; and, while there is direct conflict in the evidence upon the question, whether the appellants knew all the facts and circumstances connected with the transaction and were fully informed by respondents thereof, there is sufficient evidence to justify a finding to that effect by the court. We are satisfied that there is not sufficient evidence to overturn the findings of the trial court upon that question.

The judgment appealed from must therefore be affirmed. No costs will be allowed to the respondents, because they have made no appearance in this court.

TOLMAN and BRIDGES, JJ., concur.

Digitized by Google

STATE v. CHITTENDEN. (No. 15846.)

(Supreme Court of Washington. June 4, 1920.)

1. Forgery ⟸47—Evidence held sufficient for submission to jury in prosecution for uttering forged check.

In prosecution for cashing a check with knowledge that the drawer was not authorized or entitled to make or draw the check, with intent to defraud, involving issue of whether he cashed check with fraudulent intent, evidence *held* sufficient for submission of the case to the jury.

2. Criminal law ⟸798(½)—Instruction that charge was addressed to jurors individually held properly refused.

Refusal of requested instruction to the effect that all of the court's instructions were intended as though addressed to each juror individually, instead of to jury as a body, was not error.

Department 2.

Appeal from Superior Court, Pierce County.

Robert Chittenden, alias Fred Robinson, was convicted of cashing a check with knowledge that the drawer was not authorized, or entitled to make or draw the same, with intent to defraud, and he appeals. Affirmed.

Guy E. Kelly and Thos. MacMahon, both of Tacoma, for appellant.

Wm. D. Askren and J. W. Selden, both of Tacoma, for respondent.

TOLMAN, J. Appellant was arrested in California, brought back to Pierce county, and there arraigned and tried upon an information charging that he, with intent to defraud the prosecuting witness of $27.50 in money, cashed a check for that amount drawn on the Scandinavian-American Bank of Tacoma, to the order of Fred Robinson, signed by the "Acme Fuel Company by James E. Davidson, Pres.," knowing that the drawer of said check was not authorized or entitled to make or draw the same. From a verdict of guilty and a judgment of conviction thereon, this appeal is taken.

The prosecuting witness identified appellant as the person who came into his store on January 16, 1919, and asked him to cash the check, and testified that he had never seen the appellant before that time, and only for about three minutes on that occasion; that he suggested to appellant that he did not know the Acme Fuel Company, and appellant in answer suggested that he satisfy himself by telephone; that he went to the rear of the store as if for that purpose, and then, noticing that it was after banking hours, that his clerks were all busy, that other customers were waiting to be served, and, being impressed by the appearance of appellant, he abandoned the idea of telephoning and cashed the check without further question; that the check was dishonored at the bank on which it was drawn; that he caused inquiry to be made at the bank; and was informed that there was no such concern as the Acme Fuel Company known to it; that he knew of no such company, and knew of no such person as James E. Davidson president of any fuel company. Two police officers testified that they had searched the Tacoma city directories and the telephone directories covering a period of six years immediately prior thereto, and had inquired of at least three different people engaged in the fuel business in the city of Tacoma, and that they knew of and could learn nothing of any such company as the Acme Fuel Company, or of any such person as James E. Davidson engaged in the fuel business in Tacoma, though on cross-examination they refused to state positively that there was no such person operating under that name. The check with the notations made upon it was introduced in evidence, and an officer of the bank on which the check was drawn explained the notations as showing that the bank had no such depositor, and no account subject to a check so signed, stating, further, that he knew of no such fuel company or man in the fuel business, and his bank had no such customer. After qualifying as a handwriting expert, he further testified that he had compared the handwriting on the face of the check, including the signature, with the indorsement of "Fred Robinson" on the back of the check, and gave it as his best judgment that the same hand that wrote the indorsement also wrote and signed the check. Certain qualifying remarks by this witness are the basis of some of appellant's assignments of error, and we therefore quote the witness on this subject:

"Q. I wish you would take this check, State's Exhibit A, and look at the signature on the front, 'James E. Davidson, President,' and also the payee in the check, 'Fred Robinson,' and compare them with the words 'Fred Robinson' on the back, and state whether or not in your judgment it was the same hand that wrote all of that on this check. A. I think it is, although I would not care to state that definitely.

"Q. That is your best judgment? A. My best judgment is that it is, but I made a mistake once, however.

"Q. Do you see a considerable similarity between the writing? A. Yes; the capital 'R' bears a strong characteristic of being the same. The figures are similar; the strokes in the figure '2' and the figure '5' on the front and back of the check show the same. The letters 'on' in 'Robinson' appears to be the same. One is written in a backhand as if it were written

Digitized by Google

by the same person in an attempt to disguise it evidently, but I would feel fairly sure the same person wrote both of them."

On cross-examination the witness stated that there was some similarity between the handwriting of appellant's then counsel, which was shown him, and the handwriting on the check, but he would be more definite as to the similarity of the handwriting on the face and the back of the check.

[1] Appellant contends that the trial court should have dismissed the case, instructed a verdict for defendant, or at least have granted a new trial, because of the insufficiency of the evidence. It is admitted that there was sufficient evidence from which the jury could find that the appellant was the person who cashed the check, and that the check was bad because the drawer had no account in the bank upon which it was drawn, but it is strenuously argued that the evidence was insufficient to justify the jury in finding that the Acme Fuel Company was nonexistent, or that the person who indorsed and cashed the check in fact wrote it, and that the jury must have found one of these facts in order to draw the inference that appellant in cashing the check intended to defraud. The check was dated Tacoma, Wash., January 16, 1919, on a printed form, stamped with its amount by a protectograph, such as is used by well-established business houses, and the name "Acme Fuel Company" was stamped thereon by a rubber stamp, from which the jury would be fairly justified in drawing the conclusion that it was not such a check as would be drawn by an itinerant dealer, or by a producer or dealer doing business in some other city, some suburb, or outlying timber or mining district. When there is added to the check itself the testimony as to the inquiry made for the Acme Fuel Company and James E. Davidson in the fuel business and the results of that inquiry as testified to, the conclusion, in the absence of explanation, became almost irresistible that the check was fraudulently uttered and negotiated. But were this not so, the testimony of the officer of the bank hereinbefore quoted, taken in connection with the check itself, and the obvious similarity of the handwriting on its face to the indorsement shown by direct testimony to have been made by appellant, would be sufficient evidence to justify the jury in finding the necessary criminal intent. If we admit for present purposes as contended by appellant that in a criminal case a mere scintilla of evidence or even some proof is not sufficient to require the submission of the case to the jury, yet that rule does not apply here, because, as we view it, there was substantial evidence upon all material points. As we said in State v. Lance, 94 Wash. 484, 162 Pac. 574:

"We are satisfied that there is substantial evidence tending to show every material fact necessary to be shown in order to sustain the verdict found. This is as far as the appellate court may legitimately inquire. The weight of the evidence was for the jury, and, when it has found that every material fact necessary to be proven has support in the evidence, and that the trial court has refused to interfere, the verdict is conclusive."

Appellant makes no complaint of instructions given, but assigns error upon the refusal of the court to give three instructions requested by him. The first of these covers the subject that the opinion of the prosecuting attorney as to defendant's guilt should not be considered by the jury. The court did instruct that the jurors should base their conclusions exclusively upon the evidence in the case, and we see nothing so far overzealous in the prosecutor's remarks to the jury, which are preserved in the record, as to make it error to refuse the requested instruction.

[2] The next requested instruction was to the effect that all of the court's instructions were intended as though addressed to each juror individually, instead of to the jury as a body. It seems well settled in this state that it is not error to refuse such an instruction. State v. Robinson, 12 Wash. 491, 41 Pac. 884; State v. Cushing, 17 Wash. 544, 50 Pac. 512.

The last requested instruction upon the refusal of which error is assigned was given in substance by the court, and, as given, appears to have been as clear and as favorable to appellant as was the one he requested.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

Digitized by Google

STATE ex rel. STEPHENS et al. v. SUPERIOR COURT et al. (No. 15872.)

(Supreme Court of Washington. June 2, 1920.)

1. **Eminent domain ⇐264—Error not called to attention of trial court cannot be considered on certiorari.**

Where it was not called to the attention of the trial court that a logging company, proceeding for condemnation of a right of way, had failed to prove filing of certificate of partnership character, such error cannot be considered in the Supreme Court on certiorari.

2. **Eminent domain ⇐198(1)—Contract to carry produce of lands affected need appear only in final record.**

Under Laws 1913, p. 412, § 3, the required contract and agreement of a logging company, seeking to condemn a right of way for its railroad to carry produce raised by landowners affected, need not be tendered or proven in the preliminaries of the condemnation proceeding to determine necessity; it being only necessary that it appear in the final record, and be entered into by condemning parties before they can acquire right of way.

3. **Eminent domain ⇐198(1) — Selection of right of way by logging company makes prima facie case of necessity.**

Selection of a route for its right of way by a logging company seeking to condemn under Laws 1913, p. 412, makes a prima facie case of necessity for taking such land; and in the absence of evidence of bad faith, oppression, or abuse of power, evidence that another route is feasible is not enough to show the one selected shows bad faith, oppression, or abuse.

4. **Eminent domain ⇐56—Company which can float out timber on river not entitled to condemn right of way.**

Logging company, which can get out its timber by use of a floatable river, is not entitled to condemn a right of way by necessity for its railroad, under Laws 1913, p. 412, though, if there is a reasonable necessity to use the land sought to be condemned, the necessity is not overcome by the existence of another possible route; that required being a reasonable necessity.

5. **Eminent domain ⇐198(1)—Necessity for right of way question of fact.**

The question whether there exists a necessity that a logging company should condemn a right of way for its railroad to authorize it to do so under Laws 1913, p. 412, is a question of fact.

6. **Eminent domain ⇐196—Evidence held not to show necessity for right of way for lumber company.**

In proceedings by a logging company under Laws 1913, p. 412, to condemn a right of way for its railroad on the ground of necessity, evidence *held* insufficient to show a reasonable necessity for the right of way; the company having already available a river for floating out logs.

Department 1.

Certiorari by the State of Washington, on the relation of John J. Stephens and others, against the Superior Court and others, to review action of the trial court in condemnation proceedings. Reversed.

Louis A. Merrick, of Everett, for relators.

M. J. McGuinness, of Snohomish, W. P. Bell, of Everett, and Kerr & McCord, of Seattle, for respondents.

MACKINTOSH, J. This is certiorari to review the proceedings leading up to and resulting in the entry of an order of necessity in a condemnation action brought by George Miller and Joseph Swalwell, doing business as the Miller Logging Company, seeking a right of way for a logging railroad across the lands of the petitioners in this action. The objections raised to the regularity of the proceedings and the entry of the order of necessity we will examine in the order in which they were urged:

First. Irregularities in the manner of the service of the condemnation notice and petition. An examination of the return of the person making the service and of the record made by the petitioners on their special appearance, when they were objecting to the service, satisfies us that there is no merit in this point, and that due and proper service of notice and petition was had upon the property owners.

[1] Second. It is urged that the proceedings are defective and that the court was without jurisdiction, for the reason that the logging company failed to prove the filing of its certificate of partnership character. It may be that it is unnecessary in the preliminary proceedings which are here under review to make this proof; but, assuming, however, without deciding, that it was error to omit proving the filing of the partnership certificate, the rule is that errors of this sort which are not called to the attention of the trial court will not be considered here, for the reason that it is to be presumed that an oversight of this kind can be easily remedied, when it occurs by calling the court's attention to it at the trial. This is the rule which has been applied many times in cases of appeal. Rothchild Bros. v. Mahoney, 51 Wash. 633, 99 Pac. 1031; Bowman v. Harrison, 59 Wash. 56, 109 Pac. 192; Pierson v. Northern Pac. R. Co., 61 Wash. 450, 112 Pac. 509; Thompson-Spencer Co. v. Thompson, 61 Wash. 547, 112 Pac. 655; Hale v. City Cab, Carriage & Transfer Co., 66 Wash. 459, 119 Pac. 837; Washington Printing Co. v. Osner, 99 Wash. 537, 169 Pac. 988. We see no good reason why the rule should not be applied here though this is not strictly an appeal, the proceedings in a condemnation suit, anterior to the trial on the ques-

Digitized by Google

tion of damages, being reviewable here, not by appeal, but by certiorari.

[2] Third. The petitioners claim that the condemnation petition failed to give the court jurisdiction by reason of its failure to allege an offer of contract to haul produce raised by the landowners upon the lands through which the right of way was being sought. Chapter 133, § 3, Laws 1913, provides that one seeking a right of way for a logging railroad as a condition precedent must "contract and agree to carry and convey over such roads to either termini thereof any of the timber or other produce of the lands through which such right is acquired." There was no contract or agreement alleged in the petition, nor was any offer thereof made, although the transcript now contains a contract and agreement signed by the logging company, which was filed on the day that the order of necessity was filed. It is not necessary, under section 3, that the contract and agreement there called for should be tendered or proven in the preliminaries of a condemnation proceeding. It may be properly withheld until the trial takes place on the question of damages, or may be presented at any time prior to the close of the trial of the case. It is only necessary that such agreement or contract appear in the final record in the case, and must be entered into by the condemning parties before they can acquire the right of way. There was therefore no error in the failure to allege an offer to enter into such contract, and if there was error it was cured by the voluntary act of the logging company in offering such contract as noted.

Fourth. The most serious objection made to the record is that the evidence fails to sustain the court's finding of necessity. This condemnation takes place under chapter 133, Laws 1913, which provides for the taking of private property for private ways of necessity; section 1 of the act providing:

"The owner * * * of land which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity * * * may condemn and take land of such other sufficient in area for the construction and maintenance of such private way of necessity. * * * The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over and through the land of another for * * * the construction and maintenance thereof of * * * logging roads."

The landowners claim that the testimony shows that a feasible route exists for the logging company to take its timber out other than over their lands, and that such a route is adequate and in every way preferable to the route sought by the condemnation; that two other routes could be used over lands either owned or leased by the logging company connecting with public highways; and that, therefore, no necessity existed for a private way over their lands for the benefit of the logging company.

It was claimed in the testimony that the logging company might, by the use of trucks, take out their logs across their own land to the public paved highway. Testimony was introduced by the landowners showing that such an operation was possible; whereas the logging company's testimony, as found by the trial court, shows that the use of the paved highway—

"is not a way this timber can be taken out or should be taken out; it is not a way the logging company should be required to take it out. * * * The paved highway was built for a public use, and not to be used as a private way for logging companies. The road would not last to take out 70,000,000 feet of lumber, it would be nothing but a lot of junk, broken-up concrete; so that is not a way these logs should be taken out. In fact, it is a way they should not be permitted to be taken out."

With this conclusion we must agree.

[3] It was further alleged that a more feasible route exists for the logging company, by taking the logs by a road to be condemned over private property belonging to others than the parties to this proceeding; but, even were this a proper matter for consideration, the testimony is not at all convincing that such route is more feasible. The selection of the route by the logging company makes a prima facie case of the necessity for taking such specific land, and in the absence of evidence of bad faith, oppression, or abuse of power, evidence that another route is feasible is not enough to show that the selection of the route sought by the condemnors shows such bad faith, oppression, or abuse of power. As we said in State ex rel. Grays Harbor L. Co. v. Superior Court, 82 Wash. 503, 144 Pac. 722:

"In order to justify the court in ordering the change of location of the proposed road it was necessary to show, not only another route which was practicable, and that the road could be constructed thereon at reasonable cost, but it was necessary to go further and show by clear and convincing evidence that in the selection of the route sought to be condemned there was bad faith, oppression, or an abuse of power. The evidence offered does not go to the extent of showing that the route selected by the condemnor causes unnecessary damage to the relators' property, and that the route over section 31 would cause much less damage to that property than would the route selected cause to the relators' property."

There was therefore no merit in the suggestion that the logging company should be forced to condemn the other route suggested by the respondents here.

[4] The main contention against the necessity of the condemnation was based upon the proximity of a floatable river, upon which logs could be taken from a point

Digitized by Google

above the landowners' property. Testimony pro and con on this question was introduced, and if it is satisfactorily established thereby that this route was adapted to the business of the logging company, it would not be entitled to maintain these condemnation proceedings; for the only reason for condemning private property is because there is a reasonable necessity for another method of getting out the logs than that which is already open to the logging company. If there is a reasonable necessity for the use of the land sought to be condemned, that necessity is not overcome, however, by the existence of another possible route. The necessity which is required by the statute is a reasonable necessity, and to determine whether it is reasonably necessary the court is compelled to view the entire situation. State ex rel. Milwaukee Term. R. v. Sup'r Ct., 54 Wash. 365, 103 Pac. 469, 104 Pac. 175; State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444; State ex rel. Postal Tel. Co. v. Superior Court, 64 Wash. 189, 116 Pac. 855; State ex rel. Grays Harbor L. Co. v. Superior Court, supra; State ex rel. Preston Mill Co. v. Superior Ct., 91 Wash. 249, 157 Pac. 689; State ex rel. Patterson v. Superior Ct., 102 Wash. 331, 173 Pac. 186.

The trial court found that it was not feasible to float loose logs down the river, but found that, if they could be rafted above the land of the petitioners here and taken out that way, it was a feasible way, but "if they have to be taken down loose to some point where they can be rafted and towed away I do not think it is feasible," and found that "there is no evidence here that it is feasible to boom these logs above the respondent's land and tow them out in booms during the entire year, and that is the only feasible way, in my opinion, to get these logs out—is in booms and not letting them float down the river, forming jams, and damaging people's property"—concluding therefrom that there was a necessity for building the logging road as petitioned for by the logging company.

As we read the evidence, we cannot concur with this finding. The evidence tended only to show that the water route, if logs were floated, was not as convenient as might be desired, and that it could be made more satisfactory, were it possible to boom the logs. The inconvenience arose from the fact that floating the logs might result in jams and injury to property abutting on the river; but these are considerations which are not material to the question before us, for those are incidents to logging operations on floatable streams, and as long as they are not the result of negligent or unauthorized acts of the logging company they are not the basis of actionable liability. The river being a floatable one, the logging company had the right to use it for the floating of logs, and though this may not afford the ideal means of egress, it destroys the claim that there is a reasonable necessity to interfere with the relators' property. The right of the private landowner to full and free possession and use of his property is not to be curtailed, unless there is a reasonable necessity therefor, and the fact that convenience of the party seeking the condemnation will be served cannot take from another his property to serve that convenience. As between alternative routes over private property, the question of which is more feasible may be material; but when the discussion is between a route over private property and a route already possessed by the condemnor, the question is one of reasonable necessity.

The landowners rely upon the case of State ex rel. Carlson v. Superior Court, 181 Pac. 689, where it was held that no necessity existed where the road sought for a private way of necessity was more convenient and more practicable than a road already for seven years in use; the question in that case being "whether one, having a legal right to pass over the land of his grantor, may reject the way the law gives him, and which his grantor cannot deny him, and compel a way of necessity over the lands of a stranger, where, upon a mere admeasurement of convenience and expense, it is held that the way over the land of the stranger is the more practicable than the way over the land of the grantor." A review of the testimony in that case satisfied the court that no necessity existed; the court recognizing that "in this state we have, perhaps, adopted the rule of reasonable necessity."

[5, 6] The question of necessity is a question of fact, and, under the rule which has been adhered to, the proof in this case was not sufficient to show a reasonable necessity; therefore the order entered by the trial court was incorrect.

For the reasons stated, the action of the lower court is reversed.

HOLCOMB, C. J., and PARKER, MITCHELL, and MAIN, JJ., concur.

Digitized by Google

RAWLINGS et ux. v. HEAL. (No. 15871.)

(Supreme Court of Washington. June 4, 1920.)

1. Husband and wife ⇐255, 262(1)—Community character of property depends on source of purchase price; presumption of community character of property rebuttable.

Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and credit or separate funds, and the issues and profits thereof, there being always a rebuttable presumption that it is community property.

2. Husband and wife ⇐254—Where husband and wife unite in note and mortgage for purchase money, property is community.

Status of property is fixed at the time of purchase, and if husband and wife unite in promissory note secured by mortgage, payable direct to their grantor as a part of the purchase price or by the same means borrow money of some third party for use in payment, in either event the money borrowed becomes community property, and to that extent the property purchased is community property.

3. Husband and wife ⇐255, 262(1)—Property purchased held community except to extent of separate funds used; presumption as to community property not overcome.

Where, upon a wife's request, she was made grantee in a deed because she furnished $700 from her separate estate for the purchase price, the husband's consent or want of objection was an admission of no more than that to the extent of the property received it should be her separate estate, and where she did not then expect a subsequent gift made by her father to complete payment, it is presumed that husband and wife contemplated payment of balance for which they had given mortgage by their joint efforts, so that the property belonged to the community except to the extent of such $700 paid by wife, and her payment from such gift and husband's reference to same as her property do not overcome the presumption.

Department 2.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by C. A. Rawlings and wife against John W. Heal, Jr., to quiet title. From a decree quieting title and awarding plaintiffs' costs, the defendant appeals. Judgment reversed.

S. H. Kelleran and John W. Heal, Jr., both of Seattle, for appellant.

Bigelow & Manier, of Olympia, for respondents.

TOLMAN, J. The facts necessary for a decision of this case are practically all admitted, and may be briefly stated as follows: In 1899 Andrew Wright and Juliet C. Wright, husband and wife, acquired by purchase 320 acres of land in Thurston county, Wash., the purchase price of which was $2,240. This was paid by the turning in of a 10-acre tract of land belonging to the wife as her separate property upon which the parties theretofore had made their home, at a valuation of $700, and by the giving of a mortgage on the land purchased, signed by both the husband and wife, to secure the payment of the balance of $1,540, the mortgage debt being evidenced by notes, also signed by both the husband and wife. At the time of the purchase, the husband and wife being both present, the wife, according to her testimony, said:

"I told him [her husband] that I had given up my home for this, and I thought he should put it in my name, and he did not object."

The deed was therefore made to Juliet C. Wright as grantee. Thereafter the mortgage was paid with funds derived from the sale of a portion of the land, from the sale of logs from the land, and the remainder by money given to the wife for that purpose by her father. In the year 1908, Andrew Wright died, leaving surviving him his wife and four children. His estate was not probated, but on January 23, 1909, Juliet C. Wright made and filed of record an affidavit, in which she set forth that her husband died intestate, leaving no unpaid indebtedness, and naming the four children and herself as his only heirs. On January 5, 1914, appellant recovered judgment in the superior court for Thurston county, against Lona Wright Spillman, one of the children of Andrew and Juliet C. Wright, which judgment has never been satisfied. In January, 1919, Juliet C. Wright and the four children, including Lona Wright Spillman, joined in a deed conveying 70 acres of the tract of land, acquired as heretofore stated, to the respondents. The purchase money therefor was all paid to Juliet C. Wright except $800, which was evidenced and secured by a mortgage payable to her, which contained a provision that if respondents were required to pay anything on account of appellant's judgment against Mrs. Spillman, in order to protect their title, such payment should be credited upon the mortgage debt. Shortly after thus acquiring title the respondents began this action against appellant to quiet their title as against his judgment.

There was also evidence offered that Andrew Wright in his lifetime joined with his wife in deeding portions of the land which were conveyed; that he executed a right of way agreement for a logging road across the land, and that he stated to the wife and to the children that the land belonged to the wife. The family made its home upon the land from the time of the purchase until the death of Mr. Wright, and the farm was operated mainly by the sons, who looked after the business affairs and testified to the pay-

Digitized by Google

ment of the purchase-money mortgage and the taxes on behalf of their mother. From a decree made and entered on December 1, 1919, quieting title in respondents free from any claim or lien on the part of appellant, and awarding them judgment for costs, this appeal was taken.

[1] The lien of appellant's judgment, which continued for six years after its rendition (Seattle Brewing & Malting Co. v. Donofrio, 59 Wash. 98, 109 Pac. 335; Catton v. Reehling, 78 Wash. 187, 138 Pac. 669) has now expired, and our first thought was that the question now before us is a moot one only, but as this point has not been raised or argued, and as the appellant, after the entry of the decree, which did not restrain him from so doing, might have proceeded by the issuance and levy of an execution to acquire a specific lien and by sheriff's sale to acquire title to some part of the land, we have thought best to pass this question and inquire only whether or not appellant's judgment was a general lien on December 1, 1919, when the decree was entered.

"Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof, the presumption always being that it is community property, but this presumption may be rebutted by proof." United States Fidelity & Guaranty Co. v. Lee, 58 Wash. 16, 107 Pac. 870.

[2] It is now equally well settled in this state that the status of the property is fixed at the time of the purchase, and that if the husband and wife unite in a promissory note secured by a mortgage payable direct to their grantor as a part of the purchase price, or by the same means borrow the money to be used in payment from a third party, in either such event the money borrowed becomes community property, and to that extent the purchased property is community property. Katterhagen v. Meister, 75 Wash. 112, 134 Pac. 673, and cases there cited. An apparent exception to the latter part of this rule, as is pointed out in Finn v. Finn, 106 Wash. 137, 179 Pac. 103, arises when the spouse who furnishes the separate consideration for the purchase raises or secures the remainder of the purchase price by a mortgage upon separate property theretofore owned by such spouse, thus clearly making the debt a separate one, even though the other spouse may be required to join in the note and mortgage to satisfy the lender. See, also, Graves v. Columbia Underwriters, 93 Wash. 196, 160 Pac. 436.

[3] Applying the law to the facts in this case, it is apparent that the request of the wife that she be named as grantee in the deed was based upon the fact that she was furnishing $700 of the purchase price from her separate estate, and the husband's consent, or want of objection thereto, was an admission of no more than that to that extent the property received should likewise be her separate estate. There is no evidence that at the time of the purchase the wife had any other separate estate or means with which to pay the mortgage debt, or that she then had any expectation of a subsequent gift from her father for that purpose, and the natural presumption is that the husband and wife then contemplated that they would, by their joint efforts, and the use of the property purchased, pay the mortgage debt as it matured. Clearly neither these facts nor the fact that the wife was the business man of the community, and thereafter paid the mortgage debt in whole or in part with her separate funds, nor the evidence that the husband in his lifetime referred to the property as belonging to his wife, are sufficient to overcome the presumption in favor of the community character of the property acquired during the existence of the marriage, no matter to which spouse the deed ran.

It is contended that Juliet C. Wright has been in the open, notorious, and adverse possession of the property under consideration, and has paid the taxes for a sufficient time to claim the protection of the statute of limitations. Unfortunately the only allegation of the complaint under which the statute of limitations can be considered is:

"That the plaintiffs and their grantors have been in the open, notorious, and adverse possession of said property for a period of 40 years and have paid all taxes thereon for a like period of time."

Since Lona Wright Spillman was one of respondent's grantors that allegation fails to show any possession by any one adverse to her, nor do we find any evidence in the record that Mrs. Wright's possession has been openly and notoriously adverse to her children or either of them.

We conclude, therefore, that at the time of the acquisition the title to an undivided 700/2240 of the property vested in Juliet C. Wright as her separate estate, title to the remainder then vesting in the community, and at the time of the sale to respondents, Lona Wright Spillman was the owner of an undivided one-eighth interest in the community estate upon which appellant's judgment was a general lien at the time the decree was entered.

The judgment appealed from is therefore reversed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

Digitized by Google

BEYERLE v. BARTSCH. (No. 15613.)

(Supreme Court of Washington. June 10, 1920.)

1. War ⟸11—Void marriage to alien enemy does not toll limitation statute.

Where a claimant against an estate had contracted a marriage with an alien enemy, which was void because he had another wife living, she did not thereby become an alien enemy, so as to be entitled to the benefit of Trading with the Enemy Act Oct. 6, 1917 (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j), and of Rem. Code 1915, § 171, excluding the time of war from the period of limitation for the commencement of action by an alien enemy.

2. Husband and wife ⟸248 — Property acquired during bigamous marriage is separate property.

Property acquired by one who had contracted marriage with a man who then had a wife living is her separate property and not community property.

3. Marriage ⟸11 — Bigamous marriages are void, and not merely voidable.

Under Rem. Code 1915, § 7151, prohibiting marriages when either party has a spouse living, a marriage to a man while he has a wife living is absolutely void, in view of Rem. & Bal. Code, § 7162, which defines voidable marriages, notwithstanding Rem. Code 1915, § 983, authorizing decree of nullity of marriage.

Department 1.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Karolina Beyerle against George Bartsch, as administrator with the will annexed of the estate of Frederick Stolley, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Russell & Blinn, of Seattle, for appellant.

Smith, Chester & Brown, of Seattle, for respondent.

MACKINTOSH, J. The appellant sues the respondent in his official capacity as administrator with the will annexed of the estate of Frederick Stolley, deceased, for the value of services she rendered Stolley during his lifetime. On May 11, 1917, Stolley's will was admitted to probate and on May 22 respondent was appointed administrator with the will annexed, and qualified on November 15, 1917; on the same day an order was made for publishing notices to creditors, and on April 16, 1918, the appellant presented her claim, which was rejected, of which she was notified on July 22, 1918, and thereafter, on August 26, 1918, began this action.

Several defenses are presented to the action, but only one will be noticed here; that is, that the action was not begun within 30 days after the appellant received notification of the rejection of her claim. The appellant, in answer to this defense to the action, claims that she was married to Charles D. Schabel, who was a citizen of Germany, and who was taken into custody as an alien enemy March, 1918, and was still interned at the time of the trial of the action, May 26, 1919; that during Schabel's internment she learned that at the time of her marriage to him he had a wife living from whom he had not been divorced. She thereupon began an action to have her marriage annulled, which proceeded to judgment annulling the marriage. This judgment was entered two days prior to the trial of the present case. From these facts she argues that she, having been the wife of an alien enemy, was entitled to the benefit of the act of Congress, known as the "Trading with the Enemy Act," passed October 6, 1917 (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j), and of section 171, Rem. Code, which provides that, when a person shall be an alien subject or citizen of a country at war with the United States, the time of the duration of the war shall not be a part of the period limited for the commencement of an action, and that the existence of the state of war between the United States and Germany had tolled the statute, and that she was not therefore bound by the statute, which calls for the filing of an action upon rejected claims within 30 days after rejection, and that, although her marriage to Schabel had been annulled prior to the trial of the present case, where an obstacle to the maintenance of an action exists at the time the action is begun, and such obstacle is removed before the time of trial, it does not prevent the hearing and determination of the action.

[1] As we view the facts of this case, the position taken by the appellant does not answer the objection raised to her suit. Her marriage with Schabel having been bigamous, she was, in the eyes of the law, never married to him, the marriage being void ab initio, and therefore, not having been the wife of an alien enemy, she did not herself become an alien enemy, and whatever statutes, federal and state, might operate in suspending litigation between citizens of this country and alien enemies, could not operate either for or against her, and the statute which provides for the beginning of actions upon rejected claims was binding upon her.

[2] We have held that there is no community property without lawful marriage; the property acquired by a woman who has contracted marriage with a man, having a wife living, during the time she was living with her purported husband, is her separate property. Stans v. Baitey, 9 Wash. 115, 37 Pac. 316; In re Sloan's Estate, 50 Wash. 86, 96 Pac. 684; Engstrom v. Peterson, 182 Pac.

Digitized by Google

623. Therefore appellant's claim for services rendered to Stolley was her separate property, as she alleged in her complaint.

[3] Section 7151, Rem. Code, provides that marriages are prohibited "when either party thereto has a wife or husband living at the time of said marriage." Such marriages are therefore void, and not merely voidable. The general law is as stated in 18 R. C. L. p. 445:

"At common law, and in the absence of statutory provision having a modifying effect, a civil disability, such as having a lawful living husband or wife by a former marriage, renders a subsequent marriage absolutely void ab initio, in consequence of which it is good for no legal purpose, and the incidents which attend and follow on a valid marriage are not, in the absence of statute, acquired by the parties. * * * In many jurisdictions a bigamous marriage is expressly declared by legislative enactment to be illegal and void from the beginning, and the effect of such a statute is not altered by the fact that it also provides for actions to annul such marriages."

The fact that actions of annulment are taken to declare bigamous marriages void does not have the effect of making such marriages voidable, for, as stated in 18 R. C. L. p. 441:

"A marriage void in its inception does not require the sentence, decree, or judgment of any court to restore the parties to their original rights or to make the marriage void, but though no sentence of avoidance is absolutely necessary, yet as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction. Another reason why a judicial determination of such a marriage ought to be sanctioned is that an opportunity should be given, when the evidence is obtainable and the parties living, to have the proof of such marriage being void presented in the form of a judicial record, so that it cannot be disputed or denied. This right is granted in some jurisdictions by express statutory provision."

The statutes of this state do not expressly provide for the annulment of void marriages, but section 7162, Rem. & Bal. Code, defines what marriages are voidable, and section 983, Rem. Code, provides:

"Where there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage."

Concluding that she was never married to Schabel, her claim was her separate property, and she was bound to pursue her action upon it, after its rejection, within the time fixed by law; she not having been the wife of an alien enemy, and not entitled to any extensions accorded to alien enemies by federal or state statutes during the period of war.

The lower court was right in determining that appellant's action was barred, and the judgment is affirmed.

HOLCOMB, C. J., and PARKER, MITCHELL, and MAIN, JJ., concur.

BOOST et ux. v. CAPEN et al. (No. 15887.)

(Supreme Court of Washington. June 4, 1920.)

1. Mortgages ⟸38(2)—Clear proof that absolute deed a mortgage required.

Before a deed absolute in form will be adjudged a mortgage, clear, satisfactory, and cogent proof must be produced to establish the fact that it was given as security for an indebtedness, and that both parties so intended.

2. Mortgages ⟸38(1)—Evidence held to show deed was not a mortgage.

In action for partition of a farm, evidence *held* to show that the deed given plaintiffs by defendants, absolute in form, was not in fact a mortgage, but was given pursuant to a straight sale of a half interest in the farm.

Department 2.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by C. W. Boost and wife against Frank Capen and wife and another. From judgment for defendants, plaintiffs appeal. Reversed, and cause remanded, with instructions to enter judgment for plaintiffs.

Wood, Montague & Matthiessen, of Portland, Or., and Troy & Sturdevant, of Olympia, for appellants.

Frank C. Owings, of Olympia, for respondents.

MOUNT, J. This action was brought by the plaintiffs, who alleged they were owners of an undivided one-half interest in certain described 800 acres of land in Thurston county. The prayer was for partition of the premises between the plaintiffs and the defendants. For answer to the complaint the defendants denied that the plaintiffs were the owners in fee of an undivided one-half interest in the land, and by affirmative defense alleged that the deed which had been executed by the defendants to the plaintiffs was intended to be and was in fact a mortgage. For reply the plaintiffs denied the affirmative allegations of the answer. Upon these issues, the case was tried to the court, without a jury, and resulted in a judgment to the effect that the deed given by the defendants to the plaintiffs was in fact a mortgage and that there was $7,467.10 due from the defendants to the plaintiffs. The plaintiffs have appealed from that judgment.

At the trial of the case, the appellant Mr. Boost offered in evidence a deed which was

Digitized by Google

executed on November 24, 1915, by the defendants to the plaintiffs. He then testified that the property was incapable of division without a sale. The defense then endeavored to show that the deed, which was a general warranty deed in form, was in fact a mortgage. This was the sole disputed question in the case and is the only one presented here for our determination.

[1] The rule in this class of cases is, as stated by this court many times:

"Before a deed absolute in form will be adjudged a mortgage, clear, satisfactory, and cogent proof must be produced to establish the fact that it was given as security for an indebtedness, and that both parties so intended." Washington Safe Deposit & Trust Co. v. Lietzow, 59 Wash. 281, 109 Pac. 1021.

In the case of Nutter v. Cowley Investment Co., 85 Wash. 207, 147 Pac. 896, we said:

"We have carefully examined the evidence and conclude that the trial judge erred in holding the deed to be a mortgage. We are satisfied that it was an absolute conveyance, and was so intended by the parties. All written instruments before us indicate this fact most clearly. No note was executed to respondents by appellants. We have repeatedly announced the rule that when property has been conveyed by a deed absolute in form, without any contract of defeasance, or other written instrument showing that it was intended as a mortgage, clear, convincing and cogent evidence will be required to establish the contention that it was intended as a mortgage."

The only evidence in this record even tending to show that the deed executed by the respondents to the appellant in November of 1915 was intended to be a mortgage was the evidence of Mr. Capen, one of the grantors. His testimony in effect was that the appellant Mr. Boost was his wife's uncle, that Mr. Boost agreed to advance money with which to run the place, and that the deed was intended as a mortgage to secure these advances. It was not claimed that any note or other evidence of indebtedness was ever given, or that any rate of interest was ever agreed upon or discussed.

The testimony on behalf of the appellant Mr. Boost was to the effect that he was informed by the respondents Mr. and Mrs. Capen that they were largely in debt; that they were not able to finance the farm; that they had lost thereon $16,000 in a few years prior to this transaction; that Mr. Capen wanted to sell the farm; that Mr. Boost said to him that he thought it would be better for Mr. Capen to let some one purchase a half interest and furnish money to conduct the farm; Mr. Capen said to this, "You are the only man I would enter into that kind of a contract with"; that Mr. Boost agreed to purchase an undivided one-half interest in the farm, for $6,000, and to assume one-half of a mortgage of $6,000 then upon the farm; that it was agreed between them that the farm at that time was worth $12,000 or $13,000, and that the purchase money should be put into the farm.

Mr. Boost thereupon paid $500 upon the purchase price to Mr. Capen, who executed a warranty deed, regular in form, for an undivided one-half interest to Mr. Boost, and had the same recorded and sent it to Mr. Boost at Portland, Or. Thereafter Mr. Boost paid personal debts of Mr. Capen amounting to more than $3,000. And afterwards, in the next 2½ years, advanced for the use of the farm a total of something over $8,000.

We have carefully examined the abstract of the evidence in this case, which is full and complete, and to which no exceptions have been taken by the respondent, and we are satisfied therefrom that the evidence in this case is neither clear, cogent, nor convincing that this deed, absolute upon its face, was intended as a mortgage, and but for the fact that the trial court, seeing and hearing the witnesses, concluded otherwise, we think there could be no serious question that the great weight of the evidence is with the appellant to the effect that the deed was exactly what it purports to be, a straight deed for an undivided one-half interest in the land.

The testimony of the parties directly interested is in conflict. There is no circumstance favoring the respondent, who seeks to have the deed declared to be a mortgage, except that his evidence was that the property at the time of the execution of the deed was of the value of $35,000 or $40,000. That fact is disputed by many facts in the case. It had been rented for a number of years for $300 per year. In 1915, at the time the deed was made, the farm had not been paying the expenses of the respondents and was very much run down. In other words, respondents were unable to make a living on the farm and had gone in debt several thousand dollars. There is evidence also, from disinterested parties, that the farm at that time did not exceed in value $13,000. It is true that in 1917 a sale was made of 160 acres for $6,500, and in April, 1918, 200 acres were sold for $10,000, and at about the same time timber was sold to the amount of some $2,400; but this was some two years after Mr. Capen had sold an undivided interest to Mr. Boost.

On the other hand, the circumstances tend strongly to corroborate Mr. Boost to the effect that the deed was an absolute deed of an undivided one-half interest in the land. As we have said before, no note or other evidence of debt was taken. Immediately after the transfer Mr. Boost went upon the land, and for more than two years spent one-half of each month thereon, working and advising as to the management. After Mr. Boost's deed was recorded, the bank account was changed from Mr. Capen's name to "Capen & Boost," and notes were executed by Capen

Digitized by Google

been unable to collect from it any part thereof. Judgment was demanded for one-third of the amount paid to the Scandinavian-American Bank by the plaintiff's predecessor in interest at the time the note was transferred to it. Issue was taken upon the complaint, and a trial entered upon by the court sitting with a jury. At the conclusion of the plaintiff's case the defendant challenged the sufficiency of the evidence to sustain a judgment against him, which challenge the trial court sustained, and afterwards entered a judgment of dismissal, with costs. From this judgment the present appeal is prosecuted.

Since the record is silent as to the reasons which actuated the trial judge in sustaining the challenge to the sufficiency of the evidence, the questions suggested can best be noticed by noticing the reasons urged by the respondent's learned counsel as supporting his ruling. The first of these is that the record fails to show a payment by the appellant's assignor of the obligation due from the Kugarok Mining & Ditch Company to the Scandinavian-American Bank. The record on this matter is, it will be remembered, that the assignor of the appellant, in consideration of a transfer of certain property to it by Metson, assumed the liability of Metson as guarantor of the note, and that afterwards, on demand of the bank, paid the amount of the note to the bank and took an assignment of the note. The respondent calls attention to the general rule that the right of contribution between sureties arises only after the payment of the common obligation, or after something is done in relation thereto by the surety claiming contribution equivalent to a payment, and argues that since the obligation still exists against the Kugarok Mining Company there was here no payment.

[1] But this argument mistakes the rule. It is not necessary that the obligation of the principal debtor be canceled or satisfied as against the principal debtor to give rise to the right of contribution. The obligation arises when payment is made to the creditor to whom the guaranty runs. Here there was such a payment. The bank, the guaranteed creditor, no longer has any claim either against the guarantors or the Kugarok Mining & Ditch Company, the principal debtor. As to these parties the debt is paid and the guaranty satisfied. The fact that the guarantor who paid the debt took an assignment of it from the creditor does not alter the situation. This in no manner affected the liability of the debtor. Had there been no note, or had there been no assignment of the note that actually existed, its obligation would have been the same as it now is. In such a case it would still have owed the debt, and would have owed it, as it now does, to the guarantor who paid the bank instead of owing it to the bank itself. In other words, the situation is no different than is the situation which always arises where a guarantor pays the obligation of his principal. The fact, therefore, that the guarantor took an assignment of the note, instead of having it canceled, in no way affects the liability of the other guarantors to contribute.

The second reason urged is that the appellant, the present plaintiff, has no capacity, as assignee of the Pioneer Mining Company, to sue upon the obligation. This contention is founded upon section 191 of the Code (Rem.), which, omitting the proviso, reads:

"Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned."

Arguing in support of the contention, counsel say that this statute "clearly and specifically requires that the obligor or debtor to be sued must be named in the assignment" before an action on an assigned obligation can be maintained by the assignee thereof. But we cannot think this the true meaning of the statute. In the first place, the purpose of the section of the statute is not to confer a right of action in the assignee of a chose in action where the assignment is absolute; this is done elsewhere in the statute, but it was intended to confer such right of action in those instances where the assignor retains "an interest in the thing assigned," instances inapplicable to the situation before us. In the second place, we cannot think the interpretation which the contention puts upon the statute the correct interpretation, even conceding the statute applicable. The phrase "obligor or obligors, debtor or debtors, therein named," seems more naturally to refer to the person named in the obligation assigned, and thus not intended to require that the writing by which the obligation is assigned must name them.

[2] But the answer may be rested on broader grounds. General assignments of choses in action, even when no specific mention of the particular chose in action is made, have been recognized as valid, since early territorial days, and our books are full of cases where the assignee of an obligation so assigned has been permitted to enforce it against the obligor. Legal rules and principles, long acquiesced in and acted upon, cannot be suddenly changed without working hardship and loss upon the business world, and such a course is not to be thought of, unless some overwhelming necessity exists therefor. No such necessity exists in this instance. The statute is at best of doubtful applicability and of doubtful interpretation, and we think should be given an interpreta-

Digitized by Google

tion in accordance with established usage.

[3] In this connection it is further insisted that the assignment is of itself insufficient to pass choses in action. The concluding clause of the assignment we have quoted. It is sweeping in its terms, and clearly shows an intent on the part of the assignor to sell and transfer to the assignee named in the instrument all of its personal property of every kind whatsoever. While the cases may not be uniform on the question, it is generally held, and the better reason is, that choses in action will pass under a general description of this sort. 5 C. J. 946.

The third reason is that the action is barred by the statute of limitations. From an examination of the dates heretofore given it will be noticed that the present action was begun more than three years, but less than six years, after the time the appellant's assignor paid to the bank the obligation of the Kugarok Mining & Ditch Company for which it had become sponsor, and the contention is that the three-year, and not the six-year, statute of limitations is controlling. But we think the question is controlled by our decisions in the cases of Caldwell v. Hurley, 41 Wash. 296, 83 Pac. 318 and Lindblom v. Johnston, 92 Wash. 171, 158 Pac. 972. These were actions for contribution by one surety, who had been compelled to answer for the default of the common principal against another, who was equally liable to answer for the default. In the one case the parties were sureties on the note of a third person, and in the other they were sureties upon the bond of a postmaster. In each of them the action was instituted more than three years, but less than six years, after the cause of action accrued, and in each of them the defense of the statute of limitations was imposed. In each case it was held that the statute was inapplicable, since the action was based upon an implied agreement arising out of a written instrument, and could be maintained at any time within six years after the cause of action accrued.

[4] Counsel seek to distinguish these cases from the case at bar, but, without following the arguments, we think the governing principle is the same. If an action for contribution by one indorser of a note against another indorser of the same note, or an action for contribution by one surety on the bond of a postmaster against another surety thereon, is an action upon an implied contract arising out of a written instrument, within the meaning of our statute, clearly so is an action for contribution by one guarantor of the indebtedness of a third person against his coguarantor thereon, even though the guaranty in form be separate from the writing evidencing the debt. It is unnecessary to review the cases from other jurisdictions apparently maintaining a contrary view. In the cases cited we pointed out the distinctions in the statutes which give rise to the differences in the holdings.

[5] The next reason urged is that "the guaranty running to the Scandinavian-American Bank is not transferable." To this it is a sufficient answer to say: There was no transfer by any one of the written contract of guaranty. The facts are that in response thereto one of the guarantors paid the obligation and sought to assign the right of contribution arising thereby to another, and the real question is whether this right of contribution is assignable. We have no doubt that it is, and we so held in the case of Lindblom v. Johnston, supra. The principal case cited by the respondent in support of this branch of its contention, namely, Crane v. Specht, 39 Neb. 123, 57 N. W. 1015, 42 Am. St. Rep. 562, does not, as we view it, touch the question here involved. There the defendant, in consideration that the Crane Bros. Manufacturing Company, a corporation, would sell certain materials to one Litchenberger, guaranteed payment of the purchase price of the materials. After selling certain materials to the person named, the corporation changed its name to Crane Company, and thereafter sold to the same person additional materials. The materials were not paid for, and the corporation under its changed name brought an action on the guaranty. It was held that because of this change of name there could be no recovery, either for the materials sold prior or subsequent to the change of name; this on the principle that it was an action by one party on a guaranty given to another. The principle the court thought controlling is in itself undoubtedly sound, although, were the question necessary to be determined, we might seriously doubt its applicability to the facts presented. But, be this as it may, clearly the case does not determine that a claim for contribution is not assignable.

But perhaps the respondent means that the obligation of Metson on the guaranty was so far personal that he could not arrange with another to take up the obligation and confer on that other the right to exact from the other sureties their proportional share of the obligation when paid. If this be the point, we cannot think it tenable. The doctrine of contribution is a doctrine of equity. It is not based on contract, but is based on the principle that equality is equity, and manifestly the duty of a surety to respond when a common obligation is paid by a third person at the procurement of his cosurety is just as potent as it would be, were the obligation paid by the cosurety personally. Here the cosurety surrendered his property in consideration that the person to whom it was surrendered would take up this obligation, and unless this was done under an understanding or agreement that all the

Digitized by Google

sureties were to be released, the liability of the others to contribute continues. The record before us shows no such understanding or agreement.

The fifth reason assigned is that, when the appellant's assignor paid this obligation, it was but paying its own debt, and because thereof had no cause of action against any one, and hence no cause of action which it could assign to the appellant. In support of this position, counsel say:

"It is claimed in this case that the Pioneer Mining Company, assignor of the plaintiff, by virtue of a contract between it and W. H. Metson, one of the joint guarantors, became substituted for Metson as to all rights and liabilities in connection with the affairs of the Kugarok Mining & Ditch Company. Of course, this is absolutely silly. It takes at least three parties to create a contract of novation. In fact, it takes the consent of all interested in the subject-matter. No such novation as here claimed could possibly be created without the express consent and concurrence of the defendant, Davidson, and J. E. Chilberg, the other joint guarantors, and the Kugarok Mining & Ditch Company. This in reference to Kugarok affairs. A glance at the matters involved in this contract will show that it would have needed the concurrence of some 10 or 15 other persons. The agreement 'as is,' that they refer to, may be good as between the Pioneer Mining Company and Metson; but they cannot foist off onto the defendant any person he has not agreed to accept, nor can they vary his previous rights and liabilities, nor create new ones. This contract does not affect Davidson at all. The only bearing it has on this case is to show why the Pioneer Mining Company paid the amount of this note to the bank; and it shows very clearly. It paid it because for a valuable consideration (and that a very, very valuable one) it promised Metson so to do. It was paying its own debt, and not some one else's."

[6] This argument does not seem to us to be conclusive. The doctrine of subrogation, as between the appellant and the respondent, is not involved. The guarantor, Metson, contracted with the Pioneer Mining Company to satisfy an obligation on which he was jointly liable with the respondent and another. To make this contract valid required no consent on the part of the other obligors, or on the part of their common creditor. As between Metson and the Pioneer Mining Company, the mining company was perhaps but paying its own debt, when it paid Metson's proportionate share of the obligation; but, when it paid the shares of the other obligors, it did not pay either its own debt or Metson's debt, save as one person always pays his debt when he pays an entire obligation on which another is or others are jointly liable with him. While the payment satisfied the debt as between the guarantors and the principal creditor, it gave rise to a new right, namely, the equitable right to exact contribution from the other obligors. It is on this latter right that the action is founded, and, so far from being satisfied by the payment of the principal obligation, it was created by such payment.

The sixth reason is that the question involved is res judicata. In his answer to the complaint the respondent, as an affirmative defense, set out the proceedings in an action in which the respondent, J. W. Davidson, was plaintiff, and J. E. Chilberg was defendant, and alleged that the subject-matter of the present action was fully adjudicated therein, further alleging:

"That the plaintiff [the present appellant] has no title or interest in or to said note and guaranty described in the complaint, but is a mere tool and dummy of the said Chilberg, and bringing this suit fraudulently for the purpose of tying up and preventing the defendant from collecting his said judgment against Chilberg, by issuing and serving a writ of garnishment in this suit, and that said Chilberg is the real and beneficial plaintiff in this action; that the subject-matter of this suit is a part of the subject-matter of said suit of Davidson v. Chilberg, and the real parties in interest in both suits are the same."

A demurrer was interposed and sustained to this branch of the answer, and the appellant asks us—

"to disregard the erroneous decision of the lower court sustaining the demurrer, take as established the facts stated in said opinion (the opinion of the court rendered in the case of Davidson v. Chilberg), and to hold that this is another good reason to sustain the decision of the court below in this case."

[7] But this is asking us to exceed our powers. The question whether the court erroneously sustained the demurrer is not before us. This is an appeal by a plaintiff from a judgment of dismissal entered against it, because it was deemed that its evidence was insufficient to make a prima facie case in its favor. In such a case errors of the court committed against the other side are not reviewable. Moreover, we have quoted enough from the answer to show that it contains traversable allegations extrinsic of the judgment record, the truth of which could not be assumed, even were we to hold that a defense to the plaintiff's cause of action was stated therein.

The final reason assigned requires no special consideration. It is sufficient to say that it suggests inquiries which the court cannot enter upon on this appeal.

The judgment appealed from is reversed, and the cause remanded for further proceedings.

MOUNT, TOLMAN, and BRIDGES, JJ., concur.

HOLCOMB, C. J. I dissent particularly upon the fifth contention of respondent, as stated in the majority opinion.

Digitized by Google

STATE v. McBRIDE.

(Supreme Court of Idaho. May 29, 1920.)

1. Criminal law ⟸1186(4)—Errors not prejudicing defendant's substantial right will not justify reversal of a conviction.

A departure from the form or mode prescribed in the Code respecting pleadings and proceedings in criminal cases, or mistakes and errors therein which do not tend to prejudice the substantial rights of the defendant, will not justify the reversal of a judgment of conviction.

2. Intoxicating liquors ⟸132—Statutes ⟸225¼—Statutes construed together; pari materia rule is especially applicable to statutes passed at same session.

The rule that statutes in pari materia should be construed together applies with peculiar force to those passed at the same session of the Legislature.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

J. N. McBride was convicted of having intoxicating liquors in his possession unlawfully, and he appeals. Affirmed.

Eustace & Groome and O. M. Van Duyn, all of Caldwell, for appellant.

T. A. Walters, former Atty. Gen., J. P. Pope, Asst. Atty. Gen., Roy L. Black, Atty. Gen., and James L. Boone, Asst. Atty. Gen., for the State.

MORGAN, C. J. Appellant was accused of unlawfully possessing and transporting intoxicating liquor. He demurred to the information on the ground, among others, that more than one offense was charged therein. The demurrer was overruled, and at the trial he objected to the introduction of any evidence on the same ground. After plea and before the introduction of evidence the following occurred:

By Mr. Eustace: "At this time the defense will ask that the court require the state to elect upon which charge of the information this prosecution will be had. The information charges possession and transportation and a demurrer to this information has been filed and passed upon by this court, and as the information now stands it charges possession and transportation."

By Mr. Stone: "The prosecution in this case elects to stand upon the charge of possession."

Appellant was not called on to again plead, and now insists the election by the prosecuting attorney was such a material amendment as to amount to lodging a new information and that therefore the case was tried without an issue of fact having been framed.

The plea of not guilty placed in issue every material allegation of the information, including the charge on which the state elected to stand and for which appellant was tried.

[1] If we adopt the theory that the information as filed was defective, in that it charged more than one offense, the defect was cured by the state's election. C. S. §§ 9084 and 9191, admonish us to disregard such defects in procedure as are those above mentioned.

Section 9084: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

Section 9191: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right."

[2] An act of the thirteenth session of the Legislature known as Senate Bill 50, approved February 18, 1915 (Sess. Laws 1915, c. 11, p. 41), defines the term "prohibition district," and makes it unlawful for any person to have in his possession or to transport any intoxicating liquor within a prohibition district, unless the same is procured, possessed, and transported under a permit therein provided for. The same Legislature enacted House Bill 142, approved March 1, 1915 (Sess. Laws 1915, c. 28, p. 83), which is as follows:

"Section 1. The manufacture, disposal and transportation of intoxicating liquors for beverage purposes are prohibited in the state of Idaho.

"Sec. 2. The state of Idaho is hereby constituted a prohibition district, and all statutory provisions now or which may hereafter be in force in prohibition districts, so far as the same are not inconsistent herewith, are made applicable and operative for the enforcement hereof.

"Sec. 3. This act shall be in force and take effect on and after January first, 1916."

Appellant insists that because section 1 of the act above quoted prohibits the manufacture, disposal, and transportation of intoxicating liquor for beverage purpose, the portion of chapter 11, supra, prohibiting possession of it is repealed by implication, and that on November 25, 1916, the date of the commission of the act of which he was convicted, it was not a crime to possess intoxicating liquor.

We said in Perrault v. Robinson, 29 Idaho, 267, at page 275, 158 Pac. 1074, at page 1076, quoting from Peavy v. McCombs, 26 Idaho, 143, 140 Pac. 965:

"The rule that statutes in pari materia should be construed together applies with peculiar force to statutes passed at the same session of the Legislature." 25 R. C. L. §§ 167, 168, 169, and 170.

Digitized by Google

It cannot be said that the two acts here under consideration are in conflict. When read and construed together, they prohibit the manufacture, disposal, transportation, and possession of intoxicating liquor in the state of Idaho. In re Crane, 27 Idaho, 671, at page 694, 151 Pac. 1006.

Other points are presented in appellant's brief, but we do not find them to be meritorious.

The judgment appealed from is affirmed.

RICE and BUDGE, JJ., concur.

FEHR et al. v. HAWORTH et al. (No. 3020.)

(Supreme Court of Idaho. May 26, 1920.)

1. Trial ⟸391—Findings by court should set out ultimate facts.

The findings of the trial court should specifically set forth the ultimate facts found in response to the issues presented by the pleadings.

2. Appeal and error ⟸931(1)—Findings of fact liberally construed.

Findings of fact are to be liberally construed in support of the judgment.

3. Fraud ⟸58(1)—Allegation of fraud must be sustained by reasonably convincing evidence.

Fraud is not presumed, and an allegation thereof must be sustained by evidence reasonably clear and convincing.

Appeal from District Court, Ada County; Carl. A. Davis, Judge.

Action by Agnes Fehr and Ida Harbent, copartners doing business as Needlecraft Shop, against C. L. Haworth, administrator of Emma J. Haworth and C. L. Haworth, and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Barber & Davison, of Boise, for appellants.

P. E. Cavaney, of Boise, for C. L. Haworth, personally and as administrator.

RICE, J. This is an action to rescind a certain contract of sale of the goods and business comprising what was known as the Needlecraft Shop. Appellants allege that they were induced to enter into the contract by reason of certain false and fraudulent representations on the part of respondent C. L. Haworth and his intestate.

[1, 2] Appellants specify as error the failure of the court to find upon all the material issues presented by the pleadings. The findings of the court are defective, in that they consist largely of inferences and conclusions of fact rather than specific findings of fact. Findings of fact are to be liberally construed in support of the judgment, especially in the absence of request made to the trial court to make its findings more definite and certain. Donaldson v. Donaldson, 31 Idaho, 180, 170 Pac. 94; Fouch v. Bates, 18 Idaho, 374, 110 Pac. 265. After carefully examining the findings in this case, we conclude that they meet the material issues presented by the pleadings and are sufficient to sustain the judgment.

The principal contention of appellants is thus stated in their brief:

"That the evidence is insufficient to sustain the findings and judgment of the court; and affirmatively shows, on the other hand, that the findings and judgment should be in favor of plaintiffs."

[3] Upon these questions the evidence has been examined and found to be sufficient to justify the findings of the trial court. We do not think any good purpose would be served by setting forth an analysis of the evidence in this case. Fraud is not presumed, and an allegation thereof must be sustained by evidence reasonably clear and convincing.

The judgment is affirmed. Costs awarded to respondents.

MORGAN, C. J., and BUDGE, J., concur.

STATE v. BILBOA.

(Supreme Court of Idaho. May 29, 1920.)

1. Criminal law ⟸177, 295—Allowance of demurrer to information may be a final judgment barring a future prosecution; no bar without proof that offense thereafter charged is the same.

If a demurrer to an information is allowed, the judgment is final and a bar to a future prosecution for the same offense, unless the court directs the prosecuting attorney to file another information, or, in case of an indictment, directs the case to be resubmitted to the same or another grand jury; but, in order that the action of the court in sustaining a demurrer may be a bar to a future prosecution, proof must be submitted that the offense thereafter charged is the same.

2. Indictment and information ⟸125(2)—Several offenses may not be joined except in prosecution for sales of intoxicating liquor.

C. S. § 8829, does not authorize inclusion in an information of more than one offense, except when the offenses charged relate to the sales of intoxicating liquor.

3. Indictment and information ⟸122(2)—Information may be filed charging offense for which accused is held although complaint charged two offenses.

The fact that two offenses are charged in a complaint before a committing magistrate

Digitized by Google

does not deprive the prosecuting attorney of power to file an information charging an offense for which the accused has been held to answer.

4. Indictment and information ⟸147—Information charging more than one offense is demurrable for duplicity.

Where an information charges more than one offense, contrary to the provisions of the statute, a demurrer thereto on the ground of duplicity in the information should be granted.

5. Indictment and information ⟸132(7)—Motion to require election where information charges more than one offense should be granted.

Where an information charges more than one offense, a motion on the part of defendant that the state be required to elect upon which charge it will prosecute should be granted at the opening of the trial, and, where the motion is renewed at the close of the state's evidence, it is prejudicial error to deny the same.

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Vicente Bilboa was convicted of transporting intoxicating liquor, and he appeals. Reversed and remanded.

Frawley & Koelsch and Chas. F. Reddoch, all of Boise, for appellant.

T. A. Walters, former Atty. Gen., J. P. Pope, Asst. Atty. Gen., R. L. Black, Atty. Gen., James L. Boone, Asst. Atty. Gen., and E. S. Delana, Pros. Atty., of Boise, for the State.

RICE, J. Appellant was convicted of the crime of transporting intoxicating liquor. On October 2, 1916, an information was filed against him, charging possession and transportation of intoxicating liquor. A demurrer to the information was sustained, and the prosecuting attorney granted 10 days in which to file an amended information. After the expiration of the 10-day period, upon application of the prosecuting attorney, the court entered an order directing that the cause be resubmitted to a justice of the peace for the purpose of allowing a new preliminary examination upon matters connected with the charges contained in the information. On December 21, 1916, a new complaint was filed before a committing magistrate, charging appellant with transporting intoxicating liquor for beverage purposes, possession of intoxicating liquor for beverage purposes, possession of intoxicating liquor, and possession of intoxicating liquor within the state of Idaho. The committing magistrate ordered that appellant be held to answer upon the charges contained in the complaint. On January 29, 1917, the prosecuting attorney filed an information charging appellant with the crimes of transporting intoxicating liquor for beverage purposes, of having in his possession intoxicating liquor for beverage purposes, and of having in his possession intoxicating liquor. Appellant moved to set aside this information, and also demurred thereto. The motion and demurrer were overruled, and appellant thereupon filed a motion that the state be required to elect upon which of the offenses charged it would prosecute, which motion was denied. At the trial, and before the introduction of any evidence, the appellant renewed his motion to require the state to elect, which motion was denied with leave to renew the same later. The motion was renewed by appellant after the state had rested, which motion the court denied, but reserved the right to sustain it when all the evidence had been submitted. No evidence was introduced on the part of appellant, and the court thereupon of its own motion required the state to elect. The first cause of action stated in the information, namely transportation of intoxicating liquor, was elected by the state.

On December 23, 1916, appellant filed a motion that he be discharged and that his money deposited instead of bail be refunded. The court denied his motion to dismiss and ordered that his bond be exonerated. The ruling of the court in declining to dismiss is assigned as error.

[1] It is urged that, the court having sustained a demurrer to the information, further prosecution was barred because the amended information was not filed within the time given by the court in its order sustaining the demurrer, and the court's subsequent order directing the prosecuting attorney to submit the case for re-examination before a committing magistrate was void.

C. S. § 8874, is as follows:

"If a demurrer is allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the case to be resubmitted to the same or another grand jury."

It is to be observed that an order sustaining a demurrer to an indictment, or information, bars another prosecution for the same offense. The distinction between "offense," as used in C. S. § 8874, and "act" or "omission," as used in C. S. § 8602, is discussed in the case of State v. Gutke, 25 Idaho, 737, 139 Pac. 346. It is a sufficient answer to the contention in this case that it does not appear upon the face of the record that the complaint laid before the committing magistrate charged the same offense as the information to which the demurrer had been sustained. Although the charge contained in the complaint appeared to state an offense of the same nature as that contained in the former information, it would have required

Digitized by Google

additional evidence to show that the offense charged was the same, or that it grew out of the same transaction, which evidence was not produced in support of the motion.

Appellant moved to quash the information upon several grounds, all of which are based upon the proposition that the complaint laid before the committing magistrate charged four separate offenses. The motion was properly overruled.

A preliminary examination before a committing magistrate is in no sense a trial. The purpose is to obtain the judgment of a magistrate to the effect that a crime has or has not been committed, and if committed that there is reasonable ground to believe that the person accused is guilty of committing the crime. It is not to be expected, nor is it required, that the same formality and precision must obtain in a preliminary examination as is required upon the trial. Duplicity in criminal pleading is an irregularity, and even in the trial of a case in the district court an objection that the indictment or information charges more than one offense may be waived. C. S. §§ 8878, 9019; State v. McBride, 72 Wash. 390, 130 Pac. 486; State v. Mahoney, 24 Mont. 281, 61 Pac. 647; People v. Shotwell, 27 Cal. 394; Ince v. State, 77 Ark. 426, 93 S. W. 65; Connors v. United States, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

[2-4] While under the statutes it is clearly contemplated that a complaint laid before a committing magistrate shall charge a single offense, yet the fact that it charges more than one offense is an irregularity which is not of so fundamental a character as to deprive the prosecuting attorney of power to file an information, where the committing magistrate has held the accused to answer for the offense afterward set out in the information. See Sothman v. State, 66 Neb. 302, 92 N. W. 303. Nor is it fatal that the magistrate has found the offenses specified in the complaint to have been committed and has held the accused to answer for them all. Should the prosecuting attorney afterward file one information charging all the offenses for which the accused has been held to answer, the accused is not deprived of any substantial right. Upon arraignment he has ample opportunity to object to the information by demurrer, and may, if he chooses, require the state to elect upon which of the charges he shall be prosecuted.

The trial court should have sustained the demurrer to the information, upon the ground that it stated more than one offense. The general rule is that an indictment or information must charge but one offense. C. S. §§ 8829, 8870.

The only exception to this rule is found in C. S. § 2642, as follows:

"When a defendant has been held to answer to the district court for more than one offense under the laws of this state relating to the sale of intoxicating liquors, the prosecuting attorney may, in filing his information against such defendant, include therein all the offenses for which such defendant is then held to answer to such district court, stating each offense under separate counts in such information, and, upon the filing of such information, the proceedings thereunder shall be the same as though one offense only were charged therein: Except that, upon the trial of such defendant thereunder, he may be convicted of one or more of the offenses charged therein as the evidence may warrant, and the failure of the jury to find the defendant guilty under any count shall be deemed an acquittal of the defendant of the offense contained in such count."

[5] The foregoing section, however, refers only to offenses committed in making sales of intoxicating liquor, and cannot be enlarged to include other offenses against the prohibition law. However, the error in failing to sustain the demurrer might have been cured had the court required the state to elect upon which of the charges stated appellant should be put upon his trial. In this case, the information having charged more than one offense, the state should have been required to elect at the opening of the trial; but appellant renewed the motion at the close of the state's case. The action of the court in denying the motion was error. State v. Gomes, 9 Kan. App. 63, 57 Pac. 262; Moss v. State, 3 Ala. App. 189, 58 South. 62; State v. Schweiter, 27 Kan. 500; State v. Harris, 51 Mont. 496, 154 Pac. 198; State v. Miller, 263 Mo. 326, 172 S. W. 385, Ann. Cas. 1916A, 1009; State v. Poull, 14 N. D. 557, 105 N. W. 717; Dix v. Commonwealth, 110 Va. 907, 67 S. E. 344; State v. Roby, 128 Minn. 187, 150 N. W. 793, Ann. Cas. 1915D, 360; 22 Cyc. 408.

The fact that appellant introduced no evidence does not render the error of the court nonprejudicial. His failure to introduce evidence may have been caused by the action of the court in refusing to require the state to elect. See Moss v. State and State v. Gomes, supra.

The judgment is reversed, and the cause remanded to the district court for further proceedings in accordance with the views herein expressed.

MORGAN, C. J., concurs.

BUDGE, J., sat at the hearing in the above cause, but took no part in the opinion.

Digitized by Google

STATE v. HALL.

(Supreme Court of Idaho. May 29, 1920.)

1. Criminal law ⟸970(6)—Indictment and information ⟸130—Motion in arrest granted after conviction on information charging more than one offense; transporting and possession of liquors may not be joined in different counts.

Where an information charges more than one offense and a demurrer is interposed upon that ground, and the jury finds the defendant guilty of all the offenses charged, a motion in arrest of judgment should be granted.

2. Criminal law ⟸984—Grant of motion in arrest as to all but one offense, after conviction of several offenses charged in same information, held error.

Where a motion in arrest of judgment has been interposed by a defendant who has been found guilty of several offenses charged in a single information, to which information a demurrer has been filed upon the ground of duplicity, it is error for the court to grant the motion as to all but one of the offenses of which defendant has been found guilty, and to permit the prosecuting attorney to select the offense upon which the defendant shall be sentenced.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

T. C. Hall was convicted of having intoxicating liquor in his possession, and he appeals. Reversed and remanded.

Chas. F. Reddoch and Frawley & Koelsch, all of Boise, for appellant.

T. A. Walters, former Atty. Gen., J. P. Pope, Asst. Atty. Gen., R. L. Black, Atty. Gen., James L. Boone, Asst. Atty. Gen., and E. S. Delana, Pros. Atty., of Boise, for the State.

BUDGE, J. The appellant was convicted of the crime of having in his possession intoxicating liquor. The information upon which he was tried and convicted contains three counts, as follows: Transporting intoxicating liquor, possession of intoxicating liquor for beverage purposes, and possession of intoxicating liquor.

To this information appellant filed a demurrer, among several grounds setting up the following: That more than one offense is charged in said information; that said information segregates one act or omission into three separate and distinct offenses as set forth in the three causes of action thereof. This demurrer was overruled.

At the opening of the trial, the appellant moved to require the state to elect upon which charge it would go to trial, which motion was overruled. At the close of the state's testimony, the motion to require the state to elect was renewed, and denied by the court.

The court instructed the jury, in part, as follows:

"Should the jury believe from the evidence beyond a reasonable doubt that the defendant is guilty of any one or more of the offenses charged in the information, he may be convicted of one or more of such offenses; and the failure of the jury to find guilty under any count shall be deemed an acquittal of the defendant of the offense contained in such count. And the defendant may be found not guilty of one or more of said offenses."

The jury convicted the appellant upon the three counts charged in the information, whereupon a motion in arrest of judgment was made, setting up among other grounds the following:

"That the defendant has been convicted of three separate and distinct offenses based upon one act, and therefore subject to three separate punishments for one crime."

This motion was granted as to two of the counts and the prosecuting attorney directed to elect upon which charge he desired appellant sentenced. He thereupon elected to have appellant sentenced upon the charge of possession of intoxicating liquor.

[1, 2] The offenses charged in this information, not relating to the sale of intoxicating liquor, do not come within the provisions of C. S. § 2642, and it was error for the court to overrule the demurrer, as well as to refuse to require the state to elect. State v. Bilboa, 190 Pac. 248.

The defect in the information complained of, having been made the subject of demurrer, was not waived, and the motion in arrest of judgment should have been granted. The action of the trial court in sustaining the motion as to two of the counts did not render this error harmless. The motion, being good as to two of the counts, was equally well taken as to the third.

Other assignments of error are urged. In the case of State v. Bilboa, supra, similar assignments are considered and decided.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

MORGAN, C. J., and BUDGE, J., concur.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

WALSH et ux. v. COGHLAN et al.

(Supreme Court of Idaho. May 26, 1920.)

1. Vendor and purchaser ⟸97, 303 — Vendor held not entitled to forfeit purchaser's interest or sue for price without tendering deed and abstract.

A vendor who retains title to real property as security for the payment of the purchase price which, according to the contract of sale, was to be paid in installments, whereupon he was to convey the property to the vendee and furnish an abstract showing clear title, is not in position, when all unpaid installments are due, to demand a forfeiture of the vendee's interest, or to maintain an action for the purchase price, without tendering the deed and abstract.

2. Vendor and purchaser ⟸273, 285(5)—Vendor may sue to foreclose purchaser's interest without tendering deed and abstract, but is not entitled to attorney's fee.

The vendor may, under the circumstances above stated, without tendering the deed and abstract, maintain a suit to foreclose the vendee's interest and for sale of the property, but is not entitled to have an attorney's fee, payable according to the terms of the notes given for the purchase price in case of suit or action to collect the same, included in the sum for which the property is to be sold.

Budge, J., dissenting.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by John Walsh and wife against Harlan W. Coghlan, Annetta B. Coghlan and Belle Coghlan to foreclose the defendant's interest as purchaser of real property and for the sale thereof with separate answer and disclaimer by Belle Coghlan. Decree for plaintiffs against defendants other than Belle Coghlan, and the other defendants appeal. Reversed, with instructions and for judgment for Belle Coghlan for costs.

P. E. Cavaney and John Jackson, both of Boise, for appellants.

J. C. Johnston and J. F. Colvin, both of Boise, for respondents.

MORGAN, C. J. Appellants, Harlan W. and Annetta R. Coghlan, and respondents, on July 16, 1909, executed a written contract whereby the latter agreed to sell to the former a lot in Boise City for $2,000, $300 of which was paid and the balance was to be paid in quarterly installments, evidenced by 22 promissory notes for $75 each and one for $50, bearing interest at the rate of 8 per cent. per annum. One of the conditions of the contract was that, if the purchasers should make all payments according to its terms, respondents would execute and deliver to them a warranty deed conveying the lot and furnish them an abstract showing the title to be clear, except as to a sewer bond assessed against it. The purchasers agreed to pay all taxes or assessments which were or might become due on the premises after January 1, 1910, and the contract contained the following provision:

"In the event of a failure to comply with the terms hereof by the said parties of the second part (the purchasers), the said parties of the first part (respondents) shall be released from all obligations in law or in equity to convey said property, and the said parties of the second part shall forfeit all rights thereto, and all payments made on said property, which shall be retained by the parties of the first part as damages for the detention of said property and occupancy of the same by the said parties of the second part, and after the failure of the said parties of the second part to comply with the terms of this agreement for a period of thirty days, then the parties of the second part shall become the renters of the parties of the first part and shall be subject to dispossession under the laws relating to landlord and tenant under the statute of the state of Idaho."

Appellants went into possession of the premises and made part of the payments, but defaulted in others. This action was commenced to foreclose their interest and to sell the property, and resulted in a decree for plaintiffs, from which this appeal is prosecuted.

After finding that the contract in question was entered into as above stated, the trial judge found:

"That the said contract of purchase provided for forfeiture of the rights of the defendants in the contract of purchase if they failed to keep the covenants and agreements in the said contract contained, and in said case of failure to keep the covenants and agreements provided for in the contract the plaintiffs should be released from all obligations in law or equity to convey the said property to the defendants. * * *

"That the said defendants have failed and refused to keep and perform the covenants and agreements in the said contract contained which were by them to be done and performed. * * *

"That under the law and facts as proven in the case before the court, the defendants have forfeited all right, title, and interest in and to the property set forth and described in the complaint and contract of purchase, and all interest, claim, or demand in or to the property set forth and described in the plaintiffs' complaint."

The court found the amount due from appellants to respondents in principal, interest, and attorney's fees provided for in the notes, together with costs, and an amount paid by the latter in satisfaction of taxes and assessments levied against the property for the years 1913, 1914, and 1915, and entered a decree that the premises be sold by the sheriff, after public notice according to

Digitized by Google

law relative to the sale of real estate under execution, and that he, after the expiration of the time allowed for redemption, execute a deed to the purchaser; that out of the proceeds of the sale he pay respondents the principal and interest due on the purchase price of the lot, also the sums found to have been paid by them as taxes and assessments thereon, together with the attorney's fee mentioned in the findings. It was further decreed that appellants be barred and foreclosed of and from all claim to or interest in the premises after the expiration of the period of redemption, as provided by law; reference being had to the time allowed for redemption of real property from execution or mortgage foreclosure sale.

[1, 2] The record discloses that all the unpaid installments of purchase price were due at the time the action was commenced. Therefore, in order to be in position to demand a forfeiture of appellants' interest, or to waive it and recover judgment for the purchase price, it was necessary for respondents to allege and prove they tendered a deed conveying the property to the purchasers, together with an abstract showing title as mentioned in the contract. Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; 39 Cyc. 1907; Roy v. Vaughan, 100 Wash. 345, 170 Pac. 1019. There is neither allegation nor proof that such a tender was made, and the findings of fact above quoted, if such they may be called, are without support in the record.

While it was not necessary that respondents resort to foreclosure and sale in order to terminate appellants' interest in the property, that remedy was available (Security Savings & Trust Co. v. Mackenzie, 33 Or. 209, 52 Pac. 1046; Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791; Kent v. Williams, 114 Cal. 537, 46 Pac. 462; Taylor v. Interstate Inv. Co., 75 Wash. 490, 135 Pac. 240; Baldwin v. McDonald, 24 Wyo. 108, 156 Pac. 27; Denton v. Scully, 26 Minn. 325, 4 N. W. 41), and they could and did choose it. The findings are inconsistent with the relief sought and do not support the decree.

The inclusion of an attorney's fee in the amount to be raised by sale of the property was erroneous. According to the terms of the notes, an attorney's fee was to be paid by the makers in case of suit or action to collect the amount therein mentioned, or a portion of it. As above stated, respondents have not put themselves in position to sue on the notes, or for a personal judgment for the purchase price. Recovery in this case is limited to the foreclosure of appellants' interest in, and sale of the property, and a money judgment cannot be had.

It is appellants' right that, after the costs and expenses of sale and the amounts due according to the terms of the contract are paid, any balance remaining from the proceeds of the sheriff's sale be paid to them. The sum for which the sale is made fixes the amount to be paid by them should they redeem the property. Their substantial rights were invaded by including the attorney's fee in the sum for which the property was ordered to be sold, and the decree must be reversed.

Appellant Belle Coghlan answered separately and disclaimed any interest in the property. The evidence fails to show any liability on her part, and she is entitled to a judgment for her costs. The other appellants admitted the execution of the contract and alleged a subsequent oral modification of it whereby respondents agreed, in the event of failure of the purchasers to pay for the lot, to reimburse them for the costs of certain improvements they had made thereon. This claim was not sustained by the evidence and was properly disallowed.

The judgment appealed from is reversed, with instructions to the trial court to make findings and conclusions and to enter a decree in conformity to the views herein expressed. Costs are awarded to appellants.

RICE, J., concurs.

BUDGE, J. (dissenting). Some time ago the duty of writing the opinion in this case was assigned to me, and I prepared the opinion that hereafter follows. Being unable to secure indorsement of my views as herein expressed, by either of the other members of this court, it becomes necessary for me to file the within opinion as my individual views and conclusions in disposing of this case.

On July 16, 1909, respondents executed a written contract with appellants Harlan W. and Annetta R. Coghlan for the sale of certain real property in Boise for $2,000, payable $300 in cash and the balance of $1,700 at the rate of $75 on or before the 16th of October, January, April, and July of each year thereafter, according to the terms of 22 promissory notes of even date for $75 each, and one note for $50, all bearing 8 per cent. interest. Upon the completion of the payments, respondents were to execute and deliver a warranty deed and abstract showing clear title to said property to appellants, who also agreed to pay all city, state, special, and county taxes or assessments after January 1, 1910. Upon failure of appellants to comply with the terms of the contract, respondents were to be released from all obligations in law or in equity to convey said property, and appellants should forfeit all rights thereto and all payments made which were to be retained as damages for the retention and occupancy of the property. If appellants should fail to comply with the terms of the agreement for a period of 30 days, then they were to become renters

Digitized by Google

of respondents and to be subject to dispossession under the laws relating to landlord and tenant.

Respondents commenced this action, setting up in their complaint the foregoing facts, alleging full performance on their part, failure to meet the payments on the part of appellants, the amounts due on principal and interest, the payment of certain sums as taxes and assessments, the failure and refusal of appellants to keep and perform the covenants and agreements of the contract, the incurrence of an attorney fee, and alleging that appellant May Belle Coghlan claimed some interest in the property, and prayed judgment for the amounts alleged to be due, for foreclosure and sale, for deficiency judgment if the proceeds of the sale should prove inadequate to satisfy the judgment, that either party be permitted to become purchaser, and for general relief.

The separate answer of Belle Coghlan specifically denied the allegations of the complaint and disclaimed any interest whatever in the property. The answer of the other appellants admitted the execution of the contract upon the terms alleged and put in issue all of the other allegations of the complaint, and as an affirmative defense set forth an alleged subsequent oral modification of the contract whereby respondents agreed to refund the price of certain alleged betterments and improvements placed upon the property by appellants, or to credit the same upon the purchase price of the property.

Upon the issues thus made, the action was tried by the court. Findings of fact and conclusions of law were filed and a judgment entered decreeing foreclosure and sale of the premises as upon execution, permitting either party to become a purchaser at the sale foreclosing appellants of all right, title, or interest in or to the property after the expiration of the period of redemption, and directing that the proceeds of the sale be applied to the payment of the amounts found due, including therein the sum allowed as attorney fees. This appeal is from the judgment.

While the appellants' brief contains many assignments of error, they are not separately discussed, but have been grouped as bearing upon certain main points contended for. In disposing of the case I shall pursue the same course.

As to the contention that the contract was modified, the court found generally that the allegations of the answer were not true. Not only is the finding supported by the evidence, but appellants failed to introduce any substantial evidence in support of this allegation.

The controlling question in the case arises from appellants' contention that respondents have proceeded upon the wrong theory for the reason that the evidence shows that the only actions that should have been brought were an action in equity for specific performance, or at law for the balance of the purchase price as provided in the contract, or for possession of the land by summary proceedings. But the law is well settled that an action to foreclose is a proper remedy and the existence of other remedies does not deprive the vendor of his right to foreclose. 3 Pomeroy's Equity Jurisprudence (4th Ed.) §§ 1260–1262; 5 Pomeroy's Equity Jurisprudence (4th Ed.) §§ 2285, 2286; 2 Sugden on Vendors (8th Amer. Ed.) c. 19; 2 Warvell on Vendors (2d Ed.) §§ 712–714; 39 Cyc. 1874; Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791; Denton v. Scully, 26 Minn. 325, 4 N. W. 41; Ferguson v. Blood, 152 Fed. 98, 82 C. C. A. 482; Roy v. Vaughan, 100 Wash. 345, 170 Pac. 1019.

In connection with this argument, appellants strongly urge that a foreclosure proceeding is not proper for the reason that the vendor, having retained the legal title, does not have a vendor's lien. An examination of the authorities, however, discloses the fact that, while they are not agreed upon the question whether the vendor under such circumstances has a vendor's lien, the dispute is largely as to what is an appropriate legal name to give to the vendor's interest. To my mind it is not important to determine whether this interest shall be denominated a vendor's lien, or an interest analogous to that of an equitable mortgagee, or a lien on the vendee's equitable estate. Whatever the interest of the vendor, who has retained a legal title under a contract to sell, may be called, the authorities are practically unanimous in holding that a foreclosure proceeding is a proper method of enforcing the vendor's right after the vendee has defaulted in his payments according to the terms of the contract.

Appellants complain of the fact that respondents did not tender a deed to the premises. The omission to plead or prove a tender of the deed and abstract, which were to be delivered upon the completion of the payments specified in the contract, deprived respondents of the right to claim a forfeiture thereof and of the right to a money judgment (Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Roy v. Vaughan, supra), but did not deprive them of the right to foreclose (Roy v. Vaughan, supra). Respondents did not seek to enforce a forfeiture, and the finding of the trial court that a forfeiture of appellants' rights resulted from their failure to comply with the terms of their contract was outside of the issues. But since the judgment does not decree a forfeiture, the finding may be disregarded as surplusage. No personal judgment was entered. Under the circumstances, the court could, and did, go no further than

Digitized by Google

to find the amount due and decree the foreclosure and sale and the application of the proceeds to the payment thereof. The balance, if any, should have been directed paid to the vendee.

The error, which is predicated upon the action of the court in permitting the respondents to reopen in order to introduce proof as to attorney fees, is not only without merit for the reason that such action was within the sound discretion of the court and there is nothing from which an abuse of discretion can be inferred, but the record clearly leaves the inference that the objection to reopening was waived except as to evidence bearing upon matters already presented. As no such evidence was offered, there is no point left upon which error could be predicated.

The allowance of attorney fees is assigned as error. The point is well taken. Respondents are not suing on the notes, but are foreclosing appellants' rights under the contract, which contains no provision for attorney fees. Farnsworth v. Pepper, 27 Idaho, 154, 159, 148 Pac. 48.

As to the appellant Belle Coghlan, respondent's evidence fails to show that she had or claimed any interest whatever in the property. The record shows that she had no interest therein. She should have been dismissed with her costs. Upon modification of the judgment as herein indicated, it should be affirmed.

KINZELL v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Idaho. April 3, 1920. On Petition for Rehearing.)

1. Courts ⟸391(3) — Jurisdiction of United States Supreme Court to review proceedings of state courts is limited to denials of federal rights.

The jurisdiction of the Supreme Court of the United States to review the proceedings of state courts is not that of a general reviewing court, but is limited to specific instances of denials of federal rights or federal questions involved.

2. Courts ⟸391(3)—Error involving no federal question is not reviewable by Supreme Court of the United States.

Assignments of error which involve no federal question cannot be reviewed by the Supreme Court of the United States under Judicial Code, § 237, as amended by Act Dec. 23, 1914 (U. S. Comp. St. § 1214).

3. Courts ⟸400—State court should dispose of errors left undecided by decision of the United States Supreme Court.

Where a state court has declined to rule on errors properly assigned upon the theory that the decision of the federal question involved disposes of the case, and the cause on certiorari to the Supreme Court of the United States is reversed, and remanded for further proceedings not inconsistent with the decision of the latter court, the former court should dispose of the errors so left undecided.

4. Trial ⟸143—Conflicting evidence on an issue of fact is for the jury.

When the evidence is conflicting upon any issue of fact, such issue should be determined by the jury.

5. Master and servant ⟸213(5) — Risk of coupling negligently attempted at excessive speed held not assumed.

An employé working on a dozer assumes the risk of a coupling made by a work train at the usual and customary speed; but he does not assume the additional risk of a coupling negligently attempted at an unusual and excessive rate of speed, for he has the right to assume that the coupling will be made at the usual rate of speed, and if a coupling is attempted at an excessive rate of speed he is not in a position to exercise any choice in the matter.

6. Master and servant ⟸217(21)—Employé without notice of omission of safety appliances does not assume risk.

An employé working upon a dozer assumes the risk involved in the use, in the customary manner, of such safety appliances as are usually and generally furnished for the use of his fellow servants; but he does not assume the additional risk entailed by the omission of such a customary appliance, where he has no previous notice of such omission, for he is placed in a position where he has no choice in the matter.

7. Appeal and error ⟸1068(5) — Erroneous refusal of instruction was not reversible, where jury's finding negatived its hypothesis.

Even though the trial court should err in refusing a requested instruction, such refusal does not require the reversal of the judgment, where the jury by a specific finding of fact distinctly negatived the hypothesis upon which alone the instruction was based.

8. Master and servant ⟸180(1)—Fellow servant doctrine abolished by federal act.

Under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the fellow servant doctrine no longer obtains; but the employer is liable to the employé for injuries caused by the negligence of other employés when acting within the scope of their employment.

9. Master and servant ⟸137(3) — Coupling work train to dozer held negligence.

It is a part of the trainman's duties, when moving a work train towards a dozer for the purpose of coupling thereto, to keep a lookout in the direction in which they are going, to reduce the speed, so that when attempting to couple the train shall not strike the dozer with great or unusual force or violence, and an omission to observe this duty is negligence.

Digitized by Google

10. Trial ⟸66—Reopening of case rests in trial court's discretion.

The propriety of permitting a party to reopen his case rests in the sound discretion of the trial court.

11. Trial ⟸66—Reopening of case held not abuse of trial court's discretion.

Held that, in view of the sharp conflict in the evidence upon the questions to which the experimental evidence was directed, the trial court did not abuse its discretion in permitting respondent to reopen his case.

12. Damages ⟸30—Elements jury may consider in assessing damages under federal Employers' Liability Act stated.

In an action for damages for personal injuries, brought by the injured employé himself, under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the jury may take into consideration, in assessing the damages his pain and suffering, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work, and its effect upon his future.

13. Damages ⟸134(1)—$35,000 for injury seriously disabling an employé 29 years of age held excessive.

Held, that the judgment is excessive, and must be reduced from $35,000 to $25,000, and unless plaintiff consents to such reduction of the judgment a new trial is granted.

Morgan, C. J., dissenting.

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Action by William Kinzell against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appealed, and after a reversal, with direction to dismiss, and that decision was reversed by the United States Supreme Court, with mandate, modified and affirmed, on condition of a remittitur of damages.

Geo. W. Korte, of Seattle, Wash., and Robt. H. Elder, of Cœur d'Alene, for appellant.

John P. Gray, of Cœur d'Alene, Wm. D. Keeton, of St. Maries, W. F. McNaughton, of Cœur d'Alene, and James A. Wayne, of Wallace, for respondent.

BUDGE, J. This case is now here on mandate from the Supreme Court of the United States, reversing the former decision of this court (Kinzell v. Chicago, etc., R. Co., 31 Idaho, 365, 171 Pac. 1136), and remanding the case for further proceedings not inconsistent with the opinion of that court (250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. 893).

An application has been made by respondent to have this court tax certain alleged costs, to wit, $75.75, paid to the clerk of this court for a certified copy of the record for use on application for writ of certiorari to the Supreme Court of the United States, and $299, paid for printing transcript of record for use on said application. It is claimed that these items are taxable under subdivision 3, rule 24, of the Rules of the Supreme Court of the United States (32 Sup. Ct. xi), which is as follows:

"In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court.

"The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case."

Both items were included in the original cost bill filed in the Supreme Court of the United States, and were rejected. It is urged by appellant that there is no statute of this state permitting the recovery of the particular costs and disbursements set forth in the memorandum, and that costs are not recoverable under the laws of this state, in the absence of a statute (Cronan v. District Court, 15 Idaho, 462, 98 Pac. 614; Schmelzel v. Board of County Commissioners, 16 Idaho, 32, 100 Pac. 106, 21 L. R. A. [N. S.] 199, 133 Am. St. Rep. 89, 17 Ann. Cas. 1226), or rule of this court (Price et al. v. Garland, 5 N. M. 98, 20 Pac. 182); but I am of the opinion that respondent's right to have the items presented taxed as costs does not depend upon the existence of any statute of this state or rule of this court. His right to recover these costs is given by the rule of the Supreme Court of the United States above quoted, and this court is merely an arm of that court for the purpose of taxing such costs. In other words, the right to recover the items as costs exists by virtue of the rule of the Supreme Court of the United States, and the duty of this court to tax or fix the amount of such costs exists by virtue of the same rule.

[1-3] Appellant has made application to argue the assignments of error which were not considered by this court in arriving at its former decision. This application has been resisted by the respondent, upon the theory that the whole case went to the Supreme Court of the United States on the writ of certiorari, and that its decision reversing the decision of this court is final as to all matters involved in the case, and that nothing now remains for this court to do, except to affirm the judgment from which the appeal has been taken. Many authorities have been cited in support of this theory, but none of them appear to us to be in point. Counsel for respondent in their brief say:

"It will be noticed that all the cases we have cited are cases in which the writ of certiorari has been issued to a Circuit Court of Appeals, rather than to the highest court of a state or territory. Comparison of the two acts, however, indicates no reason why the practice in

Digitized by Google

the consideration and disposition of the case should not be uniform under the two acts. * * *"

This statement clearly indicates the error into which counsel have fallen. The two acts referred to are section 237 of the federal Judicial Code, 36 Stat. 1156, as amended 38 Stat. 790, U. S. Comp. Stat. 1916, § 1214, vol. 2, p. 1580, 5 Fed. Stat. Ann. (2d. Ed.) 723, providing for writs of error and certiorari to the highest court of a state, and section 240 of the Judicial Code, 36 Stat. 1157, U. S. Comp. Stat. 1916, § 1217, vol. 2, p. 1750, 5 Fed. Stat. Ann. (2d Ed.) 854, providing for the writ of certiorari to the Circuit Court of Appeals. While the procedure under the two acts is identical, the scope of review exercised by the Supreme Court of the United States under them, respectively, is very different. Murdock v. City of Memphis, 87 U. S. (20 Wall.) 590, 22 L. Ed. 429. On writ of certiorari to the Circuit Court of Appeals, the Supreme Court of the United States has power to dispose of the merits, which, however, it will only do in exceptional cases and for very important reasons; the usual practice being to correct the error, if any is found, committed by the Circuit Court of Appeals, and remand it to that court, so that it may proceed to discharge its duty of hearing and deciding the case conformably to law. Brown v. Fletcher, 237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128. On the other hand, however, when a writ of certiorari is issued to the highest court of a state, the Supreme Court of the United States is not concerned with, nor does it have jurisdiction to dispose of, the merits, except in so far as they relate to the federal question upon which its jurisdiction depends. St. Louis, etc., R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417. In the former opinion the Supreme Court of the United States said:

"We have not the power to correct mere errors in the trials in state courts, although affirmed by the highest state courts. This court is not a general court of appeals, with the general right to review the decisions of state courts. We may only inquire whether there has been error committed in the decision of those federal questions which are set forth in section 709 of the Revised Statutes [now section 237 of the Judicial Code]. * * *"

In the latter case that court said:

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of federal rights, whether those pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities, and privileges of federal origin, specially set up in the state court and denied by the rulings and judgment of that court."

Assignments of error which involve no federal question cannot be reviewed by the Supreme Court of the United States under Judicial Code, § 237. Central Vermont R. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

In our previous opinion we confined our decision expressly to the federal question involved, and held that respondent was not entitled to proceed under the federal Employers' Liability Act, because he was not engaged in interstate commerce. We therefore necessarily left undecided, and so stated, other important errors urged on the appeal. But the Supreme Court of the United States held that respondent was engaged in interstate commerce at the time of his alleged injury, and was entitled to bring his action under said act, and has remanded the case to this court by its mandate for further proceedings not inconsistent with its opinion.

Since the Supreme Court of the United States has decided that respondent is proceeding properly under the federal Employers' Liability Act, it is our duty to consider upon the merits the errors relied upon for a reversal of the judgment. This procedure is in conformity with the authorities already cited, and the practice pursued in cases of this kind by other states. Goodtitle v. Kibbe, 1 Ala. 403; Gibson v. Chouteau, 50 Mo. 85; Harding v. Harding, 148 Cal. 397, 83 Pac. 434; Ettor v. City of Tacoma, 77 Wash. 267, 137 Pac. 820; Simonson v. Monson, 36 S. D. 245, 153 N. W. 1020; St. Louis, I. M. & S. R. Co. v. McWhirter, 155 Ky. 301, 159 S. W. 796.

Having reached the conclusion that the remaining assignments of error are here for decision, we shall proceed to dispose of the points raised.

[4] Appellant contends that the trial court erred in submitting the question whether the "presence of the tail air hose would have prevented a collision with the dozer with such force as to knock and jar plaintiff therefrom." There was evidence tending to show, not only that it was usual and customary to equip such trains with a tail air hose, but that just prior to the accident the two work trains in use upon this particular work were so equipped, and further that the tail air hose was designed for use in emergencies, and that by its use the brakeman could stop the train when necessary, without signaling the engineer. The evidence leaves no doubt that the particular train which struck the dozer at the time of respondent's injury was not so equipped, and the testimony of respondent is to the effect that he did not know whether it was or not. Although the evidence offered by appellant was to the effect that none of the trains engaged in this work were equipped with a tail air

Digitized by Google

hose, and also that it was not practical to so equip them, it is clear from the conflicting nature of the evidence that the issue of the tail air hose was one upon which the jury had a right to pass, and the court committed no error in refusing to take that issue from the jury.

Appellant insists that the court should have directed a verdict for the reason that "eight unimpeached railroad men proved that the speed of the train did not exceed four miles an hour when making this coupling." The testimony of respondent and of Lee, who was also working on the dozer at the time of the accident, was to the effect that the train was moving at a speed of about ten miles an hour; that, notwithstanding they were both holding on to portions of the dozer, the force of the impact was such as to break their hold loose, respondent being thrown between the cars. A witness for appellant testified on cross-examination that, if such were the fact, the train was moving at a greater speed than four miles an hour. Here, again, the conflicting testimony made it necessary for the jury to determine the fact.

[5, 6] Appellant also urges, if we understand his contention correctly, that since respondent was in a position where, if he had looked, he could have seen at what speed the train was coming, that he did not do so, and that therefore he assumed the risk of the unusual speed at which the train was traveling. We are unable to see any element of assumption of risk in this phase of the case. All of the evidence discloses, and it is conceded by both appellant and respondent, that if the train had not been proceeding at to exceed a speed of four miles per hour the appellant would not have been negligent, but that any speed in excess of four miles per hour would be a negligent and careless speed at which to attempt to couple on to the dozer. Respondent, therefore, had the right to assume that the coupling would be made at a speed of not to exceed four miles per hour, and to proceed with his duties on the dozer with the feeling of security which that assumption would give, and he was not required to turn from his duties for the purpose of determining whether or not the particular coupling would be negligently attempted, and by omitting to do so he assumed no risk which a speed in excess of four miles per hour would entail. Even if he had looked, and had seen at what speed the train was coming, that would not bind him to an assumption of such a risk. The position which he then occupied left him no choice but that of protecting himself as best he could against a risk which he had not assumed and which was not necessarily or properly incident to the business.

A similar contention that respondent assumed the risk in the absence of a tail air hose is equally untenable. If we assume from the verdict that the jury found that it is usual and customary to equip work trains with such an appliance, and that the absence of the tail air hose was negligence, there is no evidence that respondent had been previously notified that this particular train would not be so equipped, nor is there anything in the record from which it may be inferred that respondent, by the exercise of ordinary care, should have ascertained the fact. It is not within the bounds of probability that he could have discerned this defect a quarter of a mile distant, at which he first observed the approach of the train, and the same rule of law which gave him the right to assume that the coupling would be made at the usual rate of speed also gave him the right to assume that the approaching train was equipped with the customary safeguards. Furthermore, even if upon the approach of the train he could have discerned that it was not equipped with a tail air hose, he could not be said to have assumed that risk, for he was already placed in a dangerous position, augmented by risks as to which he was not advised, and which were not present when he entered into the employment and assumed his duties on the dozer. By driving down upon him with a train thus defectively equipped, the railroad company could not enlarge the scope of the risks which he had already assumed.

[7] Appellant complains of the instructions which the trial court gave for the guidance of the jury in the event they should find the respondent to any extent guilty of contributory negligence, but the jury found specifically upon an interrogatory submitted that appellant was entitled to no diminution from the amount of damages actually sustained attributable to contributory negligence, a finding which must in the very nature of things have been based upon the further finding by the jury that the respondent was not guilty of contributory negligence. Without passing upon the sufficiency or correctness of the instructions questioned, it is clear that from this state of the record no error appears of which appellant may complain. The point is controlled by the rule aptly expressed by the Supreme Court of the United States as follows:

"Error in refusing a requested instruction does not require a reversal of the judgment where the jury, by its specific findings of fact, distinctly negatived the hypothesis upon which alone the instruction was based." Kanawha & Michigan Railway Co. v. Kerse, 239 U. S. 576, 36 Sup. Ct. 174, 60 L. Ed. 448.

[8] Error is predicated upon the giving of the following instruction:

"You are instructed that if you find from all of the evidence of the case that the brakeman Moody and the engineer and other employés on the train at the time of the happening of the

Digitized by Google

accident and injury to the plaintiff in this action were employed by the defendant company as such employés upon the train at the time in question, *I charge you that the defendant company is bound by the acts of each of such employés within the scope of his employment and authority by the defendant, and the defendant is responsible for any act or acts of negligence of such employés, and if either or any of such employés was guilty of any negligent action or conduct as such employé in the discharge of his duty and employment at the time of the accident, the defendant is responsible therefor, and the employé's negligence in respect to the discharge of his duties as such employé of the defendant company upon the said train in question, if any, was the negligence of the defendant.*"

It is urged that the italicized portion of the foregoing instruction is misleading and foreign to the issues involved, and that by its terms the jury were at liberty to unearth any act against any employé, call it negligence, and charge it to the railroad company, and to base its verdict on acts other than the two specific charges of negligence, viz. the absence of the tail air hose and the excessive speed of the train. When this instruction is read in connection with instructions Nos. 5 and 14, wherein the jury was told that the appellant would be liable to the respondent for damages if it should find that while engaged in interstate commerce he was injured as a result of the negligence of appellant, it is not open to the criticism offered by appellant. The purpose of the instruction was to advise the jury that under the Employers' Liability Act the fellow servant doctrine no longer obtains, but that the employer is liable to the employé for injuries caused by the negligence of other employés when acting within the scope of their employment. Considering the instructions as a whole, the jury was not misled by the instruction complained of. Taylor v. Lytle, 29 Idaho, 546, 160 Pac. 942; State v. Ward, 31 Idaho, 419, 173 Pac. 497; Tyson Creek R. R. Co. v. Empire Mill Co., 31 Idaho, 580, 174 Pac. 1004.

[9] Error is also predicated upon the giving of the following instruction:

"You are further instructed that it is the duty of defendant, in operating its said train and cars over the track, to use reasonable care to keep a lookout ahead, and if said defendant and its employés in charge of the said train by keeping a lookout could have seen the said dozer upon the track and the plaintiff thereon in ample time to have stopped the said train, or to have reduced the speed of the train so as to make an easy coupling, but notwithstanding such facts failed to keep such lookout, or keeping such lookout failed to reduce the speed of the train so that an easy coupling might be made, and that by reason thereof struck the train with great and unusual force and violence, jarring and knocking the plaintiff off of the said dozer, then the defendant was guilty of negligence."

Appellant contends that this instruction injected a new and false issue into the case, involving the last clear chance doctrine. The contention is unsound. It was a part of the trainmen's duties to keep a lookout in the direction in which they were going, viz. towards the dozer and those working thereon, and to reduce the speed and to see to it that when attempting to couple on to the dozer the train did not strike it with great or unusual force or violence. Any less degree of care would be palpable negligence on the part of appellant. The instruction was properly given.

[10, 11] It is strenuously insisted by appellant that certain experiments and examinations which were made on and of the person of the respondent during the trial in the presence of the jury were so indecent and shameful as to require a reversal of the case. While we are of the opinion this evidence was properly admitted (Greenleaf on Evidence [16th Ed.] c. 4, § 13g; Wigmore on Evidence, vol. 1, § 445; Id. vol. 2, § 1159; Id. vol. 3, § 2180; Jones on Evidence, vol. 3, § 403, 17 Cyc. 290, 291, 294; Dunkin v. City of Hoquiam, 56 Wash. 47, 105 Pac. 149; Cook v. Danaher Lumber Co., 61 Wash. 118, 112 Pac. 245), it should be observed that the only objections which were made went, not to its admissibility, but to the order in which the evidence was offered. The first objection, that respondent was interfering with the presentation of appellant's case, was sustained. The next objection, that the evidence was not proper rebuttal, was acceded to by respondent, and the trial court permitted the latter to reopen his case, to which appellant objected. The propriety of permitting respondent to reopen rested in the sound discretion of the trial court, and in view of the sharp conflict in the evidence upon the questions to which the experiments were directed, we are satisfied that the trial court did not abuse its discretion in this regard. Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 545; Hall v. Jensen, 14 Idaho, 165, 93 Pac. 962; Union Sav., etc., Co. v. McClain, 23 Idaho, 325, 130 Pac. 84.

Moreover, appellant's counsel, while objecting upon the ground that respondent's examination was not cross-examination, but was interfering with the conduct of appellant's case, stated:

"I have no objection to the examination of the anus. I did not object to it, and do not object now; but I do object now to any further demonstration here to confuse the jury."

The record discloses no change of attitude on the part of appellant, except as to the objections already referred to. There is, therefore, no merit in this contention.

Appellant assigns as prejudicial error a remark of the court made during the progress

Digitized by Google

of the trial. Michael McGraw was a witness for the appellant, and in the course of his cross-examination had denied that he felt very unkindly toward respondent Kinzell. Respondent was called in rebuttal, and on his direct examination the following occurred:

"Q. Did you see that man, Mr. McGraw, there any place? A. No, sir; he was not there.

"Q. Did you discharge McGraw at any time? A. I did; yes, sir.

"Mr. Korte: I object to that as not rebuttal; collateral issue brought out on cross-examination. We would have a right to again try that issue by our witnesses as to whether he was there or not.

"The Court: I think it is not proper rebuttal.

"Mr. Gray: Question of interest. He denied interest in that respect—feeling towards this witness.

"The Court: He showed very strongly that he had feeling against Kinzell while upon the witness stand.

"Mr. Korte: I think your honor's remark is very prejudicial, and want to except to it, with all deference to the court."

The remark of the court was erroneous. Trial courts should be very careful to make no remark during the progress of a trial having a tendency to express the court's opinion as to the credibility of a witness, or as to the weight of the evidence. It is not sufficient cause for reversal of a judgment that an erroneous remark of the trial court, during the progress of the trial, may possibly have affected the verdict. Brown v. Tull (Okl.) 164 Pac. 785; First Nat. Bank v. Yoeman, 17 Okl. 613, 90 Pac. 412. Considering the portion of the record quoted above, in connection with the entire record in the case, it is not reasonably probable that the remark of the court affected the verdict, or deprived appellant of any substantial right. The court subsequently instructed the jury:

"You are the exclusive judges of the credibility of the witnesses, and the weight to be given the testimony of each witness."

While such an instruction generally would not cure the injury caused by a remark of the court having a tendency to give its opinion as to the credibility of a witness, or as to the weight of his testimony, we are of the opinion that in this instance prejudicial error, requiring reversal of the judgment, was not shown.

[12, 13] It is contended that the verdict is excessive, and that the instructions of the trial court relative to the measure of damages were erroneous. As to the instructions, appellant appears to be proceeding upon the erroneous theory that respondent would only be entitled to recover his actual pecuniary loss. The rule is well settled to the contrary, where the action is brought by the injured employé himself, that the jury may take into consideration in assessing the damages the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work, and its effect upon his future. Chesapeake & O. R. Co. v. Carnahan, 241 U. S. 241, 36 Sup. Ct. 594, 60 L. Ed. 979; Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

The exhibition of respondent's person at the close of the trial was of a nature to strongly excite the sympathies of the jury, and we conclude that the amount of the verdict was in part the result of passion and prejudice. The respondent at the time of his injuries was 29 years of age, and had an expectancy of about 35 years; his average earnings being $150 per month. While seriously disabled, the evidence shows that he still possesses some earning capacity. We conclude that a verdict for $25,000 is as much as the evidence in the case will justify. That sum, if put out at 7 per cent. interest, will produce a yearly income of $1,750. This income, in view of the evidence, is compensation to respondent for the loss of his earning capacity. There would remain the principal sum of the judgment unimpaired, which, under any reasonable view, is a sufficient sum to compensate him for his pain and suffering, mental anguish, and bodily injuries sustained. McKenzie v. North Coast Colliery Co., 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244.

We have carefully gone through the entire record, and are satisfied that no error has been presented which would justify us in reversing the case.

The judgment will be affirmed to the extent of $25,000, together with respondent's costs in the district court, with interest on both the judgment and such costs from the date of the original judgment at the rate of 7 per cent. on condition that the respondent file, within 30 days after the going down of the remittitur, a waiver of the excess of $10,000, and an acceptance of the judgment as thus modified. On failure to do so the judgment will be reversed in toto, and a new trial granted. Maloney v. Winston Bros. Co., 18 Idaho, 740, 111 Pac. 1080, 47 L. R. A. (N. S.) 634; Walsh v. Winston Bros. Co., 18 Idaho, 768, 111 Pac. 1090; Barter v. Stewart Mining Co., 24 Idaho, 540, 135 Pac. 68; Kelly v. Lamhi Irr. & Orchard Co., Ltd., 30 Idaho, 778, 168 Pac. 1076. No costs are awarded on appeal in this court.

RICE, J. I concur in all of the foregoing opinion, except that portion referring to the taxation of the items of costs claimed under subdivision 3, rule 24, of the Rules of the Supreme Court of the United States. In that portion of the opinion I do not concur.

MORGAN, C. J. (dissenting). The negligence of appellant's employés, alleged in the

Digitized by Google

complaint and relied on for recovery, consisted in causing the train to be run at a dangerous speed against the car, referred to in the foregoing opinion as a "dozer," causing respondent to be thrown therefrom and injured; in not maintaining a proper lookout on the front of the train as it was being pushed along the track toward respondent; in not maintaining a brakeman to transmit signals between the front of the train and the engine; in not maintaining, on the front car, an air hose and valve by means of which the train could be stopped; also that after respondent was knocked off the car the engineer negligently and carelessly failed to apply the air brakes, by reason whereof respondent was pushed, dragged, and rolled along the track, whereby he sustained the injuries to recover damage for which he sued.

Instruction numbered 4, being that first quoted in the foregoing opinion, advised the jury that appellant was responsible for any act, or acts, of negligence of its employés on the train, and—

"if either or any of such employés was guilty of any negligent action or conduct as such employé in the discharge of his duty and employment at the time of the accident, the defendant is responsible therefor, and the employé's negligence in respect to the discharge of his duties as such employé of the defendant company upon the said train in question, if any, was the negligence of the defendant."

The error in this instruction consists in not confining it to acts of negligence embraced within the issues, and which resulted in respondent's injuries, and the same criticism may be made of instructions numbered 5 and 14, relied on in the foregoing opinion to correct it.

The instructions given in this case cannot be sustained, when viewed in the light of the authorities cited in the opinion in support of them. The entire charge, when read and considered together, permitted the jury to take into consideration and to base its verdict on any act or acts of negligence of any employé or employés of appellant who were working on the train in question, whether or not such acts were relied on by respondent for a recovery, or such negligence caused or contributed to his injuries.

The remark of the presiding judge, reflecting on the credibility of appellant's witness McGraw, was prejudicial error. The jury could not do otherwise than draw the inference therefrom that his honor was convinced, from the demeanor of the witness, he was biased and prejudiced, and that his testimony, with respect to his feeling toward respondent was false. After finding the conduct of the trial judge to be erroneous, the majority of the court observes:

"Considering the portion of the record quoted above, in connection with the entire record in the case, it is not reasonably probable that the remark of the court affected the verdict, or deprived appellant of any substantial right."

This is important, if true, but I am unable to find anything in the record which tends to correct the error nor have I been able to ascertain what is relied on to render the remark harmless, though I have earnestly sought such information where, if it exists, it ought to be found. The danger in that remark, coming from the source it did, is apparent when viewed in the light of the entire instruction, a small portion of which has been quoted in the opinion, apparently "in mitigation of damages":

"You are the exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony of each witness. You may take into consideration the interest, bias, or prejudice of any witness, if such interest, bias, or prejudice exists, the probability or improbability of the testimony, and any and all other facts and circumstances in evidence which in your judgment would add to or detract from the credibility of the witnesses or the weight of their testimony. If there is a conflict in the testimony you must reconcile it, if you can. If not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit. If you believe that a witness has knowingly testified falsely as to any material matter, you are at liberty to disregard the entire testimony of such witness, except in so far as he may be corroborated by other credible evidence."

By the erroneous remark the presiding judge told the jury McGraw showed very strongly he "had feeling against Kinzell," although the witness had testified to the contrary. In the instruction the jury was told it might take into consideration the bias and prejudice of a witness as a fact which would tend to detract from his credibility, and if there was a conflict in the testimony, which it could not reconcile, it might believe or disbelieve any witness, according as it might think him entitled to credit. Furthermore, if it believed a witness had knowingly testified falsely as to any material matter (and the jury was in possession of the views of his honor on this point with respect to the witness McGraw), it was at liberty to disregard the entire testimony of such witness, except in so far as he might be corroborated by other credible evidence. The Supreme Court of Iowa, in State v. Philpot, 97 Iowa, 365, 66 N. W. 730, said:

"The rule seems to be well settled that if the judge, during the progress of the trial, makes remarks in the presence of the jury which would be erroneous and prejudicial, had they been embodied in the formal charge given by him to the jury, it will entitle the losing party to have a verdict to which they might have contributed set aside."

Digitized by Google

The Texas Court of Criminal Appeals, in Gribble v. State, 210 S. W. 215, 3 A. L. R. 1096, said:

"The fact that a statement of the court as to the importance or unimportance of testimony is stated from the bench would often make it no less hurtful than if contained in the written charge. The trial judge is to the jury the Lord's anointed; his language and his conduct have, to them, a special and peculiar weight."

The rule with respect to prejudicial remarks by the presiding judge in the presence of the jury may be gleaned from the following quotations from the opinions of justices of our court written during the quarter of century last past:

"There can be no question but that the remarks of the court were not only improper, but were manifestly prejudicial to the defendant, and constitute reversible error." State v. Taylor, 7 Idaho, 134, 61 Pac. 288.

"It is a well-settled principle that trial courts should be guarded from any expression, in the presence or hearing of the jury, that can in any way be construed into an expression of their views on any evidence that may be before the jury." State v. Shuff, 9 Idaho, 115, 72 Pac. 664.

"The trial court must avoid remarks that tend to give to the jury the impression that counsel is asking foolish questions and trifling with the court, and thus create prejudice." Nave v. McGrane, 19 Idaho, 111, 113 Pac. 82.

"It is a well-recognized fact that jurors as a rule are quick to discern the opinion of the trial court as to the guilt or innocence of a defendant, or his opinion as to the truthfulness of a witness, and if a juror concludes from the act or suggestion of the court that it disbelieves a witness, it is sure to have a prejudicial effect against the litigant calling the witness, and especially is this true where public feeling and prejudice run rampant against a defendant charged with a horrible crime." State v. Clark, 27 Idaho, 48, 146 Pac. 1107.

Criticizing the conduct of a trial judge in discussing in his instructions the credibility of the defendant as a witness, it is said:

"We think the better rule for the court to follow is not to single out any special witness personally and burden his testimony with any suggestions which might indicate to the jury that in the opinion of the court such witness was liable to testify falsely. * * * And the giving of such instruction cannot be regarded as otherwise than erroneous." State v. Rogers, 30 Idaho, 259, 163 Pac. 912.

The testimony of McGraw contradicted that of respondent as to the speed of the train and as to what the latter was doing just prior to the accident, and, if believed, should have, and almost certainly would have, prevented the verdict complained of.

Since those responsible for the foregoing opinion have found the remark of the presiding judge to be erroneous, because it reflected on the credibility of the witness and detracted from the weight of his testimony, and since they are unable to find, or at least to point out, wherein it was cured, and in view of the importance of that testimony, it is safe to say a justifiable reason for the conclusion announced does not exist.

On Petition for Rehearing.

BUDGE, J. Upon petition for rehearing our attention has been called to the statement in the original opinion:

"That the *amount* of the verdict was in part the result of passion and prejudice."

Since the meaning we intended to convey has been apparently misunderstood, we desire to add that, although we cannot say that the rendition of the verdict in favor of respondent was the result of passion or prejudice, his condition, observed by the jury during the exhibition of his person at the close of the trial, was such as naturally to strongly excite the sympathies of the jury, and the verdict was doubtless augmented as a result thereof.

The petition for rehearing is denied.

MORGAN, C. J., and RICE, J., concur.

DELAP v. LAWSON et al. (No. 3056.)

(Supreme Court of Idaho. May 26, 1920.)

Evidence sustaining judgment.

Evidence examined, and *held* sufficient to support the findings of the trial court.

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by Alex Delap against Ola Lawson and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. R. Good and S. L. Tipton, both of Boise, for appellant.

Elliott & Healy, of Boise, for respondents.

RICE, J. This is an action upon a promissory note in which judgment was rendered for the defendants. The appeal is from the judgment.

The appellant makes but one specification of error, as follows:

"The court erred in rendering judgment against the plaintiff; the same not being supported by the evidence in the record."

This assignment is very defective. Caldwell v. Wells, 16 Idaho, 459, 101 Pac. 812; Newport Water Co. v. Kellogg, 31 Idaho, 574, 174 Pac. 602; Citizens' Right of Way Co. v. Ayers, 32 Idaho, 206, 179 Pac. 954; Citizens' Right of Way Co. v. Pollard, 32 Idaho, 212, 180 Pac. 259.

Digitized by Google

The evidence contained in the record is conflicting. There is ample evidence to support the findings of the trial court.

The judgment is affirmed. Costs awarded to respondents.

MORGAN, C. J., and BUDGE, J., concur.

JOHNSON et al. v. STATE. (No. 9568.)

(Supreme Court of Oklahoma. May 25, 1920.)

(Syllabus by the Court.)

Criminal law ⟸1130(2)—On failure to file briefs, appeal will be dismissed.

Where time has been allowed within which to file briefs in this court, and neither party to the appeal files such briefs or offers any excuse for failure to file the same, it will be presumed that the appeal has been abandoned, and the same will be dismissed.

Error from District Court, Washita County; Thomas A. Edwards, Judge.

Proceeding between the State of Oklahoma and A. H. Johnson and others, and from the judgment Johnson and others bring error. Appeal dismissed.

Swan C. Burnett, of Pawhuska, for plaintiffs in error.

A. R. Ash, of Cordell, for defendant in error.

BAILEY, J. Petition in error and case-made in this cause was filed in this court on November 3, 1917. The cause was regularly assigned for hearing and submitted, and on the 20th day of January, 1920, an opinion filed in said cause dismissing the same for failure to file briefs. On the 17th day of February, 1920, on showing that attorneys in said cause were unaware of the assignment of the cause and that no notice of such assignment had been received by them, the opinion filed was withdrawn said dismissal was set aside, and the attorneys allowed 15 days within which to file briefs. Although the time allowed for filing such briefs has long since expired, neither party to the appeal has filed a brief, or offered an excuse for failure to do so. Under the well-established rule and practice of this court, it will be presumed that the appeal has been abandoned, and the same will be dismissed.

And it is so ordered.

All the Justices concur.

TIGER et al. v. NOLEN et al. (No. 9680.)

(Supreme Court of Oklahoma. May 11, 1920.)

(Syllabus by the Court.)

Indians ⟸27(2)—District courts on July 6, 1909, might partition inherited lands of mixed-blood Indians.

On July 6, 1909, the district courts of this state had jurisdiction of an action to partition inherited lands of mixed-blood Indians, including minors, and were authorized to decree a sale of such lands if found to be incapable of partition by the commissioners appointed by said courts.

Error from District Court, Hughes County; Geo. C. Crump, Judge.

Action between Ewnah J. Tiger, a minor, by Barney Tiger, his guardian and next of friend and Barney Tiger, against James M. Nolen and another. Judgment for the latter, and the former brings error. Affirmed.

Diamond & Sherrow, of Holdenville, for plaintiff in error.

Skinner & Bailey, of Holdenville, for defendants in error.

JOHNSON, J. It was stipulated in this case as follows:

"The defendants in error filed a demurrer to the petition of the plaintiffs in error, and upon said demurrer coming on for hearing, the parties having agreed in open court that the sole and only question of law to be determined by the court was, whether or not the district court could partition the land of a full-blood Indian inherited by a seven-eighths blood minor."

This stipulation eliminated from the case everything as stated except the sole question of law, "Whether or not the district court of this state could partition the land of a full-blood Indian inherited by a seven-eighths blood minor." This court has recently answered that question in the affirmative in the case of Salmon et al. v. Johnson (No. 9717) 189 Pac. 537, in an opinion by Mr. Justice Rainey, decided at the present term and not yet officially reported.

The question of law decided in said cause is controlling in the instant case, being the identical question herein involved.

Under the rule of law announced in cause No. 9717, and the authorities there cited, it is ordered that the judgment of the trial court be affirmed.

All the Justices concur.

Digitized by Google

SIMON v. HINE et al. (No. 9894.)

(Supreme Court of Oklahoma. May 11, 1920.)

(Syllabus by the Court.)

1. **Cancellation of instruments ⊂⊃35(1) — Quieting title ⊂⊃30(3)—Person whose status will be changed necessary party.**

In an action for the cancellation of deeds and to remove cloud on title to real estate, every person whose legal or equitable status with reference to the real estate involved will be materially changed by the judgment is a necessary party to the suit.

2. **Reformation of instruments ⊂⊃33 — Deed will not be reformed without making grantors parties.**

In a suit for reformation of deed, equity in such case, not knowing the interest of grantors, will not reform such deed without making the grantors parties to the suit.

3. **Quieting title ⊂⊃44(2)—That one claiming as innocent purchaser knew title was in litigation admissible.**

In an action to remove cloud on title, where the claim of one of the title holders is that he was an innocent purchaser in good faith, the records of a former trial and judgment, which tend to show that such party had notice of the condition of title to the land, and that it was in litigation, and that he was a necessary party to such former action, are competent evidence, material to the issue, to exclude which is error.

Error from District Court, Seminole County; C. Guy Cutlip, Judge pro tem.

Action by Polly Simon against T. S. Hine and others to cancel deeds and to quiet title, with cross-petition by defendant Hine. Judgment for defendant Hine, reforming a deed as prayed by him and plaintiff appeals. Reversed and remanded.

J. A. Baker, of Wewoka, for plaintiff in error.

Davis & Patterson, of Wewoka, for defendants in error.

HARRISON, J. This was a suit for the cancellation of certain deeds and for removal of cloud on title to real estate.

Polly Simon was a Seminole freedman, duly enrolled and received her allotments as such. She had two sons, Gus Island and Pilot Island, by a former husband, whose name was Harry Island. The two sons were likewise enrolled as Seminole freedmen and received allotments as such. Pilot Island's allotment comprised the W. ½ of the S. E. ¼, and the S. E. ¼ of the S. E. ¼ of section 24, township 9 N., range 7 E. I. M. He died December 23, 1906, at the age of 15 years. The title to his said allotment, it is claimed, passed to his mother, Polly Simon, as sole heir of his estate, and this suit grew out of transactions involving a conveyance of his allotment within a few days after his death. On the next day after his death his mother, Polly Simon, drove into the town of Wewoka to get a coffin and shroud in which to bury him, and went to the store of C. S. Crouch, a dealer in coffins, etc., and, not having the money to pay for same, she sought to sell a farm lease on 40 acres of her deceased son's allotment. Mr. Crouch informed her that he was not dealing in lands, but knew a man who was; his name being James E. Foreman. So Crouch and one Dennis Cyrus saw Foreman and brought him down to Crouch's store, whereat an agreement was reached that Polly Simon would convey to Foreman some kind of a right to the deceased minor's allotment, and Foreman would pay for the coffin.

Polly Simon claims in her petition herein, and so testified, as shown by the record herein, that the agreement was that she would convey to Foreman a 5-year farm lease on 40 acres of the allotment, in consideration for which Foreman was to pay for the coffin and shroud, which cost $30, and for some groceries, which amounted to something over $2.50. Some years later she discovered that what she understood to be a five-year lease on 40 acres had developed into two warranty deeds to the entire 120-acre allotment, and the decision in this case turns upon the question whether she intended to execute a lease on 40 acres of the allotment, or that she intended to execute a warranty deed to the entire 120-acre allotment, for the price of the coffin and the few groceries she received. She claims that she executed a lease, and that the lease was the only instrument of any kind that she ever executed to Foreman, and that the deeds in question are absolute forgeries. The defendant claims that the deeds are genuine, and that she understood them to be warranty deeds at the time she executed them. One of said deeds purports to have been executed and acknowleged by her on the day she obtained the coffin, and the other deed to the same land was executed two days later, December 26th, by Polly Simon and her husband, Jack Simon. Polly Simon denies emphatically that she signed any instrument on the day she obtained the coffin, for the reason that that was Sunday, and it was agreed that the coffin would not be paid for on that day, but that she and her husband, Jack Simon, would come in on the day after Christmas and sign a lease.

Defendant claims that on the day she got the coffin she went before M. A. Fowler, a notary public, and at his office and in his presence signed and acknowledged the deed. She denied that she knew Fowler, and denied that she had gone to his office on that day. She claims that on Wednesday, after Christmas, she and her husband, Jack Simon, came into Wewoka to sign the lease, and did sign

Digitized by Google

the lease in question in a hotel in Wewoka.

Defendant claims that she and her husband on that day signed and acknowledged the instrument in question before a notary public by the name of Jeffreys, and that such instrument was a warranty deed to all of her deceased son's 120-acre allotment to James E. Foreman. Now the defendant herein, T. S. Hine, claims title through a quitclaim deed from James A. Foreman and wife and from other sources, not material to the decisive question involved.

During the trial it was discovered that the deed executed to Foreman by Polly Simon alone, and also the deed executed to the same party by Polly Simon and her husband, both included 40 acres of Polly Simon's individual homestead allotment from the government, the same being the N. E. ¼ of the S. E. ¼ of section 24, township 9, range 7, and did not include 40 acres of the deceased minor's allotment, the same being the S. E. ¼ of the S. E. ¼ of said section, whereupon, over the objection of Polly Simon, defendant Hine was permitted to amend his cross-petition, to show that the misdescription was a mutual mistake, and asked leave to reform it. Previous to this, however, and during the proceedings, Polly Simon had asked permission to make her husband, Jack Simon, a party to the suit, which permission was denied by the court.

The finding and judgment of the court were in favor of defendant T. S. Hine, holding that the deeds in question were valid, and further ordering that the deed be reformed in accordance with Hine's amended cross-petition; that is, by leaving out Polly Simon's 40 acres, which was included in the deed, and taking in the son's 40 acres, which had been left out.

The case is brought here upon an assignment of seven separate errors. The first in effect assails the sufficiency of the evidence; the second, that Jack Simon should have been made a party; the third, in effect to the same question as the first; the fourth, to the same point in effect as the second; the fifth, to the rejection of records of a former trial, involving the same land, as evidence; the sixth, that the court erred in holding T. S. Hine not bound by the judgment in the former suit; the seventh, that the court erred in finding that "Polly Simon was the mother of deceased, Pilot Island, and as such inherited an undivided one-half interest in his estate," and then proceeding to award the whole title to T. S. Hine.

From the record in the case it becomes unnecessary for this court to weigh the evidence and decide whether the judgment of the trial court was against the clear weight of the same.

[1, 2] As to the second error assigned, it is our judgment that Jack Simon was a necessary party to the suit. This was a suit which invoked the equity powers of the court. Every person, whose legal or equitable status, with reference to the real estate involved, would be materially changed by the judgment, was a necessary party to the suit. Section 4690, Rev. L. 1910; M. & P. Nat. Bank v. Horton, 27 Okl. 689, 117 Pac. 201; Burkett v. Lehman Groc. Co., 8 Okl. 84, 56 Pac. 856; Lynch v. U. S., 13 Okl. 142, 73 Pac. 1095; Hellman v. Schneider, 75 Ill. 422; 34 Cyc. 967.

Now, Jack Simon was the husband of Polly Simon. He and his wife resided upon the homestead allotment of Polly Simon, and had occupied same as a constitutional homestead from the date of the death of the minor son, Pilot Island, to the date of filing this suit, November 12, 1915, about 9 years. Besides, he was one of the grantors in the deed under which Hine claimed, and the deed under which Hine claimed, until the court decreed the reformation of same, involved the homestead tract upon which he and his wife resided. Besides it is not made to appear in the record that he had no rights in that portion of the land which had formerly been the deceased minor's allotment; at any rate he was one of the grantors in the deed, and equity, not knowing the interest of the grantors, would not reform a deed without making the grantors parties to the suit. Hellman v. Schneider, 75 Ill. 422; Oliver v. Cliffton, 59 Ark. 187, 26 S. W. 817; Vanderbeck v. Perry, 28 N. J. Eq. 367; 34 Cyc. 367.

It is urged by the defendant in error that after the court decreed a reformation of the deed, by which reformation the tract occupied as a constitutional homestead was excluded, he was not a necessary party, and cites in support of this contention authorities; but it must be borne in mind that the reformation had not been decreed at the time Jack Simon asked to be made a party. The reformation was not decreed until after the testimony was all in and the case argued and closed; hence at the time the court refused to permit Jack Simon to be made a party the court could not have known, nor did any one else know at that stage of the proceedings, that such a decree would be rendered, and if Jack Simon had been made a party to the suit, thereby rendering his testimony competent, under section 5050, Rev. L. 1910, the decree of reformation might not have been rendered. The court did not know what interest he had in the land, nor what would have been his testimony in that regard. Had he been made a party to the action and been permitted to testify, he might have been able to show rights in the premises and his testimony might have been such as to change the result; he might have been able to explain circumstances left unexplained in this record in such manner as, after full consideration of all the evidence and the circumstances of the making of these deeds

Digitized by Google

upon which defendant Hine relied, the court would not have decreed the reformation of same. It was therefore error not to permit him to be made a party.

[3] As to the fifth error assigned, the plaintiff, Polly Simon, offered the records of a former trial and judgment in a case involving title to the same land. These records were offered for the purpose of showing that defendant T. S. Hine, in his efforts to acquire title to this land, had notice of the condition of the title and was not an innocent purchaser in good faith; that he had acquired title during the pendency of said litigation, and had notice thereof, and had an interest therein, and should have been made a party thereto. The court rejected such records as evidence, and rejected all testimony in regard to same. These records and the testimony offered by plaintiff were material on the question as to whether Hine had purchased without notice. Had the court received such records and analyzed the issues therein made and decided, and observed what land was involved in the controversy, and what parties were interested in the result of the controversy, and have permitted testimony to be offered explanatory thereof, it might not have concluded that Hine was an innocent purchaser without notice of cloud on his title or adverse claims thereto. Hence it was error for the court to reject such evidence. Miller v. Belvy Oil Co., 248 Fed. 83, 160 C. C. A. 223; Glencove Co. v. Surety Co. (C. C.) 114 Fed. 978; Am. Bell Tel. Co. v. Nat. Impt. Tel. Co. (C. C.) 27 Fed. 663; Harrod, Guardian, v. Burke, 76 Kan. 909, 92 Pac. 1128, 123 Am. St. Rep. 179; Herman on Estoppel, § 186; Tilton v. Corfield, 93 U. S. 163, 23 L. Ed. 858.

Having reached the conclusions above, and being of the opinion that they constitute reversible error, we deem it unnecessary to decide the other errors assigned, or to weigh the testimony and decide whether or not the judgment was clearly against the weight of the evidence.

The judgment is reversed and cause remanded.

RAINEY, C. J., and JOHNSON, PITCHFORD, and McNEILL, JJ., concur.

HINES, Director General of Railroads, et al. v. OLSEN et al. (No. 10780.)

(Supreme Court of Oklahoma. May 11, 1920. Rehearing Denied June 8, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸854(1)—General judgment will not be reversed if having a basis in any one of several grounds.

Where a judgment does not disclose which of several grounds it is based upon, but is general in its terms, it will not be reversed if any one of such grounds is a valid basis for the judgment, and there is sufficient evidence to sustain it upon such grounds.

2. Evidence ⟸457, 460(6)—Parol evidence is competent to explain uncertain boundaries and technical terms in deed.

In a deed of land to a railway company for right of way, where the language used in describing the land, as to location and boundaries, is uncertain, and makes use of terms not commonly understood, parol testimony, for the purpose of explaining the location and boundaries and the technical meaning of terms used, is competent.

3. Appeal and error ⟸1012(1) — Judgment not against weight of evidence not disturbed.

The judgment of a trial court, when not against the clear weight of evidence, should not be disturbed by this court.

Appeal from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Action for injunction by Walker D. Hines, Director General of Railroads, and the St. Louis & San Francisco Railway Company against O. H. Olsen and another. From an order dissolving the injunction, and dismissing the petition therefor, plaintiffs appeal. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiffs in error.

Morgan, Pinkston & Hepburn, of Henryetta, for defendants in error.

HARRISON, J. This is an appeal from an order dissolving an injunction and dismissing the petition therefor.

The plaintiffs in error, Walker D. Hines, Director General of Railroads, who was made a party to the suit, and the St. Louis & San Francisco Railway Company obtained a temporary order, restraining defendants in error from interfering with plaintiffs in error in the construction of what is denominated a spur track across a portion of lot 1, block 4, Rich Hill addition to the town of Henrietta, Okl. Olsen and his wife owned lots 1 and 2 in said block, the Frisco Railway Company owned a line of track running diagonally across the northeast corner of lot 1, which cut off a small triangular tract on the northeast corner of said lot, and sought to appropriate said triangular tract to its own use and to lay thereon some additional spur tracks. Olsen and his wife, claiming said corner under their deed, had the railroad employés arrested, whereupon the railroad company obtained said temporary order in the district court, restraining Olsen and his wife from interfering with the railroad employés in their work upon said corner.

Upon the showing made in the petition for

Digitized by Google

injunction the court granted a temporary restraining order, but upon final hearing, at which oral testimony and the deeds and plats affecting said lots were introduced in evidence, the court dissolved the temporary order, and dismissed the railroad company's petition, and from such action the railroad company appeals.

Plaintiffs in error contend that the gist of the case, the decisive point in the case, is whether a deed to the right of way to the railroad company by a Creek allottee of restricted lands must be approved by the Secretary of the Interior before it becomes valid. They further contend that, under the Act of February 28, 1902 (32 Stat. L. 43), and known as "the Enid and Anadarko Railway Act," railroad companies were authorized to obtain deeds for right of way across restricted lands, and that such deeds under the provisions of said act were valid without the approval of the Secretary of the Interior.

On the other hand, it is contended by defendants in error: First, that such a deed is not valid without the approval of the Secretary of the Interior; and, second, they deny that the validity of such a deed is the gist of this case, and that it is immaterial whether the railroad company's deed to its right of way was valid or not, for the reason that said deed did not cover nor include any portion of the lots involved in this controversy; hence its validity was not the gist of the case. This latter contention, it is very probable, is the view taken by the trial court, and constitutes the ground upon which the temporary order was dissolved and the petition for injunction dismissed.

[1, 2] The journal entry does not disclose specifically the grounds upon which the court's judgment was based, but the question as to whether or not the railroad company owned any portion of said lots under its original right of way deed was made an issue in the trial, and both record and oral testimony were introduced upon such issue, and from the entire record of the testimony it is our opinion that the issue as to whether the railroad company had any title to any portion of said lot was the decisive issue in the case, and that upon the testimony introduced the order and judgment of the court would have been justified if based upon such grounds, whether specifically so stated or not (Dunkin v. Galloway, 75 Okl. 125, 181 Pac. 939; Gorman v. Carlock, 179 Pac. 38; Shawnee Life Ins. Co. v. Watkins, 53 Okl. 188, 156 Pac. 181; Tel. Co. v. Best, 56 Okl. 85, 155 Pac. 901), and that it was immaterial whether the railroad company's original deed to the right of way across the Indian allotment was approved by the Secretary of the Interior or not; such right of way not including any portion of said lot.

It is shown by the record that the land in the deed from the allottee, Geo. W. Stidham, to the railroad company for right of way, is described as follows:

"A hundred foot strip being fifty feet on each side of the following described center line in the southwest quarter of the northeast quarter of the southeast quarter of section No. six (6) in township No. eleven (11) north, range thirteen (13) east, in the said Creek Nation, Indian Territory; beginning at a point on the present spur track five hundred and twelve feet (512') south from the head block on the main track of the Frisco R. C. said head block being M. P. 480.63; thence to a curve to the left whose radius is seven hundred and sixteen and 8/10 (716.8') feet to station 6 x 14; thence southwest to a tangent to the east line of section No. six (6) at station 14 x 10."

It also appears from the record that this deed, though executed by the allottee on September 16, 1902, was not filed for record until February 19, 1919, some time after proceedings herein were instituted.

It is also shown by the record that on April 18, 1906, the allottee and his wife, Jennie, conveyed the entire allotment, less the right of way, to the Henrietta Coal & Mining Company in a deed describing the property conveyed as follows:

"The northeast quarter of the southeast quarter, less 4.26 acres occupied as right of way by the St. Louis, Oklahoma & Southern Railroad, of section 6, township 11 north, range 13 east, containing 115.44 acres, more or less."

This deed was recorded April 28, 1906.

It is also shown by the record that on August 23, 1906, the Henrietta Coal & Mining Company platted a portion of the land conveyed to it by the allottee into town lots, designated and filed of record as the Rich Hill addition to the town of Henrietta, Okl., and that thereafter the lots in question were conveyed to one Joe Anthony, and subsequently conveyed by Joe Anthony to the defendants in error here.

The recorded plat of said addition shows a spur track of the Frisco railroad running diagonally across a portion of said addition and across the lots in question, and said plat also reserves a 25-foot right of way, that is 12½ feet on each side of the center of said spur track to the railroad company, and the deed to Joe Anthony to the lots herein and the deed to same from Joe Anthony to defendants in error herein were each made subject to said 25-foot right of way, as shown by the record plats on file.

The defendants in error herein disclaimed any rights in or to said 25-foot right of way, but did claim the triangular tract cut off on the northeast corner of lot 1 and not included in said 25-foot right of way.

[3] There was testimony to the effect that the right of way conveyed by the allottee to the railroad company as evidenced by the deed thereto did not touch nor include any

Digitized by Google

portion of the lots in controversy, and this testimony being competent for the reason that the allottee's deed to the railway company was not clear as to the exact location and boundaries of the right of way conveyed, and made use of descriptive terms not generally understood (Varner-Collins Hardware Co. v. New Milford Security Co., 49 Okl. 613, 153 Pac. 667; Eoff v. Lair, 163 Pac. 515), was sufficient evidence on this point to warrant the court in concluding that the railroad company had no right to any portion of the lots in question by reason of its deed from the allottee, and that if it had any right to any portion of said lots, such right was acquired by cession or otherwise from the mining company as shown by the recorded plat of said addition showing the railroad company to have a right to the 25-foot right of way across said lots for a switch track, and warranted in further concluding that the owners of the lots were precluded from any rights to said 25-foot right of way, not because of the deed from the original allottee to the railway company, but because their deed to the lots was made subject to said 25-foot right of way, and for the further reason that they disclaimed any right to said 25-foot right of way. Hence the conclusion of the court, not being against the clear weight of the evidence, should not be disturbed. Smith v. Skelton, 163 Pac. 268; Thomas v. Halsell, 164 Pac. 458. The judgment is therefore affirmed.

RAINEY, C. J., and JOHNSON, PITCHFORD, McNEILL, BAILEY, RAMSEY, and KANE, JJ., concur.

HIGGINS, J., not sitting.

MARTIN v. STATE. (No. A-3467.)

(Criminal Court of Appeals of Oklahoma. May 29, 1920.)

(Syllabus by Editorial Staff.)

Criminal law ⊂⊃1182—Without brief, appearance, or reversible error, conviction affirmed.

Where petition in error and case-made were filed in Criminal Court of Appeals and there is no brief for plaintiff in error or any appearance to orally argue the case at its admission, and on examination of the pleadings, instruction, judgment, and sentence, the court finds no prejudicial error authorizing a reversal, the judgment will be affirmed under Criminal Court of Appeals Rule 9 (165 Pac. x).

Appeal from District Court, Craig County; Ernest B. Hughes, Judge.

John Martin was convicted of the crime of manslaughter in the first degree and sentenced to serve a term of 35 years in the state penitentiary, and he appeals. Affirmed.

Riddle, Bennett, Wilson & Mitchell, of Vinita, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. Plaintiff in error was convicted of the crime of manslaughter in the first degree, and his punishment fixed as above stated. Judgment rendered on May 25, 1918.

This appeal has been pending in this court since October 5, 1918. No brief has been filed in behalf of plaintiff in error, and no appearance was made to orally argue the cause at the time same was submitted.

Rule 9 of this court (165 Pac. x) provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence, and if no prejudicial error appears, will affirm the judgment."

After an examination of the pleadings, the instructions of the court, and the judgment and sentence, the court finds that no prejudicial error occurred sufficient to authorize a reversal of this judgment, and the same is therefore affirmed.

MITCHELL v. STATE. (No. A-3433.)

(Criminal Court of Appeals of Oklahoma. June 14, 1920.)

(Syllabus by the Court.)

Criminal law ⊂⊃1086(13)—Where transcript of record or case-made contains no copy of judgment below the appeal will be dismissed.

Where an appeal is taken from an alleged judgment of conviction, and the transcript of the record or case-made contains no copy of the judgment of the trial court, this court does not acquire jurisdiction of the appeal, and such an appeal will be dismissed.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Jesse Mitchell was convicted of assault with a dangerous weapon, and he appeals. Appeal dismissed, and cause remanded.

Champion & George, of Ardmore, for plaintiff in error.

S. P. Freeling, Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Jesse Mitchell, was convicted in the district court of Carter county upon an information charging that in said county, on or about the 12th day of January, 1918, he did then and there willfully, unlawfully, and feloniously make an assault by shooting at and against the body of one Manuel Williams, with a pistol with the unlawful and felonious intent to do great

Digitized by Google

bodily harm, and his punishment was fixed at confinement in the county jail for a period of six months. To reverse the conviction a petition in error with case-made were filed in this court on August 15, 1918.

The Attorney General has filed a motion to dismiss because there is no judgment or copy of judgment contained in the record.

The case-made contains a copy of the verdict, the motion for a new trial, and the order of the court overruling the same. Then appears the following recital:

"And thereupon the defendant, in open court, gave notice of appeal, and thereupon the judgment and sentence of the court was pronounced against said defendant in conformity with the verdict of the jury rendered in said cause."

This is the only reference in the record which shows the rendition of any judgment of conviction, and in itself is a mere recital of the fact that a judgment had been rendered. The case-made does not contain a journal entry of judgment or a copy thereof. By numerous decisions of this court it is held that when an appeal is taken from an alleged judgment of conviction, and the transcript of the record or case-made contains no copy of the judgment of conviction, such record or case-made presents no question to this court for its determination, and the appeal will be dismissed for want of jurisdiction. McLellan v. State, 2 Okl. Cr. 633, 103 Pac. 876; Loyd v. State, 12 Okl. Cr. 82, 151 Pac. 1190; Harjoe v. State, 14 Okl. Cr. 187, 169 Pac. 659.

Inasmuch as the case-made does not contain a copy of the judgment appealed from, we are of the opinion that this court is without jurisdiction to consider the appeal. The motion to dismiss the appeal is therefore sustained, and the attempted appeal herein is dismissed, and the cause remanded to the lower court.

ARMSTRONG and MATSON, JJ., concur.

SMART v. STATE. (No. A-3453.)

(Criminal Court of Appeals of Oklahoma. May 22, 1920.)

(Syllabus by Editorial Staff.)

1. Intoxicating Liquors ⟹223(4)—Proof as to points between which liquor was conveyed held not at variance with allegations.

Where an information alleged certain points of intersection of certain sections of land in the county as the points from which and to which the liquor was conveyed, and the evidence showed that the confusion of the prosecuting witness as to the section numbers was removed later in his examination, and where the record evidence supported the allegations, the jury might conclude therefrom that such points were those charged, so that there was no material variance.

2. Criminal law ⟹413(1)—Defendant's self-serving declaration, forming no part of res gestæ inadmissible.

The exclusion of defendant's proof by the prosecuting witness that defendant had stated to the witness about an hour before his arrest that he had purchased the whisky and alcohol in Missouri and was transporting it thence into the county when apprehended was proper, because it was an attempt to prove defendant's self-serving declaration, forming no part of the res gestæ of the crime.

Appeal from County Court, Rogers County; Edward Jordan, Judge.

E. L. Smart was convicted of unlawfully conveying intoxicating liquors and he appeals. Affirmed.

Jennings & Hall, of Claremore, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Rogers county, Okl., wherein the defendant was convicted of unlawfully conveying certain intoxicating liquors, to wit, 108 quarts of whisky and 20 gallons of alcohol, from one place within said county to another place therein, and his punishment fixed at imprisonment in the county jail for a period of 60 days, and to pay a fine of $100.

[1] It is first alleged that there is a material variance between the allegations in the information as to the particular points from which and to which the said intoxicating liquors were alleged to have been conveyed and the proof adduced upon the trial as to such points.

The information alleged certain points of intersection of certain sections of land in said Rogers county as the points from which and to which said conveyance was made, and the evidence in the record discloses that the prosecuting witness was at first somewhat confused as to the section numbers, but later in his examination, whatever confusion at first arose in his mind was cleared up, and there is evidence in the record supporting the allegations contained in the information as to the particular points from which and to which the said intoxicating liquors were conveyed by the defendant, and the jury was authorized to reasonably conclude from such evidence that such points were the identical points charged in the information.

[2] It is also contended that the court erred in refusing to permit the defendant to prove, both by cross-examination of the prosecuting witness and later when said witness was called as a witness in behalf of the de-

Digitized by Google

fendant, that the defendant had stated to such witness, about one hour after he was arrested, that he had purchased the said whisky and alcohol in Webb City, Mo., and was in the act of transporting it from that place into Rogers county, Okl., at the time he was apprehended.

This evidence was properly excluded by the court, even should it be considered material in defense of this prosecution, which we do not decide, for the reason that it was nothing more than an attempt to prove a self-serving declaration on the part of the defendant, made about an hour after he was first arrested, and forming no part of the res gestæ of the crime.

For the reasons stated, the judgment of conviction is affirmed.

SHERWOOD v. STATE. (No. A-3275.)

(Criminal Court of Appeals of Oklahoma. May 29, 1920.)

(Syllabus by Editorial Staff.)

Criminal law ⟸1086(13)—Where transcript contains no copy of judgment appeal dismissed.

Where an appeal is taken from an alleged judgment of conviction, and the transcript of the record or case made contains no copy of the judgment, such record or case made presents no questions for determination by the Criminal Court of Appeals, and the appeal will be dismissed for want of jurisdiction.

Appeal from County Court, Payne County; Wilburforce Jones, Judge.

John Sherwood was convicted of a violation of the prohibitory liquor laws, and he appeals. Appeal dismissed.

John Adams, of Guthrie, and W. R. Taylor, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. John Sherwood was convicted in the county court of Payne county on an information charging him with unlawfully conveying certain whisky from a place unknown in Payne county to another place in said county, to wit, a point on the public highway in the southeastern part of the city of Cushing. The petition in error recites that judgment was rendered against the plaintiff in error on the 25th day of February, 1918, and there is a recital in the minutes of the clerk of the trial court to the effect that the court ordered that the defendant be confined in the county jail for a period of 60 days and that he pay a fine of $100 and costs. The appeal is by transcript of the record, and the record before us contains no copy of any judgment as rendered in the court below from which an appeal could be taken.

This court has repeatedly held:

"When an appeal is taken from an alleged judgment of conviction, and the transcript of the record or case-made contains no copy of the judgment of conviction, such record or case-made presents no question to this court for its determination, and the appeal will be dismissed for want of jurisdiction." Harjo v. State, 14 Okl. Cr. 187, 169 Pac. 659; Lloyd v. State, 12 Okl. Cr. 82, 151 Pac. 1190; Fowler v. State, 11 Okl. Cr. 157, 143 Pac. 658; Dansby v. State, 7 Okl. Cr. 496, 124 Pac. 328; Allen v. State, 6 Okl. Cr. 665, 118 Pac. 1102; Bradford v. State, 3 Okl. Cr. 367, 106 Pac. 535; McLellan v. State, 2 Okl. Cr. 633, 103 Pac. 876.

For the reason that the transcript does not contain a copy of the judgment appealed from, we are of opinion that this court is without jurisdiction to consider the appeal, and for such reason the appeal is dismissed.

YOUNG v. STATE. (No. A-3431.)

(Criminal Court of Appeals of Oklahoma. June 8, 1920.)

(Syllabus by the Court.)

Evidence sustaining conviction of grand larceny.

In a prosecution for grand larceny, evidence examined and *held* sufficient to sustain the conviction.

Appeal from District Court, Washita County; Thomas A. Edwards, Judge.

Walter Young was convicted of grand larceny and he appeals. Affirmed.

Swan C. Burnette, of Pawhuska, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of the district court of Washita county rendered upon a verdict finding plaintiff in error, Walter Young, guilty of grand larceny as charged in the information and fixing his punishment at confinement in the state reformatory at Granite for a period of 18 months. The petition in error with case-made was filed in this court on August 12, 1918, and no brief has been filed and no appearance made on behalf of plaintiff in error in this court. The cause was submitted on the record.

The errors assigned question the sufficiency of the evidence to support the verdict. The information charges the larceny of

Digitized by Google

about 600 pounds of cotton of the value of $50, the personal property of J. M. Hardesty. After a careful examination of the record and the evidence we reach the conclusion that the evidence is amply sufficient to sustain the conviction, and that no such error was committed, if any at all, as would justify a reversal of the conviction.

The judgment is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

CRABTREE v. STATE. (No. A-3514.)

(Criminal Court of Appeals of Oklahoma. June 14, 1920.)

(Syllabus by the Court.)

Homicide ⟹343 — Plaintiff in error cannot complain that the jury were too lenient in fixing punishment.

In a prosecution for assault with intent to kill by shooting with a pistol, the record reviewed, and *held*, that plaintiff in error had a fair trial and was properly convicted.

Appeal from District Court, Cherokee County; John H. Pitchford, Judge.

Mat Crabtree was convicted of assault with intent to kill, and he appeals. Affirmed.

Bruce L. Keenan, of Tahlequah, and W. J. Crump, of Muskogee, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Mat Crabtree, was tried on an information charging that in Cherokee county, on or about the 25th day of June, 1918, he did shoot and wound with intent to kill one J. R. Cannon. The jury found him guilty of assault with intent to kill as charged in the information and fixed the term of his imprisonment in the penitentiary at one year. He has appealed from the judgment rendered on the verdict, but there has been no appearance in his behalf on his appeal, and the cause was submitted on the record.

The first assignment of error is that the court erred in admitting over the objection of the defendant incompetent, irrelevant, and immaterial testimony. It appears that some exceptions were taken during the course of the trial to the admission of evidence bearing upon the issues in the case, but we are of the opinion that none of them were well taken.

Error is assigned in the giving and refusing of instructions. We have examined the instructions given and those refused, and discover no error.

The remaining assignment of error is that—

"The court erred in overruling a motion for a new trial because the county attorney offered to confess the motion; that, while the record is silent upon the official offer on the part of the county attorney, plaintiff in error is authorized to say that the county attorney made such offer in open court, for the reason that the prosecuting witness was shot through the body several times, and his intestines punctured in several places, and the verdict and sentence is not commensurate with the punishment that ought to be inflicted."

We have examined the record carefully, and our conclusion is that there is no error in this case, unless it is the error of the jury in fixing the punishment. It is apparent that the jury were exceedingly merciful in the discharge of their duty. However, the plaintiff in error will not be permitted to complain that the jury were too lenient with him.

The judgment is affirmed.

ARMSTRONG and MATSON, JJ., concur.

PATTERSON v. STATE. (No. A-3408.)

(Criminal Court of Appeals of Oklahoma. June 5, 1920.)

(Syllabus by the Court.)

Intoxicating liquors ⟹236(9) — Insufficiency of evidence to sustain conviction for maintaining public nuisance.

In a prosecution for maintaining a public nuisance, evidence *held* insufficient to sustain a conviction.

Appeal from County Court, Oklahoma County; William H. Zwick, Judge.

Charles Patterson was convicted of a violation of the prohibitory liquor law, and he appeals. Reversed, and cause remanded.

S. H. Harris and J. I. Howard, both of Oklahoma City, and A. M. Beets, of Cordell, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error prosecutes this appeal from a judgment of the county court of Oklahoma county, sentencing him to be confined in the county jail for six months and to pay a fine of $100 for maintaining a public nuisance.

The information in substance charges: That on the 1st day of January, 1917, thence continuously up to and including the 3d day of April, 1917, in Oklahoma county, the defendant did then and there willfully and unlawfully keep and maintain a place at the corner of Reno and Pennsylvania avenues, Oklahoma City, wherein spirituous, vinous,

Digitized by Google

and malt liquors, to wit, beer and whisky, were by said defendant possessed and kept with the intent to sell, barter, give away, and otherwise furnish the same, and at which place during said period of time, at the procurement and solicitation of the said defendant, numerous and divers persons in large numbers did resort and congregate there for the purpose of drinking said beer and whisky, all thereof to the common nuisance of the public.

The principal contention on the part of the defendant is that the evidence is insufficient to sustain the verdict of conviction.

The testimony on the part of the state was as follows:

E. J. Helm, the first witness for the state, testified that he was a deputy sheriff, and knew the defendant and the place where he lived on the southwest corner of Reno and Pennsylvania; that with deputy sheriffs Farris and Nash he raided the place on the 2d day of February, 1918; that a fellow named Duchardt drove up with three sacks of beer in a wagon; that they found several sacks of beer, in a trench, about a barrel, found something like four bottles of whisky in a woodpile, found a case in a little house where some fellow slept, and found a part of a quart of whisky there, also found a barrel buried lengthwise in the ground with a square hole in the top, covered with straw, and some beer was in the barrel. Was acquainted with the general reputation of the place as being a place where intoxicating liquor was kept for the purpose of selling the same, and where persons resorted for the purpose of drinking liquor, and it was bad; that he had never heard the neighbors say anything about the reputation of the place; that he had never made a raid on Patterson's place prior to the date testified to, but did make a raid one time after, and did not find anything.

C. B. Farris testified: That he went with Officers Helm and Nash to the defendant's place, and "we found a little beer and whisky, that to make a long story short we dug up about a barrel of beer. The defendant at the time was building a barn, and came over and said the beer in the wagon belonged to his mother." Asked if he knew the general reputation of the place as to being a place where liquor was kept and stored for the purpose of sale and where people congregated and resorted to drink the same, he answered:

"We heard it had that reputation—that is the reason we went out there—and it would be bad, because we found whisky and beer there."

That the sacks in which the beer was, looked like they had been buried for some time. This was the only raid he had ever made on the defendant's place.

W. M. Nash, deputy sheriff, testified: That he went with Officers Helm and Farris to the defendant's place about the 3d day of April. That they found a farm hand with a wagon and team, and found three or four sacks of beer in the wagon. The defendant came up and said the fellow was going to drive with the beer over to his mother's. They found three or four sacks of beer in a ditch, and found three quarts of whisky in a woodpile, and in the little house they found a case unbroken, "but don't know what was in it; it was marked intoxicating liquor. We went in the house and didn't find a thing; did not know the general reputation of the place."

On behalf of the defendant, Mrs. Dora Finley testified that she was his sister, and the beer in the wagon belonged to their mother, who was living temporarily at 608 Fifth street; and she went with Frank Duchardt to the station to get it the day her brother was arrested, and produced the shipment receipt for the beer, which she received at the freight office; that she was at the defendant's place nearly every week, and would often stay there overnight; never saw persons congregate there, and never saw any one drinking around there; that old man Carpenter lived there in the little house, and he had spells of heart trouble, and he had whisky there, and would drink it whenever he could get it.

H. C. Carpenter testified that he was 68 years old; engaged in the real estate business; was living at the defendant's place, and occupied the little house out in the yard; that he had the beer and whisky out there that the officers found, and had a case containing four quarts of wine in the little house; that he put the barrel in the ground and kept beer and ice in it; that he buried the sacks of beer, and would bring it in and put a dozen or a half dozen bottles in the barrel; that the defendant did not order or own any part of the whisky, beer, or wine, or have anything to do with it. Had known Mrs. Patterson for 20 years, and that he hid this beer and whisky because she was very much opposed to the use of beer and whisky, and if she knew he had it she would not have let him keep it about the place; never saw persons congregating around there, and never knew of the defendant having, selling, giving away or otherwise furnishing liquor of any kind to any person.

Mrs. Belle Patterson, the defendant's wife, testified that they lived on her mother's place, a 10-acre tract, near the corner of Reno and Pennsylvania; that she never saw people coming to the place for the purpose of drinking beer and whisky, and never saw her husband sell beer or whisky, or have any beer or whisky there; that Mr. Carpenter occupied the little house south of their home; that she did not know for sure that Carpenter had any whisky there until it was found by the officers; that she had known Mr. Carpenter

Digitized by Google

for a long time; never saw him drinking, but heard that he did; that she was very much opposed to liquor in all its forms, and never used it herself; that she did know about some beer out in the barn for Mr. Patterson's mother, but would not permit it in the house; that her husband was not a drinking man, and she never saw him under the influence of liquor.

James Trippett testified that he lived in the first house south of the defendant more than a year; that he was home every night and never saw anybody at the defendant's place drinking intoxicating liquors; that he never heard of the place having a reputation of being a place where intoxicating liquors were sold.

Joe Winto testified that he lived within 250 feet of the defendant's place, and worked at the city pumping station; goes to work at 11:30; comes home at 11:30, changing every two weeks; that he never saw persons congregating around Patterson's house at night; never heard of Patterson's place having a bad reputation; never heard any discussion among the neighbors, although he had been living there for 3 years; never saw any indications around Patterson's place that they were selling whisky and beer there; not related to Patterson and has no interest in the case.

The defendant, Patterson, as a witness in his own behalf testified that he had been living there 2 years with his wife and two children; that he was a farmer and contractor, farming about 35 acres in addition to his place; that Mr. Carpenter during the time mentioned lived in the little house about 60 feet from his residence, both within the same inclosure; saw the officers stop Duchardt the hired man; that the beer in the wagon was his mother's; that Duchardt was moving her that day; that he told the officers at the time where the beer was going; that the beer found by the officers belonged to Carpenter; that he had nothing to do with putting the barrel in the ground, or keeping beer in it; did not know about the whisky Carpenter claimed being in the woodpile; that he had no whisky or beer about the place, and never solicited any person to come there and drink intoxicating liquors and no people ever came there to drink intoxicating liquor at any time.

In rebuttal the record of the Wells Fargo Express Company was introduced, showing that in the month of February there was one shipment of four quarts of liquor to Henry Carpenter, but no shipments of beer, and showing that no shipments of intoxicating liquor were received by the defendant.

At the close of the evidence the defendant moved the court to instruct the jury to return a verdict of not guilty, for the reason that the evidence is not sufficient to sustain a conviction, which the court overruled and allowed exception.

This conviction was obtained under that part of section 13, c. 70, Laws 1910–11, which reads:

"All places where any spirituous, vinous, fermented or malt liquors, or any imitation thereof, or substitute therefor; * * * is manufactured, sold, bartered, given away or otherwise furnished in violation of any provision of this act; and all places where any such liquor is kept or possessed by any person in violation of any provision of this act; and all places where persons congregate or resort for the purpose of drinking any such liquor, are hereby declared to be public nuisances, * * * and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a public nuisance, and shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months."

The charge of the court required the jury to find from the evidence beyond a reasonable doubt that the defendant maintained a public nuisance at the place named from January 1, 1917, continuously to and including the 3d day of April, 1917, where intoxicating liquor was kept and possessed by said defendant during said period of time with the intention of selling, bartering, and giving away the same in violation of law, and at which place during the said period of time, at the procurement and solicitation of said defendant, numerous and divers persons congregated for the purpose of drinking said liquor.

Where there is evidence to support the verdict this court will not pass upon its weight or sufficiency in order to determine whether or not the defendant was guilty as charged. However, there must be evidence tending to support the essential allegations of the information. In this case there is no direct evidence tending to show possession of intoxicating liquor. The facts relied upon by the state to show possession are circumstantial. The defendant denied possession, and another person claimed ownership and possession of the liquors seized by the officers.

Assuming that the evidence on the part of the state showed possession by the defendant of the liquors seized, there was no evidence tending to show that the defendant intended to sell or dispose of the same as charged in the information, and the evidence wholly fails to show that persons had congregated and resorted to the defendant's place for the purpose of drinking such liquor. In the brief for the state it is said:

"The evidence, attempting to show that persons congregated and resorted on the defendant's premises for the purpose of drinking such liquors, wholly fails. The evidence as to the general reputation of the premises is without force."

Digitized by Google

Because the evidence is insufficient to sustain the conviction, the judgment of the lower court is reversed, and the cause remanded.

ARMSTRONG and MATSON, JJ., concur.

EWING v. STATE. (No. A-3457.)

(Criminal Court of Appeals of Oklahoma. June 14, 1920.)

(Syllabus by the Court.)

1. **Criminal law ⟸369(13), 722½, 730(13), 1186(1)—Conviction reversed for error in admission of evidence and argument prejudicial to defendant.**

Where incompetent, irrelevant, and immaterial evidence is admitted over proper objection and exception of defendant's counsel, and improper remarks are made by the county attorney clearly outside the record, and are properly excepted to, and it is apparent to this court upon an examination of the entire record that such errors probably resulted in a miscarriage of justice, and were prejudicial to the substantial rights of the defendant, the judgment of conviction will be reversed.

2. **Criminal law ⟸643 — On timely request argument should be ordered taken in shorthand.**

When timely request is made, the trial court should order the court reporter to take down in shorthand the argument of counsel.

Appeal from County Court, Lincoln County; Ira E. Billingslea, Judge.

E. A. Ewing was convicted of the crime of assault and battery, and he appeals. Reversed and remanded.

Jarrett & Speakman, of Chandler, and Erwin & Erwin, of Wellston, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Lincoln county, wherein the defendant was convicted of the crime of assault and battery, and his punishment fixed at a fine of $75.

The defendant was charged with an assault and battery upon one Marie Evans, a girl 13 years of age, whose parents were tenants upon the defendant's farm, and lived close to the home of the defendant. The prosecuting witness and her 11 year old brother testified that the defendant put his arm around the prosecuting witness and pinched her on the breast.

The defendant denied having in any way willfully touched the prosecuting witness, but stated that he had attempted to grab a letter out of her hand, and the prosecuting witness jumped away from him, and that he had never treated her in a rude or insolent manner. The defendant had six or seven witnesses who testified to his good reputation for peace and as a law-abiding citizen. This evidence was controverted by two witnesses, one of whom had had some controversy with the defendant, and the other the grandfather of the prosecuting witness.

[1] During the progress of the trial, the court, over objection and exception by the defendant, permitted a witness to testify that the defendant on one occasion had attempted to persuade such witness to have sexual intercourse with the prosecuting witness This alleged conversation occurred some time after the alleged commission of this offense, and was in no way connected with it, and nothing said in such conversation in any way tended to explain the offense for which the defendant was upon trial, or nothing detailed by said witness amounted to an admission of guilt by the defendant of the alleged offense, and was clearly incompetent, irrelevant, and immaterial evidence, and in the opinion of this court was prejudicial to the substantial rights of the defendant, and the objection of counsel for the defendant to the admission of such evidence should have been promptly sustained, and the evidence excluded.

It also appears from the record that the county attorney, in his opening statement and during the examination of the witnesses, and in the closing argument to the jury, made certain remarks that this alleged offense was one of a series of offenses that had "continued down there for over 2 years, and that this defendant has during this time persisted in his attempts to ruin this girl." There was no theory in the trial of this case upon which evidence of other similar offenses was admissible, and the court excluded such evidence upon the trial, and the statement in the closing argument of the county attorney was clearly outside the record, and was improper argument, and the court should have instructed the jury not to consider the same, when the objection was made thereto by counsel for the defendant. The action of the trial court in refusing so to instruct the jury was also, in the opinion of this court, prejudicial to the defendant.

It also appears in the record that after the county attorney, in his closing argument to the jury, had made certain remarks which counsel for the defendant considered to be improper and prejudicial, a request was made by counsel for the defendant to have the court reporter take down in shorthand the further argument of the county attorney. This request was denied by the trial court, and an exception taken thereto. This action by the trial court was erroneous.

[2] This court has held that upon request counsel for either side have the right to have the stenographer take down in shorthand the

Digitized by Google

argument of opposing counsel, and the refusal of the court to comply with such request constitutes ground for reversal of the judgment without regard to the merits of the case. Tudor v. State, 14 Okl. Cr. 67, 167 Pac. 841; Miller v. State, 9 Okl. Cr. 255, 131 Pac. 717, L. R. A. 1915A, 1088; Walker v. State, 6 Okl. Cr. 370, 118 Pac. 1005; Lamm et al. v. State, 4 Okl. Cr. 641, 111 Pac. 1002.

This is a closely contested case upon the facts, but there is evidence in the record which would amply support the verdict. An examination of this record, however, convinces the court that the remarks and insinuations made during the progress of the trial of this cause tended in no small degree to arouse the prejudices and passions of the trial jurors, in view of the fact that the defendant was charged with having assaulted a child of tender years.

The prosecution was not commenced until three months after the commission of the alleged offense, although the parents of the prosecuting witness admitted to have obtained information of its alleged commission upon the very next day after it was supposed to have been committed. During the interim between the alleged commission of the offense and the institution of this prosecution, the families of the prosecuting witness and the defendant maintained friendly relations. The mother of the prosecuting witness testified that "neighborhood gossip" was the instigating cause of the prosecution. Before such gossip became current, the matter never assumed serious consequences so far as the parents of the prosecuting witness were concerned.

The defendant was a man who evidently bore a good reputation for peace and as a law-abiding citizen in his neighborhood, and had lived in that community upwards of 20 years. He had never before been charged with crime, and in view of the errors heretofore pointed out, it is the opinion of this court that the defendant did not receive that fair and impartial trial accorded to him under the laws of this state.

For the reasons stated, the judgment of conviction is reversed, and the cause remanded to the county court of Lincoln county for further proceedings in accordance with law.

DOYLE, P. J., and ARMSTRONG, J., concur.

THOMPSON v. STATE. (No. A-3470.)

(Criminal Court of Appeals of Oklahoma. May 29, 1920.)

(Syllabus by Editorial Staff.)

Criminal law ⟸1182—Where record discloses no error and evidence sustains the verdict, judgment will be affirmed.

On appeal from a conviction for the theft of an automobile, where there was no appearance for plaintiff in error and the case was submitted on the record, and an examination thereof in connection with the errors assigned showed that the state's testimony, if credited, was amply sufficient to sustain the verdict, and no error is found in the record, the judgment will be affirmed.

Appeal from District Court, Kiowa County; Thomas A. Edwards, Judge.

Dave Thompson was convicted of stealing an automobile, and he appeals. Affirmed.

Geo. W. Martin, of Gotebo, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Dave Thompson, jointly with Jim Thompson, Fane Thompson, and Ernest Stuart, was charged with the theft of one Ford automobile, the property of Fred Tilley. The defendant Jim Thompson pleaded guilty. Upon their trial the other defendants were found guilty, but the jury was unable to agree upon the punishment. The judgment and sentence of the court was that plaintiff in error, Dave Thompson, be confined in the state reformatory at Granite for a period of 18 months. He has appealed from said conviction to this court, but there has been no appearance in his behalf on his appeal, and the case was submitted on the record.

We have carefully examined the record in connection with the errors assigned, and we find that the testimony on the part of the state, if credited, as it was, was amply sufficient to sustain the verdict, and, finding no error in the record, the judgment is affirmed. Mandate forthwith.

Digitized by Google

MAYFIELD et al. v. STATE. (No. A-3379.)

(Criminal Court of Appeals of Oklahoma. June 7, 1920.)

(Syllabus by the Court.)

1. **Criminal law ⟸1163(1), 1186(4)—Unless resulting in a miscarriage of justice error in opening argument is not reversible.**

It is not the rule in this state that error presumes injury, and a judgment of conviction will not be reversed because in the opening statement of the case to the jury the county attorney was permitted to state, over the objection of defendants' counsel, that he expected to prove certain statements of a codefendant, not upon trial, made at the time of the arrest of such codefendant and not in the presence of the defendants on trial, unless after an examination of the entire record it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

2. **Criminal law ⟸1171(2)—County attorney's opening argument held without injury.**

Where the trial court at the trial afterwards sustained an objection to the offer of the county attorney to prove such statements, and held the evidence inadmissible, and it is clear from the record that the statement of what the county attorney expected to prove was not maliciously made, but resulted from a misconception of the law as to the admissibility of such evidence, and the competent evidence adduced against the defendants reasonably supports the verdict, no apparent injury has resulted.

3. **Criminal law ⟸789(1, 2)—Practice of attempting to define reasonable doubt disapproved; instruction defining "reasonable doubt" not erroneous.**

The practice of trial courts in attempting to define the term "reasonable doubt" is not approved. For an instruction defining "reasonable doubt" and held not to be erroneous, see body of opinion.

4. **Larceny ⟸55 — Evidence held to support conviction for grand larceny.**

Evidence examined, and *held* sufficient to support the conviction.

Appeal from District Court, Rogers County; W. J. Campbell, Judge.

Frank Mayfield and Leonard Mayfield were convicted of the crime of grand larceny, and they appeal. Judgment as to each affirmed.

Frank Mayfield and Leonard Mayfield were convicted in the district court of Rogers county, at the December, 1917, term of that court, of the crime of grand larceny, for stealing 16½ bushels of wheat from the granary of one B. S. Clifton, a farmer living in the northwest part of said county. These defendants were jointly informed against with one Jess Kirk and one Ed Polson, and were granted at their request a separate trial, and upon a verdict of guilty the court sentenced each of these defendants to serve a term of one year and three months' imprisonment in the state penitentiary.

The evidence is substantially as follows:

On the morning of the 3d day of August, 1917, between the hours of 2 and 3 o'clock, W. R. Mosby, a constable, and W. E. Heinzelman, a deputy sheriff, were patroling the public highways in the northwest part of Rogers county for the purpose of discovering persons hauling intoxicating liquors in automobiles; it was a moonlight night, and the said officers apprehended one Jess Kirk with an automobile loaded with wheat. Three other men were in the car with Kirk, but jumped out when these officers in a second car were about to overtake them. One of the officers testified that in his best judgment two of the men that jumped out of the car in which Kirk was riding were these defendants, the Mayfield boys, and that the third person was Ed Polson. Kirk was overtaken and arrested, and the finding of the wheat in Kirk's car was reported to the prosecuting witness, B. S. Clifton, who up to that time did not know that any of his wheat had been stolen. After the report of the finding of the wheat and the arrest of Kirk, the officers, Mosby and Heinzelman, together with Mr. Clifton, went to the latter's granary and discovered where some wheat had evidently been taken therefrom, and tracks of an automobile were also found in a public highway near the granary, and evidence of footprints back and forth from the granary to the place where the automobile had been standing, and also evidence of wheat scattered along from the granary to the place where the automobile had been standing.

After the arrest of Kirk, and on the day following, other officers went to the home of the Mayfields and arrested them on this charge, and the testimony is by such officers that the Mayfields asked if Kirk had turned them in, and these officers also swore that the Mayfields stated at the time of their arrest that they "jumped out of the car and liked to have got run over." The defense interposed was an alibi; one of the defendants testifying that they stayed at home from 8 o'clock in the evening of August 2, 1917, until the next morning, and slept on a porch at their home all that night, and had nothing to do with stealing the wheat. However, the defendants admitted that they were in the city of Collinsville on the afternoon of August 2, 1917, and were in company with Jess Kirk in an automobile, and stopped at the residence of a witness by the name of Hagerty, who lived between Collinsville and the home of the Mayfields, north of that city, and the evidence is that one of the Mayfield boys tried to borrow some money from Hagerty on that occasion.

Digitized by Google

Fred Ellis, a brother-in-law of these defendants, testified that he was living at the Mayfield home at that time, and that these defendants, together with Jess Kirk, came to that place about 7 or 8 o'clock in the evening of August 2, 1917, in an automobile, and that Jess Kirk was driving the car; that Jess Kirk stayed there about 30 minutes and then left, and that the defendants were at the Mayfield home when the witness Ellis went to bed on the porch and were there sleeping on the porch when the witness got up about 9 o'clock the next day.

F. M. Mayfield, the father of these defendants, was introduced as a witness in their behalf, and testified that he was at home on the night of the 2d of August, 1917, and heard them come home some time in the fore part of the night, and also knows that they were there the next morning, but that he slept in a different room and did not pay any particular attention to the boys that night. The witness Frank Mayfield also denied making the statement to the arresting officers about asking if Jess Kirk had told on them, or about jumping from the car. The defendant Leonard Mayfield did not take the witness stand.

Goldesberry & Boone, of Collinsville, for plaintiffs in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). [1, 2] The first assignment of error relates to the action of the trial court in permitting the county attorney, in his opening statement of the case to the jury, to state that the evidence would show that one Jess Kirk told the officers, at the time he (Kirk) was arrested, that the wheat in the automobile belonged to Mr. Clifton, and that the parties who jumped from the car were Frank Mayfield and Leonard Mayfield. The record relative to this assignment is as follows:

"That they arrested Mr. Kirk, who, I believe the evidence will develop, was the driver of the car, and they found this car contained about 16½ bushels of wheat; that Mr. Kirk told the officers who made the arrest that the wheat belonged to Mr. Clifton and that it was taken that night, and as a part of the statement he voluntarily made the statement that the parties who had left the car was Frank Mayfield, Leonard Mayfield— (interrupted by counsel for the defendants).

"By Counsel for Defendants: Wait a minute—we object to that statement because if the evidence is offered it will be incompetent, irrelevant, and immaterial and cannot be used against these defendants.

"By the Court: Overruled.

"By Counsel for Defendants: Exception.

"By Counsel for the State (continuing): That they took this party in charge and I think the evidence will show that they took the wheat to Vera and unloaded it, and immediately went to Mr. Clifton's residence and thereupon told him of the incident and he went down and discovered that the wheat was missing."

It will be noted that, while objection was made to the statement of the county attorney relative to what Kirk had said to the arresting officers concerning the Mayfield boys having jumped from the automobile, there was no request made to the trial judge to withdraw said remarks from the consideration of the jury. While it is apparent that the court erred in not sustaining the objection of defendants' counsel to this statement of the county attorney, in view of the fact that it was not made to appear that either of the Mayfield boys were within hearing distance at the time Kirk is alleged to have made this remark, it is also clear from the entire record in this case that the statement was not made by the county attorney maliciously and purposely with the intent to prejudice these defendants, but was made by him under a misconception of the admissibility of this evidence. Later, in the progress of the trial, the county attorney offered to prove by these officers that Kirk had made the statements attributed to him in the opening statement, and the trial court at that time very promptly and correctly sustained the objection of defendants' counsel to the admission of this evidence, because the testimony of the officers then developed that the defendants Mayfield were not within the hearing of Kirk at the time the remark was made. After the trial court had ruled upon the admissibility of this evidence, no further attempt was made by the county attorney to draw from any witness any statement of Kirk's relative to the Mayfield boys.

While this court is of the opinion that the trial court erred in not sustaining the objection of defendants' counsel to the statement of the county attorney, we do not think the error complained of sufficiently prejudicial to authorize a reversal of this judgment under the circumstances of this case. It is not the rule that error presumes injury, and the foregoing assignment of error rests upon the same basis as would the improper admission of evidence. An application must be made in this instance of the provisions of section 6005, Revised Laws 1910, which prohibits this court from reversing any judgment of conviction in such an instance, "unless * * * after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

[3] The trial court also, over objection and exception by defendants' counsel, gave an instruction defining the term "reasonable doubt." This court has repeatedly urged trial courts not to attempt to define the term "reasonable doubt," as an instruction that it is incumbent upon the prosecution to prove the guilt of the defendant beyond a reasonable

Digitized by Google

doubt is held to be sufficient without further explanation. Ofttimes an attempt to define such term only results in confusion which tends to create doubts instead of removing them. Hence the admonition against giving such an instruction. Gransden v. State, 12 Okl. Cr. 417, 158 Pac. 157; Nelson v. State, 5 Okl. Cr. 369, 114 Pac. 1124.

The instruction given in this case was as follows:

"You are instructed that, by the term 'reasonable doubt' is meant a real, substantial doubt of the guilt of the defendant, existing or arising in your minds after a fair consideration of all the evidence in the case. It is more than a mere surmise, conjecture, or fanciful doubt. It is such a doubt as would cause a reasonably prudent man to pause or hesitate before acting on matters of grave importance to himself. If, after considering all the evidence in the case, your judgment and understanding are convinced and satisfied of the guilt of the defendants, or either of them, and you have a fixed abiding conviction, amounting to a moral certainty, that the defendants, or either of them, are guilty, then you have no reasonable doubt, and must convict such defendant; otherwise, if your minds and understandings are not so convinced and satisfied, then it will be your duty to acquit the defendants."

It is to be noted that the trial court, in the foregoing instruction, told the members of the jury that their judgment and understanding must be convinced and satisfied from a consideration of all the evidence of the guilt of the defendants, or either of them, to the extent that they have a fixed abiding conviction, amounting to a moral certainty, before they would be justified in convicting either of the defendants.

In the case of Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, the Supreme Court of the United States approved an instruction defining reasonable doubt somewhat similar to the one given in this case. In the Hopt Case, Mr. Justice Field, speaking for the court, said:

"The word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact."

In the case of Thompson v. State, 16 Okl. Cr. —, 184 Pac. 467, this court held an instruction defining "reasonable doubt" in terms almost identical with that given in this case not to be reversible error.

The practice of trial courts in attempting to define "reasonable doubt" is not approved, and the foregoing instruction is not incorporated in this opinion for the purpose of giving the same the unqualified approval of this court. On the other hand, the court is satisfied from an examination of the record that this alleged error did not affect the substantial rights of the defendants in this case, and is not such as should result in a reversal of this judgment.

[4] It is also contended that the evidence in the case is not sufficient to support the conviction. The court is not impressed with the cogency of the argument advanced in support of this assignment. It is sufficient to say that there is ample competent evidence in the record which would authorize the jury to conclude that the crime was committed as charged in the information, and that the defendants were participants therein.

For the reasons stated, the judgment of conviction as to each defendant is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

WHITMORE v. STATE. (No. A-3504.)

(Criminal Court of Appeals of Oklahoma. June 17, 1920.)

(Syllabus by the Court.)

Homicide ⟹250, 354—Evidence held to sustain conviction for murder and imprisonment for life.

In a prosecution for murder, the evidence reviewed, and *held* sufficient to sustain the conviction with imprisonment for life as the punishment, and that no material error was committed upon the trial.

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Barney Whitmore was convicted of murder, and he appeals. Affirmed.

P. T. Hamilton, of Waurika, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Barney Whitmore, herein referred to as the defendant, was convicted of murder, and in accordance with the verdict of the jury was sentenced to imprisonment for life at hard labor. He has appealed from the judgment of conviction to this court, but there has been no appearance in his behalf on his appeal. The information, in substance, charges that in Jefferson county on or about the 24th day of January, 1918, the said Barney Whitmore

Digitized by Google

did kill and murder one John Goldsmith, by striking and crushing his head with a blunt, dangerous and deadly weapon.

The record discloses, in substance, these facts:

The deceased, a man about 45 years of age, with his wife, and child lived at Healdton, and was engaged in hauling junk; the defendant, a man about 24 years of age, had lived in that neighborhood for about 10 years. About a week before his death deceased hired the defendant to work for him. On the date alleged they left the place in a two-horse farm wagon with sheet and bows, and in it was a mattress and quilts. The next morning the defendant was back at the place and told Mrs. Goldsmith her husband had gone to Ft. Worth; that on their way to Waurika they met a man driving a Ford car just west of Cornish. The man said "Hello, John," and deceased stopped, left the wagon, and they talked a few minutes. Deceased called the man "Loney," and came back to the wagon and told the defendant to take the wagon and team back home and go on with the work, and to tell his wife that he was going to Ft. Worth and would be back in a week or two. A day or two later the defendant moved his wife and two children to deceased's place and continued to work there for about three weeks. About a month later the body of deceased was found in an old well in Talley Wilson's pasture, four miles southwest of the old town of Cornish and about two miles south of Miller's store on Mud Creek. The well was between 20 and 30 feet deep, the body was covered with rubbish and a large rock, a binder wheel, and some pieces of boards and of old stove pipe. It apparently had been pitched in head foremost and the feet remained uncovered. When taken out it had on only an undershirt, drawers and socks. Later a sack containing a part of the clothes worn by deceased and his overcoat was found in a concrete culvert on the road about two miles from Ringling. The medical witnesses who made the post mortem examination testified that the forehead had been crushed in with a blunt instrument, and the skull back of the left ear was crushed in, and also the jawbone had been broken in two or three places.

The evidence shows that defendant and deceased stopped at a wagon yard in Ringling that day and bought some feed for the team; that they left the wagon yard together about 4 o'clock and that night stopped at Miller's store on Mud Creek and ate supper, fed the team, and remained there about an hour, leaving there between 8 and 9 o'clock. Several witnesses testified that deceased was very drunk while at Miller's store. A witness testified that deceased paid for the dinners in Ringling that day with a $5 bill, and that he had a roll of greenbacks that looked like $50 or more in his hand at the time.

When arrested the defendant stated to the sheriff, in the presence of several persons, that the last time he saw Goldsmith he got out of his wagon and got into a car and went off with somebody; that he went to Ringling that day with Goldsmith and they were going to Waurika to buy a bunch of mules and got as far as Mud Creek, near Cornish, and there met a Ford car, and Goldsmith got out of the wagon and went to the car and talked a little bit and came back to the wagon and told him to go ahead with the work; that he was going to Ft. Worth; that Goldsmith called the man "Loney," or some such name as that. A witness testified that in Ringling that day the defendant told him there was a man in the wagon yard by the name of Goldsmith, who had just got out of the penitentiary, and they had been stealing chickens together and they intended to get some hogs over on Mud Creek; that the defendant said Goldsmith had some money, a good team and harness, and a good wagon, and he had an axe and hammer and was going to kill Goldsmith and throw him in the creek; that he was going to kill him if he had to take him to Red river and tie a rock around his neck.

There was testimony tending to show that the defendant had in his possession the coat and pants which were worn by the deceased on the day he left home. The only testimony offered on the part of the defendant explaining or denying the inculpating circumstances was to show that the coat and pants in question belonged to the defendant, and evidence tending to impeach the witness who testified that the defendant told him that he was going to kill Goldsmith. The defendant did not testify.

The errors assigned are that the verdict is not sustained by sufficient evidence; that the court erred in admitting irrelevant, incompetent, and immaterial testimony and in refusing to admit competent and material testimony offered by the defendant. We have carefully examined the record, independent of the errors assigned, and have given the case that careful consideration which its importance demands, and we have been unable to find a single ruling of the court on the admission or in the rejection of evidence upon which error could be predicated, and our conclusion is that the undisputed facts and circumstances justified the verdict of the jury. A more cold-blooded, brutal, and inhuman murder could hardly be imagined; it was heartless in conception and cruel in execution.

There is no error presented in the record; accordingly the judgment is affirmed.

ARMSTRONG and MATSON, JJ., concur.

Digitized by Google

WOOD v. STATE. (No. A-3509.)

(Criminal Court of Appeals of Oklahoma. June 19, 1920.)

(Syllabus by the Court.)

Intoxicating liquors ⟹236(20)—Evidence held to sustain conviction for unlawful transportation.

In a prosecution for unlawfully transporting intoxicating liquor, evidence examined, and *held* sufficient to sustain the conviction, and that no reversible error was committed on the trial.

Appeal from County Court, Cherokee County; J. D. Cox, Judge.

Bush Wood was convicted of unlawfully transporting intoxicating liquor, and appeals. Affirmed.

George N. Hughes, of Tahlequah, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall and E. L. Fulton, Asst. Attys. Gen., for the State.

DOYLE, P. J. Plaintiff in error Bush Wood and one Lon Johnson were jointly charged with transporting 12 half pints of whisky from a place unknown to a point in front of Sansing's Store in the town of Park Hill, in Cherokee county. Upon his separate trial plaintiff in error Wood was convicted and his punishment fixed at a fine of $500 and six months in jail. From the judgment rendered on the verdict, he appeals.

The principal contention on the part of the plaintiff in error is that the evidence is insufficient to sustain the verdict, in that it does not meet the requirement of the statute which declares the testimony of an accomplice insufficient to convict unless it is corroborated by other evidence tending to connect the defendant with the commission of the offense.

The evidence on the part of the state was substantially as follows:

Mrs. Annie Mathews testified:

"I am the wife of Price Mathews, a merchant in Park Hill. His place of business is across the street from the Sansing store. I have known Bush Wood for seven or eight years. I saw him probably 10 minutes before the 3:10 p. m. train arrived, driving a car, and he stopped across the street. Lon Johnson was with him. Bush Wood came into our store and warmed, and just after the train passed a man took some whisky out of the car."

Sam Agee testified:

"I am a blacksmith at Park Hill. I saw Bush Wood and Lon Johnson pass in a car. It was something near 3 o'clock."

Lon Johnson testified:

"At that time I lived two miles southwest of Park Hill. I went to Tahlequah on the train and met Bush Wood there about 11 o'clock. I asked him if he could get me some whisky. He said he could; that he was going out to Park Hill, and I could go back with him. I got eight half pints of Old Taylor whisky from him out by Cale Starr's place, and paid him for it at Park Hill. I served a term in the penitentiary for assault with intent to kill. I was convicted before statehood for disposing of whisky. I was convicted yesterday of transporting whisky under a separate charge."

This witness entered a plea of guilty in this case, at the February, 1920, term of the district court of Cherokee county, was convicted of the murder of Rex Sansing, and is now serving a life sentence in the penitentiary.

E. A. Maloney testified:

"I was deputy United States marshal stationed at Tahlequah. On the day alleged, I went from there to Park Hill on the train. Arrived there about 3:30 p. m. I saw Bush Wood driving west just before the train stopped. I recognized the car as Bush Wood's car. There was a Winchester in the car. I picked it up and unloaded it. I got a piece of iron and broke into the back part of the car, which was locked, and found 12 pints of Old Taylor whisky in there. I later arrested Lon Johnson, and he had 6 half pints of Old Taylor whisky."

Ned Gritts testified:

"I am chief of police of the city of Tahlequah. On the date alleged I saw Bush Wood driving his car down Main street, and Lon Johnson was with him."

There was no testimony offered by the plaintiff in error.

These are the undisputed facts, and in our opinion, excluding the accomplice testimony, the evidence was amply sufficient to show that plaintiff in error transported the whisky as charged. It is only when there is a total failure of substantial evidence of the elements, or some one element, of an offense, that this court on appeal is permitted to reverse a conviction on the ground that the evidence is insufficient to sustain it. The case was submitted to the jury on correct instructions. The trial was in all respects fair, and we are unable, after a careful examination, to find anything in the record sufficient to create a doubt as to the correctness of the result, or to warrant us in interfering with the verdict.

The judgment is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

STATE v. UNDERWOOD. (No. A-3407.)

(Criminal Court of Appeals of Oklahoma. May 22, 1920.)

(Syllabus by the Court.)

1. **Indictment and information ⟸60—Information informing one of common understanding of what is intended is sufficient.**

An information charging the offense in ordinary and concise language without repetition, in such a manner as to enable a person of common understanding to know what is intended, is sufficient.

2. **Property ⟸7—Ownership of chattel denotes possession and control.**

Ownership of a chattel denotes possession, dominion, and control over it.

3. **Indictment and information ⟸110(2)—Words conveying same meaning as those used in statutes are sufficient.**

Words used in a statute to define a public offense need not be strictly pursued in the information, but other words conveying the same meaning may be used.

4. **Indictment and information ⟸71—Need not be certain to a certain intent in every particular.**

The common-law doctrine of a strict construction of criminal law and all proceedings in criminal cases, and that an information should be certain to a certain intent in every particular, is not in force in Oklahoma.

5. **False pretenses ⟸26 — Information held sufficient.**

For reasons holding an information sufficient as charging the defendant with having obtained certain property by false pretenses, as against a motion in arrest of judgment, see body of opinion.

Appeal from District Court, Bryan County; Jesse M. Hatchett, Judge.

D. F. Underwood was convicted of the crime of obtaining property by false pretenses and his punishment fixed by verdict at imprisonment for two years, and, from an order arresting the judgment, the State appeals. Reversed, and cause remanded, with directions to overrule the motion in arrest of judgment and pronounce judgment in conformity with the verdict.

Chas. P. Abbott, Co. Atty., of Durant, and S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

Hatchett & Ferguson, of Durant, for defendant in error.

MATSON, J. This is an appeal by the state from an order of the district court of Bryan county arresting the judgment upon a trial in which the defendant, Underwood, was convicted of the crime of obtaining property by false pretenses, and the punishment fixed by the jury's verdict at imprisonment in the state penitentiary for a term of two years.

The information upon which this prosecution is based, omitting the caption, is as follows:

"Comes now Chas. P. Abbott, the duly qualified and acting county attorney in and for Bryan county, state of Oklahoma, and gives the district court of Bryan county and state of Oklahoma to know and be informed that the above-named defendants, D. F. Underwood, and Frank Adams, late of Bryan county, did in Bryan county and in the state of Oklahoma, on or about the 15th day of November, in the year of our Lord one thousand nine hundred and fourteen, commit the crime of obtaining property under false pretenses in the manner and form as follows:

"That is to say, the defendants did in said county and state, at the date above named, unlawfully, willfully, and feloniously represent to one I. C. Tally that one D. F. Underwood was the owner of a certain good and valid note for the sum of $1,250.00, and that said note was secured by mortgage on certain lands located in Murray county, Okl., and relying upon said representations as being true, and believing same to be true, the said I. C. Tally was then and there induced to and did part with a certain stock of goods located at Silo, Okl., in exchange for said note and mortgage, when in truth and in fact said note was bogus and was not secured by mortgage on said lands as represented and same is worthless, all of which said defendants then and there well knew, and the said representations were made designedly, fraudulently, feloniously and willfully with intent to wrong, cheat and defraud the said I. C. Tally out of the said stock of goods and the value thereof, contrary to the form of statutes in such cases made and provided, and against the peace and dignity of the state."

Section 2694, Revised Laws 1910, is the statute upon which this prosecution was based, and reads as follows:

"Any person who, with intent to cheat or defraud another, designedly, by color or aid of any false token or writing, or other false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money or property, is punishable by imprisonment in the penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment."

[1, 2] No demurrer was interposed to said information in the lower court, neither was any objection made to the introduction of evidence upon the ground that the information failed to state a public offense. The first time the sufficiency of the information was attacked in the lower court was after verdict, and upon motion in arrest of judgment, which reads as follows:

Digitized by Google

"Now comes the above-named defendant and moves the court to set aside and vacate the verdict of the jury returned in this cause and dismiss this action for the following reasons and on the following grounds, to wit:

"Because the information filed against the defendant in this cause does not state facts sufficient to constitute a public offense against the state of Oklahoma and does not state facts sufficient to constitute the offense of false pretense with which it attempts to charge the defendant.

"Of all of which the defendant prays the judgment of the court."

Section 5791, Revised Laws 1910, provides:

"The defendant may demur to the indictment or information when it appears upon the face thereof, either:

"First. That the grand jury by which an indictment was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county.

"Second. That it does not substantially conform to the requirements of this chapter.

"Third. That more than one offense is charged in the indictment or information.

"Fourth. That the facts stated do not constitute a public offense.

"Fifth. That the indictment or information contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution."

Section 5799, Id., provides:

"When the objections mentioned in section 5791 appear from the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, and in arrest of judgment."

Section 5939, Id., provides:

"A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on plea or verdict of guilty, or on a verdict against the defendant on a plea of former conviction or acquittal. It may be founded on any of the defects in the indictment or information mentioned as grounds of demurrer unless such objection has been waived by a failure to demur, and must be before or at the time the defendant is called for judgment."

In Rhea v. U. S., 6 Okl. 254, 50 Pac. 993, it is said:

"The defendant below, so far as the record in this court discloses, neither moved to set aside the indictment nor demurred thereto, and has therefore waived all objections to the same, except that it does not state facts sufficient to constitute a public offense, or to give the court jurisdiction of the subject matter."

It follows from the foregoing statutes and the decision of this court in the Rhea Case that, if the information upon which this prosecution is based is sufficient to state a public offense (as that is the only statutory ground upon which it was attacked in the lower court by motion in arrest of judgment), then the order of the trial court arresting the judgment should be reversed; otherwise, sustained.

[3-5] Counsel for defendant have filed an elaborate brief basing the contention that the information is wholly insufficient to charge a public offense upon the sole ground:

"It is nowhere alleged in the information that the defendant obtained said stock of goods, any benefit therefrom, or any part thereof."

In the case of White v. State, 4 Okl. Cr. 146, 111 Pac. 1012, this court said:

"If the indictment was defective this matter should have been called to the attention of the trial court by proper motions before the defendant entered his plea. This is the reason why the defendant is allowed by statute one day in which to plead. If the defendant enters his plea and waits until the introduction of the evidence to object to the sufficiency of the indictment, the objection should be overruled if by any * * * intendment the indictment can be sustained."

The decision in the White Case has been uniformly followed by the later decisions of this court, and states the correct rule in this jurisdiction by which the sufficiency of the information should be measured on a motion in arrest of judgment.

The second subdivision of section 5738, Revised Laws 1910, provides:

"The indictment or information must contain: * * * A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."

Section 5744, Id., provides:

"The words used in an indictment or information must be construed in their usual acceptation, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning."

Section 5745, Id., provides:

"Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used."

Section 5746, Id., provides in part:

"The indictment or information is sufficient if it can be understood therefrom: * * *

"Sixth. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition and in such a manner as to enable a person of common understanding to know what is intended.

"Seventh. That the act or omission charged as the offense, is stated with such a degree of

Digitized by Google

certainty, as to enable the court to pronounce judgment upon a conviction according to the right of the case."

The information in this case alleges that the defendant, Underwood, "willfully and feloniously represented to one I. C. Tally that he, Underwood, was the owner of a certain good and valuable note for the sum of $1,250.00, and that said note was secured by a mortgage on certain lands located in Murray county, Okl." The allegation that the said Underwood was the owner of such a note and mortgage was equivalent in meaning, according to lexicographers, to an allegation also that the said Underwood was possessed of such property. Thomas v. Blair, 111 La. 678, 35 South. 811. Ownership of a chattel denotes dominion and control over it.

The information further alleges that—

"The said Tally, relying upon said representations as being true, and believing same to be true, was then and there induced to and did part with a certain stock of goods located at Silo, Okl., in exchange for said note and mortgage."

Webster defines the word "exchange" to mean:

"To part with, give or transfer to another in consideration of something received as an equivalent; usually followed by 'for' before the thing received; to barter, swap, as 'to exchange horses,'" etc.

The allegations quoted above are equivalent in the opinion of this court, according to their meaning in common language, to an allegation directly charging that the said Underwood obtained from the said Tally, by means of such representations as aforesaid, a certain stock of goods located at Silo, Okl., in exchange for the said certain note and mortgage, of which he, the said Underwood, was then and there the owner and possessed. If such language would in its ordinary and usual acceptation be understood to mean that the defendant in fact obtained the stock of goods, the information was sufficient in that respect to comply with the requirements of the statutes of this state, even if a construction could be placed upon said language to the contrary, because it has never been the rule in this state that indictments or informations are required to contain that degree of certainty to a certain intent in particular which was formerly required, and now is, in some other jurisdictions where a strict construction prevails as to criminal pleadings.

In Price v. State, 9 Okl. Cr. 359, 131 Pac. 1102, it is held:

"The common-law doctrine of a strict construction of criminal law and all proceedings in criminal cases, and that an indictment should be certain to a certain intent in every particular is not in force in Oklahoma."

Also, it has been held that if an indictment or information "states the facts in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, it is sufficient." Star v. State, 9 Okl. Cr. 210, 131 Pac. 542; Deen v. State, 7 Okl. Cr. 150, 122 Pac. 941.

Counsel for the defendant have cited several authorities in which points closely related to the one raised in this case were considered, and in which decisions the courts of other states have held indictments and informations containing allegations similar to those in this information insufficient to charge the offense of false pretenses, on the ground that such allegations do not sufficiently charge that the defendant obtained money or property, which is the gravamen of the offense under the statutes.

But in view of our statutes above cited, such decisions cannot be held controlling upon this court, which has in the past followed more liberal and reasonable rules than obtain in the states from which such decisions come. Our statutes applying to the construction to be given indictments or informations are clearly antagonistic to the idea that such pleadings are to receive a strict and technical construction. The court is of the opinion that the information above quoted sets forth the offense of false pretenses in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and that the offense is charged with a sufficient degree of certainty to enable the court to pronounce judgment upon the conviction according to the right of the case. Viewed from such a standpoint, the information is sufficient, and the trial court erred in sustaining the motion in arrest of judgment.

For the reasons stated, the order of the district court of Bryan county, sustaining the motion in arrest of judgment, is reversed, and the cause remanded, with instructions to the trial court to overrule the motion in arrest of judgment and to pronounce judgment upon the defendant in conformity with the verdict returned, and for further proceedings in accordance with law.

DOYLE, P. J., and ARMSTRONG, J. concur.

Digitized by Google

STATE ex rel. LAWTON v. PUBLIC SERVICE COMMISSION OF NEVADA et al. (No. 2432.)

(Supreme Court of Nevada. June 14, 1920.)

1. **Mandamus ⟸81—Will not lie to compel Public Service Commission to annul order discontinuing street car service.**

Where the Public Service Commission has at the instance of a traction company made an order allowing it to permanently discontinue service over certain streets, mandamus will not lie to compel the commission to annul such order, in view of Rev. Laws, § 5695, providing that the writ may be issued to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station; there having been no refusal on part of commission to perform any duty conferred upon it.

2. **Mandamus ⟸154(1)—Writ will not lie to compel traction company to continue service not discontinued.**

Where the Public Service Commission has issued an order allowing a traction company to discontinue service over certain streets, mandamus will not lie against the company to compel it to continue service, where the petition fails to show that service has been discontinued, notwithstanding that it applied to the commission for the order of discontinuance.

3. **Mandamus ⟸1—Writ will not be granted in anticipation of supposed omission of duty.**

Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives.

4. **Mandamus ⟸1—Duty to continue street car service not considered, in advance of actual discontinuance.**

In proceedings for mandamus to compel the Public Service Commission to annul an order to allow a traction company to discontinue service over certain streets, and to compel the traction company to continue such service, whether it is the traction company's legal duty to continue service cannot be determined in advance of actual discontinuance of service.

Original proceeding in mandamus by the State of Nevada, on relation of W. J. P. Lawton, against the Public Service Commission of Nevada and another. Writ denied, alternative writ quashed, and proceedings dismissed.

McCarran, Miller & Mashburn, of Reno, and J. W. Dignan, of Oakland, Cal., for relator.

Leonard B. Fowler, Atty. Gen., and Robert Richards, Deputy Atty. Gen., for defendant Public Service Commission.

Goodfellow, Eells, Moore & Orrick, of San Francisco, Cal., for defendant Reno Traction Co.

DUCKER, J. This is an original proceeding in mandamus. The petition of W. J. P. Lawton shows, among other matters, that on August 24, 1904, the city council of the city of Reno, a municipal corporation, approved an ordinance granting to certain persons, their successors in interest or assigns, the right to construct, maintain, and operate a street car line over, across, and upon certain streets, alleyways, and avenues of said city. The franchise privileges granted thereby were duly accepted by them, and thereafter assigned to the defendant, Reno Traction Company, a corporation organized and existing under and by virtue of the laws of California, which now owns and holds said franchise, and by virtue thereof has constructed, maintains, and operates street car lines over and across and upon certain streets of the city of Reno. On the 4th day of September, 1919, the said Reno Traction Company made an application to the Public Service Commission of Nevada for an order permitting it to permanently discontinue all service upon and over certain branches of its street car lines in said city. In pursuance of said application and after notice duly given, the Public Service Commission held a public hearing, and on the 22d day of December, 1919, made and filed an order authorizing the Reno Traction Company to permanently discontinue service over the street railway lines designated in the application. The order was made effective January 15, 1920. The commission afterward amended this order making it effective January 20, 1920.

The petition sets forth, further, that by reason of said franchise, its terms and conditions, and the acceptance thereof by the Reno Traction Company and its predecessors, the construction, maintenance, and operation of the street car lines and street car service on the streets of the city of Reno, and especially by reason of those designated in the order of discontinuance by the commission, property rights have been acquired by many of the citizens of the city of Reno, homes have been constructed, money been expended by such citizens and taxpayers, as well as by the municipal corporation itself, in the paving and improving of the streets, establishment, and maintenance of sewerage systems and other essential municipal improvements; that the Public Service Commission, unless otherwise directed by the mandate of this court, will cause its order of permanent discontinuance of street car service to become effective January 20, 1920, and that the company will discontinue such service to the irreparable injury of the petitioner and other citizens and taxpayers of the city of Reno in their property and property rights, acquired and depending on such service. This service, it is alleged, is a business of a public nature,

Digitized by Google

and has become and now is a public necessity, and one upon which petitioner, as a householder in the proximity of one of said street car lines, as well as a great number of citizens of said city, have become wholly dependent for transportation to and from their respective homes and places of business, and that the public welfare of these citizens whose homes and properties lie adjacent to, or in the proximity of, the streets and avenues named in the order is for the same reason dependent upon and involved in such service.

It is also alleged that the Public Service Commission in making and entering the order exceeded its jurisdiction, in that by the order it attempts to nullify the terms, conditions, and obligations of a written contract mutually entered into between the municipality of the city of Reno, a corporate body, and the Reno Traction Company, a public service corporation, and that the order is therefore null and void; the petitioner, as well as a great number of citizens, taxpayers, and householders of the city of Reno, has no plain, speedy, and adequate remedy in the ordinary course of law.

Petitioner prays that an alternative writ of mandamus issue out of this court, commanding the Public Service Commission to refrain and desist from in any wise enforcing or making effective said order, and commanding and directing the commission to nullify and set the order aside, and commanding the Reno Traction Company to continue service.

Upon this petition the alternative writ was issued by this court, commanding the commission to set the order aside and the company to continue the service, or appear and show cause why the mandate and order should not be made peremptory and effective.

The Public Service Commission and the Reno Traction Company demurred to the petition, the former upon the ground that the petition does not state facts sufficient to constitute a petition for a writ of mandamus or to warrant its issuance, and the latter upon the same grounds, and, in addition thereto, that there is a misjoinder of parties defendant, and that this court has no jurisdiction of the subject-matter of the proceedings. The commission and the company also filed their respective answers to the petition.

In this proceeding the jurisdiction of the Public Service Commission to make the order authorizing the Reno Traction Company to discontinue street car service over the streets designated in the order is challenged upon the ground that the ordinance of the city of Reno, and the acceptance of the franchise privileges thereby accorded by the company and its predecessors, constitutes a contract which the commission cannot abrogate without the consent of the parties. The demurrers present the question as to whether mandamus is a proper remedy to inquire into the jurisdiction of the commission to make the order of discontinuance complained of by petitioner. We are of the opinion that mandamus will not lie against either of the defendants.

[1] There has been no refusal on the part of the commission to perform any duty enjoined upon it. The writ is not sought to stimulate the commission to action pursuant to some legal duty, but rather to cause it to undo the result of action taken in a matter in which its jurisdiction has been invoked in conformity with the statute defining its powers over public utilities in this state. Mandamus is ordinarily a remedy for official inaction, and will not lie to undo what has been done. 26 Cyc. 158.

As set out in the foregoing statement of facts, the prayer of the petition is that an alternative writ of mandamus issue out of this court, commanding the Public Service Commission to refrain and desist from in any wise enforcing or making effective its order, commanding and directing said Public Service Commission of Nevada to nullify and set aside said order.

The function and scope of the extraordinary writ of mandamus have been clearly and definitely defined by the statutes of this state and by the decisions of this court, as pointed out and discussed by counsel for the commission and the company in oral argument, and in their briefs. That part of section 5695 of the Revised Laws of Nevada applicable in this proceeding reads:

"It [the writ of mandamus] may be issued by the Supreme Court, a district court, or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. * * *"

Discussing the office and scope of the writ under this statute, this court, in State of Nevada v. Gracey, 11 Nev. 223, said:

"To justify the issuance of the writ to enforce the performance of an act by a public officer, two things must concur: The act must be one the performance of 'which the law especially enjoins as a duty resulting from an office,' and the actual omission on the part of the respondent to perform it. It is incumbent on the relator to show, not only that the respondent has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application."

Again, in State of Nevada ex rel. Freyesleben v. Ninth Judicial District Court, 40 Nev. 168, 161 Pac. 510, this court, referring to the function of the writ of mandamus, declared that:

"It needs no citation of authority to support the well-established rule that the writ of mandamus will not assume the functions of a writ

Digitized by Google

of error, nor will it serve to require the inferior tribunal to act in a particular manner or to enter any particular judgment or order. On the contrary, it serves only to compel the doing of some act which it is the clear, legal duty of the lower court in some way to do."

Other decisions of this court, which need not be alluded to specially, express the same view that mandamus is in no wise a preventative remedy, into which it is sought to be converted in this case.

"Its purpose and object is to command performance, not desistance, and is a compulsory as distinguished from a revisory writ; it lies to compel, not to revise or correct action, however erroneous it may have been, and is not, like a writ of error or appeal, a remedy for erroneous decisions." 18 R. C. L. 114.

This limitation is maintained by the general current of authority; and this court, in restricting the issuance of the writ under the section of the statute cited to cases where it went "to compel the performance of an act especially enjoined by law," has disposed of the contention made here that it will lie to reverse the order of the commission for want of jurisdiction.

In State v. Curler, 26 Nev. 347, 67 Pac. 1075, the district judge, after a hearing under a special statute providing for the appointment of appraisers to appraise the value of property involved in certain claims against counties, refused to make the appointment. The writ was sought to compel said judge to appoint appraisers, and was denied by this court. The court in the concluding paragraphs of the opinion announced the rule that mandamus will not lie to determine the question as to whether a public officer had exceeded his power and jurisdiction. It said:

"Again, if respondent, under the act, had the power or authority to determine the constitutionality of the act (a power which the relator, it seems, does not controvert), then the issuance of the peremptory writ involves a review and determination in mandamus of the correctness of the decision of the respondent upon that constitutional question; but, if such power does not exist (the power to determine the constitutionality of the act of 1901 in the proceeding before the respondent), then the issuance of the peremptory writ by this court requires that we consider and determine that respondent exceeded his power and jurisdiction—a question which cannot be considered and determined in mandamus.

"Adhering to the settled rules of the law, we must hold that, under the facts of this record, mandamus will not lie, for the reasons given; and therefore the peremptory writ will be denied, and the proceeding dismissed."

State v. Curler was cited and discussed by counsel for the commission and the company in their briefs; but, without discussing the rule there declared or seeking to obviate its application to the case at bar, counsel for relator rely upon decisions from other jurisdictions to sustain their position that mandamus is an appropriate remedy in this case.

As we conclude, irrespectively of the existence or nonexistence of another plain, speedy, and adequate remedy in the ordinary course of law, that mandamus is not proper in this case, the rule quoted, as stated in 18 R. C. L. 100, by counsel for relator, to the effect that such remedy must be adequate to afford relief in the existing emergency, is not applicable. The case of Raisch v. Board of Education of the City and County of San Francisco, decided by an evenly divided court, is, in our opinion, of no weight as an authority. In the case of In re Barber Asphalt Paving Co., 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761, the writ was issued to compel the lower court to set aside a stay order and proceed to the trial of a case on the merits. The stay order in this case was tantamount to a refusal by the lower court to perform an act required by law. No such question is presented to us by the facts of this case. On the contrary, the commission has proceeded to hearing and decision on the merits of the controversy, and the question is whether this court can, by the writ of mandate, recall the commission's order for want of jurisdiction, and substitute its own judgment instead.

Counsel for relator also cite Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214, in which the Supreme Court of the United States issued a writ of mandamus to restore to practice an attorney at law who had been disbarred by the inferior court for contempt. In this decision it was held that the lower court was without jurisdiction to debar the petitioner for contempt of court, and that mandamus was a proper remedy. The case is an authority in the federal jurisdiction that mandamus will lie in this specific class of cases, where a court without jurisdiction in a summary proceeding disbars an attorney at law, and where there is no other remedy whatever. This is the extent of the ruling in Ex parte Bradley; and, were we inclined to accept it and give it a wider application, it would still be at variance with State v. Curler, and we have not been shown nor do we find any reason to disapprove the latter.

[2, 3] As the writ will not lie against the commission, neither will it go against the company, primarily for the reason that the petition does not show that the company has discontinued its service. Its application to the commission, and the order of the latter permitting the discontinuance, afford a strong presumption that it will do so, but, as previously stated, the writ of mandamus is in no sense a preventative remedy. Its function is to enforce action—to compel the performance of a duty or obligation which is enjoined by law. Mandamus is never granted in anticipation of a supposed omission of

Digitized by Google

duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. High's Extraordinary Legal Remedies (3d Ed.) § 12.

"In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such a default before the time arrives when the duty should be performed. * * *" State v. Gracey, supra.

[4] Whether it is the company's legal duty to continue street car service over the streets designated is a question which cannot be determined in a proceeding of this character in advance of an actual discontinuance of such service.

The peremptory writ of mandate prayed for is denied, the alternative writ quashed, and the proceedings dismissed.

COLEMAN, C. J., and SANDERS, J., concur.

ACME HARVESTING MACH. CO. v. BENEDICT. (No. 4139.)

(Supreme Court of Montana. May 24, 1920.)

1. Assignments for benefit of creditors ⟸215 —Assignee stands in place of assignor.

Under Rev. Codes, §§ 6136–6161, as at common law, an assignee for benefit of creditors stands in the place of the assignor.

2. Assignments for benefit of creditors ⟸191 —Does not affect creditors' right to sue assignor.

The rule that the execution of a common-law assignment for the benefit of creditors is no bar to an action by a creditor against the assignor, and in no way affects the right of the creditor to proceed to judgment after the assignment is made, is not changed by Rev. Codes, §§ 6136–6161.

3. Assignments for benefit of creditors ⟸362 —Assented to by creditor, does not discharge his debt.

An assignment for benefit of creditors and the assent thereto of a creditor did not effect the assignor's release from any portion of his original obligation not discharged by his assignee.

4. Assignments for benefit of creditors ⟸326 —Creditor's release held insufficient to release unpaid portion of debt.

Nothing short of an agreement expressed in terms indicating clearly the creditor's intention to accept the pro rata distribution as a full discharge of his indebtedness absolves the original debtor, and a receipt reciting payment to the receipting creditor by the assignee of a certain sum "being" a certain per cent. "final dividend on our account, which account is hereby settled and closed and said assignee is released from said trust, and finally discharged from his duties and obligations as such assignee," is not such an agreement.

Appeal from District Court, Fergus County; H. Leonard De Kalb, Judge.

Action by the Acme Harvesting Machine Company against M. J. Benedict. From judgment for plaintiff and an order denying defendant a new trial, defendant appeals. Judgment and order affirmed.

E. K. Cheadle, of Lewistown, and John P. Swee, of Ronan, for appellant.

Mettler & Briscoe, of Lewistown, for respondent.

COOPER, J. This action was instituted by respondent to recover the sum of $247.03 for certain goods, wares, and merchandise. Appellant admits the purchase of goods of the value of $357.49, but defends the action upon the ground that he had executed a deed of assignment of all his property for the benefit of his creditors to Andrew J. Brower, as his assignee, and that all of his creditors consented in writing thereto. He alleges affirmatively that 30.9 per cent. of $357.49 was paid by the assignee and, by virtue of the acceptance of $110.46 and the execution of a receipt by plaintiff, a complete release and discharge of the balance of the debt was accomplished. The receipt is as follows:

"The said sum being thirty and nine-tenths per cent. (30$^{9}/_{10}$%) final dividend upon our account, which account is hereby settled and closed, and said assignee is released from said trust, and finally discharged from his duties and obligations as such assignee."

The plaintiff was awarded judgment against defendant for the sum of $247.03, with interest and costs. The appeal is from the judgment and from an order denying defendant a new trial.

[1] The receipt, appellant contends, constituted a full release of the original indebtedness and effectuated his complete discharge of the original obligation. The answer of respondent to this is that the payment of $110.46 by the assignee did not effect the discharge of the original indebtedness. The law governing assignments for the benefit of creditors is covered by sections 6136–6161 of the Revised Codes; and, as at common law, the assignee stands in the place of the assignor. Durfee v. Harper, 22 Mont. 354, 56 Pac. 582. The point raised on this appeal is settled adversely to appellant, by the overwhelming weight of authority. The rule applicable to the question now before us is stated in 5 Corpus Juris, § 275, p. 1191, as follows:

Digitized by Google

"As a right of action is given by law and cannot be destroyed by the voluntary act of the debtor, it is the rule that the right of a creditor to maintain an action against his debtor and to recover a personal judgment is not affected by the latter's voluntary assignment of all his property for the benefit of all his creditors; nor is such creditor's right to proceed to judgment defeated because he has filed his claim with the debtor's assignee."

[2] The rule governing common-law assignments for the benefit of creditors remains unaffected by our statutes, in so far as the question now before us is concerned. It is no longer open to question that the execution of a common-law assignment for the benefit of creditors is no bar to an action by a creditor against the assignor and in no way affects the right of the creditor to proceed to judgment after the assignment is made. Detroit Stove Works v. Osmun, 74 Mich. 7, 41 N. W. 845.

[3, 4] The assignment in question, assented to by the creditor though it may have been, did not effect the release of the assignor of any portion of his original obligation not discharged by the assignee. 5 Corpus Juris, 1285. In Howlett v. Mills, 22 Ill. 341, it is held that the mere assent of a creditor that his debtor may make an assignment for the benefit of creditors does not release the original debt. There the court said:

"The mere assent by a creditor, that his debtor may make an assignment for the benefit of his creditors, cannot have the effect to release and discharge the debt, and this is what is asserted by this plea. It, at most, could only be held to require him to look to the fund for his portion to be applied on his claim, and leave him to collect the remainder out of the debtor."

To the same effect is Emerson v. Gerger, 178 Mass. 130, 59 N. E. 666. In the case last cited, the assignment contained a provision that all creditors assenting to it thereby discharged all other claims against the debtor in consideration of the right of receiving the dividend from the assignee. It was there held that a subsequent receipt by the creditor of a check from the assignee purporting to be a final dividend intended to be accepted in full discharge of the creditor's claim, and use of the check by the creditor, are not enough to show an assent on his part to an agreement of composition, and the creditor was held to still have the right to sue the assignor and recover the balance of his claim. 5 Corpus Juris, § 480, pp. 1285, 1286.

Our conclusion, therefore, is that nothing short of an agreement expressed in terms which indicated clearly the intention of the creditor to accept the pro rata distribution as a full discharge of his indebtedness could absolve the original debtor, and in our opinion the receipt above set forth is not such an agreement.

The judgment and order appealed from are affirmed.

Affirmed.

HOLLOWAY, HURLY, and MATTHEWS, JJ., concur.

SMITH v. SULLIVAN. (No. 4132.)

(Supreme Court of Montana. May 24, 1920.)

1. Appeal and error ⟸1042(4)—Refusal to strike an admission from complaint not prejudicial to defendant.

Refusing to strike from the complaint an allegation amounting to no more than an admission that plaintiff owed defendant a certain amount for certain services was not prejudicial to defendant, who was permitted to plead the same matter as a counterclaim, and received credit therefor.

2. Evidence ⟸376(1)—Ledger held admissible without production of mechanics who turned in time cards.

A ledger into which are immediately transferred by the bookkeeper the items of time and material put into each job in a repair shop, as shown by time cards each day turned in by each mechanic, being under Rev. Codes, § 7951, the book of original entries, is admissible without production of the mechanics, trustworthiness of their cards being sufficiently shown, and the bookkeeper making a proper showing, notwithstanding section 7862, limiting, with exceptions, testimony to those facts of which witness knew of his own knowledge.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Letitia M. Smith, executrix, substituted for M. G. Smith, deceased, against Michael Sullivan, doing business as the Sullivan Electric Company. From judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

J. E. Healy, of Butte, for appellant.

John E. Corette and C. J. Christian, both of Butte, for respondent.

HOLLOWAY, J. The plaintiff in his complaint alleges that between November 23, 1915, and August 15, 1916, he performed certain work and labor upon automobiles owned by the defendant, and furnished repair parts and pieces for such cars, and sold and delivered to defendant oil, gasoline, and other materials; that the work was done and the goods were furnished at the special instance and request of defendant, and were of the reasonable value of $556.17, no part of which has been paid except the sum of $52.90. The complaint then contains the following paragraph:

Digitized by Google

"But the defendant has a legal offset or counterclaim for goods, wares, and merchandise and labor sold and delivered and performed by the defendant for the plaintiff between the 11th day of September, 1915, and the 14th day of April, 1916, of the reasonable value of, $202.11, and there is now due, owing, and unpaid from the defendant to the plaintiff the sum of $301.16."

The prayer is for the balance, $301.16. The defendant appeared and moved to strike from the complaint the paragraph above; and, the motion being denied, he answered, admitting that he had employed plaintiff to perform certain work and furnish certain repairs for the automobiles, but under a special contract that the cost should not exceed $90. The other allegations of the complaint are denied, and defendant then pleaded as a counterclaim the same account mentioned in the paragraph above. There was issue joined by reply, and the trial thereafter resulted in a verdict for plaintiff, according to the prayer of the complaint. In passing upon a motion for new trial, the court required plaintiff to remit $25 of the amount of the verdict, and, this having been done, judgment was entered, the motion denied, and defendant appealed.

[1] 1. Error is predicated upon the ruling of the trial court, refusing to strike from the complaint the paragraph quoted above. It is true that the draftsman violated the rules of good pleading in attempting to anticipate the defendant's defense, but the allegation amounted to nothing more than an admission on plaintiff's part that he owed defendant $202.11, and if he had merely admitted the same while a witness on the stand, or by failing to deny the allegations of defendant's counterclaim, the position of the parties would not have been altered. Defendant was permitted to plead the same account as a counterclaim, and received credit for it. It is therefore impossible for us to perceive in what manner defendant could have been prejudiced by the court's ruling. The maxim, "Error appearing, prejudice will be presumed," ceased to be of force or effect in this state many years ago. It is now the rule that—

This "court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

[2] 2. Plaintiff kept a garage in Butte, and was engaged in the business of repairing automobiles, and selling oil, gasoline, and other supplies. He worked as a laborer himself, and employed three or four other mechanics. Repair parts were supplied to the mechanics by plaintiff or his bookkeeper. Every mechanic was furnished a time card, and it was his duty and practice to enter in writing on this card, as he proceeded with his work, the amount of time devoted to each separate job and the materials used by him thereon. Every day these time cards were turned in to the bookkeeper, who immediately transferred the items to a loose-leaf ledger, distributing to each job each workman's time upon that job and the materials used by him, with the price of the same. Apparently the time was kept in dollars and cents, based upon the prevailing wage scale. The time cards and loose-leaf ledger constituted the only books of account employed in plaintiff's business. The evidence discloses that this method of procedure had been employed with respect to defendant's cars. The leaves of the ledger containing defendant's account disclose that three or four of the mechanics, other than plaintiff, had worked upon defendant's cars from time to time. These other mechanics were not called to testify; neither was their absence explained. Plaintiff and the bookkeeper were the only witnesses in plaintiff's behalf.

In so far as indicated by the time cards kept by himself, plaintiff testified that the work was done and materials were supplied and actually used on defendant's cars, and that the several amounts charged therefor were reasonable. He also testified that he maintained careful supervision of the other mechanics; had observed them at work and using materials upon defendant's cars, and positively identified some of the items; that he knew in a general way that their time cards actually spoke the truth, but upon cross-examination admitted that he was frequently out of the garage, and could not know definitely that the accounts on the time cards of the other mechanics were absolutely correct. The bookkeeper testified that the materials charged upon the time cards of the other mechanics were actually delivered to the mechanics for use upon defendant's cars; that she had observed these mechanics at work upon defendant's cars, and had seen some of the parts placed in the cars, and could identify some of the items, but she was not able to say that all the time and materials indicated upon those time cards had actually been employed upon defendant's cars.

The items of time and materials thus definitely identified constituted only a portion of the whole. To supplement this evidence and make out the case against defendant for the entire amount of the bill, plaintiff introduced in evidence, over objection, the loose leaves from the ledger which contained defendant's account, and the ruling of the court admitting this evidence is assigned as error. Our Code (section 7862) provides:

"A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible."

Digitized by Google

This statute is but declaratory of the common-law rule in force generally, long before the Code was adopted. The rules of evidence were never intended to be ironclad. The law is progressive. It is not intended that a new rule shall be adopted to meet the exigencies of every new case, but the general rules are to be so construed that they will adapt themselves to the varying situations which the lapse of time and changing conditions in the business and commercial world render imperative. The purpose of the rule above is to elicit facts; to obtain the best evidence consistent with the circumstances of the case, or, in other words, to require that degree of proof, which produces conviction in an unprejudiced mind.

It is insisted by appellant, in effect, that it required the composite testimony of the several mechanics and the bookkeeper to render the books of account admissible, and, in the absence of the mechanics, the books contained an element of hearsay which rendered them inadmissible. To the general rule that a witness must speak from personal knowledge, a number of exceptions have been recognized by the courts generally, and this is particularly true with respect to the character of evidence now under consideration. If the mechanics were dead or out of the jurisdiction of the court at the time of the trial, the authorities generally would admit the books if they were kept in the usual course of business and the entries were transferred to them within a reasonable time after they were made, and this upon the ground of the impossibility of obtaining the confirmatory testimony. Other authorities have expanded the exception somewhat, and grounded the admissibility of the books upon the unavailability of the confirming witnesses, without reference to the cause of the unavailability. Wigmore on Evidence, § 1530, after considering the exceptions noted, as where the entrant or transactor is dead or both of them are dead, treats of the subject now under review as follows:

"One more consideration remains to be noted. The supposition in the above cases was that B. or S. or both were dead. But suppose, instead, that S., the salesman, teamster, or the like, is otherwise unavailable; is the result to be any different? It need not be. In the language of Chief Justice Shaw, already quoted (ante, par. 1521): 'The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial.' Now the ordinary conditions of mercantile and industrial life in some offices do in fact constantly present just such a case of practical impossibility. Suppose an offer of books representing transactions during several months in a large establishment. In the first place, the employés have in many cases changed, and the former ones cannot be found; in the next place, it cannot always be ascertained accurately which employé was concerned in each one of the transactions represented by the hundreds of entries; in the third place, even if they could be ascertained, the production of the scores of employés to attend court and identify in tedious succession the detailed items of transactions would interrupt and derange the work of the establishment, and the evidence would be obtained at a cost practically prohibitory; and finally, the memory of such persons, when summoned, would usually afford little real aid. If unavailability or impossibility is the general principle that controls (ante, par. 1521), is not this a real case of unavailability? Having regard to the facts of mercantile and industrial life, it cannot be doubted that it is. In such a case, it should be sufficient if the books were verified on the stand by a supervising officer who knew them to be the books of regular entries kept in that establishment, and the production on the stand of a regiment of bookkeepers, salesmen, shipping clerks, teamsters, foremen, or other subordinate employés, should be dispensed with. No doubt much should be left to the discretion of the trial court; production may be required for cross-examination, where the nature of the controversy seems to require it. But the important thing is to realize that upon principle there is no objection to regarding this situation as rendering in a given case the production of all the persons practically as impossible as in the case of death.

"The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employé affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical."

If only the death of the mechanics or their absence from the jurisdiction of the court

Digitized by Google

would excuse their being called as witnesses, then it might occur that, although within this state, they would be at such distance from the place of trial that their mileage and per diem as witnesses would amount to more than the total of the items of the account which they would be called upon to identify. It cannot be possible that the law contemplates that a clerk who has sold 50 cents worth of ribbon must be called as a witness, at an expense of at least $3—the per diem of a witness for one day—to identify the sale slip, before the account books containing the item can be admitted in evidence to prove that the ribbon was sold. Furthermore, some of the transactions recorded upon the time cards of these absent mechanics occurred a year and a half prior to the trial, and it is inconceivable that, if called, they could have remembered the facts recorded. At best, they could probably have done nothing more than identify the entries upon the cards as in their handwriting, and generally testified that they kept accurate accounts. There are numerous reported cases which hold that the books are admissible under the exception as amplified by Wigmore above, without calling the clerks who made the entries upon the sale slips or time cards, and without explaining their absence, and the reasoning of these courts appeals to us. Among the leading cases of this class are State v. Stephenson, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Ann. Cas. 841; L. & N. R. Co. v. Daniel, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; Firemen's Ins. Co. v. Seaboard A. L. Co., 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517.

In Meredith v. Bowman, 49 Mont. 204, 141 Pac. 643, the account books were excluded, but the facts were that the bookkeeper was not called, his absence not accounted for, and the books were not identified: The court said:

"There was in fact no preliminary evidence tending to show that the books had been kept in the usual course of business, that the entries had been made contemporaneously with the transactions out of which the charges grew, or that they had been honestly and correctly kept. The defendant Bennett, in connection with whose testimony they were offered, testified in substance that he knew nothing of them, except that they had been delivered to him by Bradley after the work had been completed. This preliminary evidence was necessary to render the books admissible."

Our conclusion is that the record contains sufficient evidence of the trustworthiness of the time cards to admit the ledger which, under the provisions of section 7951, Revised Codes, was the book of original entries. It was within the sound discretion of the trial court to require the mechanics to be called, or not, and in the absence of any showing of abuse of discretion the ruling admitting the book was not erroneous. The bookkeeper identified the ledger as the book kept by the plaintiff in the regular course of business, testified that the entries upon the time cards were transferred to the ledger contemporaneously with the transactions; that the items were transferred accurately, and the book fairly, honestly, and correctly kept.

The judgment and order denying a new trial are affirmed.

Affirmed.

HURLY, MATTHEWS, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

CHURCH v. ZYWERT. (No. 4141.)

(Supreme Court of Montana. May 24, 1920.)

1. Sales ⟸384(2)—Damages for buyer's breach is difference between market and contract price.

The measure of damages for buyer's breach under Rev. Codes, § 6081, is the difference between the contract price and the price which the seller could have obtained in the market nearest the place of delivery under the contract; hence admission of proof of price received in a different market will not alone establish the market price, and its admission for such purpose would be error.

2. Appeal and error ⟸1170(7)—Erroneous admission of evidence as to market value harmless, where evidence as to value was not attacked.

In an action for breach of contract to buy cattle, where there was no error assigned on the insufficiency of the evidence as to the value of the cattle in the market nearest that of delivery, the admission of incidental evidence as to the market value of the cattle at a distant point was, under Rev. Codes, § 9415, harmless.

3. Parties ⟸75(7)—Objection to parties must be taken by demurrer if defect appears on complaint.

Under Rev. Codes, § 6534, if a defect of parties appears on the face of the complaint, it must be taken advantage of by demurrer, which under section 6535 must point out specifically the defect relied on.

4. Parties ⟸75(6)—Where not appearing in complaint, objection to defect of parties taken by answer.

Where defect of parties does not appear on the face of the complaint, it may, under Rev. Codes, § 6538, be taken by answer.

5. Parties ⟸80(2½)—Objections to defect of parties, when not raised by demurrer or answer, are waived.

Under Rev. Codes, § 6539, objections to defect of parties are waived when not made by

Digitized by Google

answer or demurrer, such objections being in the nature of dilatory pleas; hence, where the complaint failed to disclose that any one other than plaintiff was interested in the transaction, and defendant, with knowledge that another was in that transaction, a partner with plaintiff, failed to present the question of defect of parties by answer, the objection was waived.

6. Estoppel ⟹71—Where one interested in cattle recovers full damages, another disclaiming at trial could not recover from defendant.

Where plaintiff, who had purchased cattle under agreement that an associate should share in the loss or gain, sued defendant for breach of contract to buy the cattle, and plaintiff's associate testified at trial, disclaiming any interest, the parties, if partners, being joint tenants, and plaintiff having recovered the full amount of damages, the associate could not thereafter recover from defendant.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

Action by A. J. Church against J. Zywert. From judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

H. C. Crippen, of Billings, for appellant.
C. R. Ingle, of Billings, for respondent.

MATTHEWS, J. The complaint herein alleges that plaintiff sold to defendant, at an agreed price per pound, approximately 100 head of cattle, to be delivered in lots during the months of August and September, 1916; that the first delivery was made August 1, received and paid for by defendant, but that thereafter, by reason of a decline in the market, he refused to receive and pay for the remainder of the cattle, although plaintiff was at all times ready, willing, and able to make the deliveries, and that by reason of the breach of the contract plaintiff was forced to sell at a loss, on the Billings market, of $1,350.75.

In his brief, counsel for defendant states:

"The theory of the defendant, as shown by his answer, was that whatever dealings he had with regard to the purchase of the cattle was had by him with the plaintiff and one Runkle, as partners. This theory is borne out by the evidence of the plaintiff."

The answer, however, merely denies specifically each of the allegations of the complaint, and goes no further. It contains no averment suggesting that defendant had any dealings with either Church or Church and Runkle; nor does it contain any intimation that plaintiff, in his individual capacity, was not the proper party plaintiff.

On the trial defendant was permitted, without objection, to show that while Church purchased the cattle and was sole owner of them, he had an agreement with Runkle that the latter was to assist in disposing of them, and was to receive one-half of the profit, if any, and to share any loss sustained. Both parties having rested, defendant moved for a directed verdict on the ground of nonjoinder of parties, insufficiency of the evidence as to the market value at Billings, and that the complaint did not state a cause of action, which latter objection also referred to suit by Church in his individual capacity. The motion was overruled, and the court refused all offered instructions based on the assumption that a partnership existed. The jury returned a verdict for the amount sued for. Defendant moved for a new trial, which motion was denied. The appeal is from the judgment and from the order denying his motion for a new trial.

[1, 2] 1. The first assignment of error is predicated on the court's action in overruling defendant's objection to the question, "What did you receive for the cattle at Omaha?" While it is true that the measure of damages is deemed to be the difference between the contract price and the price which the seller could have obtained in the market nearest the place of delivery under the contract (section 6081, Rev. Codes; Brazell v. Cohn, 32 Mont. 556, 81 Pac. 339), and therefore the admission of proof of the price received in a different market, alone, for the purpose of fixing the damages, would constitute error, the plaintiff only incidentally proved the actual amount received for the cattle and thereafter introduced evidence of the market value of the cattle in the proper market. There is no error assigned on the insufficiency of this evidence; and the court properly instructed the jury as to the measure of damages under the statute. If, therefore, the ruling of the court was erroneous, it could not have affected the substantial rights of the parties, and must be disregarded. Section 9415, Rev. Codes; State ex rel. Nipp v. District Court, 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256.

[3-6] 2. The remaining assignments are directed to the action of the court in its refusal to direct a verdict, refusal to give certain offered instructions, and in overruling the motion for a new trial, and are all based on the contention that the evidence disclosed a partnership. They will therefore be considered together.

The facts on which defendant relies were known to him at the time he drew and filed his answer. They do not appear on the face of the complaint. Under our Code, if a defect in parties appears on the face of the complaint, it must be taken advantage of by demurrer (Rev. Codes, § 6534), and the demurrer must point out specifically the defect relied upon (section 6535). Poe v. Sheridan County, 52 Mont. 280, 157 Pac. 185. When not so appearing, the objection may be taken

Digitized by Google

by answer. Section 6538. "If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same." Section 6539. These provisions have been in effect since territorial days, the only change being that in the last provision quoted the word "must" has been substituted for that of "shall," and were construed in the case of Parchen v. Peck, 2 Mont. 567, where the court said:

"The evidence shows that the Northwest Transportation Company was a firm * * * composed of the appellant, Durfee and Coulson. Durfee has since died. It is claimed that the court erred in proceeding against Peck, and that Coulson should have been joined with him. * * * The appellant did not set forth in his answer that Coulson was a member of the firm, or that there was a nonjoinder of parties. Can judgment be entered against Peck under the issues?"

The court then quotes the provisions of the Civil Practice Act referred to, and continues:

"These sections have been interpreted in the following cases: Fosgate v. Herkimer M. Co., 12 N. Y. 584; Zabriskie v. Smith, 13 N. Y. 336; Voorhies' Code, § 148. According to these authorities, we hold that the appellant waived any objection that Coulson was not a party by his omission to point out the same."

The provisions of our Codes and the above decision are in accord with the general rules on the subject, noted in Cyc. as follows:

"A defense that the plaintiff is not the real party in interest and hence has no right to sue must be specially pleaded in bar. * * * The rule usually adopted under the Code provision, that the answer may set forth as many grounds of defense as the defendant may have, is that nonjoinder of a party may be pleaded together with matter in bar. The objection that there is a defect of parties must be presented in the answer in a clear and distinct manner. In analogy to a plea in abatement which must be so specific as to omitted parties as to give plaintiff a better writ, an answer setting up a defect of parties must state the omitted parties precisely and truly and facts should be alleged showing that they are necessary parties. * * * So an answer setting up nonjoinder of plaintiffs must distinctly set up such defense and specifically show wherein the defect consists and who should have been joined as parties." 31 Cyc. 219, 220, 221, and cases cited.

In Conklin v. Fox, 3 Mont. 208, action was brought on an account for goods sold, alleging that Fox with two others were partners. Service was had on Fox alone, and he filed his separate answer, denying the allegations of the complaint. It was contended by counsel, as here, that the question of misjoinder was raised by the answer, but the court held that, by his failure to plead the fact "appellant waived his objection to the misjoinder of the parties defendant," that the allegation of a partnership would be treated as surplusage, and that the entry of judgment against appellant alone was proper.

In the case of Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551, the question was raised as to whether, under the rule stated above, the court could dispose of the subject-matter of the suit in its entirety; the court held that:

"Partners are joint tenants of all partnership effects; * * * joint tenants are not owners of separate shares. Each joint owner has title to the entirety. * * * I am, therefore, of opinion that where the defendant permits one or more of several joint tenants to sue alone * * * the recovery should be for the damages sustained by all the joint tenants."

Runkle was personally present and took part in the trial, asserting no rights therein and disclaiming any interest in the cattle; if a partner, he was a joint tenant with Church; and, Church having secured judgment for all damages sustained, Runkle could not thereafter maintain an action against appellant. As was said in the case of Gilland v. Union Pac. Ry. Co., 6 Wyo. 185, 43 Pac. 508, the plea of misjoinder or nonjoinder of parties was regarded at common law, and is still regarded under the Codes as a dilatory defense of which, to be availing, timely advantage must be taken. If the facts established on the trial are true, defendant is in no worse position than he would be in an action by the joint tenants, and his substantial rights have not been affected. Having failed to plead a nonjoinder of parties plaintiff, defendant waived the objection, and the lower court was justified in disregarding his motion for a directed verdict, and in its refusal of the offered instructions on the subject.

We find no substantial error in the record, and the judgment and order of the district court are therefore affirmed.

Affirmed.

HOLLOWAY, HURLY, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

Digitized by Google

WIPF v. KELLEHER et al. (No. 4140.)

(Supreme Court of Montana. May 24, 1920.)

Trial ⊂=159—Direction of nonsuit on counterclaim on the ground of variance between the pleadings and proof held warranted.

In a suit on a note, where defendants by way of counterclaim alleged that plaintiff contracted to purchase from them a separator, that the note should be applied in payment of the freight upon, and the purchase price of, the separator, and the balance should be paid in cash, and that plaintiff refused to accept the separator, to defendants' damage $285, which was the sum defendants would have realized as their commissions, and the evidence showed that defendants purchased the separator outright, and that their cause of action was for plaintiff's refusal to accept the machine and not for alleged commissions, a nonsuit as to the counterclaim was properly directed, there being no request for permission to amend, in view of Rev. Codes 1907, § 6059, providing that the detriment caused by breach of a buyer's agreement to accept and pay for the personal property, title of which is not vested in him, is deemed to be, if the property has been resold, the excess of the amount due under the contract over the net price of the resale, or if the property has not been resold, such excess, etc., over the value to the seller.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by Joseph A. Wipf against James Kelleher and Leon A. Kelleher, copartners doing business under the firm name and style of James Kelleher & Son, and James Kelleher and Leon A. Kelleher, who counterclaimed. From a judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Affirmed.

E. K. Cheadle, of Lewistown, and A. D. Strouf, of Stanford, for appellants.

O. W. Belden, of Lewistown, for respondent.

HURLY, J. This is an action brought to recover upon a promissory note executed and delivered by the appellants to the respondent. For answer, the appellants admit the execution of the note, and by way of counterclaim allege that on the 22d day of May, 1915, respondent and appellants entered into a written contract, by which the respondent agreed to purchase an Avery separator from the appellants; that the said note should be applied in payment of freight upon, and the purchase price of, the said separator and that whatever balance of the purchase price should remain due upon the said separator after the application of the whole of the sum represented by said note should be paid in cash by the respondent to the appellant; that the appellants furnished the separator according to the terms of the contract, but that the respondent refused, and still refuses, to accept the same, to appellants' damage in the sum of $285, which said sum it is alleged was the amount which the appellants would have realized upon the said separator under the terms of said contract as their commission for selling the same. It is further alleged that before the commencement of the action the appellants tendered to the respondent the amount due upon said note, less the said sum of $285. There was reply.

Upon the trial, at the conclusion of the testimony, on motion of the respondent, the court granted a nonsuit as to the counterclaim because of variance between the pleadings and the proof, and instructed the jury to return a verdict in favor of the respondent for the full amount sued for in the complaint. Judgment was then entered in favor of the plaintiff. From that judgment and from an order denying a motion for a new trial, this appeal is taken.

It appears from the testimony that the defendants purchased the machine outright from the manufacturer, agreeing to sell the same to the plaintiffs, and that what they denominated as commissions is probably the difference between the cost price thereof with freight added and the sum which they had agreed to charge the plaintiff as the purchase price of the machine, and that their cause of action or counterclaim, if any, was because of the plaintiff's refusal to comply with the terms of the contract in refusing to accept the machine, and not for alleged commissions.

The question is whether the testimony offered by appellants constituted a counterclaim, as alleged in the answer. Revised Codes Montana 1907 provides:

Section 6059: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:

"1. If the property has been resold, pursuant to section 5803, the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or,

"2. If the property has not been resold in the manner prescribed by section 5803, the excess, if any, of the amount due from the buyer under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

Objection was made to all testimony offered by appellants touching the alleged counterclaim, and in addition the motion for a nonsuit pointed out specifically that the allegations of the counterclaim were at variance with the testimony. No request was made for permission to amend.

With the record in this condition we do not feel that the trial court should be put in er-

Digitized by Google

ror for holding that there was a variance, it appearing that the defendants did not, either by their pleading or proof, bring themselves within the rule of the statute, though had they done so the evidence at hand would have entitled them to go to the jury.

The judgment and order appealed from are affirmed.

Affirmed.

HOLLOWAY, MATTHEWS, and COOPER, JJ., concur.

BRANTLY, C. J., being absent during consultation of the court, took no part in the decision.

STATE ex rel. EXAMINING AND TRIAL BOARD OF POLICE DEPARTMENT OF CITY OF BUTTE et al. v. DISTRICT COURT OF SECOND JUDICIAL DIST. IN AND FOR SILVER BOW COUNTY et al. (No. 4624.)

(Supreme Court of Montana. May 24, 1920.)

1. Prohibition ⇐21—Affidavit must show beneficial interest by facts stated, and not by conclusion.

Under Rev. Codes, § 7228, providing for issuance of writ of prohibition "upon affidavit on the application of the person beneficially interested," a statement in the affidavit that relators are persons beneficially interested is unnecessary, for, if made, it would be insufficient, in the absence of facts showing the correctness of the conclusion.

2. Prohibition ⇐15—Officers held "beneficially interested" in prohibition to stay proceedings against them.

Under Rev. Codes, § 7228, requiring relators in application for prohibition to be beneficially interested where discharged police officer brought certiorari to review the action of the mayor and examining and trial board of the police department in discharging him, the mayor and board were "beneficially interested" in prohibition, applied for by them, to stay the certiorari proceedings, especially where the certiorari commanded them to make return of a transcript of the discharge proceedings, which they alleged their inability to do.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beneficially Interested.]

3. Municipal corporations ⇐185(13)—If discharge of policeman is not supported by complaint and proof certiorari lies though charges sufficient.

If the complaint on which a police officer was tried before the examining and trial board of the police department did not state facts sufficient to constitute the offense with which he was charged, or if there was no substantial evidence offered tending to prove the charges, certiorari would lie, though the charges filed were sufficient.

4. Municipal corporations ⇐185(13)—Prohibition ⇐28—Affidavit for certiorari to review discharge of policeman must state facts, not conclusions; sufficiency of affidavit reviewable on prohibition.

Affidavit for certiorari to review alleged wrongful discharge of a police officer must state facts, not legal conclusions; and the sufficiency of the affidavit in that respect is reviewable on prohibition to stay certiorari proceedings.

5. Prohibition ⇐17 — Application to lower court to quash writ of certiorari sufficient as basis for prohibition.

Relators having exhausted their remedy in the court below by presenting the question of its lack of jurisdiction to issue writ of certiorari by their motion to quash the writ, the action of the lower court was reviewable by prohibition.

6. Prohibition ⇐3(5) — Remedy by appeal must be adequate.

The right to prohibition is defeated, not by the existence, but by the adequacy of the remedy by appeal.

7. Municipal corporations ⇐185(13)—Certiorari not proper remedy for discharged policeman, where only complaint is insufficiency of evidence; "transcript of record of proceedings;" "courts of record;" "suit."

Since the writ of certiorari can only require a return of a "transcript of the record of the proceedings" which, in proceedings for discharge of a police officer, would properly include only the complaint filed, the notice given, with all minute entries made concerning the same and concerning the motion and plea of the defendant, the setting of the matter for hearing, the formal entries of the hearing, the findings of the board, and the final order disposing of the matter and removing the officer, and since under Rev. Codes, §§ 6238, 6239, only the court of impeachment, the Supreme Court and the district courts are "courts of record," and in no other tribunal exercising judicial functions can the magistrate, person, or board officiating be compelled, in the absence of a special statutory requirement, to make or keep a record of the testimony, and under section 3308 there is no provision for recording the testimony in such proceeding for the discharge of a police officer, certiorari, even if it would lie under section 3308, providing that the district court shall have jurisdiction in a "suit brought by the officer or member to determine whether the essential requirements of law have been complied with in the matter of his trial," as included by the term "suit," would be ineffectual in such a case, where the only ground on which excess of jurisdiction could be urged was that the evidence was insufficient to warrant the findings of the trial board, and the officer's only remedy would be by independent suit in equity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Court of Record; Suit; Transcript.]

8. Certiorari ⇐28(1)—Lies only for excess of jurisdiction.

The writ of certiorari can only be employed to determine whether a tribunal exercising ju-

Digitized by Google

dicial functions has exceeded its jurisdiction or authority.

Original application by the State of Montana, on the relation of Examining and Trial Board of the Police Department of the City of Butte and another, for writ of prohibition directed to District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, in which respondents move to quash the alternative writ of prohibition. Motion to quash alternative writ overruled, and peremptory writ granted.

R. L. Clinton and C. F. Juttner, both of Butte, for relators.

Ed. Fitzpatrick and Canning & Geagan, all of Butte, for respondents.

MATTHEWS, J. Prohibition to stay the action of respondents on writ of certiorari issued against relators at the instance of one James Burns, discharged police officer of Butte.

The affidavit of relators recites that proceedings were commenced against Burns, charging acts constituting conduct unbecoming a police officer, notice given and hearing had as required by law, findings of the board sustaining the charges, and dismissal by the mayor. Thereupon Burns applied to the respondent court for a writ of certiorari, which was issued, commanding relators to certify and return to said court a full transcript of the record of the hearing, including all exhibits and all testimony offered on the hearing. Relators appeared and moved to quash the writ for insufficiency of the affidavit, lack of jurisdiction in the court, and that the court had exceeded its authority in ordering a tribunal not a court of record to return a transcript of the testimony taken. The motion was denied. Respondents move to quash the alternative writ of prohibition on the grounds:

(1) That it does not appear from the affidavit upon which the writ was issued that relators are entitled to any relief by writ of prohibition or at all.

(2) That the facts set forth in said affidavit and application are not sufficient to authorize the issuance of the writ.

1. It is contended that there is no allegation or statement in the affidavit that relators are the persons beneficially interested, nor does it appear therefrom that they are so interested, nor that the same was made on behalf of the city of Butte.

[1] Section 7228 of the Revised Codes provides that the writ may be issued "upon affidavit on the application of the person beneficially interested." A statement in the affidavit that relators are persons beneficially interested would be but a legal conclusion, and, if made, would not be sufficient, in the absence of a statement of facts showing the correctness of the conclusion. State v. Ellis, 47 La. Ann. 1602, 18 South. 636. The affidavit and application must show facts from which the court can determine the questions involved. Dakan v. Santa Cruz Superior Court, 2 Cal. App. 52, 82 Pac. 1129; In re Francis, 7 Idaho, 98, 60 Pac. 561; Clifford v. Parker, 13 Wash. 518, 42 Pac. 717. In determining whether the relators are entitled to the writ, the court will look to the allegations of fact rather than for the recital of conclusions on the subject.

[2] While the application here is made only by the mayor and the examining and trial board of the police department of the city, it must be remembered that they are officers sworn to protect the interests of the city, and are the respondents in the very proceeding which they are seeking to have stayed, and it cannot be said that they are not parties in substance, or that they will not derive benefit from the issuance of the writ; on the contrary, it would seem that relators are vitally interested, as officials of the city, in determining whether they shall be compelled to reinstate an officer to thereafter work with and under them, after they have, in their official capacity, determined that he is unfit for the position.

In the case of State v. Superior Court, 4 Wash. 30, 29 Pac. 764, the Supreme Court of Washington held that a county attorney, whose duty it was to protect the treasury of the county, was entitled to apply for the writ to prevent illegal disbursements, stating:

"We think it would be a strained construction of the proprieties to hold that the officer whose duty it is made by statute to represent the state and county * * * should not upon his own oath state the facts which constitute the basis of this proceeding. * * * Prohibition is said to be the converse of mandamus, but the same degree of strictness as to parties is not maintained."—Citing High on Extra. Remedies, 764, 779.

This case, in our judgment, presents an entirely different question from that decided in State ex rel. Hackshaw v. District Court, 48 Mont. 481, 138 Pac. 1100, where it was held that the board of county commissioners were not beneficially interested in the subject-matter of an appeal from their order granting a saloon license. There the question was as to a private right or privilege, while here the best interest of the city, which relators are sworn to uphold, is involved. Further, the relators are directly affected by the order of the court compelling them to make return of a transcript, which they allege they cannot do, and which would, if effective, require them to thereafter employ a stenographer and make a transcript of the testimony in all proceedings before the board.

2. The affidavit recites the official status of relators; the filing of charges against

Digitized by Google

Burns, notice to him of the time and place of hearing, his plea to the complaint and the hearing, findings and order of discharge of the officer. It sets out the complaint in full. It then recites the application of Burns for the writ of certiorari, setting out his affidavit in full; the writ issued out of the district court, their motion to quash the same, and the order overruling the motion. It then recites the fact that said board is not a court of record, and never had in its possession or under its control any transcript of the testimony, that relators have no plain, speedy, and adequate remedy at law, and that the trial court is proceeding and will proceed without jurisdiction. While these latter statements are in the nature of conclusions, relators have set out, in their affidavit, all of the facts from which the conclusions may be drawn, and if, as alleged, the respondent court was without jurisdiction to issue the writ complained of, in the first instance, and it further appears that the relators have no plain, adequate, and speedy remedy in the ordinary course of law—which questions will be considered later—the relators were entitled to the alternative writ, and the motion to quash should be overruled.

In addition to the motion, respondents filed their answer to the allegations of the application, which joins issue on the questions of law involved, and we will now consider such questions as are properly presented.

[3] 3. The relators' first contention is that the petition filed in the court below, and on which the writ of certiorari was issued, shows on its face that the board had jurisdiction of the party, and regularly pursued each and every statutory step required under the Metropolitan Police Law in order to invest it with jurisdiction. A careful examination of the affidavit of Burns, a copy of which is attached to the application here, discloses such to be the fact; but if, as is contended on behalf of Burns, the complaint on which he was tried before the board did not state facts sufficient to constitute the offense with which he was charged, or if, as alleged, there was no substantial evidence offered tending to prove the charges, even though the charges filed were sufficient, the writ issued by respondent court would lie, and relators here would not be entitled to the relief sought in this court. However, the application contained neither a copy of the complaint nor a résumé of the testimony, and the district court was in no position to pass upon the sufficiency of the complaint or the substantiality of the evidence.

[4] 4. The second ground urged is that affiant's showing was not sufficient to entitle him to the writ of certiorari; that his affidavit contained no facts, "but only a mass of legal conclusions." The affidavit gives no intimation as to what were the charges preferred in the complaint against him, nor does it set out facts to support the conclusions that "the complaint does not state facts sufficient to constitute the charge;" that "no substantial evidence whatever was introduced or produced," or that "the said board and mayor failed to comply with or see that all the essential requirements of law in said proceeding had been fully complied with," but required the court to accept the bald conclusions quoted in order to determine the question of its jurisdiction to issue the writ. Respondents now contend that, whether such determination was correct or not, the action of the district court is conclusive, as "the only purpose of the writ is to move the reviewing court to act. When the writ issues, the affidavit becomes functus officio. State ex rel. First Trust & Savings Bank v. District Court, 50 Mont. 259, 146 Pac. 539. But counsel mistakes the purport and application of the language quoted; it was used by the court in connection with the declaration that the affidavit "is not a pleading, and its averments cannot be traversed by any other pleading." Its averments are taken as true, and cannot be denied; but the court does not intimate that the sufficiency of those averments cannot be questioned, either on appeal or in appropriate proceeding for that purpose; the court in fact stated:

"The writ of review is issued upon a proper affidavit by a party beneficially interested. Section 7204, Rev. Codes."

If the affidavit is lacking in the essentials, it is as though no affidavit was filed.

Respondents, however, contend that the question cannot be raised, as our statute makes no provision for a demurrer or motion to quash. They, therefore, contend that the only course open, on the issuance of the writ, is to make the return commanded, and cite in support of their contention the case of Garrison v. Malheur County Court, 54 Or. 269, 101 Pac. 900, decided under a similar statute. There, it is true, we find the statement:

"The statute makes no provision for demurrer or motion to quash. When the writ issues, the inferior court has no alternative but to send up its return, and the hearing is then had upon the inspection of the writ and the return, and no demurrer or motion is necessary."

But that portion of the opinion immediately preceding the quotation explains the language used, as follows:

"Counsel for appellant ingeniously argues that respondents, having made a full return to the writ in the court below, without interposing any motion to quash or any demurrer on account of defects of parties, are precluded from raising that question, and will be held to have waived it."

Even though it be conceded that the case cited sustains the contention of respondents, the Supreme Court of Oregon has, in the later

Digitized by Google

case of Drummond v. Miami Lumber Co., 56 Or. 575, 109 Pac. 753, followed the general rule on the subject. The court there declares:

"As authoritatively settled in this state, it is essential to the availability of a proceeding by writ of review that the petition state facts sufficient to authorize the issuance of the writ, the inadequacy of which statement is fatal to the proceeding. This makes it necessary, in the case before us, to examine only the petition presented by the record, the competency of which is assailed by *proper motion*." (Italics ours.)

The rule is thus stated in 11 Corpus Juris:

"The application must also set out with reasonable certainty, but not necessarily such certainty as rebuts every conclusion to the contrary, facts, and not merely conclusions of law, showing illegal action below and consequent injury, so that the court may see, assuming the petition to be true, that there is error." Page 149. "Defects in the writ should be taken advantage of by motion or by application to supersede, before filing the return." Page 170. "Insufficiency of the petition for the writ in that its allegations do not show that the petitioner is entitled to the writ, is ground for quashing the writ"—citing numerous cases.

In Drummond v. Miami Lumber Co., supra, the applicant set up certain facts contained in his complaint in a justice's court, and that a trial was had, and then alleged that—

"After hearing the evidence introduced by the respective parties, the said court found the allegations of plaintiff's complaint were true, * * * but wrongfully and unlawfully dismissed plaintiff's complaint and wrongfully and unlawfully rendered judgment against plaintiff."

The court said:

"Neither the answer * * * nor the averments therein appear in the petition. So far, therefore, as is disclosed by the petition the defendant may have pleaded and established some adequate defense to the action, and that this was done may be inferred from the holding of the court to the effect that there was no cause for instituting the action. If, however, the answer was insufficient for that purpose, or if anything occurred at the trial disclosing irregularities prejudicial to the substantial rights of plaintiff, on account of which it may appear that the judgment was 'wrongfully and unlawfully entered,' it was incumbent upon plaintiff to so state in the petition. * * * We can determine the truth of these assertions only by the facts from which these conclusions are deduced. * * * In other words, as used in the petition, the averments are statements of conclusions only."

In the case before us, as in the Drummond Case, the averments in the petition, or affidavit, are statements of conclusions only, and, in the absence of allegations of fact from which the conclusions may be drawn, it may be inferred from the findings of the board that the complaint was sufficient and the evidence substantial and convincing. The petition was wholly insufficient, and the lower court was therefore without jurisdiction to issue the writ.

[5] 5. It is contended that, the court having acted in the issuance of the writ, prohibition will not lie to require the undoing of that which has been done; but the rule is that—

"Where anything remains to be done by the court, prohibition will give complete relief, not only by preventing what remains to be done, but by undoing what has been done." 32 Cyc. 630, and cases cited in note 6.

Relators exhausted their remedy in the court below by presenting the question on their motion to quash, thus giving that court an opportunity to correct its error in the issuance of the writ, and are properly before this court for relief.

[6] 6. Respondents contend that the writ of prohibition does not lie because of the fact that relators have a remedy by appeal from any judgment finally rendered, citing State ex rel. Browne v. Booher, 43 Mont. 569, 118 Pac. 271. This question is, however, disposed of by the decision in the case of State ex rel. Lane v. District Court, 51 Mont. 503, 508, 154 Pac. 200, 202, as follows:

"It is urged that the remedy by appeal from an adverse final judgment is available to the relator, and that the writ of prohibition should be denied for that reason. While our Code provides that the existence of a remedy by appeal will defeat the right to relief by certiorari (Rev. Codes, § 7203), the like provision is not found in the section applicable to the writ of prohibition. Unless the remedy by appeal, or by other proceeding, is plain, speedy, and adequate, relief by prohibition may be granted in a proper case. Rev. Codes, § 7228. The existence of a remedy by appeal does not necessarily defeat the right to relief by prohibition. State ex rel. Marshall v. District Court, 50 Mont. 289, 146 Pac. 743. An application of this character is addressed to the sound discretion of this court (State ex rel. Mackel v. District Court, 44 Mont. 178, 119 Pac. 476); and whenever it is made to appear, as in this instance, that under no conceivable circumstances can the district court render a valid judgment because of a lack of jurisdiction, the discretion should be exercised in favor of issuing the writ, to the end that litigants may be saved the needless trouble and expense of prosecuting their litigation to a fruitless judgment."

The district court and the litigants should know at once that the court is without jurisdiction to proceed in the matter before it, to the end that, if the discharged officer is entitled to reinstatement, proper proceedings to that end may be instituted without the unnecessary delay attendant upon final determination of a proceeding which can determine no issue.

[7] 7. Is certiorari the proper proceeding? Under sections 6238 and 6239, Revised Codes,

Digitized by Google

the court of impeachment, the Supreme Court and the district courts of the state, and only those courts, are courts of record. In no other tribunal exercising judicial functions can the magistrate, person, or board officiating be compelled, in the absence of a special statutory requirement, to make or keep a record of the testimony. There is no such provision in our Metropolitan Police Law (section 3308, Rev. Codes), and if, on such a hearing, a stenographer is employed and does take the testimony, such employment is without warrant of law, and the record of the testimony is unofficial, and could be used thereafter only by mutual agreement or stipulation, as was done in the case of State ex rel. Griffiths v. Butte, 57 Mont. —, 188 Pac. 367. The court here was without authority to command the board to return the transcript, if one was made, and it does not appear from the application for the writ of certiorari that the board had or could obtain such a transcript.

The writ of certiorari can only require a return of "a transcript of the record of the proceedings" (section 7206), which would properly include only the complaint filed, the notice given, with all minute entries made concerning the same and concerning the motion and plea of the defendant, the setting of the matter for hearing, the formal entries of the hearing, the findings of the board, and the final order disposing of the matter and removing the officer. Our statute provides that, on such a hearing:

"The decision of the board shall be final and conclusive, and shall not be subject to review by any court, on question of fact. The district court of the proper county shall have jurisdiction, however, in a suit brought by the officer or member, to determine whether the essential requirements of law have been complied with in the matter of his trial." Section 3308, Rev. Codes.

[8] In the case of Weston v. Charleston, 2 Pet. 464, 7 L. Ed. 481, quoted in Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449, Chief Justice Marshall said:

"The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy * * * which the law affords him."

The term, as used in our statute, would, therefore, include the proceedings instituted in the lower court. However, the writ can only be employed to determine whether a tribunal exercising judicial functions has exceeded its jurisdiction or authority. State ex rel. Allen v. Napton, 24 Mont. 450, 62 Pac. 686; State ex rel. King v. Second Judicial District Court, 24 Mont. 494, 62 Pac. 820; State ex rel. B. & M., etc., Min. Co. v. District Court, 22 Mont. 241, 56 Pac. 281; State ex rel. Harris v. District Court, 27 Mont. 280, 70 Pac. 981.

As the record in the instant case would contain no transcript of the evidence, it would seem that the writ would be ineffectual, since the only ground on which excess of jurisdiction could be urged is that the evidence was insufficient to warrant the findings of the board. And it would seem, therefore, that the manner in which the question could be reached would be by an independent suit in equity to set aside the judgment or order on the ground of the insufficiency of the evidence to warrant the findings on which such judgment or order is based, in which suit, the facts being properly pleaded, evidence could be introduced to establish what testimony was given before the board.

The motion to quash the alternative writ will be overruled, and the peremptory writ, as prayed for, will issue, staying further action of respondents, and directing the dismissal of the proceedings.

Writ granted.

HOLLOWAY, HURLY, and COOPER, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

BOSTWICK et al. v. HOSIER et al.*

(Supreme Court of Oregon. June 1, 1920.)

1. Eminent domain ⟸13 — Lot owners have interest in streets giving access which cannot be taken for private use.

Owners of lots who purchased their property with reference to a plat, designating certain streets giving access thereto, have a usufruct in the streets which cannot be taken from them for private use by vacating a portion of the street, regardless of the ownership of the fee in the streets.

2. Municipal corporations ⟸657(4) — Lot owners in adjoining blocks can prevent partial vacation of streets.

Owners of lots, in blocks adjacent to streets which it was proposed partially to vacate for private use, suffer an injury different from that to the general public, and can prevent such vacation, though no part of the street touching their lots was included in that vacated.

Bennett, J., dissenting.

In Banc.

Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Suit by Marion C. Bostwick and others against C. A. Hosier and others. From a decree dismissing the suit, plaintiffs appeal. Reversed, and decree for plaintiffs entered.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 20, 1920.

Digitized by Google

In Stewart's addition to Baker, Or., Tenth street runs north and south between blocks 4 and 5. Crossing it at right angles, beginning on the north, are Church street, Center street, and Jackson street, each running east and west. Center street appears to have been laid out through the blocks mentioned after they were platted.

The defendant Hosier is the owner of lot 1 and a fractional part of lot 2 in block 5, lying at the northeast corner of Tenth and Jackson streets. On his petition, the legislative authorities of the city passed an ordinance purporting to vacate for his private use a part of Tenth street in front of his premises on the east and part of Jackson street on the south. Substantially the part sought to be vacated is a strip 10 feet wide on Tenth street and another 16 feet wide on Jackson street.

The plaintiffs are owners of property fronting on Tenth street. Ayre and Sherman also front on Center, and Bostwick on Jackson. They have brought this suit to enjoin the vacation of that portion of the streets mentioned. They aver that the purported ordinance was passed without their consent and without the city's having obtained jurisdiction to enact such legislation; that no benefit will come to the city or any of its inhabitants therefrom; and that the proposed vacation of the parts of said streets is solely for the private benefit of the defendant Hosier.

The answer admits the municipal character of the city, the official position of the commissioners, and the passage of the ordinance, which was spread upon the deed records of Baker county, but denies all other allegations of the complaint. The circuit court passed a decree dismissing the suit, and the plaintiffs appeal.

O. B. Mount, of Baker, for appellants.

Smith & Smith, of Baker (W. H. Strayer, of Baker, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). [1] The defendants contend that the plaintiffs were not concerned in the proceeding to vacate the portion of the streets mentioned because their property was not contiguous to the part to be vacated, and that the defendant Hosier was the only owner to be considered in the proceeding mentioned, because his was the only property that touched the strips to be vacated. It is apparent from the record that the parties bought the properties mentioned with reference to the plat of Stewart's addition. In other words, with their purchase they acquired at least the usufruct of the adjacent streets. It is axiomatic, as well as constitutional, that private property cannot be taken for private use. As early as the case of Willamette Iron Works v. O. R. & N. Co., 26 Or. 224, 37 Pac. 1016, 29 L. R. A. 88, 46 Am. St. Rep. 620, 1 Am. & Eng. R. Cas. (N. S.) 36, the question of occupancy of streets was under consideration, and the following language was used by Mr. Chief Justice Robert S. Bean, delivering judgment:

"But there is a limitation to legislative or municipal power over a street, which cannot be exceeded without invading the constitutional rights of abutting owners. An abutting proprietor is entitled to the use of the street in front of his premises to its full width as a means of ingress and egress, and for light and air, and this right is as much property as the soil within the boundaries of his lot; and therefore any impairment thereof or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking within the meaning of the Constitution, whether the fee of the street is in the abutting owner or not."

This principle is well fortified by the precedents cited in the opinion.

A similar doctrine was announced in Sandstrom v. O.-W. R. & N. Co., 75 Or. 159, 146 Pac. 803, where the defendant had fenced off a street which ran in front of the plaintiff's premises and made a deep and impassable cut across the street, although not immediately opposite the holding of the plaintiff. Likewise, in Tooze v. Willamette V. S. Ry. Co., 77 Or. 157, 150 Pac. 252, where the defendant proposed to build a high trestle along the street in front of the plaintiff's premises, the principle was laid down that the right of the plaintiff in the street could not be interfered with in the absence of condemnation proceedings. The doctrine is discussed also in Kurtz v. Southern Pacific Co., 80 Or. 213, 155 Pac. 367, 156 Pac. 794, where the defendant undertook to lay a railway track immediately in front of the plaintiff's premises without his consent. A similar principle is announced in Johnson v. Jeldness, 85 Or. 657, 167 Pac. 798, L. R. A. 1918A, 1074. See, also, Sloss-Scheffield S. & I. Co. v. Johnson, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, and note, 119 Am. St. Rep. 89, 11 Ann. Cas. 285.

[2] Although the plaintiffs do not own the property immediately opposite the ground it is proposed to vacate, yet most of them have holdings in the next adjacent blocks, so that their situation differs only in degree from that of the opposite abutter. The accessibility of their premises is pro tanto impaired, which constitutes an injury to them not suffered by the general public.

In several of these cases the defendants were public service corporations entitled to exercise the right of eminent domain, under which, after having had his day in court and an opportunity to be heard, the plaintiff could have been compelled to surrender his property upon adequate compensation first assessed and tendered. Here the proposal is to abandon parts of the streets for the private interest of one of the defendants, and

Digitized by Google

not for any public purpose. The property rights of the plaintiffs cannot be thus invaded. If the rights of abutting owners in a street cannot be taken without condemnation at the suit of a public service corporation, much more can they not be impaired in the interest of a private owner. The circuit court was in error in dismissing the bill, and a decree will be here entered according to the prayer of the complaint.

JOHNS, J., was present at the hearing, but did not participate in this decision.

BENNETT, J., dissents.

MILLER v. CONLEY et al.

(Supreme Court of Oregon. June 1, 1920.)

1. Adverse possession ⟸85(4)—Evidence of gift of land by father to daughter sufficient to initiate possession.

In a daughter's suit to quiet title to land claimed to have been given her by her father, evidence *held* to show that the father made a parol gift of the land to the daughter, at which time she took possession of the land as her own, and continued in exclusive occupancy under the gift.

2. Adverse possession ⟸64—May be established by parol gift.

Where a gift of land is made by parol, and the donee takes possession, adverse possession is established, which, continued for 10 years, gives the donee a fee-simple title.

3. Waters and water courses ⟸137—Diversion of water not continued for 10 years did not give vested right to diverter.

Where a father made a parol gift of land to his daughter, and, after her adverse possession had ripened into a fee-simple title, the father went on the land and laid a pipe line diverting water to other premises, the diversion not having continued for ten years, and the consent of the daughter not having been obtained, it did not amount to a vested right in the father.

4. Waters and water courses ⟸152(5)—Answer insufficient to confer on defendant in suit to quiet title any right to water claimed.

In a daughter's suit to quiet title against her father, who made a parol gift of the land to her, and against her brother, claiming right to control waters flowing in a ditch, answer of the brother, stating merely that he had the right to use the waters of the ditch for irrigating his lands, *held* insufficient to confer on him any right to the water.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit by Matilda A. Miller against A. B. Conley, J. Frank Conley, Sallie Conley, and another. From decree for plaintiff, the named defendants appeal. Affirmed.

The plaintiff brought this suit against her father, A. B. Conley, and her brother, J. Frank Conley, and their wives, respectively her mother and her sister-in-law, to quiet her title in 80 acres of land in Union county, claiming that her father had given her the tract in 1900, in pursuance of which she and her husband had left their residence on land owned by the latter, had taken possession of the 80-acre tract, and had held the same adversely to all other claimants ever since. The mother disclaims all title in the property. The father denied the gift and averred in substance that the plaintiff had occupied the land by his permission, subject to his right to resume possession of the same at his pleasure. J. Frank Conley, answering with his wife, averred the title of his father and that his acts respecting the land were performed only as the father's agent. Claiming that he reserved the right to go upon the premises and make whatever improvements he chose for his own benefit or the betterment of the lands, so long as the plaintiff's use of the same as a residence was not interfered with, the father pleads that at his own expense and without objection from the plaintiff or her husband he constructed a pipe line on the land for the purpose of carrying water from a spring to other lands occupied by his son. Specifically revoking the permission which the father says he granted to the plaintiff to use the premises, he prays that he be declared to be the legal owner of the land free from all claim of the plaintiff.

In addition to what has been stated of the brother's answer, that defendant pleads that on June 28, 1918, he became the owner of certain lands adjacent to that in dispute, and then avers:

"That from time immemorial has flowed and now flows in a well-defined channel and ditch from other lands to and across the lands described in the complaint to and upon the hereinabove described lands of defendant J. Frank Conley, a stream of water, and that the waters of said stream are used by defendant on and necessary for irrigating defendant's said lands.

"That this defendant, J. Frank Conley, has the right and is entitled to the use of the waters of said stream for irrigating his land and for stock water thereon, and that it is necessary for him to go along and upon the said ditch and water course over the lands described in the complaint for the purpose of cleaning out and repairing said ditch and making necessary repairs thereto for the purpose of conducting water therein to his said land and that prior to the 28th day of June, 1918, he, said defendant, for and in behalf of A. B. Conley, the then owner of the said lands now owned by this defendant exercised the said right for and in behalf of the then owner of said lands and the then owner of the lands described in the complaint, and that, for more than 18 years

Digitized by Google

prior to the filing of this complaint, the predecessors in title of this defendant have under claim of right and openly and notoriously used said stream through said ditch and stream on the land described in the complaint and under claim of right thereto."

The reply traversed the new matter of the answers except the averments of the relationship of the parties. The circuit court heard the testimony on the issues thus framed and rendered a decree for the plaintiff substantially according to the prayer of the complaint. An appeal was taken by the defendants, except the plaintiff's mother, who had a decree for costs on her disclaimer.

J. D. Slater, of La Grande, for appellants.
John S. Hodgin, of La Grande, for respondent.

BURNETT, J. (after stating the facts as above). The testimony of the plaintiff and of her husband is to the effect that in June, 1900, the father, A. B. Conley, gave to his daughter the tract of land in dispute, in pursuance of which they went upon it, took possession thereof, and used it as her own continuously from that time forward, making sundry valuable improvements thereon. By at least three disinterested witnesses they proved that at about that time and subsequently on different occasions the father told the witnesses that he had given the 80-acre tract in dispute to his daughter, the plaintiff. At the time his testimony was taken, the father was past 82 years of age, and, as he admits, his memory was impaired. When his attention was called to the declarations imputed to him by the witnesses, he stated that he had no recollection of making them. He stoutly maintained, however, in general, that he only intended to allow his daughter to live on the land at his pleasure, and that she went there and remained there by his permission under those conditions. The mother says substantially that such was the intention of herself and her husband. But she does not give any detailed statement of what the father, her husband, who was the owner of the land, said on the subject to the daughter. There is no pretense that the father or any one for him entered upon the lands and laid the water pipe or did any other act of the kind prior to the expiration of ten years' possession by the plaintiff.

[1] A detailed analysis of the testimony as in argument before a jury would not add anything to the sum of legal knowledge to be preserved in the reports. It is sufficient to say that a careful study of the record convinces us that the circuit court was right in its decision on the facts of the case, to the effect that the father made a parol gift of the land to his daughter in June, 1900, at which time she took possession of the property as her own and continued in exclusive occupancy of the same ever afterwards under that gift. This establishes the controlling fact in the case, to wit, a parol gift by the father to the daughter, coupled with her continued adverse holding of the property for 19 years and more.

In Allen v. Allen, 58 Wis. 202, 16 N. W. 610, a father had entered a pre-emption on certain lands in the name of his minor son, then about 5 years of age. The father continued to occupy the land, the son remaining a member of his family and living there also until some years after reaching majority. It is stated in the opinion that there is no evidence in the case showing that the father asserted any title to the land hostile to the title of his son, unless his possession, use of, and improvement of the same for over 30 years is evidence of such assertion of title, until a few months before his death, when he claimed it in conversation with a third party. In the course of its discussion of the ejectment action brought by the son against one claiming under the father, the court used this language:

"Had there been no evidence in this case bearing upon the question of adverse possession except the fact that the defendant and those under whom she claims had been in the actual possession and use of the land, cultivating and improving the same, having the same assessed as their lands, and paying the taxes thereon, and in other respects using said land as the owners usually do, for more than 20 years before the commencement of the plaintiff's action, we are of the opinion that the defendant would have been entitled, at least, to have had the question of their holding adversely to the plaintiff submitted to the jury, and, perhaps, to have a verdict directed in her favor."

The case turned upon the point that the testimony clearly showed that the father admitted the son's title continuously until a short time before his death.

In Murphy v. Newingham, 151 Ky. 360, 151 S. W. 930, the principle is thus stated:

"It is well settled that where there is an unconditional parol gift of a well-defined body of land, accompanied by an actual possession for 15 years or over, with claim of ownership, such possession ripens into title, and the donor cannot recover the land. If, however, one enters upon land by the owner's permission, expecting that the owner will give it to him, then such possession is not a hostile holding. * * * If the gift was made at that time, then the holding of the plaintiffs was adverse from that moment, and, having held the land for more than 15 years, their possession ripened into title."

That was a case where a son sought to enforce an alleged parol gift of land by his father to himself. The law was as stated above, but the facts showed that no gift was made or intended, and hence the son failed to establish title. These cases are cited from the brief for the defendants, but lately the question was examined at length in Parker

Digitized by Google

v. Kelsey, 82 Or. 334, 161 Pac. 694, an almost identical case, in which we reached the conclusion that a parol gift of land is adequate to the initiation of an adverse possession by the donee, which being continued for the statutory period of 10 years is sufficient to establish a fee-simple title in the one to whom the gift was made.

[2] The fallacy in the argument for the defendants here lies in the apparent assumption that permission is not sufficient to inaugurate an adverse possession. Such, however, is not the true principle, for even the cases cited by the defendants lay down the doctrine that a gift of land by parol, itself permissive in its character and voluntary in its inception, establishes the beginning of an adverse possession. Indeed, if Jones goes upon Brown's land armed with a shotgun, drives off the latter, and remains there in that attitude for 10 years, claiming the land as his own, adverse possession is established, accruing upon which is the fee-simple title in the lands. Such, or a similar, display of force, however, is not an absolute requisite; for it is competent for Brown to give the land to Jones by parol, vacating it and allowing the latter to remain there for ten years under those circumstances, with the same result as before. The doctrine the defendant seeks to apply relates to permission merely to occupy land in subordination to the legal title of the one granting the permission. It does not include possession given with design to confer the legal title upon the one who assumes the occupancy.

[3] It remains to consider the questions about water, mentioned in the pleadings. As to the diversion of the spring, the defendants plead that A. B. Conley, operating in fact through his agent, the defendant son, went upon the land as owner and laid the pipe line conducting the water to other premises. This however, according to the testimony, was not done until after the adverse possession of the plaintiff had continued for more than 10 years and hence had ripened into a fee-simple title in the latter. If that had been done within the statutory period, it might have constituted an interruption of the continuity of the plaintiff's adverse possession and have so defeated it as a means of acquiring title. The diversion of this water, under those circumstances, however, not having continued for 10 years, and the consent of the plaintiff thereto not having been stated in the answer, it does not amount to a vested right in the defendants. In other words, their proof does not show an adverse maintenance of the right in the land of the plaintiff sufficient to establish title in the water by prescription. That is to say, the testimony discloses title to the lands in the daughter by adverse possession at the time the water was diverted, with the deduction that the allegation of the defendants that they went upon their own land and diverted the water is not proved, and with the further deduction that they have not shown title in themselves by adverse use of the water for 10 years.

The defendant brother states only conclusions of law in his attempt to control the waters flowing in the ditch mentioned in his answer. The particular language alluded to is this:

"That this defendant, J. Frank Conley, has the right and is entitled to the use of the waters of said stream for irrigating his land and for stock water thereon and that it is necessary for him to go along and upon the said ditch and water course over the lands described in the complaint for the purpose of cleaning out and repairing said ditch," etc.

The pleader does not claim to have appropriated the water within the legal meaning of that term. At best, he indicates only a right as a riparian proprietor. In the syllabus to Porter v. Pettengill, 57 Or. 247, 110 Pac. 393, condensing the opinion written by Mr. Justice Eakin, it is said:

"A complaint to determine the priority of irrigation water rights is insufficient where it does not definitely describe plaintiff's lands, and does not show that any particular land needed irrigation, does not specify the amount of water diverted nor the amount needed to the acre, or for any specific land, and does not show how much water plaintiffs' grantors acquired a right to use; an allegation that plaintiffs were entitled to all the water in a creek during the dry season being too indefinite."

[4] Measured by this standard, the answer of J. Frank Conley is insufficient to confer upon him any right to the water in the ditch mentioned. Whatever the attitude of the parties may have been at the time the pipe line was laid, whether friendly or otherwise, and whether a license grew out of the arrangement or not, are not matters for us to decide in this suit, because there is no pleading upon which such a determination could rest.

It follows that the decree of the circuit court must be affirmed.

Digitized by Google

STATE ex rel. OREGON BAR ASS'N v. HALL.

(Supreme Court of Oregon. June 1, 1920.)

1. **Attorney and client ⇐52—Accusation in disbarment proceedings held not required to set forth entire complaint by defrauded party.**

Accusation in disbarment proceedings against an attorney containing copy of a portion of the body of the complaint filed against him by a party whom he had defrauded, need not embody portions of the complaint which were surplusage.

2. **Attorney and client ⇐52—Verification of accusation in disbarment proceedings by chairman of grievance committee of bar association complied with statute.**

Where accusation against an attorney sought to be disbarred was verified by the chairman of the grievance committee of the bar association, who swore he was one of the persons making application for disbarment, and that the accusation and complaint were true as he verily believed, the verification was sufficient under L. O. L. § 1096.

3. **Attorney and client ⇐48—Order requiring attorney sought to be disbarred to appear and answer charges did not require seal of court.**

An order of the Supreme Court through the Chief Justice requiring an attorney to appear and answer charges preferred against him by the grievance committee of the bar association for disbarment etc., did not require the seal of the court to be attached.

4. **Attorney and client ⇐48—Copy of order to appear and answer disbarment charges need not be authenticated by clerk.**

Under L. O. L. § 1097, copy of order to appear and answer charges served upon attorney sought to be disbarred need not be authenticated by the clerk of the Supreme Court; an exact copy certified to by the attorney of record for the grievance committee of the bar association being sufficient.

Original proceeding for disbarment by the State, on the relation of the Oregon Bar Association, against George A. Hall. On motion to dismiss. Motion denied, and defendant granted time to answer.

Five persons, composing the grievance committee of the Oregon Bar Association, presented a written accusation against George A. Hall, a member of the bar of this state, charging him with unprofessional conduct, and praying for his disbarment.

On April 9, 1920, this court, acting through the Chief Justice, made and signed an order requiring George A. Hall to appear and answer the charges on April 27th, and directing that a copy of the accusation and "of this order be served on" Hall "at least 15 days before the date set for the appearance."

On April 10th, the sheriff of Multnomah county delivered to Hall a copy of the accusation, and also a paper purporting to be a copy of the order. The paper served upon Hall as a copy of the order indicates that the original order had been signed by the Chief Justice and attested by the clerk on April 9, 1920. The paper delivered to Hall as a copy of the order, was certified by the attorney of record for the grievance committee, and his certificate is to the effect that "the foregoing copy of the order to appear and answer" was prepared by him, and that he had carefully compared the copy with the original, "and that it is a correct transcript" of the original.

Hall appeared by filing a motion in which he declares that he appears "specially for the purpose of this motion only, and for no other purpose whatever," and by the motion he moves "to cancel, vacate, set aside, dismiss, and quash the order and pretended copy of the order of the court to appear and answer" and the return of the sheriff, because: (1) A certain paper referred to in the accusation was not entitled to be filed as a pleading in an action mentioned in the accusation; (2) the accusation is not properly verified; (3) the seal of the court is not attached to the original order or to the pretended copy of it; (4) the pretended copy is not certified by the clerk.

Oval Pirkey, of Portland, for defendant.

HARRIS, J. (after stating the facts as above). [1] The accusation relates in detail the story of the alleged swindle claimed to have been perpetrated upon Parmelia L. Tyler by the defendant George A. Hall and John M. Seivers, another member of the bar of this state. After giving a narrative of what occurred up to and including the delivery of certain certificates of stock by Parmelia L. Tyler to Seivers, and after averring that Seivers subsequently met Hall and divided the stock with him, and that Seivers and Hall then sold the stock for an amount in excess of the par value of the stock, it is alleged in the accusation that Parmelia L. Tyler, subsequent to the delivery, division, and sale of the stock, consulted her attorney, and that upon his advice she commenced an action against Hall and Seivers and two others, "wherein it was alleged in her complaint as follows," and then follows a copy of the complaint, including the title of the court and cause. The accusation does not show that the complaint referred to was signed by the plaintiff or by an attorney, and the accused contends that the complaint was not such a paper as was entitled to be filed. The objection is utterly without merit. The accusation avers that Parmelia L. Tyler, after discovering that she had been defrauded, commenced an action against Hall and Seivers and two others for the avowed purpose of recovering $24,040.25, the damage sustained by her, and that in the complaint filed by her

Digitized by Google

in that action "it was alleged * * * as follows." The accusation does not pretend to give an exact copy of the complaint, including the title of the court and cause and the verification, but the expressed purpose of the accusation is to repeat the allegations of the complaint, and to accomplish that purpose the body of the complaint is copied. The fact that a portion of the remainder of the complaint was copied did not oblige the accusers to copy all the remainder, for the reason that the whole of the remainder was surplusage.

[2] The contention that the accusation is not properly verified is likewise without merit. Section 1096, L. O. L., provides that if the accusation is made by a person other than "the court or judges thereof," it must be presented in writing, "and verified by the oath of the person making it, or of some other person, to the effect that the charges therein contained are true, as he believes." The accusation is verified by the chairman of the grievance committee of the Oregon Bar Association, and he swears that he is "one of the persons making the foregoing application for disbarment, and that the foregoing accusation and complaint is true as I verily believe." A mere statement of the facts makes it plain that the verification complies with the statute.

[3] There is no statute requiring the seal of the court to be attached to the original order; and, hence, the third objection must be overruled.

[4] The fourth objection made by the accused relates to the paper served upon him as a copy of the order. The defendant contends that the copy must be authenticated by the clerk of the court, and that a paper certified by the attorney of record amounts to a nullity. It may be assumed, for the purposes of this case, that if the copy must be authenticated, the certificate must be made by the clerk of the court, because he is the legal custodian of the files of the court. If we turn to section 1097, L. O. L., we shall discover that the Code commands the court to "cause a copy of the order and of the accusation to be served upon the accused." There is no direction that the copy of the order shall be authenticated. All that is required is that a copy shall be served; and, therefore, if a paper which was in truth a copy was served upon the accused, the law was complied with. The chapter of the Code which deals with the suspension and removal of attorneys specifies the causes for suspension and removal, and prescribes the procedure to be followed. The directions concerning the service of a copy of the accusation and of the order are not exactly the same as the directions concerning the service of summons and complaint in a suit or action. The Code provides that—

In a suit or action "the summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk." Section 55, L. O. L.

In the chapter which treats of the removal of attorneys, there is no express direction concerning certification; nor are the persons who may make the certificates specified. Usually, if not always, when the Code contemplates service by delivery of a certified copy of any paper, process, or order, there is found an express direction that the copy shall be certified; and, when we find, as we do here, a chapter which deals with a given subject, and prescribes the method of procedure to be followed, and one of the steps to be taken is the service of a copy of the order, without an express requirement that the order shall be certified, the reasonable construction to be placed upon the statute is that it requires only that the paper shall in truth be a copy, and if in fact the paper is a copy the statute has been complied with. The defendant has filed an affidavit in support of his motion, and attached to the motion is the paper which he says was delivered to him as a pretended copy of the order. A comparison of the paper received by the defendant with the original on file with our clerk shows that the paper delivered to the accused is an exact copy of the original order; and, therefore the defendant has himself proved that he received all the notice he was entitled to receive. The motion filed by the accused is denied, and he is granted 10 days within which to file an answer.

BENNETT, J., did not sit in this case.

Digitized by Google

O'NEIL v. TWOHY BROS. CO.

(Supreme Court of Oregon. June 8, 1920.)

1. Pleading ⟸312—Deed set out as exhibit prevails over pleader's statement of legal effect.

Where an executed deed is pleaded by plaintiff according to the legal effect which he puts upon it, and is also set out in hæc verba as an exhibit attached to and made part of his final pleading, the deed itself prevails to the exclusion of a statement of its legal effect in the pleading.

2. Evidence ⟸419(2) — Oral agreement pleaded as part of consideration for deed inadmissible to change its terms.

Under L. O. L. § 713, an alleged oral agreement, pleaded as part of the consideration for a deed, and hence a contractual consideration, and not one of a monetary nature, is inadmissible to vary or add to the deed.

3. Waters and water courses ⟸156(1)—One may retain his water right and alienate the ditch by means of which he enjoys it.

The owner of a vested right for the irrigation of semiarid agricultural lands by means of water from a creek drawn through a ditch may retain his water rights and alienate the ditch, the means by which he enjoyed such right, notwithstanding it is the only present means of employing the water rights.

4. Waters and water courses ⟸156(2)—Owner who conveyed his rights in water ditch could not recover damages for its destruction.

Where the owner of semi-arid agricultural lands, producing crops when irrigated, had a vested water right in the waters of a creek through a certain ditch, and by deed conveyed his interest in the ditch to an irrigation district, without reservation, he could not thereafter complain of its destruction by the district's contractor or recover damages of the contractor.

5. Evidence ⟸390(5)—Owner of water right conveying his interest in the ditch could not, by parol, claim right to its use.

Where an owner of a water right by deed conveyed his interest in the ditch to an irrigation district and retained his water right, he could not thereafter contradict his conveyance by parol, so as to claim the right to use of the ditch as the only means by which his water rights reserved in the deed, could be enjoyed.

In Banc.

Appeal from Circuit Court, Crook County; J. U. Campbell, Judge.

Action by Charles C. O'Neil against the Twohy Brothers Company. Judgment for plaintiff, and defendant appeals. Reversed.

After alleging that the defendant is a corporation, the complaint proceeds in substance to state that at all times mentioned in the pleadings the plaintiff was the owner of certain agricultural lands in Crook county, semi-arid in their nature but capable of producing crops when irrigated; that the plaintiff is the owner of a vested water right dating from the year 1909 appurtenant to 250 acres of said realty and drawn from the waters of Ochoco creek through a ditch known as the Table Land ditch; that during the year 1918 the defendant was engaged in constructing a dam on Ochoco creek below the point of diversion into that ditch; and that at all said times, including the month of May and months prior thereto, there was sufficient water to subserve plaintiff's right, "and the plaintiff had the right to the use of said ditch for the purpose of conveying water therein from said creek to his said lands; * * * and the defendant at all times had full notice and knowledge of plaintiff's said rights." Continuing, the plaintiff charges that in constructing the dam the defendant went upon said Table Land ditch, tore up and destroyed the same, and in the months of February, March, April, and May, 1918, "willfully, purposely, wrongfully, carelessly, negligently, unnecessarily, and in violation of plaintiff's said rights, and with knowledge thereof, interfered with, interrupted, obstructed, and prevented the waters of said creek from flowing into said ditch or conduit, and through the same to and upon the lands of the plaintiff, and purposely and willfully diverted and conveyed therefrom water flowing therein, and caused the same to run and flow elsewhere than to and upon the lands of the plaintiff," and failed to protect the ditch from injury, with the result that plaintiff's lands are deprived of water for irrigation purposes, and by reason thereof his crops were depreciated in quality and quantity to his damage in a sum alleged. The whole complaint is traversed by the answer, except the allegation respecting the corporate character of the defendant and the plaintiff's ownership and occupancy of the lands described.

In the defendant's brief on appeal we find this statement:

> "Leaving aside all other pleadings, we wish to present this case upon the complaint, the denials thereof in the answer and the third affirmative answer and defense and the reply thereto."

On account of this voluntary restriction we pass the first and second affirmative defenses and take up the third. Summarizing this in part, it appears therefrom that the defendant is a corporation; that the Ochoco irrigation district was duly organized to erect and maintain a dam across Ochoco creek, and a canal leading therefrom, for the purpose of impounding the waters and delivering the same to lands included in the district, among which tracts were those of the plaintiff; that at all those times whatever right in the waters of Ochoco creek the plaintiff had was being

Digitized by Google

exercised by him through the Table Land ditch, in which he had an interest; and that there was no other means of conveying the waters to his land except through that ditch. Thus far the reply admits the answer under consideration. The contested part of this defense is here quoted:

"On November 21, 1917, the plaintiff, in consideration of the sum of $10,000 paid by said Ochoco irrigation district, made, executed, and delivered to said Ochoco irrigation district a deed of conveyance of all his right, title, and interest in and to said Table Land ditch, which deed was witnessed by two witnesses and was duly acknowledged by said plaintiff, and the same was duly recorded at page 109 of Deed Book 40 of the records of Crook county, Or.; and thereupon said Ochoco irrigation district entered upon and into possession of said Table Land ditch and into possession of lands adjoining said Ochoco creek, and, after preparing plans therefor and submitting the same to the state engineer of Oregon and securing his approval thereof, constructed a dam across said Ochoco creek and across said Table Land ditch, and constructed said canal whereby the waters which had theretofore flowed in said river and in said ditch were dammed up and impounded and ceased to flow through the same prior to May 1, 1916, which said dam and canal and the construction thereof is the same dam and construction referred to and complained of in the complaint.

"After entering into possession of said Table Land ditch pursuant to said deed said Ochoco irrigation district employed defendant to construct said dam and canal, and pursuant to said employment defendant did, during the year 1917, commence construction of said dam and canal, and continued the construction thereof pursuant to said employment, and under the direction of said district, until February, 1919."

The reply to the third answer and defense admits the execution of a deed to the irrigation district by the plaintiff, his wife and other parties, of date November 21, 1917, whereby in consideration of the sum of $10,000 paid by the district to the grantors they did "by these presents bargain, sell, assign, set over, and convey unto the said Ochoco irrigation district, its successors and assigns, all our right, title, and interest in and to that certain real property known and designated as the Table Land ditch, and all water rights, rights of way, and easements owned by the said Table Land ditch and the Table Land Ditch Company, a partnership, comprised of the persons executing this conveyance, together with all branches, laterals and extensions thereof or connected thereto, under whatsoever name the same may be called or designated; * * * together with the rights of way across any or all of our said lands within the district for the canals or laterals which it may be necessary for the district to construct." The following reservation appears in the deed:

"This conveyance does not cover any water rights owned by the individuals making this conveyance nor to any water right appurtenant to their individual lands."

The document closes with covenants of seisin, and against incumbrances, and general warranty. It is admitted that this conveyance was executed, acknowledged, delivered to the grantee and recorded.

The reply sets out in substance that the Table Land ditch was constructed and owned by a partnership composed of certain individuals, of whom the plaintiff was one; that prior to the formation of the partnership each of the partners had initiated a right to the waters of Ochoco creek, appropriated a portion thereof for irrigating purposes, and afterwards constructed the ditch as a partnership venture, as a means of conveying each separate appropriation of the water to the lands of the several appropriators; but states that the partnership never owned any of the water rights of any of the waters appropriated, they being the separate property of each appropriator and appurtenant to his separate lands. Reciting that the deed was made for a consideration of $10,000, with the reservation to each member of the partnership and to each grantor which has already been quoted, it is stated further in the reply:

"And as a part of said consideration for said deed, said Ochoco irrigation district orally agreed with each of the grantors (and particularly with the plaintiff) that said Table Land ditch should be thereafter continuously maintained and used by said grantors for the purpose of conveying the water appropriated by each of said grantors (including the plaintiff) in and through said ditch to the lands of each appropriator above mentioned (and including the lands of plaintiff mentioned in the complaint), and that the water appropriated by said grantors severally should be conveyed therein to the lands of each separate grantor until the irrigation works of said district should be constructed and completed."

It is averred also that at the time the defendant entered into the contract with the district to construct the dam in question the defendant well knew all of the terms and conditions mentioned in the reply, the consideration for the deed as therein alleged, and the rights of the plaintiff which he claims have been violated.

A general demurrer by the defendant to the further and separate reply to the third separate answer was overruled. Afterwards the defendant moved the court for judgment on the pleadings as to the cause of action set out in the complaint, because it appears on the face of the pleadings that plaintiff is not entitled to recover herein. This also was overruled. As stated in the bill of exceptions:

"Immediately after plaintiff rested his case defendant moved the court for the entry of nonsuit, said motion being made in the following language, to wit: 'The defendant moves, at this time, the court for a judgment of nonsuit on the ground and for the reason that

Digitized by Google

plaintiff has failed to make out a case against this defendant sufficient to be presented to the jury for their determination.'"

This was overruled, and the defendant excepted. The trial was concluded by a verdict for the plaintiff and against the defendant, and from the ensuing judgment the defendant appeals.

E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble and James G. Wilson, all of Portland, and G. L. Bernier, of Prineville, on the brief), for appellant.

W. H. Wilson, of The Dalles (N. G. Wallace, of Prineville, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] In whatever form the questions in dispute may have been considered, they all turn upon the construction to be given the deed already mentioned. For the purposes of this opinion that instrument may be set down as an executed contract. It is pleaded by the plaintiff first according to the legal effect which he puts upon it, and likewise is set out in hæc verba as an exhibit, attached to and made part of his final pleading. In such a case the instrument itself prevails, to the exclusion of the statement of its legal effect in the pleading of which it is a part. Haworth v. Jackson, 91 Or. 272, 178 Pac. 926.

[2] We here set down the oft-quoted section 713, L. O. L.:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing,"

—except in certain cases not here involved.

The alleged oral agreement is pleaded as part of the consideration for the deed mentioned. It is therefore a contractual consideration, and not one of a monetary nature, and from Sutherlin v. Bloomer, 50 Or. 398, 93 Pac. 135, continuing through such cases as Oregon Mill Co. v. Kirkpatrick, 66 Or. 21, 133 Pac. 69; Muir v. Morris, 80 Or. 378, 154 Pac. 117, 157 Pac. 785, and Elliott Contracting Co. v. Portland, 88 Or. 150, 171 Pac. 760, the rule has been stated thus:

"The authorities are practically unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific or direct promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence. A party has a right to make the consideration of his agreement of the essence of the contract, and, when this is done, the consideration for the contract, with reference to its conclusiveness, must stand upon the same footing as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence."

See, also, Interior Warehouse Co. v. Dunn, 80 Or. 528, 535, 157 Pac. 806. The reply is a plain attempt to import into the agreement embodied in the deed additional particulars resting wholly in parol, and which the statute quoted expressly forbids, saying strictly that "no evidence of the terms of the agreement other than the contents of the writing" shall be admitted.

[3-5] It was competent, as both parties admit in their arguments, for the plaintiff to retain his water right and alienate the means by which he enjoyed it. He did this by his deed, and conveyed his interest in the Table Land ditch to the district without reservation. Hence, at the time of the grievances complained of, to wit, the tearing up and destruction of the conduit, he had no right or interest therein upon the invasion of which he might predicate damage. As the district owned the ditch, it rightfully could, as it did, contract with the defendant to tear it up and build another on its site, all without hindrance or objection by the plaintiff. The complaint avers that—

"During all of said time the plaintiff had the right to the use of said ditch for the purpose of conveying water therein from said creek to his said lands."

But his deed contradicts this averment. The plaintiff's own pleading in reply showed that he had no cause of action. Called upon to prove his traversed allegation of the right to use the ditch, the proof he offered contradicted his statement. He argues that the reservation of the individual water rights as specified in the deed amounts to a reservation also of the ditch as the only means by which those rights can be enjoyed. Both parties, however, conceded it to be the law, and it is well supported by the precedents that the ditch or other conduit carrying water may be conveyed separate from the water rights which it serves. The fact that the ditch constituted the only present means of enjoying the water rights does not destroy its alienability. In fact, the plaintiff by the very terms of his deed separated the ditch from the water right, and he cannot be heard to contradict his conveyance by parol.

However the question was treated, whether by demurrer to the reply, motion for judgment on the pleadings, or motion for nonsuit, the rulings should have been in favor of the defendant. The circuit court was in error in denying the objections thus interposed by the defendant. The judgment is therefore reversed.

Digitized by Google

In re McILROY.

McILROY v. McILROY.

(Supreme Court of Oregon. June 8, 1920.)

1. Insane persons ⟸33(1)—Petition for guardian of incompetent need only follow statute.

Petition for appointment of guardian for an alleged incompetent is sufficient if it follows substantially the wording of L. O. L. § 1319, and it is not necessary to allege all facts and details tending to show the individual is incapable of conducting his own affairs.

2. Insane persons ⟸33(1)—Evidence held to show father incapable of conducting own affairs.

On a son's petition, under L. O. L. § 1319, for appointment of guardian for his 91 year old father, evidence *held* to show that the father was incapable of conducting his own affairs, and to call for guardianship to manage and preserve the estate.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Petition by Dexter McIlroy for appointment of guardian for James McIlroy. From decree affirming decision appointing a guardian, the alleged incompetent appeals. Affirmed.

This proceeding was initiated in the county court of Union county to have a guardian appointed for the defendant, James McIlroy, father of the petitioner. The petitioner alleges that James McIlroy has in his own right about $15.000 in Liberty bonds, notes, certificates of deposit, cash, and other property to the value of about $2,000; that he lives alone and is unable to look after his own business; that on the —— day of May, 1919, he drew his money and securities from the First National Bank of Elgin and put them away somewhere about his house, forgot where he hid them, and reported the loss to many people around the town; that it is unsafe for him to have any money around the house, as it subjects him not only to loss but to danger of violence and robbery; that he is almost blind and his mind and memory are greatly weakened by age; that he is incapable of conducting his own affairs and maintaining himself; that he refuses to live with or make his home with any of his relatives; and that unless a guardian is appointed to care for him his property will be lost and dissipated.

A restraining order was granted and a citation issued to James McIlroy. The defendant appeared by his attorney and filed motions to strike out the petition upon the ground that it did not state facts sufficient to show that he was wasting his estate or was incompetent to manage his business, and to dissolve the restraining order, both of which were overruled. The defendant filed an answer denying the material allegations of the petition and alleging that the proceeding was prompted by malice and an attempt on the part of the petitioner to prevent him from conducting his own affairs and to embarrass him in the disposition of his property; that he had acquired all his property by his own industry and ability; that he has always conducted his own business and is still able to do so; that he has relied upon his son William McIlroy and the latter's wife to attend to his affairs as he directs; and that he is able and competent to manage his property and business and does not waste anything. He prayed that the proceeding be dismissed and the restraining order dissolved. The reply denied all the new matter in the answer.

A trial was had, testimony was taken, and the court found that the defendant is about 91 years of age; that his eyesight is defective and his hearing greatly impaired; that he is suffering a deterioration of intellect and senile dementia; that he is unable to conduct his own affairs and that he requires the services of a guardian for his person and estate. The court appointed F. L. Meyers as his guardian upon the giving of an approved bond for $15,000 by Meyers.

An appeal from that decision was taken to the circuit court. The case was there tried de novo upon the record and transcript made in the county court, and the circuit court made findings of fact and rendered a decree affirming the decision of the county court and its appointment of F. L. Meyers as guardian. The defendant appeals, claiming that the circuit court erred in not discharging the defendant from the custody of a guardian, in not releasing his property, in decreeing that he is incapable, or by reason of his age not competent, to manage or control his business affairs, and in confirming the appointment of a guardian to look after his person and estate.

C. H. Finn, of La Grande, for appellant.
John S. Hodgin, of La Grande, for respondent.

JOHNS, J. (after stating the facts as above). [1] The petition is based on section 1319, L. O. L., which provides that the several county courts shall have power to appoint guardians to take care of the estates, real and personal, of all who are unable to manage their own property and business. In this kind of a pleading it is sufficient if the petition follows substantially the wording of the statute. It is not necessary to allege all of the facts and details tending to show that an individual is "incapable of conducting his own affairs." Dickenson v. Henderson, 90 Or. 408, 176 Pac. 797. In the case of In re

Digitized by Google

Northcutt, 81 Or. 646, 148 Pac. 1133, 160 Pac. 801, it was held that if Northcutt were "unable without assistance properly to manage and take care of his property, and would be likely to be deceived, dominated or imposed upon by artful or designing persons," he would be incapable of conducting his own affairs, within the meaning of section 1319, L. O. L.

The testimony shows that the defendant is between 91 and 93 years of age; that he earned and accumulated funds and property after he was seventy years old; that he was divorced from his wife about 20 years ago; that he was the father of a large family, and all but one of the children took the part of the mother; that he lived alone in his own building at Elgin; that he did his own cooking and looked after his own wants; and that physically he was quite active for a man of his age. It also appears that until recently both his hearing and eyesight were good; that he read the newspapers and in large measure attended to his own business; that when the petition was signed his hearing was defective and his sight was very poor; that he had difficulty in recognizing his friends except by their voices, and that they had to speak in fairly loud tones in order for him to hear at all.

In recent years he had his money, bonds, and securities on deposit in an Elgin bank, and its officers looked after his business. His memory became very defective and he had somewhat of a delusion about his children, imagining that they had robbed him in a business transaction long past. He had acquired the habit of taking his assets from the bank, hiding them somewhere in the house where he lived, and later returning them to the bank. He did this several times in the four or five months next preceding the filing of the petition. Among his assets he had $5,000 in Liberty bonds that were "payable to bearer" and the title would be passed by delivery, and $5,400 in certificates of deposit in the Elgin bank, payable to his order. The testimony is undisputed that he took all of these papers from the bank, placed them in his kitchen stove, where they would be destroyed by a brisk fire, later concealed them elsewhere and forgot where he put them. He then notified some of his neighbors that he had been robbed. Six or seven of them joined in a diligent search of his premises, including the stove and an old mattress where he claimed he had put his papers. He also told them that at times he placed his valuables in the ash box of his heating stove. After a thorough investigation lasting about an hour and a half nothing was found, and for want of a light the searchers quit until the next morning. The bonds and deposit slips were later discovered in an old trunk, where the defendant had evidently placed them.

Several witnesses were called to testify concerning the defendant's actions, conduct, and capacity to transact business and care for his property; and there was some evidence on his part, especially that of his son William, tending to show that he was competent and qualified to look after his business affairs. He was present at the hearing in the county court, but was not called as a witness. The testimony was taken before the county judge, who had more or less personal knowledge of the surrounding circumstances. His findings were later approved by the circuit court.

[2] The strenuous objection of the son William to the appointment of a guardian was upon the ground that the father would not receive proper care and attention and that the guardian would appropriate the estate and dissipate it in costs and expenses. The purpose of the statute is to provide for the appointment of a custodian for any one who is "incapable of conducting his own affairs." After a careful reading of the testimony we are satisfied that it is prudent and best for his own interests that a guardian be appointed for the defendant to manage and preserve his estate. The man named is the cashier of a bank at La Grande and is under a sufficient bond. His conduct and management are subject to the approval of the county court, and it must be assumed that he will render a correct accounting of his trust. It is apparent that the defendant cannot manage his property without assistance, and there is serious danger that without a guardian he might be "dominated or imposed upon by artful or designing persons."

The decree is affirmed.

Digitized by Google

W. T. RAWLEIGH CO. v. McCOY et al.

(Supreme Court of Oregon. June 8, 1920.)

1. Guaranty ⟸36(5)—Transaction held not a "purchase" of goods within guaranty of payment; "transfer."

Where a company contracted to sell goods on credit at wholesale to a buyer reselling the same in certain territory, and the buyer with the company's approval accepted from another buyer from it under a similar contract goods in his possession not paid for, and authorized the company to charge him with the amount of the invoice price thereof, he obtained title thereto, by transfer from the other buyer, who had absolute title, and not by purchase from the company, within the terms of a guaranty of payment for goods purchased under the contract; a "transfer" being an act or transaction by which property of one person is by him vested in another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purchase; Transfer.]

2. Guaranty ⟸27 — Liability of guarantors without compensation strictly construed.

Liability of guarantors without hire or compensation is strictly construed.

Bean, J., dissenting.

Department 2.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Suit by the W. T. Rawleigh Company against J. W. McCoy and others on a contract of guaranty. From a judgment for defendants, plaintiff appeals. Affirmed.

The plaintiff is an Illinois corporation, with its principal office and place of business at Freeport, in that state, and a branch office at Oakland, Cal. It is engaged in a line of supplies commonly placed and used in the country home. Its method of business is for some one to make an application to the home office to purchase its goods, wares, and merchandise, to be sold by him within a certain territory. If found suitable, it then forwards one of its standard written contracts, attached to which and made a part thereof is a guaranty, to be executed by two or more different persons, to the effect that they are liable for and will pay for all goods that may be purchased from the plaintiff by their principal under the contract.

In the instant case M. C. Seward entered into such contract with the plaintiff, the material provisions of which are that it agreed to deliver the merchandise sold to Seward f. o. b. at Freeport, Ill., or one of its branches at its option.

"Said seller agrees to sell said buyer all such goods, wares, and merchandise at its current wholesale prices at the date of shipment; such prices to be shown by itemized invoice for each purchase, and shipment to be made on orders from said buyer."

In consideration thereof Seward agreed to pay the plaintiff its wholesale price f. o. b. for all merchandise which he purchased, and it agreed to purchase from him during the term, or after the expiration of the contract, at current wholesale prices, such merchandise as he "may then have on hand and unsold," provided it is in suitable condition, and "pay or credit the buyer therefor on the return of such products." He agreed to pay the plaintiff "its actual expenses of receiving, inspecting, and overhauling all such goods, wares, and merchandise." The contract further provided that it is subject to acceptance at the office of said seller at Freeport, Ill., and "shall be in force and effect from and after the date of its acceptance," and that it might be terminated upon the written notice of either party, and that it would expire by its own limitation on December 21, 1918; also "that this contract includes and does and shall constitute the sole and only and entire agreement between the parties hereto," and that it "shall not be changed or modified in any particular whatsoever by any employé or representative of the seller in any capacity, unless any such change or modification shall first be specifically reduced to writing and signed by both of the parties hereto, and then any such change or modification shall only be effective after the corporate seal of the seller shall have been duly affixed thereto."

In consideration of extending a line of credit to Seward, the defendants did "jointly and severally guarantee, unconditionally, the full and complete payment to said company of any and all indebtedness which may become due under the terms of the above and foregoing contract by the buyer named as such therein," and agreed that the guaranty could be enforced against them without joining Seward as a party to the action. There are a number of immaterial provisions. The contract with the guaranty attached was duly accepted in writing by the plaintiff at its home office on August 9, 1917.

The plaintiff alleges that between August 16, 1917, and January 8, 1918, and relying upon said guaranty and the credit of the defendants, it sold and delivered to Seward merchandise of the reasonable value of $563.69, upon which there had been paid $321.88, leaving a balance of $241.81 due and owing, for which it prays judgment against the defendants, with interest.

The defendants admit the making of the contract by Seward, and the execution of the guaranty as alleged, deny all other material allegations, and as an affirmative defense in the nature of a plea in abatement allege that the plaintiff has failed to comply with the

Digitized by Google

laws of Oregon relating to the doing of business with foreign corporations or the appointment of an agent, and that it was engaged in doing business in the state of Oregon at the time of the alleged making of the contract. As a second defense they plead that the alleged contract set out in the complaint was not executed or accepted by the plaintiff until the 17th day of August, 1917, that Seward had paid the plaintiff for all the goods which he had purchased after that date, and that such payments should be applied on the sale of goods which he purchased after the guaranty was accepted. It is then alleged that about December 1, 1917, plaintiff terminated its contract with Seward, took away from him all of the goods in his possession, and transferred them to Max Luebke, of Cottage Grove, Or., substituting him as a debtor for Seward; that the plaintiff now seeks to hold the defendants liable for the goods which were transferred by the plaintiff to Luebke without the consent of the defendants, and by reason thereof the alleged guaranty became and is null and void; and that defendants were released from liability. The defendants plead a third defense which is not important here.

For reply the plaintiff alleged that the goods referred to in the complaint were sold to Seward and the contract therefor was made in the state of Illinois, and it is not liable for a license fee to the state of Oregon, and that Seward was given credit on his contract to the plaintiff for all the goods which were turned over to Luebke, and for the amount thereof defendants were released upon their guaranty.

It appears that J. S. Barnett had a like contract with the plaintiff in the same territory, which it terminated on August 4, 1917, and that he then had in his possession in Lane county, Or., goods, wares, and merchandise which he had purchased from the plaintiff, and which were of the reasonable value of $320.94. Barnett then delivered this merchandise to Seward, who took actual possession of it as of that date, and thereafter proceeded to sell it as his own.

When the plaintiff had introduced its evidence, the court stated "that by eliminating the Barnett claim of $320.94 the defendants are entitled to a directed verdict. Therefore that will be the order of the court—a directed verdict for the defendants." Plaintiff duly excepted to this ruling. The jury returned such a verdict, upon which judgment was entered, and from which the plaintiff appeals.

Fred E. Smith, of Eugene (L. M. Travis, of Eugene, on the brief), for appellant.

C. A. Hardy, of Eugene, for respondents.

JOHNS, J. (after stating the facts as above). [1] The vital question in this case is: To whom did Barnett sell his stock on August 4, 1917, which was then in Lane county, Or., from whom did Seward purchase it, and when and where was the deal consummated? Assuming that the defendants are not liable for the goods which Seward received from Barnett, it is apparent that Seward has paid the plaintiff in full for all the merchandise which he purchased from the plaintiff, and that it would not have any legal claim against the defendants.

When the contract between them is analyzed, it simply means that the plaintiff agrees to sell and Seward agrees to buy such reasonable quantities of goods, wares, and merchandise as he "may from time to time desire to purchase" at current wholesale prices at the date of shipment, to be evidenced by an itemized invoice, which purchase and shipment is to be made on orders from Seward, and in consideration thereof he agrees to pay the plaintiff such prices for the goods which may from time to time be sold to him. In other words, on the stipulated terms, Seward agreed to pay for all the goods which he actually purchased from the plaintiff. The defendants guaranteed the full and complete payment to plaintiff of any indebtedness of Seward which might become due or owing for the goods which he purchased under the contract.

On August 4, 1917, Barnett signed the following statement addressed to the plaintiff:

"Subject to your approval, I have this date transferred to Mr. E. M. Seward, address Divide, Or."

Then follows the list of products, supplies, etc., transferred, amounting to $320.94. At the same time Seward signed the following written statement, also addressed to plaintiff:

"Subject to your approval, I have this date accepted from Mr. J. S. Barnett, address, Creswell, Or., all of the products listed above, and certify that this is a true and absolutely correct list of all products transferred. I hereby instruct and authorize you to charge these products to my account at regular current wholesale prices to buyers. I have retained a list of the products received as shown above, and ask you to mail me a fully itemized invoice promptly."

These writings were executed at Creswell, in Lane county, Or., in the presence of F. G. Larson, of Oakland, Cal., who was apparently acting for and representing the plaintiff. At Freeport, Ill., on August 16, 1917, the plaintiff mailed to E. M. Seward, Divide, Or., the following communication:

"Following is a list of products you report receiving from Mr. J. S. Barnett, Creswell, Or. Complying with your instructions, we have charged these products to your account at current wholesale prices as follows: [Then follows a list of the prices.]"

Under the same conditions another like notice was mailed on August 29, 1917, and no-

Digitized by Google

tice in return was mailed to Seward on September 27, 1917. This price list amounted to $35.75. Exclusive of such writings there is no competent testimony as to when, where, how, and by whom Seward acquired title to the goods which he received from Barnett; but it appears from them that subject to the approval of the plaintiff, on August 4, 1917, Barnett transferred the listed merchandise to Seward, and that, concurrent therewith and subject to the approval of the plaintiff, Seward accepted the transfer and authorized the plaintiff to charge him with the amount of the invoice price.

"A transfer is an act or transaction by which property of one person is by him vested in another. This, without the use of some qualifying word, is the legal meaning of the term. Transfer is an act of the parties or of the law, by which the title to property is conveyed from one living person to another." 8 Words and Phrases, p. 7064.

"The Supreme Court, in the case of Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, said 'transfer' is defined to be not only the sale of property, but every other and different mode of disposing of and parting with property. All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means or manner by which property can pass from the ownership and possession of another." 8 Words and Phrases, p. 7066.

The plaintiff contends that it purchased those listed goods from Barnett on August 4, 1917, and sold them to Seward on August 16, 1917, after it had accepted defendants' guaranty on August 9, 1917. The burden of proof was upon the plaintiff, and the only competent evidence of the sale was the writings. As we analyze them, Seward obtained title to those goods through the transfer from Barnett, of which the company was duly notified; in consideration thereof Barnett was credited on his account with the plaintiff for the amount of the invoice price; and concurrent therewith Seward assumed, and the plaintiff charged him with the amount for which it had given Barnett credit. In other words, Seward assumed the payment of Barnett's debt for the amount of the listed price. Under a like contract Barnett had previously purchased from the plaintiff and agreed to pay for the merchandise which he transferred to Seward on August 4, 1917, and it was charged to him on plaintiff's books. It was his property, and he had a right to transfer it to Seward or any one else, with or without the approval of the plaintiff. While it is true that the actual amount which Seward was to pay for it was evidenced by the value placed upon the listed goods by the plaintiff, the purpose of that was to determine the amount of Barnett's debt to the plaintiff, which Seward had assumed and agreed to pay, and for how much the plaintiff should give credit, and the amount which it should charge to Seward.

[2] The defendants became guarantors to Seward without hire, or any compensation moving to them, and for such reason their liability must be strictly construed.

"A guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance he has guaranteed." Staver & Walker v. J. S. Locke, 22 Or. 519, 30 Pac. 497, 17 L. R. A. 652, 29 Am. St. Rep. 621.

Under their guaranty the liability of the defendants was limited to the payment for goods which Seward purchased from the plaintiff on or after August 9, 1917, and they are not liable for the merchandise which was transferred by Barnett to Seward on August 4, 1917, or any debt of Barnett to the plaintiff which Seward assumed and agreed to pay.

Judgment is affirmed.

McBRIDE, C. J., and BENNETT, J., concur.

BEAN, J. (dissenting). This case turns upon the question of whether or not E. M. Seward, who had a contract with the plaintiff, the W. T. Rawleigh Company, which the defendants guaranteed in writing, purchased the first lot of goods received by him, which are involved in the action, from plaintiff or from J. S. Barnett. It appears that Barnett dealt with and sold the goods of plaintiff under a contract like the one between plaintiff and Seward. This contract provided, among other things, as follows:

"The seller agrees to purchase from said buyer at any time during the term of or promptly after the termination or expiration of this contract, and at the wholesale prices then current, all goods, wares, and merchandise (wagon excepted) as the buyer may then have on hand and unsold: Provided that these products are in as good and salable condition when received by the buyer as when purchased by him from the seller, and pay or credit the buyer therefor on the return of such products promptly by prepaid freight to Freeport, Ill., or at such other branch, transfer house, or other regular place of shipment as may be designated by the seller in writing; and provided, further, that said buyer shall pay to the seller its actual expense of receiving, inspecting, and overhauling all such goods, wares, and merchandise."

By deposition J. R. Jackson, the secretary of the plaintiff company, testified as to the purchase of the goods thus:

"26. You may state whether or not E. M. Seward, after the making of the contract, Exhibit A, purchased any goods from the plaintiff, under said contract, and, if so, how were such purchases made." To which the witness made the following answer: "Yes, after his contract was accepted, Mr. Seward purchased goods from us under this contract. The first goods he

Digitized by Google

purchased from us were goods which we had repurchased from a man who was in business in that community, and under the contract we had with him we repurchased his goods here at Freeport, and then sold them to Mr. Seward under a bill of sale that we had; the deal all being consummated here at Freeport. Then we sold him some other goods on his written order, which were sold him f. o. b. cars Oakland, Cal."

An invoice of the goods which are the subject of dispute was made out by J. S. Barnett, E. M. Seward, and F. G. Larson, the representative of the plaintiff, of Oakland, Cal., on a transfer order blank of plaintiff, which states the following:

"Transferred from J. S. Barnett, retailer transferring products, to E. M. Seward, retailer receiving products:

"August 4, 1917.

"The W. T. Rawleigh Company—Gentlemen: Subject to your approval, I have this date transferred to Mr. E. M. Seward, address Divide, Or., * * * my stock of Rawleigh products, * * * which are to be credited to my account at current wholesale prices as per contract."

After some other particulars follows the signature of J. S. Barnett and then a list of the goods at the bottom of which it is stated that, subject to the approval of the company, E. M. Seward accepted from Barnett the products listed. Mr. Seward testified in regard to the supplies contained in the list as follows:

"Q. Did you receive from the plaintiff the goods referred to in Exhibit B? A. Yes; I received them from Barnett, through their agent; it was their assistant, the manager from Oakland, was there at the time."

He further stated:

"He (Barnett) had the goods in his possession, and they were transferred, just as I transferred all the goods I had left to Mr. Luebke."

He testified in effect that he got the list of the goods and the possession of the goods from Barnett; that he did not pay Barnett for them, but only paid him the money that he had paid out for freight; that he did not promise or agree to pay Barnett the purchase price of the goods; that no value of the supplies was fixed between Seward and Barnett at the time of the transfer; that the price was fixed by the company; and that he was sent a list of the goods, with the price attached, and was charged with the amount, and Barnett was credited with it, $320.94. This appears to have been done at Freeport, Ill., on August 16, 1917, when the transfer was completed.

I find no semblance of testimony showing that Barnett sold any of these goods to Seward, or pretended to make such sale. The written evidence shows, directly to the contrary, that the goods were repurchased by the plaintiff from Barnett and sold to Seward, the payment for which was guaranteed in writing by the defendants. It was a three-cornered transaction, but was in writing, and was plain and fair. Seward appears to have made no contract whatever with Barnett in regard to the goods.

We find in 23 R. C. L. 1186, § 2:

"Blackstone defines a sale to be 'a transmutation of property from one man to another in consideration of some price or recompense in value,' and the term has been defined by courts as a transfer of the property in a chattel for a consideration. To constitute a sale in its broader sense the price need not necessarily be money, but if the property is sold for a fixed money price, whether it be paid in cash or in goods, it is a sale. In its more strict sense a sale may be defined as 'transfer of the absolute or general property in a thing for a price in money,' which the buyer pays or promises to pay for the thing bought and sold, and it has been said that it means at all times a contract to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold."

To the same effect see 35 Cyc. 25.

The trial court erred in directing a verdict for the defendants in the face of practically uncontradicted testimony. I am therefore unable to concur in the opinion of Mr. Justice JOHNS.

Digitized by Google

McDONALD v. SUPPLE.

(Supreme Court of Oregon. June 8, 1920.)

1. **Pleading ⟸236(7)—Amendment relying on implied contract held to be within court's discretion.**

Where the original complaint relied on a supplemental oral agreement modifying a written contract for services in erecting steel dredge hulls, etc., it was not an abuse of the trial court's discretion to allow plaintiff to file an amended complaint, relying on an implied contract to pay a greater sum; the two causes of action not being inconsistent.

2. **Work and labor ⟸13—Contract to pay additional sum for work and labor held implied.**

Where defendant agreed to pay a fixed sum per ton for constructing steel dredge hulls out of fabricated steel, and defendant failed to promptly supply the steel, and that supplied did not have numbers, etc., plaintiff, having at defendant's request continued to perform the contract, is entitled to recover additional compensation on the implied contract.

3. **Contracts ⟸169—Surrounding circumstances admissible as aid in construction.**

Under L. O. L. § 717, for the proper construction of a written contract, the circumstances under which it was made, including the situation of the subject-matter and parties, may be shown.

4. **Evidence ⟸457 — Evidence admissible to show technical meaning of terms used.**

Under L. O. L. § 718, evidence is admissible to show that the terms of a written contract have a technical, local, or peculiar significance, notwithstanding the presumption that words are used in their primary and general acceptation.

5. **Evidence ⟸442(1)—Parol evidence admissible to supply omitted terms.**

Under L. O. L. § 713, it is competent to introduce testimony to supply those terms actually agreed upon by the parties to a written contract, but not contained in nor conflicting with an incomplete written contract.

6. **Evidence ⟸457—That steel was not painted and numbers wore off, and of meaning of terms, held admissible.**

In an action on contract for the erection of barges out of fabricated steel, evidence that the steel was not painted, so that the numbers wore off before receipt, was admissible, as well as evidence as to the meaning of the terms "f. o. b. cars," "fabricated," etc.

7. **Evidence ⟸442(5)—Time of delivery of steel admissible on issue of additional compensation, though not specified in contract.**

In an action for additional compensation on a contract for the construction of steel barges out of fabricated steel, evidence as to the time of delivery of the steel was admissible, though not specified in the contract.

8. **Work and labor ⟸13—Right to recover on quantum meruit for extra work.**

Where failure to perform his part of the contract, by defendant, who had engaged a contractor for a fixed price per ton to construct steel dredges out of fabricated material, made the labor more burdensome and expensive, the contractor, having continued the contract at defendant's request, could recover on quantum meruit.

9. **Contracts ⟸305(3)—Acceptance of partial payment held not to preclude recovery of additional compensation.**

Where a contract for the construction of steel barges out of fabricated materials provided for partial payments, the fact that the contractor accepted partial payments at the contract rate, notwithstanding defendant's failure to carry out his agreement greatly increased the labor cost, etc., did not preclude recovery of additional compensation, where defendant frequently assured the contractor that when the work was done he would make the same right.

10. **Appeal and error ⟸1002—Verdict on conflicting evidence not reviewed.**

A verdict on conflicting evidence will not be reviewed.

11. **Work and labor ⟸13—Party may be entitled to additional compensation, though deviations were not numerous.**

Where defendant's deviations from the contract were most serious, and caused the contractor additional expenditures for labor cost, etc., the fact that the deviations were not numerous will not prevent recovery of additional compensation.

Department 2.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Robert Wakefield against Joseph Supple, in which Charles McDonald, as executor of Robert Wakefield, who died during pendency of the action, was substituted as plaintiff. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action at law, begun by Robert Wakefield April 17, 1914, in which he set up a cause of action based on a written contract entered into between plaintiff and defendant, and upon an express oral modification of the written contract. The agreement in question required plaintiff to erect and assemble the United States Engineers' dredge hulls, Multnomah and Wakiakum, defendant to furnish the materials and to pay plaintiff $15 per ton for every ton of hull material erected and put together, and $7.50 per ton for the assembling of the trusses and ladders. Issues being raised, the case proceeded to trial upon the theory that plaintiff was suing for his labor performed and materials furnished under the written contract and the express oral modification thereof as to compensation.

Digitized by Google

A verdict having been rendered in favor of plaintiff, a motion of defendant for a new trial was granted by the trial court upon the ground that there was no evidence of the alleged subsequent oral modification of the written contract. Upon appeal to this court the judgment of the lower court was affirmed and the cause was remanded. See Wakefield v. Supple, 82 Or. 595, 160 Pac. 376. By leave of the trial court, plaintiff thereupon filed an amended complaint. The defendant moved to strike paragraph VII therefrom, upon the ground that it set up a cause of action inconsistent with and contradictory to the cause of action set forth in the original complaint, and introduced a new cause of action. The motion was denied. Paragraph VII of the amended complaint reads thus:

"That if the materials had arrived fabricated and ready to erect and in proper condition, and in the condition contemplated and agreed upon as hereinbefore set out, the entire work of construction of said two hulls which the plaintiff was to perform, could have been completed within sixty (60) days, and it was contemplated and agreed between the parties that the materials would arrive in sufficient quantities to allow the constant and efficient progress of the work within a few days after the 11th day of February, 1913, so that if the materials had arrived within the time contemplated and agreed upon, and in the condition contemplated and agreed upon, all the work which plaintiff was to do could have been finished by the 20th day of April, 1913, and that at the time of entering into said agreement dated February 11, 1913, it was well known to both parties thereto that plaintiff was entering into the same, because plaintiff had available large numbers of competent workmen, who would be available for the period of time required to finish the work with the materials furnished in the condition and in the time contemplated, and that by using said men in said period that plaintiff and defendant both knew plaintiff would be able to do said work much more cheaply than if plaintiff was to be required to do the same at a later period during the summer and fall months, because, as plaintiff and defendant both knew, labor conditions in and about the city of Portland during the summer and fall months would be and were substantially different, in that during the summer and fall months plaintiff would be required to and did pay about twice what workmen could have been hired for if the work had been done in the time and was of the kind contemplated and agreed upon when the agreement of February 11, 1913, was entered into; that, if the materials had arrived at the time and in the condition contemplated and agreed upon, plaintiff could have performed said work at about the cost of $15 per ton for the hull material, and about $7.50 per ton for the trusses and ladders, but because the material did not arrive until about the 15th day of June, 1913, and because the defendant was constantly advising plaintiff that the material would arrive within a day or two, plaintiff was required to and did keep large quantities of equipment on hand ready for use and was required to and did keep large numbers of men on hand, all of which largely added to the expense and burden of doing said work and thereby greatly damaged plaintiff; that when the materials actually arrived their defective condition prevented the men from expeditiously handling the work and interfered with the progress of the workmen to the extent that only about one-third of the amount of work was performed by the workmen of what would have been performed with proper materials, and only about one-third efficiency could be obtained in the use of the plaintiff's equipment, and when the materials arrived their condition of themselves caused the men to many times a day stand idle at different parts of the work until the defective condition of the material could be remedied; that the ways furnished by the defendant for the construction of said two hulls were upon a steep slope, and because the materials did not arrive so that the lower hull could be promptly completed the high spring waters of the Willamette river came upon and over said hull during the course of construction after considerable work had been done thereon, and filled all the joints with sand and débris, thereby causing and requiring the cleaning of said joints, the partial dismantling of the work, and great trouble, annoyance, and confusion, and as a result purely of the defaults and breaches on the part of the defendant the plaintiff was required to and did perform labor and services and furnish materials in the construction of said two hulls, which were totally unlike and had no relation to the kind of work, labor, and materials it was contemplated and agreed plaintiff was to furnish under said agreement of February 11, 1913; that the reasonable cost and value of the work as actually performed, on account of the defaults and breaches of the defendant, was actually $29,408.98, whereas, if the materials had arrived within the time and in the condition contemplated and agreed upon, the reasonable cost and value of the said materials would have been approximately $9,000, and that said increases of costs and the damage to plaintiff cannot be measured by attempting to apportion same to the detailed parts of the performance of the work and construction of the said two hulls, for the reason that the work as actually performed cannot be traced to or applied upon the work contemplated, and the condition of the performance of the same is substantially different, and by reason thereof the plaintiff does not claim damages for each several breach within itself, as it is impossible to separate the same and apply it against the total result, because of the difference in the work contracted for and performed, but plaintiff alleges that all of plaintiff's work, even with all of the defaults and breaches on the part of defendant, was performed by the 13th day of November, 1913, and was thereupon accepted by the defendant, the defendant now retains the same and the benefit thereof; that the reasonable worth and value of the work, labor, and materials so furnished by plaintiff to defendant upon said two hulls is the sum of $29,408.98, of which defendant has paid only $8,755, leaving a balance due plaintiff in the sum of $20,623.98, which balance and any part thereof defendant refuses to pay, and said defendant refuses to recognize that this plaintiff has any rights in the premises, other than the rights fixed in the written agreement hereinbefore referred to, and said defend-

Digitized by Google

ant refuses to consider, with plaintiff, plaintiff's rights in the premises, and defendant renounces and denies plaintiff's rights in the premises."

Defendant filed an answer, which, after admitting a portion and denying a portion of the allegations of the complaint, set up three separate defenses, which may be summarized as follows: First, that Wakefield was himself responsible for the excessive and burdensome services performed by him, by his negligence in failing to provide proper tools or skillful employés, and Wakefield had agreed to adjust his differences with the Great Lakes Engineering Works and had so adjusted them; that time was of the essence of the Supple-Wakefield contract, and by Wakefield's negligence in the premises Supple had been subjected to payment of various penalties; second, that the plaintiff, by having prosecuted his original complaint, was barred from prosecuting the amended one; third, that all the work done by plaintiff was done under the original contract of February 11, 1913. Plaintiff filed a reply, denying generally all the allegations in defendant's answer, which conflicted with the averments of the compaint. The trial resulted in a verdict and judgment in favor of plaintiff for $10,000. Defendant appeals.

H. L. Lyons and L. E. Crouch, both of Portland (Langguth & Lyons, of Portland, on the brief), for appellant.

Coy Burnett, of Portland, for respondent.

BEAN, J. (after stating the facts as above). Error is predicated, first, upon the amendment of the complaint; second, in refusing to grant the motion to strike out paragraph VII of the amended complaint; also in denying defendant's motion for a nonsuit. These assignments of error raise practically the same question. It will be noticed that in the original complaint plaintiff alleged that it was agreed in writing that he should perform certain services for defendant for a certain fixed compensation, and that by a subsequent and supplemental oral agreement between plaintiff and defendant the defendant agreed to pay plaintiff for his services what the same were reasonably worth.

[1] The amended complaint, which was filed before the trial, sets forth the facts constituting an implied agreement to pay, in addition to the written contract prices, such a sum as would reasonably compensate plaintiff for the services performed by him under the changed conditions and circumstances set forth in the amended complaint, which work was accepted with a full knowledge of all conditions by defendant Supple. We do not think there is such a difference or inconsistency between an express agreement and a promise implied by law as to preclude an amendment or change from one to the other, to be made before trial. In the case of Elder v. Rourke, 27 Or. 363, 41 Pac. 6, the two allegations were included in the same complaint, and it was approved by this court. In that case plaintiff alleged that he—

"performed work and labor for defendant, at his special instance and request, in cutting, heading, and harvesting the wheat then growing on 965 acres of land, at the agreed and stipulated price of $1.25 per acre, amounting in the aggregate to the sum of $1,206.25; that said work and labor was and is reasonably worth the sum of $1.25 per acre, and of the reasonable aggregate value above stated."

Error was there assigned in permitting plaintiff to testify that the work performed by him was reasonably worth $1.25 per acre. It was held that the evidence was within the issues made by the pleadings. In Zimmerle v. Childers, 67 Or. 465, at page 471, 136 Pac. 349, at page 351, Mr. Justice Ramsey said:

"The provision of section 102, L. O. L., providing that the amendment of a pleading shall not susbtantially change the cause of action or the defense, does not apply to amendments made before trial. It applies only to amendments made during the trial."

See Talbot v. Garretson, 31 Or. 256, 49 Pac. 978, and Mallory v. City of Olympia, 83 Wash. 499, 145 Pac. 627.

As we view it, the amendment was properly allowed in the discretion of the trial court. No new facts were set up in the amended complaint, and the defendant was not prejudiced by the change in the pleading.

[2] The amended complaint averred, and the testimony on the behalf of plaintiff tended to show, that the defaults on the part of defendant, Supple, in the performance of the original contract were so numerous and so vital that they caused the plaintiff, Wakefield, to perform his labor under different conditions, at a different time, and in a different manner, than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon, that plaintiff, Wakefield, was not required to accept the compensation fixed in the original contract as the measure of his recovery; but by reason of the important changes in the work to be done and the defaults on the part of defendant, Supple, in his performance of the contract, plaintiff was entitled to recover in addition to the contract price such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant. There was no error in denying the motion for nonsuit. Hayden v. Astoria, 74 Or. 525, 145 Pac. 1072; Id., 84 Or. 205, 164 Pac. 729.

[3-7] Error is claimed on admission of testimony referring to the condition of the steel for the construction of the dredges at the time of its arrival in Portland, when it was

Digitized by Google

delivered by defendant, Supple, to plaintiff, Wakefield, as to the lack of numbers on the different parts of the material to show how they were to be put together, and the lack of paint on the steel, so that the numbers would not come off. The testimony clearly showed that about 75 or 80 per cent. of the numbers had dropped off in transporting the steel from Michigan to Portland, Or., by reason of exposure to the elements and the erosion of the steel, making it very difficult and practically impossible to place the several parts on the dredge or assemble the same, and rendering the assembling of the parts, according to the testimony, like a "Chinese puzzle," and taking two or three times as long to perform the work as it would if the material had been properly painted and marked, and increasing the cost in the same proportion.

We think that we should start with the premise that the plaintiff was entitled under the contract to have the material delivered to him in a reasonably suitable condition for assembling. Over the objection and exception of the defendant's counsel, Mr. S. R. Booth, a witness for plaintiff, was permitted to testify thus:

"Q. What is the fact as to steel which has been painted and the numbers put on top of that, and shipped from back in Michigan or that distance, as to whether those numbers on top of the paint would stay on or not? A. Oh, those numbers always stay on."

Defendant complains that over his objection and exception the court permitted testimony to be introduced explaining the meaning of the word "fabricated," as used in the contract between Supple and Wakefield, whereby Supple agreed to "deliver f. o. b. cars all of the steel work for hull, fabricated and ready for erection, but not riveted, nor bolted up, and all of the steel work for trusses and ladder, fabricated and riveted, but not assembled," which tended to show that, according to the term as used "by the trade," the material when fabricated would go together in a good workmanlike manner. For the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may be shown, so that the judge will be placed in the position of those whose language he is to interpret. Section 717, L. O. L.

The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is admissible to show that they have a technical, local, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement shall be construed accordingly. Section 718, L. O. L. It is competent to introduce testimony to supply those terms actually agreed upon by the parties to a written agreement, but not contained in nor conflicting with an incomplete written contract. Section 713, L. O. L. The contract in question did not state when the material was to be delivered. There was much controversy over this point. See Hayden v. Astoria, supra; American Contract Co. v. Bullen Bridge Co., 29 Or. 549, 46 Pac. 138; Stuart v. University Lbr. Co., 66 Or. 546, 132 Pac. 1, 1164, 135 Pac. 165; Holmboe v. Morgan, 69 Or. 395, 138 Pac. 1084; 17 Cyc. 741; 2 Elliott on Contracts, § 1634.

Numerous other objections and exceptions were saved by defendant to the introduction of the testimony, which we do not deem necessary to set forth in this memorandum. We find no reversible error in the admission of the testimony.

[8] The testimony on behalf of plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract, which made the labor more burdensome and extended the same to two or three times the amount it would ordinarily have been, if the material had been delivered at the time and in the condition agreed upon. Therefore the plaintiff could properly recover upon a quantum meruit. Hayden v. Astoria, supra; Gray v. Jones, 47 Or. 40, 81 Pac. 813; Dermott v. Jones, 2 Wall. (69 U. S.) 1, 17 L. Ed. 762; Salt Lake City v. Smith, 104 Fed. 457, 43 C. C. A. 637.

[9] Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that, in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through. A similar question was carefully considered by Mr. Justice McCamant, in Hayden v. Astoria, 84 Or. at page 220, 164 Pac. 729 et seq. See Sweeney v. Jackson County, 93 Or. 96, 178 Pac. 365.

[10] It was the claim of defendant, as asserted in his pleading and by his testimony, that the increase in amount of time consumed for the labor was caused by the fault of plaintiff. The issues in that regard were squarely raised, and were determined by the verdict of the jury. We are not concerned in the conflict of the testimony.

[11] It is contended on behalf of defendant that there were only two deviations from the original plan of the contract, and

Digitized by Google

that as a matter of law the deviations were not numerous enough to abrogate or change the original contract. Such a departure from the original contract cannot be determined by the number of deviations, as one important change might render the contract an entirely different one. The testimony tended to show that the steel, when delivered to Wakefield, was "partly fabricated" or in process of fabrication. Let us suppose that it had not been "fabricated" or prepared for erection at all. That would have been but one change, and yet it would entirely change the agreement of the parties, and the plaintiff would not have been required to construct the dredges for the same compensation mentioned in the written contract.

Exception is also saved to the introduction of testimony as to the number of rivets to be driven to the ton of steel. This question was practically eliminated from the case by the instructions of the court to the jury, as stated in appellant's brief.

Wakefield proceeded with the construction of the dredges, after the failure of the defendant to deliver the material as agreed, at the urgent request of defendant, Supple, and was entitled to recover a reasonable compensation caused by the changes referred to, upon the same principle that a contractor is entitled to recover for extra work performed in addition to the contract.

The cause has been tried by two juries. Two verdicts in favor of plaintiff have been rendered. We find no reversible error in the record.

The judgment of the lower court is therefore affirmed.

McBRIDE, C. J., and BENSON and JOHNS, JJ., concur.

STATE ex inf. BOYLAN, Dist. Atty., v. PARKEY et al.

(Supreme Court of Oregon. June 8, 1920.)

Waters and water courses ⟸183½—Irregularities in ballot title and numbers held not to invalidate election of officers of water district.

Under Laws 1917, p. 721, § 3, relating to the organization and election of commissions of a water district, prescribing as a ballot title "Shall that portion of —— county, * * * be incorporated as a municipal corporation for the purpose of obtaining water for domestic use for its inhabitants and to be known as," followed by the proposed name, and providing that the affirmative should be numbered 300 and the negative 301, a ballot entitled "For Incorporation of Farmers' Domestic Water District," vote "Yes" or "No," was not such a departure or irregularity as to invalidate an election, as its form could not be misleading.

In Banc.

Original action in the nature of a quo warranto by the State of Oregon, on information of Bert C. Boylan, District Attorney for Jefferson County, against Alfred E. Parkey and others. Action dismissed.

This is an original action in the nature of quo warranto to determine the right of the defendants to act as commissioners of Farmers' Domestic Water District. Upon the petition of the district attorney an alternative writ of mandamus issued out of this court, directing the defendants to abandon their claims to the office of commissioners, or to show cause why they should not. The defendants demurred to the complaint, and the cause is now submitted thereon.

Lewis H. Irving, of Madras, for plaintiff.
W. A. Johnson, of Portland, for defendants.
Arthur A. Murphy, of Portland, amicus curiæ.

BENSON, J. The county court of Jefferson county, upon a proper and sufficient petition, ordered an election to be held in certain specified territory in such county, upon the question of incorporating a municipal district for the purpose of supplying the inhabitants with water for domestic purposes; the proceedings being had under and by virtue of the provisions of chapter 346 of the General Laws of Oregon for 1917. The election was held, resulting in a majority vote in favor of the organization, and choosing these defendants as the commissioners of the district so organized. Plaintiff attacks the validity of the election upon the ground that the form of ballot used does not comply with the requirements of the statute. The accuracy of the ballot is challenged in two particulars: (1) That it did not contain the ballot title required by the statute; and (2) that the ballot numbers used were not those specified in the act.

Section 3 of the act under which the election was held contains the following:

"The ballot title to be used at such specified election shall read as follows:

"Shall that portion of —— county, state of Oregon, * * * be incorporated as a municipal corporation for the purpose of obtaining water for domestic use for its inhabitants and to be known as —— (here insert proposed name) in accordance with the provisions of that certain act of the legislative assembly of the state of Oregon, passed at its regular session held in 1917, entitled 'An act to authorize communities to incorporate for the purpose of supplying their inhabitants with water for domestic purposes; to issue, sell and dispose of bonds and other securities, levy

Digitized by Google

taxes and have the right of eminent domain for such purpose?"

It further provides that—

"The affirmative of the measure on the official ballot shall be numbered 300 and the negative shall be numbered 301, both in numerals."

The preparation of such ballot is by the act intrusted to the county clerk. That officer, in the present instance, appears to have performed his part of the work without any serious consideration of the statute, since, instead of using the prescribed ballot title, there was substituted this: "For incorporation of Farmers' Domestic Water District Vote 'Yes' or 'No.'"

Instead of using the ballot numbers "300" and "301," there were substituted the numbers "12" and "13." These two departures from the statutory directions constitute the sole basis of the action. The ballot which was used contained, at its head, in bold type, these words: "Official Ballot, Special Election, Farmer's Domestic Water District, Held on Tuesday the 14th day of October, 1919." This was followed by a specification of the polling place, and a detailed description of the territory to be included in the district. The only matters to be voted upon were the incorporation of the district and the selection of commissioners to manage its affairs.

The first question to be considered is: Does the omission of the prescribed ballot title invalidate the election? This question has been definitely answered by this court in the case of Kiernan v. Portland, 57 Or. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 332. In that case, the municipal ordinance required that the ballot should contain the words, "Charter amendment submitted by the council," and it was urged that the omission of them from the ballot rendered the election void. Speaking for the court, Mr. Justice McBride says:

"It may be conceded that these words should have been printed upon the ballot, and that the ordinance requiring this to be done is in a sense mandatory upon the officers charged with the duty of preparing the ballot; but it does not follow that a failure in this respect rendered the election void. The omission could have misled nobody, as the important question for the voter to decide was, not who introduced the measure, but what its real merits were."

So, in the present case, the ballot, we think, contained sufficient information to fully advise the electors as to the question which was to be determined by their votes, and it seems clear that nobody could have been misled by the omission.

The contention regarding the use of other ballot numbers than those specified in the statute is disposed of in like manner, by the opinion of this court in State ex rel. v. Kelsey, 66 Or. 70, 133 Pac. 806, which was a case wherein the city ordinance directed that the ballot numbers should be "400" and "401," while the ballot as prepared used the numbers "10" and "11." It was there held that the ballot otherwise clearly notified the voter as to how he was to vote, and that nobody could have been misled by the error.

It is to be regretted that county officials should be guilty of the negligence in the preparation of this ballot, when a strict compliance with the requirements of the law would have been so simple and easy; but we must conclude, upon authority, that the assigned defects do not render the election void, and the demurrer is therefore sustained, and the action dismissed.

BURNETT, J., not sitting.

Digitized by Google

STATE ex rel. SHEEHAN v. REYNOLDS, Presiding Judge, et al. (No. 15910.)

(Supreme Court of Washington. June 8, 1920.)

1. Judges ⇐51(1)—Accused having secured change of judge, his attorney cannot also obtain a change.

Accused having exercised his right to a change of judge under Rem. Code 1915, §§ 209—1, 209—2, his attorney cannot also exercise a similar right and obtain a change; the statute contemplating only one change.

2. Judges ⇐51(2)—Application for change of judge must be timely and seasonable.

Application for a change under Rem. Code 1915, §§ 209—1, 209—2, must be timely and seasonably made, and before the jurisdiction of the court has been submitted to.

Department 1.

Application by the State, on the relation of Mike Sheehan, for mandamus against W. A. Reynolds, Presiding Judge of the Superior Court of the State of Washington for Lewis County, and another. Writ denied.

Ralph S. Pierce, of Seattle, for relator.
Herman Allen, of Chehalis, and J. H. Jahnke, of Centralia, for respondents.

MAIN, J. This is an original application in this court for a writ of mandamus. The respondents are Hon. W. A. Reynolds, judge of the superior court of Lewis county, and Hon. R. H. Back, judge of the superior court of Clarke county. The facts as shown by the affidavit in support of the petition for the writ which are not controverted and the facts which are shown by the returns of the respondents to the alternative writ which are not denied may be summarized as follows:

Elmer Smith and Mike Sheehan, together with other defendants, had been charged by information by the prosecuting attorney of Lewis county with the crime of murder in the first degree. On the 26th of April, 1920, Smith and Sheehan were brought before Judge Reynolds in order that they might enter their respective pleas to the information. While there were other defendants named in the information, only the two mentioned were brought before the court, and the case will be here treated as though they were the only parties defendant jointly charged with the crime. When they appeared before Judge Reynolds, one of the attorneys for them then being present informed the court that a motion for change of judge had been filed in the cause, supported by an affidavit of prejudice. Judge Reynolds thereupon declined to proceed further with the case, and requested Judge Back, of Clarke county, to come to Lewis county for the purpose of presiding in the cause. On the 4th day of May, 1920, Smith and Sheehan were brought before Judge Back, then presiding as judge of the superior court in Lewis county, for the purpose of entering their pleas to the information. Before the case proceeded and before the pleas were taken the attorney who was present representing the defendants informed the court that a motion for change of judge and affidavit in support thereof had been filed. This motion was heard and denied by the court. The first motion for change of judge, or that presented to Judge Reynolds, purports to be made by both of the attorneys of record for the defendants on behalf of the "undersigned defendant." The motion is supported by affidavit of the defendant Smith. Judge Reynolds, in his return, states:

"That at the time the request was made for change of judge I was given to understand and led to believe that the motion for change of judge applied to both of the defendants, and it was so stated to respondent, and because of the filing of the affidavit for change of judge I had no further jurisdiction in the cause over either of the defendants, except to designate to what judge the cause would be referred. * * *"

The second motion for change of judge, or that presented to Judge Back, recites that it was made on behalf of the attorney for the defendant Sheehan, and is supported by the affidavit of the attorney signing the motion, in which affidavit it is claimed that Judge Back is prejudiced against the attorney, and for this reason the change of judge was sought.

[1] From the facts stated it appears that, while the first change, that from Judge Reynolds, was supported by the affidavit of one of the defendants only, the recital in the return shows that the motion for change of judge was intended to apply to both defendants. The question presented by the facts stated is whether, after there had been one change of judge on behalf of both of the defendants, upon motion supported by affidavit, subsequently the attorney or attorneys for the defendants were entitled to a second change upon a motion made by the attorney supported by his affidavit that the judge called in to hear the case was prejudiced against him. The question must be determined by recourse to the statute. Section 209—1 of Remington's 1915 Code provides:

"No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. * * *"

Digitized by Google

Section 209—2 is as follows:

"Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: Provided, further, that no party or attorney shall be permitted to make more than one application in any action or proceeding under this act."

The section of the statute first quoted provides that no judge of the superior court shall sit to hear or try an action when he is prejudiced against any party or attorney or the interests of any party or attorney appearing in the cause. In this section there is no limitation upon the time when the right given by the statute may be exercised. If the language used is given its literal meaning, the right would exist up to the time of the entry of judgment, and such a construction as is pointed out in State ex rel. Lefebvre v. Clifford, 65 Wash. 313, 118 Pac. 40, would hamper the courts in the administration of justice to an intolerable extent. The second section prescribes the manner in which the prejudice of the judge may be established by any party or attorney appearing therein. In this section there is likewise no limitation until the proviso is reached, where it is provided that no party or attorney shall be permitted to make more than one application in any action or proceeding under the act. It is this proviso which is to be construed in this action. It is to be so construed that after the parties to an action have exercised their right to a change of judge under the statute an attorney or attorneys may exercise a similar right as to the judge called in to hear the cause. If the language in the proviso were transposed so as to read in effect that not more than one application in any action or proceeding under the act shall be made by any party or attorney, it would be reasonably plain that, after the party has exercised the right to a change, the attorney could not claim a right to a subsequent change. While the proviso is probably not aptly worded, we are inclined to the view that the Legislature intended by the limitation there placed upon the statute to provide that only one change could be made, and, after this right had been exercised by a party to the action, that an attorney for such party did not have a right to a second change. This view is but in accord with the views expressed in decisions of this court where the statute has been construed. Soon after the statute became effective it came before the court for construction, and the court has consistently adhered to the view of giving it a construction which will not unnecessarily impede the administration of justice. In State ex rel. Nelson v. Yakey, 64 Wash. 511, 117 Pac. 265, referring to the statute, it was said:

"This statute is novel and introduces a new rule of practice. Like almost all instruments designed for protection, the statute may be subject to abuse. We feel warranted, therefore, in saying that we are not disposed to give it a construction that will operate to defeat or delay the progress of a case in those counties where there is but one judge."

In State ex rel. Lefebvre v. Clifford, supra, it was said, referring to the statute:

"If literally construed, the right would exist at any time prior to the entering of the judgment. But to place such a construction on the law is to charge the lawmaking power with an intention to cripple and handicap the courts in their attempted enforcement of the law, to an intolerable extent. Hence the necessity of construction; and, construing the law and attempting to ascertain its meaning, we cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case."

In State ex rel. Nixon v. Superior Court, 87 Wash. 603, 152 Pac. 1, certain creditors in a receivership proceeding petitioned the court for the removal of the receiver, and at the same time filed an affidavit of prejudice against the presiding judge. It was there held that the statute would not be construed to permit in the collateral proceedings persons who may be interested in the result of the litigation when they are not actual parties thereto to disqualify the judge by means of an affidavit of prejudice. In the course of the opinion this language was used:

"In addition to the reasons already stated above, we are satisfied that the judge may not be disqualified to try a pending receivership proceeding to final judgment when one or a portion of the creditors interested in the receivership made an affidavit that he is disqualified in some proceeding collateral to the receivership. If this may be done by one creditor, it may be done * * * by other creditors against another judge who may be called in, and interminable confusion would necessarily result. We are clear that it was not the intention of the Legislature to permit, in collateral proceedings, persons who may be interested in the result of litigation, when they are not actual parties thereto, to disqualify a judge by means of an affidavit of prejudice."

[2] By these decisions, and others that might be cited, it has become the settled rule that an application for change of judge under the statute must be timely and seasonably made and before the jurisdiction of the court has been submitted to.

Digitized by Google

Adhering to the view expressed in the former decisions of this court as already stated, we think it was the intention of the Legislature by the proviso not to permit the attorney to have a change of judge after the party to the action had once exercised the right given by the statute.

The writ will be denied.

HOLCOMB, C. J., and MACKINTOSH, MITCHELL, and PARKER, JJ., concur.

In re BAYER'S ESTATE. (No. 15536.)

(Supreme Court of Washington. June 8, 1920.)

Insane persons ⟸29—Facts held to show person incompetent to manage estate, so that guardian would not be discharged.

On petition for a discharge of a guardian of an estate of an alleged incompetent person, facts *held* to show that the ward was not mentally competent to manage her own affairs, and that it was error for the superior court to grant the petition.

Holcombe, C. J., and Mount, J., dissenting.

Department 2.

Appeal from Superior Court, Lincoln County.

In the matter of the guardianship of the estate of Martha E. Bayer, an incompetent person. Petition to discharge guardian. From an order discharging him, the guardian appeals. Reversed and remanded, with directions.

See, also, 185 Pac. 606.

Samuel P. Weaver and S. H. Boyles, both of Sprague, for appellant.

C. B. Willey, of Randolph, and Merritt, Lantry & Merritt, of Spokane, for respondent.

FULLERTON, J. In November, 1916, one John Dotson filed a petition in the superior court of Lincoln county, averring therein that Martha E. Bayer had valuable real property situated in the county named, that she was incompetent to manage her own affairs, and asked that a guardian be appointed over her estate. The application was regularly heard by the judge of the superior court, and at the conclusion of the hearing denied. The applicant appealed to this court from the order entered in the trial court, where the order was reversed and the cause remanded, with instructions to the trial court to cause letters of guardianship to issue. In re Bayer's Estate, 101 Wash. 694, 172 Pac. 842. After the return of the remittitur from this court, the trial court, on July 2, 1917, appointed D. R. Cole as guardian. Cole qualified as such, and has been since so acting.

This is a petition on the part of Martha E. Bayer to discharge the guardian. It was filed in the superior court on August 18, 1918. In the petition Mrs. Bayer averred that she had fully recovered from any mental disability that might have existed at and prior to the former hearing, and was not then suffering from any mental weakness, or disability whatsoever. The application was resisted on the part of the guardian, and a hearing was had in which voluminous testimony was taken. The trial court, at the conclusion of the hearing, discharged the guardian, and from the order of discharge the guardian prosecutes the appeal.

We do not think it profitable to discuss the evidence at length. It was directed mainly to the question of the sanity of Mrs. Bayer. While it establishes in our opinion the fact that she is not insane in the sense that she requires confinement, or requires the supervision of a guardian over her person, we think it falls far short of establishing that she is competent to manage her property interests, or, as the statute has it, "capable of managing her own affairs." As we stated in our former opinion, Mrs. Bayer conveyed to one of her brothers the property in Lincoln county for $3,000 in cash, a note for $10,000, and the assumption of a mortgage which was then upon the property of $7,000, a consideration then less than one-half the value of the land itself. It further appears that at the time of this sale the land had upon it a matured crop which afterwards netted the purchaser some $1,500 more than his cash outlay, and that he has since paid nothing on the obligations save an inconsiderable sum, the major portion of which was a charge for board furnished Mrs. Bayer while she was residing at his farm in the state of Nebraska. The note is unsecured and draws interest at 6 per centum. The real property conveyed is farm and pasture land, and yields in annual rentals more than ten times the annual interest on the note. As a business transaction, which the brother insists that it was, it was an unconscionable bargain, in which the losses were all on the part of Mrs. Bayer, clearly demonstrating, as we view it, incompetency on her part to bargain in her own interests. We find nothing in the additional evidence that shows a return of capacity. She still insists that she is satisfied with her bargain, and seems to be impressed with the idea that the present proceedings are proceedings on the part of other members of her family to deprive her of the property, notwithstanding the fact that she has attempted voluntarily to part with her interests. As further evidence of her incompetency in property matters, it was shown that she owns an interest in property in another state, yet gives it no personal attention, and does not know its character or value; and she testifies that from an item she saw in a newspaper she was led to be-

Digitized by Google

lieve that she still owned a tract of land which she had conveyed to a sister many years ago.

The trial court, in his remarks made at the time of passing upon the present application, laid stress upon the fact that the proceeding was a squabble among Mrs. Bayer's relatives, and that the interest taken in the cause by certain of her brothers, whom the court names, arises from the fact that they desire an interest in the property. It may be that the brothers who are censured will inherit from Mrs. Bayer if they survive her, and that their interests are selfish to that extent. But we think, nevertheless, that their conduct is meritorious when compared with the conduct of the brother whom the court does not name or censure. This brother has taken the property from Mrs. Bayer, and has given her nothing for it save his naked promissory note. If the guardian is discharged, he has it within his power to so dispose of the property as to leave Mrs. Bayer remediless on the note, and after so doing can thrust her out for the remainder of her existence on the cold charities of the world. On the other hand, the action of the other brothers, if successful, will preserve the property for her use, and the property in the hands of the court will furnish her with an abundance for the remainder of her existence. Considering the question in this light, therefore, we think the comparison not unfavorable to the brothers who are seeking to preserve the property. Another matter is worthy of mention; this contest is waged solely in the interests of the brother who has the title, or at least he will be the sole beneficiary of the proceeding if it is successful, yet he has permitted his sister to bear the expense of the proceedings out of the fund she received from him as a cash payment on the purchase price of the property, a payment which, as we say, was returned to him, with $1,500 in addition, shortly after he made the purchase, out of the matured crop then on the premises.

But the real issue is not what the brothers may desire. It is Mrs. Bayer's interest that is alone to be considered. If she is mentally competent to manage her own affairs, she should be permitted to do so, however much her acts in relation thereto may deprive her of her means of subsistence. If she is not so competent, the courts should interfere and protect the property for her use, however much she may will to the contrary. From the record before us we can but think she is incompetent, and that the court erred in discharging the guardian.

The order is reversed, and the cause remanded, with instructions to deny the prayer of the petition.

TOLMAN and BRIDGES, JJ., concur.

HOLCOMBE, C. J., and MOUNT, J. We dissent. In our opinion, the analysis of the evidence does not by any means indicate a preponderance of the facts contrary to the findings of the trial court. Moreover, the trial court had the advantage of having all the witnesses and parties before it, and was thereby enabled to judge of their credibility in a way in which we are not. If, as the majority opinion states, Mrs. Bayer is "not insane in the sense that she requires confinement, or requires the supervision of a guardian over her person," that certainly goes very far to justify the trial court's findings and conclusions. The mere fact that Mrs. Bayer preferred one of her relatives to another, or that she was generous or reckless with her property, does not of itself indicate incompetency. Many persons are extravagant or overgenerous, or partial to one or another of their relatives or friends, but are not for that reason considered incompetent to manage their affairs. If sane, Mrs. Bayer has the right to squander her property to the last dollar if she desires.

The judgment should be affirmed.

STATE ex rel. YOUNGER v. CLAUSEN, State Auditor. (No. 15701.)

(Supreme Court of Washington. June 7, 1920.)

1. Officers ⟸100(1)—When an officer's compensation may be increased during term of office.

The powers and duties of an officer may be increased during his term of office, but generally, under Const. art. 2, § 25, prohibiting increase of compensation during term of office, the officer cannot be given increased compensation during such term for the performance of the new duties, unless the new duties are extrinsic or foreign to the prior duties, and not incidental, collateral, or germane thereto.

2. States ⟸63—State labor commissioner not entitled to increased compensation for new duties.

Under Const. art. 2, § 25, art. 3, § 25, and in view of article 4, § 13, and article 11, § 8, the State Labor Commissioner elected under Rem. Code, § 6550, for four-year term commencing April 3, 1917, was not entitled to increased compensation during such term for performance of additional duties prescribed by Laws 1919, pp. 310, 311, 312, 321, 328, §§ 4, 6, 7, 8, 34, 50, notwithstanding section 39, providing for increased compensation, such duties relating to safety and welfare of employés, and being incidental, collateral, or germane, and not extrinsic or foreign to his previous duties under Rem. Code 1915, §§ 6550 to 6604—32, title "Health," sections 5482–5491, title "Navigation," sections 8213–8240, and sections 5487, 6553, 6571—3, 6571—4, 6590, 6599, 8213.

Digitized by Google

Department 1.

Original application for writ of mandamus by the State on the relation of C. H. Younger against C. W. Clausen, as State Auditor of the State of Washington. Denied.

W. V. Tanner, of Seattle, for relator.

L. L. Thompson, Atty. Gen. and G. H. Bucey, of Tacoma, for respondent.

MAIN, J. This is an original application in this court for a writ of mandamus. The relator is the state labor commissioner and the respondent the state auditor. The relator claims the right to have issued to him certain salary warrants by virtue of chapter 130 of the Laws of 1919. The relator's term as commissioner of labor of the state of Washington began on April 3, 1917, and under the statute (Remington's Code, § 6550) his term of office was for a period of four years. The salary of the office at the time of his appointment was $2,400 per annum. It thus appears that at the time the act of 1919 became effective, under which the warrants in this action are claimed, the relator was the commissioner of labor, serving a term which would not expire until April 3, 1921. The respondent declined to issue the warrants demanded, relying upon section 25 of article 2 of the state Constitution, which, among other things, provides that:

"* * * nor shall the compensation of any public officer be increased or diminished during his term of office."

[1] The question here is not whether the Legislature may increase the powers and duties of an officer during his term. That this may be done is well settled. The real question is whether the Legislature may increase the powers and duties of an office and allow additional compensation therefor during the term that an officer may be serving, notwithstanding the constitutional provision. The relator claims that his added powers and duties under the act of 1919 are extrinsic and foreign to his duties under the prior laws, and that therefore the constitutional provision does not apply. The respondent claims that the new duties of the relator under the act of 1919 are incidental, collateral, or germane to the duties which he was required to perform under the prior law, and that therefore the salary increase during his present term is inhibited by the Constitution. The general rule supported by the authorities is that, where new duties are added to the office during the term, and the act fixes the compensation therefor, the constitutional inhibition does not apply if such new duties are extrinsic or foreign to the prior duties. On the other hand, if the new duties are incidental, collateral, or germane to the duties which the officer was required to perform under the prior law, the salary increase cannot be sustained. The question is not so much over the statement of the rule as it is the application thereof. Probably the best statement of the rule will be found in sections 862 and 863 of Mechem on Public Officers, as follows:

"An officer who accepts an office, to which a fixed salary or compensation is attached, is deemed to undertake to perform its duties for the salary or compensation fixed, though it may be inadequate, and if the proper authorities increase its duties by the addition of others germane to the office, the officer must perform them without extra compensation. Neither can he recover extra compensation for incidental or collateral services which properly belong to or form a part of the main office. * * *

"Where, therefore, a public officer is employed to render services in an independent employment, not germane or incidental to his official duties, * * * he may recover for such services."

Inquiry, then, must be directed to whether the powers and duties of the relator under the act of 1919 were extrinsic or foreign to the duties which he was required to perform under the then existing law, or whether they are incidental, collateral or germane thereto. The powers and the duties of the relator under the act of 1919 will first be reviewed, and these will be followed by the review of his duties under the law as it was at the time of his appointment.

[2] The act of 1919 is entitled, "An act relating to industrial insurance, to the medical and surgical care of injured workmen, providing certain means for the prevention and avoidance of injuries to workmen," and amending and adding certain sections to Remington & Ballinger's Code. Under section 4 of this act it is the duty of every employer to furnish a place of work which shall be as safe for the workmen therein as may be reasonable and practicable under the circumstances, surroundings, and conditions. The employer is also required to furnish and use such safety devices and safeguards and to adhere to and use such practices, means, and methods as under the circumstances are reasonable and practicable in order to "render the work and the place of work safe." The employer is further required to comply with such standards of safety for the place of work and such safety devices and systems of education for safety as shall be from time to time prescribed for such employer by the state safety board. Section 6 of the act creates a state safety board which shall consist of two members other than chairman thereof. The commissioner of labor, under section 7, is required to act as an advisory member of the state safety board, but in such capacity only, and shall not be allowed to vote on any question coming to the board. It is expressly provided in the section that the commissioner of labor shall "not be included in the designation 'state safety board' wherever used." Under section 8 the state safety board, for

Digitized by Google

all work other than coal mining, is required to make and promulgate standards of safety, to wit:

"(1) To make safe the place of work of workmen, same to be termed 'safe place standards;'

"(2) Of safety devices and safeguards to make safe machines, tools, apparatus, and appliances, same to be termed 'safety device standards;'

"(3) Of educational systems for the education and training of employer and workman in the appreciation and avoidance of danger and in the maintenance and use of safe place and safety device standards."

Section 34 provides that the state labor commissioner, under the provision and control of the state safety board, shall have the sole charge of the "enforcement of safe place and safety device standards (other than for the mining of coal) and of inspection and certification thereof." Under section 50 it is made the duty of the labor commissioner to inspect the establishment of work of every employer engaged in extrahazardous work in the state (other than coal mines) as often as directed by the state safety board, but not less than once every four months. Section 39 covers the matter of the additional salary for the labor commissioner and is as follows:

"For the performance of his duties under section 6604—81 [section 34] the state labor commissioner shall receive a salary of one hundred and fifty dollars per month in addition to his salary as state labor commissioner."

Reading section 34 and section 39 together, it appears that the labor commissioner's additional salary, under the act, was for the performance of his duties in the enforcement of safe place and safety device standards (other than for coal mines), and of the inspection and certification thereof. The warrants which the relator is seeking to have issued to him by the state auditor are for salary for certain months claimed to be due him under the statute. The duties imposed upon the labor commissioner by the act will be found in sections 7 and 34, above referred to, and may be set out as follows: (1) To act in an advisory capacity only to the state safety board. (2) Under the supervision and control of the safety board enforce, (a) safe place standards, (b) safety device standards, other than for coal mining, (c) inspection and certification thereof. Speaking generally, these duties have to do with the safety and welfare of employés and workmen. The purpose of the safe place standards and the safety device standards is to make "the work" and "the place of work" safe and thus avoid unnecessary accidents and injuries.

Reference will now be made to the duties of the state labor commissioner under the law as it was at the time of his appointment and which he is still required to perform. Under title 50 of Remington's 1915 Code, certain acts of the Legislature are codified under the general title of Labor Law. Under this title there are a number of separate chapters, among which are those entitled "Bureau of Labor," "Female and Child Labor," "Health and Safety of Employés in Factories, etc.," "Arbitration and Disputes," "Workingmen's Compensation Act." Two chapters of the Code not codified under the above general title of the Labor Law are chapter 8, "Regulation and Conduct of Bakeries," under the general title of "Health," and chapter 8 under the general title of "Navigation." The general duties of the labor commissioner are defined in section 6553 of Remington's Code, which is one of the sections entitled "Bureau of Labor." Under this section it is made the duty of the labor commissioner to enforce all laws regulating employment of children, minors, and women, or laws established for the protection of the health, lives, and limbs of operators in workshops, factories, mills and mines, on railroads and other places, and "all laws enacted for the protection of the working classes." In certain respects it is made the duty of the commissioner to enforce laws "hereafter to be enacted." It is further made the duty of the commissioner to collect, assort, arrange, and present in biennial reports to the Legislature statistical details "relating to all departments of labor in the state; to the subjects of corporations, strikes or other labor difficulties; to trade unions and other labor organizations and their effect upon labor and capital; and to such other matters relating to the commercial, industrial, social, educational, moral and sanitary conditions of the laboring classes, and the permanent prosperity of the respective industries of the state as the bureau may be able to gather."

By section 6571—4, which is one of the sections under the chapter headed "Female and Child Labor," the labor commissioner is made an ex officio member of the "Industrial Welfare Commission," the duties of which commission as set forth in section 6571—3 are "to establish such standards of wages and conditions of labor for women and minors employed within the state of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women."

By section 6590, Remington's Code 1915, which is one of the sections under the chapter entitled "Health and Safety of Employes in Factories, etc.," it is made the duty of the commissioner of labor to examine "all factories, mills, workshops, storehouses, warerooms, stores and buildings and the machinery and appliances therein contained to which the provisions of this chapter are applicable for the purpose of determining whether they do conform to such provisions, and of granting or refusing certificates of approval, whether requested to do so or not."

Digitized by Google

Further provisions of the chapter provide certain standards for factories, mills, workshops, etc., for the safety and welfare of employés. By section 6599 of Remington's Code 1915, which is one of the sections under the chapter entitled "Arbitration and Disputes," the labor commissioner is required to perform certain duties with reference thereto. By section 5487, Remington's 1915 Code, which is one of the sections under the chapter entitled "Regulation and Conduct of Bakeries," it is made the duty of the commissioner of labor to inspect bakeries and issue a certificate to the owner, if such be the fact that he is complying with all the provisions of the chapter. The commissioner is also authorized to issue orders to improve the condition of a bakery. Under section 8213, which is one of the sections under the chapter entitled "Regulation of Steam Vessels, etc.," the commissioner of labor is charged with the administration of the provisions of the act. The act provides for a system of inspection and regulation of certain steam vessels which are properly subject to state regulation. It will thus be seen that prior to the passage of the act of 1919 the powers and duties of the labor commissioner with reference to enforcing laws enacted for the safety of workmen were extensive. It may be said of these laws that the general purpose running through them was the welfare and safety of the employés or workmen. Under these laws the labor commissioner was required to make certain inspections and enforce certain standards for the safety of work and the places of work. He was required to issue certificates as therein provided. He was also required to enforce all laws enacted "for the protection of the working classes." These duties were of the same general nature as those imposed upon him by the law of 1919. As already pointed out, that law as well as the prior laws which defined his duties were enacted for the general purpose of the safety and welfare of employés or workmen. In acting in an advisory capacity to the state safety board under the act of 1919 he was but serving the same general purpose that the prior laws required of him. It is true that under the act of 1919 his powers and duties have been increased, but this fact alone will not sustain an act of the Legislature under the constitutional provision above referred to, which increases his compensation during his term of office. State ex rel. Davis v. Clausen, 47 Wash. 372, 91 Pac. 1089; State ex rel. Funke v. Board of Commissioners, 48 Wash. 461, 93 Pac. 920. In the case first cited the powers and duties of the state board of control were increased, and the salary of the members was increased. It was there held that the members of the board were not entitled to the increased compensation by reason of the fact that the powers and duties had been increased. Before such increase in salary can be sustained it is necessary, as already pointed out, that the duties under the new act shall be extrinsic or foreign to those to be performed under the existing law and shall not be incidental, collateral or germane thereto. It is said, however, that under the act of 1919 the labor commissioner is required to perform certain duties relative to the Industrial Insurance Commission, such as that at the end of each calendar year it shall be his duty to certify to such commission the compliance or noncompliance with the safety standards by employers. From this it is argued that the labor commissioner is thereby required to perform duties in connection with another department of the government because under the prior law he was not required to perform any duties in connection with the Industrial Insurance Commission. It cannot be held, however, that the duties which the Commissioner of Labor is required to perform in connection with the Industrial Insurance Commission are extrinsic and foreign to the duties which he was required to perform under the prior law. It will hardly be denied that one of the purposes of the Workmen's Compensation Act (Rem. Code 1915, §§ 6604—1 to 6604—32) was to promote the welfare and safety of employés or workmen. This is the same general purpose which is sought to be accomplished by other labor laws. The case of State ex rel. Seattle v. Carson, 6 Wash. 250, 33 Pac. 428, is readily distinguishable. It was there held that a law passed during the term of a county treasurer, which imposed upon him the duty of the collection of city taxes, and allowed him a salary for such purpose in the sum of $500 a year in addition to the salary otherwise provided by law, was not subject to the constitutional provision providing that the salary of a public officer should not be increased or diminished during his term of office. The reason for the holding was that the collection of city taxes was a matter which was "entirely outside" of his duties as county treasurer for which his previous salary had been fixed. The functions of the county do not bear that close relation to those of a city as the purposes of the labor laws of the state, including the Workmen's Compensation Act, do one to the other. In Spokane County v. Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830, commenting upon the doctrine of the Carson Case, it was said:

"We do not think that the doctrine enunciated in that case should in any event be extended, though it is plainly distinguishable from the case at bar."

To apply the doctrine of the Carson Case to the case now before us would require an extension of the doctrine of that case. It is the positive policy of the Constitution, expressed in a number of ways, that the salaries of officers should not be increased during their term of office. This is made apparent by ref-

Digitized by Google

erence to other similar provisions, but which are not here directly involved. Section 25 of article 2, which is the section here immediately involved, provides that the compensation of any public officer shall not be increased or diminished during his term of office. Section 25 of article 3 provides that the compensation of state officers shall not be increased or diminished during the term for which they shall have been elected. Section 13 of article 4 provides that the judges of the Supreme Court and judges of the superior courts shall severally, at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. Section 8 of article 11 provides that the salary of any county, city, town or municipal officer shall not be increased or diminished after his election or during his term of office. After reviewing these various provisions of the Constitution in State ex rel. Clausen, 47 Wash. 372, 91 Pac. 1089, supra, it was said:

"So that it will be seen that it was a positive policy of the Constitution, expressed in every possible way, that the salaries of officers should not be increased during their term of office. This wise provision was no doubt intended to prevent pernicious activity on the part of the office holders of the state being brought to bear upon the members of the Legislature—a wise provision which must not be construed out of existence or evaded by legislative enactment."

A similar comment is found in State ex rel. Port of Seattle v. Wardall, 183 Pac. 67, as follows:

"Other courts have said that such provisions also have an additional purpose, namely, to prevent the salary fixing body from rewarding their friends and punishing their enemies, which they were sometimes wont to do, by increasing the salaries of those in favor and decreasing the salaries of those whose actions did not meet with the approval of that body."

A careful consideration of the duties imposed upon the labor commissioner by the law of 1919 in comparison with those which he was required to perform under the prior law leads to the conclusion that his duties under the 1919 act are not extrinsic and foreign to his previous duties, but that they are germane thereto. To review the authorities in detail, cited in the briefs, would unduly extend this opinion, already probably unreasonably long. The question has frequently been before the courts of other states under similiar constitutional provisions. In some cases it is held that the duties created by the later act are extrinsic and foreign, while in others that they are incidental, collateral, or germane, each line of cases applying the general rule as above quoted from Mechem. It is apparent that in determining whether the duties are extrinsic and foreign or collateral and germane each case must depend, to a considerable extent, upon its own facts. As a type of the cases holding duties to be extrinsic and foreign the case of State v. Reddle, 12 S. D. 433, 81 N. W. 980, may be cited. In that case, by act of the Legislature the secretary of state was made a member of what was referred to as the "Brand and Mark Committee," and compensation was allowed him for his duties in connection with that committee in addition to his salary as secretary of state. It was there held that his duties as a member of the Brand and Mark Committee were extrinsic to those which he was required to perform as secretary of state. As a type of the cases holding that duties are germane or collateral, the case of the Board of County Commissioners of Creek County v. Bruce, 51 Okl. 541, 152 Pac. 125, Ann. Cas. 1918E, 1060, may be referred to. In that case additional duties were conferred upon county clerks of the state, in that they were required to issue hunting licenses. It was there held that such duties were germane to the office of county clerk. Not all the cases support the general rule as first above quoted. For instance, the Supreme Court of Missouri holds that, where new and additional duties are imposed upon an officer, and the act provides conpensation therefor, such act is not subject to the constitutional provision prohibiting increase in the pay of an officer during his term of office. State ex rel. v. Sheehan, 269 Mo. 421, 190 S. W. 864. But this court has taken a different view of a similar constitutional inhibition as pointed out in the Funke and Davis Cases, supra, where it is held that new and additional duties are not sufficient to sustain the application of the act to the officer holding under a term at the time of its passage.

This opinion can be better concluded then by a quotation from the Funke Case, supra, as follows:

"The increase of compensation by those statutes and also by the one now before us was, no doubt, in each instance a meritorious thing for the Legislature to do, having reference to future office incumbents. But the constitutional provision as to present incumbents must not be so construed in the interest of seeming expediency or even apparent necessity as shall practically amount to an evasion of the organic law. That the constitutional provision exists is not only true, but it is also true that it is so clear and is founded upon such practical wisdom as calls for no elastic effort to construe it."

The writ will be denied.

HOLCOMB, C. J., and MITCHELL, PARKER, and MACKINTOSH, JJ., concur.

Digitized by Google

STATE ex rel. BAGLEY v. CLAUSEN, State Auditor. (No. 15702.)

(Supreme Court of Washington. June 7, 1920.)

States ⇐63—State mining inspector not entitled to increase in compensation during term of office.

Under the Constitution prohibiting increase in compensation of officer during his term of office, state mining inspector, whose term of office commenced prior to enactment of Laws 1919, p. 309, was not entitled to additional compensation for performance, during such term, of duties of enforcing safety standards, inspecting mines, and making annual report to state industrial insurance commission, imposed by sections 7–10, 18, 28, 49, though section 32 provides for additional salary such duties not being extrinsic to or outside of his prior duties under Laws 1917, pp. 116–120, §§ 7, 8, 10.

Department 1.

Original application for a writ of mandamus by the State of Washington, on the relation of James Bagley, against C. W. Clausen, as State Auditor of the State of Washington. Denied.

W. V. Tanner, of Seattle, for relator.

L. L. Thompson, Atty. Gen., and G. H. Bucey, of Tacoma, for respondent.

MAIN, J. This is an original application in this court for a writ of mandamus. The relator is the state mine inspector and the respondent the state auditor. This is a companion case to that of State ex rel. Younger v. Clausen, 190 Pac. 324, just decided, which will herein be referred to as the case of the state labor commissioner. The two cases were covered in the same briefs, and were argued together. In this case it will not be necessary to do more than examine the powers and duties of the mine inspector as they were defined by law prior to the act of 1919, and compare them with his powers and duties under that act.

The relator, by this action, claims the right to certain salary warrants under the act of 1919. The term of the mine inspector is for a period of four years, the relator having begun his term on July 6, 1917. The act of 1919 upon which he relies was passed during the term which he was then serving, and was designed to increase his salary during that term. The respondent, the state auditor, refused to issue the warrants, claiming that the act was inhibited by that provision of the Constitution which provides that the compensation of a public officer shall not be increased or diminished during his term of office. The case presents the same general question as was presented in the case of the state labor commissioner.

For the purpose of determining whether the new duties imposed upon the state mine inspector fall within that class which is outside or extrinsic to his duties under the prior law, or whether they fall within the class of incidental, collateral, or germane duties, attention will be first given to his duties under the law as they existed at the time of his appointment, and this will be followed by a review of the duties imposed upon him by the act of 1919. The office of inspector of coal mines was originally created in 1897 (Laws of 1897, c. 45), but the relator holds his present office under chapter 36, Laws of 1917, known as the Coal Mining Code. This Code is a comprehensive act and describes in detail the requirements to be observed in the operation of coal mines, various regulations being therein provided concerning safety, health, inspection, hours of labor, etc. Under section 7 of the Code it was made the duty of the mine inspector to enforce the provisions of the act, and he was required to devote his entire time to the duties of the office. Under section 8 it was his duty to "enter, inspect and examine any coal mine in this state, and the workings and the machinery belonging thereto." It was further made his duty to make and keep a record of each visit, noting the time and material circumstances of the inspection. In other provisions of the Code certain safe place and safety device standards were prescribed which were to be observed in the operation of a coal mine. The act fixes the mine inspector's salary at $3,000 per year. In general, under the act, the mine inspector was required to make inspections, keep a record thereof, and enforce the provisions of the act, including the safe place and safety device standards prescribed therein. He was further required by section 10 of the Code to transmit a synopsis of his annual report to the Governor of the state, not later than March 1st of each year.

Reference will now be made to the duties imposed upon the mine inspector by the act of 1919. By section 7 of this act the state mine inspector bears the same relation to the state safety board as does the commissioner of labor. Section 8 provides for the promulgation of the standards of safety as set out in the case of the state labor commissioner. Section 9 provides that the safe place standards and the safety device standards for coal mines of the state shall be those prescribed by the Coal Mining Code. By section 10 the educational standards for coal mines are to be prescribed by the board created, to be known as the state mining board, consisting of two members to be appointed by the state safety board. By section 18 any coal mine employer, or workman, or association of either, or any joint committee of such employers and workmen, or

Digitized by Google

the state mine inspector are authorized to make recommendations to the state mining board of educational standards. By section 28 it is provided that the state mine inspector shall have sole charge of the enforcements of the standards of safety for coal mining and of the inspection incident thereto. By section 49 it is made the duty of the state mine inspector by himself or deputy to inspect every coal mine in the state not less than once every four months, for the purpose of ascertaining whether the safety standards applicable thereto are being complied with. This section further provides that the state mine inspector, at the end of each calendar year shall certify to the state industrial insurance commission the compliance or noncompliance with the safety standards on the part of each coal mine employer in the state during that year. Section 32 of the act provides that the mine inspector shall receive a monthly salary of $100 per month for the performance of his duties in enforcing the use of "safety standards and inspecting and certifying the same," this monthly salary to be in addition to the salary which is provided for him by the Coal Mining Code. It thus appears that the additional salary is for his duties in enforcing (a) the use of safety standards (b) inspecting, and (c) certifying the same. The safety standards which the mine inspector was required to enforce under this act were the same as those which he was required to enforce under the prior law. The act of 1919, in section 9, expressly provides the safe place standards and the safety device standards for coal mines shall be those prescribed by the Coal Mining Code. The mine inspector's duty as to inspections under the act of 1919 are practically the same as those which he was required to perform under the prior law, and is still required to perform. Substantially the only new or additional duty which is imposed upon the mine inspector for which the additional salary is allowed is the requirement that he shall make a report annually to the state industrial insurance commission. The facts which he shall report are those which under the Coal Mining Code he is required to ascertain by inspection and keep a record thereof. It will not do to hold that because one state officer is required to perform the additional duty of certifying certain facts from the records of his office to another officer of the state or agency of the government he is thereby performing new and additional duties which are extrinsic to and outside of the duties that he is required to perform in collecting and recording such facts. The certification of these facts to another state officer or agency of the government is but incidental or germane to the duties of his office. If by such a device the salary of a public officer during his term can be increased, the constitutional provision, inhibiting the increase or diminishing of salaries during a term of office, would be of little consequence. As stated in the case of State ex rel. v. Clausen, 47 Wash. 372, 91 Pac. 1089, cited in the case of the state labor commissioner, this provision of the Constitution "must not be construed out of existence or evaded by legislative enactment." The additional duties of the mine inspector created by the act of 1919 more clearly fall within that class of duties which is incidental or germane to his duties under the prior law than do those of the state labor commissioner.

The writ will be denied.

HOLCOMB, C. J., and MITCHELL, PARKER, and MACKINTOSH, JJ., concur.

KENNERY v. NORTHWESTERN JUNK CO. (No. 15501.)

(Supreme Court of Washington. June 7, 1920.)

En Banc.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

On rehearing. Former opinion adhered to, and judgment affirmed.

For former opinion, see 185 Pac. 636.

Gates & Helsell, of Seattle, for appellant.

Jones & Riddell, of Seattle, for respondent.

PER CURIAM. Upon rehearing en banc and a careful reconsideration of the whole subject-matter, a majority of the court adheres to the opinion heretofore filed herein as reported in 185 Pac. 636, and for the reasons there stated the judgment is affirmed.

MOWBRAY PEARSON CO. v. E. H. STANTON CO. (No. 15457.)

(Supreme Court of Washington. June 7, 1920.)

En Banc.

Appeal from Superior Court, King County; Hugo E. Oswald, Judge.

On rehearing. Former opinion adhered to, and judgment reversed and cause remanded, with instructions.

For former opinion, see 187 Pac. 370.

Stephens & Jack, of Spokane, for appellant.

Lee & Kimball and Ed. B. Powell, all of Spokane, for respondent.

PER CURIAM. Upon a rehearing en banc, a majority of the court adheres to the

Digitized by Google

opinion heretofore filed herein, as reported in 187 Pac. 370; and for the reasons therein stated the judgment is reversed, and the cause remanded, with instruction to enter a judgment in favor of appellant, to the effect that respondent take nothing by its action.

RORVIK v. NORTH PAC. LUMBER CO. et al.

(Supreme Court of Oregon. June 8, 1920.)

1. Negligence ⟸18—Captain of vessel injured by negligence of shipper's employés held within protection of Employers' Liability Act.

The captain of a steamship company's vessel, who was injured through the negligence of the employés of a lumber company while standing on its wharf at a place where his duties of superintending the receiving and stowing away of lumber required him to be, sustained such relation to the lumber company as brought him within the protection of the Employers' Liability Act. (Per McBride, C. J., and Johns, J.)

2. Pleading ⟸433(8)—Absence of allegation that work of decedent involved risk held not available after verdict.

In an action under the Employers' Liability Act for the death of the captain of a vessel who was killed when the same was being loaded with lumber at defendant shipper's wharf, the complaint after verdict *held* sufficient to bring the case within the Employers' Liability Act, despite objection that it was not averred that the work decedent was engaged in at the time of the injury involved a risk or danger. (Per McBride, C. J., and Johns, J.)

3. Negligence ⟸136(18)—Hazardous occupation on premises of another employer held question for jury.

In an action for the death of the captain of a vessel killed while superintending the loading of the vessel with lumber at defendant shipper's wharf, whether his work involved a risk or danger, so as to bring him within the Employers' Liability Act, *held*, under the evidence, a question for the jury. (Per McBride, C. J., and Johns, J.)

4. Assignments ⟸24(1)—Tort action cannot be assigned.

A tort action cannot be assigned. (Per McBride, C. J., and Johns, J.)

5. Master and servant ⟸369—Subrogation under foreign compensation act held unenforceable because contrary to law of forum.

The provision of Workmen's Compensation Act Cal. for subrogation to the rights of the injured employé will not be enforced in Oregon, as, under the law of that state, a tort action is not assignable; and hence the fact that the widow of the captain of a vessel, killed at defendants' wharf, presented a claim under the California act against the owner of the vessel, a California corporation, the deceased being a resident of that state, will not preclude the widow's recovery against defendants on the theory the owners of the vessel were subrogated to her rights against defendants. (Per McBride, C. J., and Johns, J.)

6. Master and servant ⟸369 — Resident wrongdoer suable for death of employé domiciled in sister state allowing limited compensation with subrogation.

As Workmen's Compensation Act Cal. does not profess to make full compensation for injury, but limits the amount in case of death to $5,000, the fact that the widow of the captain of a vessel killed while superintending loading lumber at defendant's wharf presented a claim against the owner of the vessel, a California corporation, will not, where the owner fails to sue defendant, preclude the widow from suing defendant in Oregon to recover full compensation for the injury. (Per McBride, C. J., and Johns, J.)

7. Judgment ⟸815—Where no remittitur filed judgment appealed from is not entitled to faith and credit.

Where the Supreme Court of California, to which an award under the Workmen's Compensation Act was ultimately appealed, had not filed any remittitur, the decision cannot be treated as a judgment of a foreign state entitled to full faith and credit. (Per McBride, C. J., and Johns, J.)

8. Trial ⟸296(3)—Instruction on duty to employés of others under Employers' Liability Act approved in view of explanation.

In an action for the death of a captain of a vessel killed while superintending loading lumber at defendant's wharf, an instruction that if the work defendant was doing involved a public risk or danger, and decedent was a member of the public, rightfully on the premises when injured, and that defendant failed to use care which it might have used, cannot, in view of a clear explanation given in another instruction, be deemed misleading, under the Employers' Liability Act, where there was no question as to the right of decedent to be at the place he was. (Per McBride, C. J., and Johns, J.)

9. Death ⟸95(2)—Measure of damages for husband's death defined.

In a widow's action under the Employers' Liability Act for death, an instruction that she was entitled to recover an amount equal to the pecuniary loss resulting to her, and that the value of her husband's life was the net amount which he would have saved from his earnings, taking into consideration his habits and expenditures, is correct. (Per McBride, C. J., and Johns, J.)

Department 2.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Action by A. Maude Rorvik against the North Pacific Lumber Company and H. A. Sargent and others, as receivers. From a judgment for plaintiff, defendants appeal. Affirmed.

Digitized by Google

This is an action brought under the Oregon Employers' Liability Act (Laws 1911, p. 16) for damages for the death of C. P. Rorvik.

The plaintiff is the widow of deceased. The defendant corporation is extensively engaged in the business of manufacturing and dealing in lumber in the city of Portland, and maintains on its premises, and adjoining the Willamette river, a dock, upon which it stores its lumber for sale, and from which the lumber is transferred to vessels for shipment to ports on the Pacific and elsewhere.

At the time of the accident the corporation was in the hands of a receiver, one Henry P. Dutton, but he subsequently resigned, and Sargent, Hawkins & Bradley were appointed in his place, and as such are made defendants.

The particular situation at the time of the accident is described in the complaint as follows:

"That on the 3d day of August, 1916, the said Henry P. Dutton, as receiver, was conducting said business as aforesaid, and was engaged through his servants and employés, in hauling a quantity of lumber to the said wharf of the defendant company, and placing said lumber upon the said wharf in reach of ship's tackle alongside said wharf, so that the same could be loaded upon the steamship Klamath, which was docked at said wharf; that said lumber was placed upon the cars of the said defendant company hereinbefore described, which cars were drawn by a horse, a rope or chain being attached to the rear of said cars extending forward alongside of said cars, to which the horse was hitched, the horse in drawing the same passing alongside of the said track and the cars running thereon; that on the said 3d day of August, 1916, the said C. P. Rorvik was employed by the owner of the said steamship Klamath, and was in charge of the said steamship, and engaged in loading the same at the said wharf of the defendant company with the lumber which was being placed by the said receiver upon the said wharf in reach of the ship's tackle; that at the place where the said steamship was being loaded and the place where the said lumber was being placed upon the wharf by the said receiver the said defendant company and its said receiver maintained several of its said railway tracks, which ran across said wharf at right angles to the water's edge and to the edge of the dock; the floor of said wharf was about eighteen (18) feet from the level of the river; that the said receiver on the said 3d day of August, 1916, or shortly prior thereto, had placed alongside of one of said tracks on said wharf a pile of lumber, said lumber being piled parallel with the said track and to a point within approximately thirty inches of the edge of the said wharf next to the water line; that on the said date last mentioned said C. P. Rorvik, while in the discharge of his duties as captain of the said steamship Klamath, and engaged in the loading of the said steamship as aforesaid, was standing on said wharf adjoining the river, and while the said Rorvik was standing as aforesaid the said receiver caused two of the said cars of the said defendant corporation, heavily loaded with lumber, to be drawn along the said track last mentioned, which paralleled the said pile of lumber behind which the said Rorvik was standing; the said cars were not fastened together, and the forward car was being shoved forward by the weight of the rear car at the rear end of which the horse was attached as aforesaid; that the said receiver caused and allowed the said cars to be drawn along said track without providing any brakes or other contrivance by which the same could be stopped, and to be propelled in such a way that when the horse which was drawing them stopped the said cars would continue upon their journey until they should stop of their own accord; that the said cars and horse were in charge of only one employé of the said receiver; that the said receiver, by his servants, negligently and carelessly piled the said lumber so near to the said track, and placed the lumber upon the said cars in such a position, that when the forward end of the said forward car reached a point on the said track opposite to the said pile of lumber upon the said wharf a portion of the lumber upon the said forward car violently and with great force struck a portion of the said lumber piled upon the wharf, and shoved it forward, causing it to strike the said C. P. Rorvik, by reason of which he was knocked off the said wharf, receiving therefrom mortal injuries, from the effects of which he died on August 8, 1916."

The acts and omissions of defendants which the complaint sets forth as the cause of the accident are stated as follows:

"That the said injuries to the said C. P. Rorvik were caused not through any negligence or lack of care on the part of the said Rorvik, but solely through the carelessness and negligence of the said Henry P. Dutton, as receiver, and his servants and employés, in this: that he negligently and carelessly caused the said cars to be drawn along the said track in such a manner as to strike the lumber piled alongside the said track, and allowed the said cars to be used without devices or appliances with which to keep them under control and stop them, at any given time, quickly and efficaciously; and allowed the said cars to be operated by means of a horse pulling on a rope, or similar contrivance attached to the rear of the said cars, in such a manner as to allow the horse to pass along the side of the said track and opposite the said cars, and thus draw the cars forward, and without providing any means for stopping the progress of said cars in the event that the horse was stopped; and by allowing the said forward car to be shoved forward by the force and weight of the rear car without having it attached to the rear car, and without having any devices or other means for stopping it in the event that the rear car should be stopped at any time; and by allowing the said cars to be operated by one man walking along by the side thereof driving the horse pulling the same, which necessitated said man being in such a position behind the said horse and near the rear of the said cars that it was impossible for him to see the track ahead of said car, or to see the opposite side of said car, so as to protect persons who might rightfully be in such positions; and by operating said car as aforesaid without formulating, promulgating, or enforcing any

Digitized by Google

rules or regulations, or providing any system of communication by means of signals or otherwise, so as to protect the public from injury by the said cars as they were being shoved forward in advance of the operator along said track; and by operating said cars with one man only, instead of providing a sufficient number of men to enable the operator to keep a watch ahead of the said cars, so as to avoid collisions with obstacles upon or near the track or with persons who might rightfully be in front of said cars; and by piling the said lumber alongside the said track in such proximity to said track that the said loaded cars were unable to pass the same without striking it; and by loading the said cars in such a manner as to allow the lumber placed thereon to strike the said lumber piled alongside the said track; and by failure to exercise such care and precaution, which it was entirely practicable to use, to prevent the car of lumber passing along said track from striking the said lumber placed alongside the track."

There were other allegations showing how the defects and omissions above set forth could have been remedied without impairing the usefulness of the agencies used by defendant in loading the vessel.

The answer denied the material allegations of the complaint; pleaded negligence on the part of plaintiff's intestate as the cause of the injury; and, by way of affirmative defense, set forth the contents of chapter 176 of the Laws of the state of California for the year 1913, known as the "Workmen's Compensation, Insurance and Safety Act," and certain amendments thereto, adopted in 1915, and designated as chapters 541, 607, and 662. The plea is too long to be inserted here, but will be further elaborated in the opinion.

It was then alleged that on the 27th day of October, 1916, plaintiff duly presented her claim to the Industrial Accident Commission, created by this act, against the Klamath Steamship Company, a California corporation and owner of the steamship Klamath, of which deceased was captain, and being the vessel which was being loaded when the accident occurred, said claim being for compensation to plaintiff for the death of her husband by reason of said accident.

The answer alleged that the Klamath Steamship Company answered said claim, and that thereby issues were made up as required in such cases, and that thereafter a hearing was had, and on the 30th day of January, 1917, findings and an award were made in favor of plaintiff and against said steamship company; that thereupon the said company caused the said proceedings to be reviewed upon certiorari in the Supreme Court of the state of California, and upon the hearing there the findings and award of the Industrial Accident Commission were in all things upheld and sustained, and are in full force and effect; that by virtue of the laws of California the liability for compensation provided by said Workmen's Compensation Act was in lieu of any other liability whatever to any person, and that the making of a lawful claim under said act operated as an assignment to the employer of any right to recover damages which the injured employé, his representatives or dependents, had against any other party for such death, and the employer was thereby subrogated to the rights of such party, and that by the making of such claim against an employer before the Industrial Accident Commission such claimant surrendered up and canceled his right to make any claim against any other person on account of the death of such employé; that decedent was injured and died in Portland, Or.; that at the time of his death both he and the Klamath Steamship Company were residents of the state of California, and that his contract of employment was made in the state of California.

Plaintiff replied, putting in issue all the new matter alleged in the answer, except that by affirmative allegations she admitted the proceedings before the Industrial Accident Commission, the affirmance of its proceedings before the Supreme Court, but alleged that upon the petition for certiorari the proceedings upon the award were stayed during the pendency of the review; that the laws of California provide that a litigant shall have 90 days from the rendition of a decision by the Supreme Court of that state to apply for a writ of error to the Supreme Court of the United States, and plaintiff alleges, upon information and belief, that the Klamath Steamship Company will apply for said writ; that the award of the Accident Commission is still stayed, and that plaintiff is not entitled to recover thereon or have the same made effective.

Plaintiff filed a supplemental complaint, setting up the proceedings before the Industrial Accident Commission and the Supreme Court, and alleging that since the filing of her complaint, and since the decision of the Supreme Court of California, the Klamath Steamship Company had finally and in writing reassigned any claim which it had by reason of the subrogation claimed in defendants' answer to plaintiff, and that by virtue of such assignment plaintiff is now the owner of any claim which said company may have had against defendants.

The supplemental complaint being put in issue by an appropriate answer and reply thereto, the cause came to trial, wherein plaintiff had a verdict and judgment for $12,500, from which defendants appeal. The alleged errors are set forth in the opinion.

S. C. Spencer, of Portland (Emmons & Webster and Wilbur, Spencer, Beckett & Howell, all of Portland, on the brief), for appellants.

Digitized by Google

Homer D. Angell, of Portland (Ira S. Lillick, of San Francisco, Cal., and Angell & Fisher, of Portland, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). This case presents many intricate propositions, and for that reason we have given a more than usually extended statement of the contentions of the parties as they appear from the pleadings.

[1] It is first contended that plaintiff cannot recover under the Employers' Liability Law of this state, because neither the complaint nor the evidence show that the deceased was an employé of defendant, or that he sustained to it any such relation as brings him within the terms of such act. The complaint and the uncontradicted testimony disclose the following facts:

The evidence indicates that at the time the accident occurred the deceased was captain of the steamship Klamath, and an employé of the Klamath Steamship Company, a California company, and that the ship, at the time of the accident, was taking on a load of timber being shipped by defendants; the lumber was being delivered entirely by the employés of the receiver. Neither the decedent nor any employé of the steamship Klamath had any part therein. But the employés of the Klamath Steamship Company were obliged to be about the work carried on by the receivers in order to receive the lumber as it was delivered by the receivers. The two sets of employés in their work intermingled. The contract of sale provided that the lumber should be placed on the wharf within reach of the ship's tackle by the seller. When the lumber was delivered and placed in reach of the ship's tackle by the receivers, the duties of the employés of the steamship began, namely, to load the lumber on the ship. The employés of the steamship took up the work where the receivers stopped. In fact, as the cars loaded with lumber were placed on the wharf in reach of the ship's tackle, the servants of the steamship would, by means of the slings and tackle, remove the lumber from the cars into the hold of the ship. The employés of the receivers and the employés of the steamship, including the steamship's employé the decedent, thus met on common ground, and both, by the necessities of their duties, were obliged to work on the wharf, on and about the tracks, and around the machinery where the operations were being carried on.

The only evidence introduced tended to show that deceased was standing on the edge of the wharf in a place where the convenient and proper execution of his duties required him to be, and there is nothing to indicate that he was negligent in any particular, or that any other place would have been safer, consistently with the performance of those duties. In other words, as the employé of the Klamath Steamship Company he was in the place where his duties required him, engaged in the labor of receiving and stowing away, or superintending the receiving and stowing away, of the lumber brought to the edge of defendants' wharf, and in reach of the tackle of the steamship company.

In view of the able and exhaustive analysis of our Employers' Liability Act by Mr. Justice Harris in Turnidge v. Thompson, 89 Or. 637, 175 Pac. 281, which covers every phase of the question as to the persons who are within or without the act, we deem any attempt at further analysis or distinction unnecessary. From the lucid interpretation in that case and in other cases hereafter mentioned, we deduce the rule that the Employers' Liability Act does not extend to the protection of the general public as such, but that it does extend its protection to employés of the particular person owning or operating dangerous machinery or engaged in hazardous employments, and to other persons or employés of other corporations whose lawful duties require them to be or work about such machinery, or expose themselves to the hazards of the machinery or appliances in use by the owner thereof.

Such, when considered with reference to the case then in hand, was the holding in Clayton v. Enterprise Electric Co., 82 Or. 149, 161 Pac. 411, which, with the limitation given above, is approved in Turnidge v. Thompson, supra. See, also, Morgan v. Bross, 64 Or. 63, 129 Pac. 118; Cauldwell v. Bingham & Shelley Co., 84 Or. 257, 155 Pac. 190, 163 Pac. 827.

From these authorities we conclude that if the other elements authorizing recovery are present the deceased was a member of that class on behalf of which a recovery is authorized by the act.

[2, 3] It is urged that "plaintiff does not allege or prove that the work decedent was engaged in at the time he was injured involved a risk or danger, and therefore she cannot maintain this action." While the complaint is not so definite in this respect as the rules of good pleading would seem to require, yet, taken as a whole, we think it is sufficient. After stating in detail the business the receivers were engaged in, including the operation of railway tracks and machines for transporting the lumber from the mill to the wharf, and stating that such transportation was by means of cars placed upon said tracks and drawn by horses, one paragraph of the complaint states that "such business was a work involving risk and danger to the public."

The paragraphs quoted in the statement give in great detail the manner in which the work of loading was carried on; point out its defects and omissions, and how they might have been remedied or avoided; and

Digitized by Google

the abstract shows no demurrer or objection to the pleading before trial, and the case was tried apparently upon the theory that it was sufficient. Under the circumstances we think the pleading was sufficient. This being the case, the question as to whether the work was hazardous, or in fact involved risk or danger, became a question for the jury. Wolsiffer v. Bechill, 76 Or. 516, 146 Pac. 518, 149 Pac. 533; Yovovich v. Falls City Lbr. Co., 76 Or. 585, 149 Pac. 941. There was evidence from which the jury had a right to infer that the work was hazardous, especially in the manner and with the appliances with which it was prosecuted.

[4, 5] The next assignment of error is based upon the failure of the court to grant plaintiff's motion for a nonsuit and directed verdict, and for judgment on the pleadings based upon the assumption that by presenting a claim against the Klamath Steamship Company for indemnity for her husband's death, under what is known as the Workmen's Compensation, Insurance and Safety Act, plaintiff divested herself of any right to bring an action against the defendants under our Employers' Liability Law.

Those sections of the California Act which are supposed to bear upon this contention are found in chapter 176 of the statutes of California for 1913, as amended by chapters 541, 607, and 662, Laws of 1915, and are as follows:

"Sec. 12. (a) Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employés arising out of and in the course of the employment and for the death of any such employé if the injury shall proximately cause death in those cases where the following conditions of compensation concur:"

"Sec. 73. (a) All proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, or for the enforcement against the employer or an insurance carrier of any liability for compensation imposed upon him by this act in favor of the injured employé, his dependents or any third person, or for the determination of any question as to the distribution of compensation among dependents or other persons or for the determination of any question as to who are dependents of any deceased employé, or what persons are entitled to any benefit under the compensation provisions of this Act, or for obtaining any order which by this act the commission is authorized to make, shall be instituted before the commission, and not elsewhere, except as otherwise in this act provided, and the commission is hereby vested with full power, authority and jurisdiction to try and finally determine all such matters, subject only to the review by the courts in this act specified and in the manner and within the time in this act provided."

"75a. The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employé is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employé or his dependents shall be entitled to the compensation or death benefits provided by this act."

"Sec. 31. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé, shall operate as an assignment to the employer of any right to recover damages which the injured employé, or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employé or his dependents is entitled shall not be admissible in evidence in any action brought to recover damages, but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employé or other person entitled."

Whether or not the legislative authority of the state of California extends to providing for compensation for an injury inflicted by one citizen of that state upon another citizen, even when the injury occurs outside the territorial limits of the state, need not be discussed or questioned. Neither is it necessary to discuss the effect of such an assignment or subrogation by operation of law, as is provided for in the section last quoted, where the cause of action to which the subrogation is intended to apply arose or is suable in the state.

But in this case a different question arises. The accident and death occurred in this state, and the defendants are receivers of a corporation located in this state. As a corporation resident in this state is suable here only, they are in fact sued here. In this state a right of action for tort is not assignable. Plaintiff, who was a resident of California, could not have gone to California and made an assignment of an interest in her claim for damages against defendants to a resident of that state, or to the Klamath Steamship Company, which could have authorized it to bring an action in our courts to recover damages for the death of Captain Rorvik. Such an action would be contrary to the policy of our laws and against the decisions of our courts. While courts, as a matter of comity, will usually enforce a right arising out of a statute of another state, they will not do so where the statute infringes upon the law of the forum. 5 R. C. L. § 8, and cases there cited.

It is conceded that the statute of California can give the Klamath Steamship Company no higher or greater right than it could have obtained by private contract with plaintiff, and that could never have gone to the

Digitized by Google

extent of authorizing it to sue in its own name in our courts on account of a tort committed to the damage of plaintiff. It may also be noticed that plaintiff is not divested by the California statute of all interest in her claim, but the employer is only allowed to retain an amount sufficient to reimburse itself for the amount which it has paid, or is liable to pay, as compensation, and is required to pay the overplus, if any, to plaintiff.

[6] The California act does not profess to make full compensation for the injury, but limits the amount to be allowed to the sum of $5,000. Between the employer and employé this sum is the limit of the recovery, but this fact does not bar a recovery against the actual wrongdoer to the full extent of the injury suffered. With such an interest in the case we are of the opinion that plaintiff would, in any event, be entitled to sue in her own name in our courts in case the Klamath Steamship Company should fail to do so, even if we gave, which we do not, full effect to the subrogation provided for by the California statute.

The views above expressed render unnecessary any discussion as to the sufficiency of the supplemental complaint filed by plaintiff, or the validity of the evidence offered in support of it. Neither is it necessary to discuss the validity of plaintiff's claim against the Klamath Steamship Company beyond saying that, in view of the decision of the Supreme Court of the United States in the case of S. P. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, it seems clear that the Industrial Accident Commission of California had no jurisdiction to entertain plaintiff's claim against the steamship company, and that if that company has failed to prosecute an appeal to the Supreme Court of the United States, or has lost that privilege by sleeping upon its rights, it has been guilty of such laches as would probably preclude it from recovering from these defendants.

Since the original draft of this opinion was prepared we have received the advance sheets containing the opinion of the United States Supreme Court in the case of Knickerbocker Ice Co., Plaintiff in Error, v. Lillian E. Stewart, Defendant, 252 U. S. ——, 40 Sup. Ct. 438, 64 L. Ed ——, decided May 17, 1920, in which it is held that even Congress cannot constitutionally authorize a state industrial accident commission to take cognizance of marine torts; thus settling the question in accordance with the views above expressed.

[7] It may be added that there is no evidence that there has ever been any remittitur from the Supreme Court of California to the lower court in the matter, or any proceeding taken which establishes the decision of the California Supreme Court as a final judgment so as to bring it within the "full faith and credit" clause of the Constitution.

In any case these defendants are not liable to be harassed by another action after the present suit is disposed of. Beyond that contingency it is a matter of no consequence to defendants whether the action is brought by plaintiff or by the steamship company.

It will be noticed that the alleged award by the California Industrial Accident Commission is not pleaded by way of mitigation or reduction of damages, but as a bar to this action. As such it is ineffective. Defendants' motions for abatement, nonsuit, and directed verdict were, therefore, properly overruled.

[8] Defendants except to the giving of the following instruction:

"If you find from a preponderance of the evidence that the work that the receiver was doing was one involving a risk or danger to the public and that the decedent was a member of the public and rightfully upon the premises where and when he was injured, and that the receiver failed to use any one or more of such devices, care, and precaution which it was practicable to use for the protection and safety of life and limb, and that such failure was in one or more of the particulars as alleged by the plaintiff, and that by the use thereof the efficiency of the structure, machine, or other apparatus or device said receiver was using would have been preserved, and that by reason of such failure, the same being the proximate cause of the accident, that the decedent received the injuries which caused his death, in that event the plaintiff would be entitled to recover."

The argument in support of appellants' contention is stated as follows:

"Whatever duty the defendants owed Captain Rorvik was not a duty they owed to him as a member of the public. Captain Rorvik docked the steamship Klamath at our dock for the purpose of loading it with lumber we had sold to be loaded on that steamship, and thereby there arose certain legal duties that the defendant owed to the deceased, but all those legal duties were and are well defined by laws other than the duties laid down by our Employers' Liability Act. The act did not add to or take away any of these duties.

"By this instruction the jury were told that the plaintiff could recover if decedent was a member of the public as such, and if the work the receiver was doing was one involving a risk or danger to the public as such, if the decedent was rightfully upon the premises, etc. The vice of this instruction lies in the fact that the Employers' Liability Act does not embrace the public as such, and the instruction states that it does."

The argument proceeds upon the theory that this action is based upon the proposition that deceased was a mere member of the public without any duties which required his presence at the place where he was injured, and in contiguity to the machinery and apparatus employed in loading the vessel, whereas the complaint, taken as a whole, and

Digitized by Google

the uncontradicted testimony, show that deceased was necessarily in the position he occupied and engaged with defendants' employés in loading the vessel. It is true that the duties of the deceased and the employés of the steamship company began where the actual physical labor of defendants' employés left off, but no link in the chain was broken; the loading was a continuous work, and could not be otherwise; the lumber was put upon the slings extending from the vessel by defendants' employés, and from that position moved aboard by machinery operated by the employés of the steamship company. The vessel could not be loaded in any other manner, and while deceased was in one sense a "member of the public," in another he was an employé engaged in working about or in the vicinity of machinery found by the jury to be dangerous, which brings the case squarely within the rule announced in Clayton v. Enterprise Electric Co., supra.

If there existed a controversy as to the surroundings or the reason for the decedent's presence on the wharf, or his relation to the subject-matter, the instruction objected to might have had a tendency to mislead the jury; but, in view of the evidence actually given, it tended to narrow, rather than extend, the limit of defendants' liability.

In a subsequent instruction Judge Tucker explained what he meant by the term, "a member of the public," in the following language:

"In this connection I instruct you that if you find the decedent, at the time he received the alleged injuries, was upon the wharf of the North Pacific Lumber Company, defendant, and was in charge of the loading of the steamship Klamath, either upon the express or implied invitation of the receiver, and that as captain of the said steamship his duties in respect thereto required that he be upon the wharf, that in that event he was a member of the public, and as such was entitled to whatever protection the law provides for the public. Or if you find that the decedent was in charge of the loading of the vessel, and that the vessel was being loaded at the said wharf at the express or implied invitation of the receiver, that by reason thereof the decedent was entitled to go upon the wharf if it was reasonably necessary for him so to do in order to superintend the loading of the vessel, and while upon the wharf under such conditions he was a member of the public, he was, as a matter of law, rightfully upon the wharf.

"The defendants in their answer claim, in effect, that it was not necessary for the decedent, the captain of the ship, in the discharge of any of his duties at the time he was hurt, to stand in front of the pile of lumber which was piled close to the edge of this dock, and that he received the injuries that resulted in his death from his own carelessness and negligence in standing in this narrow place. And if you believe, gentlemen of the jury, from a preponderance of the evidence in this case, that the duties of the captain did not require him to stand in this narrow place, and you further find that it was carelessness and negligence on his part to stand in this place when there were other places upon the dock that he could have stood with safety, and you believe from a preponderance of the evidence that he sustained his injury, which resulted in his death, because of his own carelessness and negligence, and that there was not any negligence on the part of the defendants contributing to the injury, then your verdict should be in favor of the defendants."

In view of this explanation the instruction objected to was not misleading, any tendency in that direction being obviated by the clear explanation given in the succeeding part of the charge last above quoted, which is fairly within the rule announced in Clayton v. Enterprise Electric Co., supra.

Several other objections to instructions are specified, but they all find their basis in the theory of the nonapplicability of the workmen's compensation law to the circumstances of the case at bar, or to the ruling of the court as to the effect of the claim and award under the provisions of the California Compensation Act. If the writer is wrong in his views as to the force and effect of either of these, then the court below was wrong, and this opinion is not the law. As we view the law, the objections are not well taken.

[9] The last objection is to an instruction upon the measure of damages, which is as follows:

"If you find from a preponderance of the evidence that the plaintiff is entitled to recover in this case, it will then become your duty to consider and assess her damages. In determining the amount of the damages, you are instructed that if she is entitled to recover she is entitled to damages equal to the pecuniary loss resulting to her from the death of her husband. The value of the decedent's life is the net amount which the decedent would have saved from his earnings by his skill and bodily labor in his calling during the residue of his life, had he survived, taking into consideration, from the evidence submitted, his age, health, ability, habits of industry and sobriety, and mental and physical skill so far as they affect his capacity for earning money by rendering service to others or accumulating property. All this must depend upon the evidence that has been produced before you on that subject. The amount of damages, however, shall not exceed that asked for in the complaint."

We see nothing wrong in this instruction. The plaintiff was decedent's wife and only heir. Her damages would be an amount equal to the pecuniary loss resulting to her from the death of her husband, and that amount would be such a sum as he probably would have accumulated if he had been permitted to live to the limit of his life expectancy. There is no absolute method of computing the damages in a case of this kind. It would be within the bounds of speculation to imagine that in spite of health conditions and habits, both shown to have been good,

Digitized by Google

there was a possibility that he might die sooner than the life expectancy tables indicated, by some accident on land or sea and incident to his profession, or that his accumulations might be swept away by bad investments, leaving him to die a pauper, or that plaintiff might have died before him, or any one of many possible contingencies. The rule adopted by the court was one more likely to work out justly in practice than any other that can be formulated, and is sanctioned by authority. McClaugherty v. Rogue River Electric Co., 73 Or. 135, 140 Pac. 64, 144 Pac. 569.

This has been an exceedingly interesting and difficult case. The facts are scarcely contested, but the questions of law involved are intricate, and their examination has consumed much time and labor; but, after a thorough consideration of them, we feel assured that no mistake has been made to the prejudice of defendants, and the judgment of the lower court will therefore be affirmed.

JOHNS, J., concurs.

BEAN and BENNETT, JJ., concur in result.

STATE ex rel. BLOOM v. STATE BOARD OF DENTAL EXAMINERS.

(Supreme Court of Oregon. June 15, 1920.)

1. **Physicians and surgeons ⇐6(2)—One licensed to conduct dental parlor cannot practice dentistry unless licensed.**

Under Laws 1919, p. 177, one holding license or privilege only to conduct, manage, or maintain a dental parlor must confine himself strictly to such activities, maintaining an office, having all instruments and appliances, and employing competent dentists, but cannot himself engage in practice of dentistry or examination of patients without being also licensed to practice dentistry.

2. **Physicians and surgeons ⇐2—Act requiring license to practice before conducting dental office constitutional.**

Laws 1919, p. 177, requiring every individual or member of any firm, with certain exceptions, to obtain license to practice dentistry before engaging in conducting or maintaining a dental office or parlor within the state, is constitutional.

Department 2.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

On petitions for rehearing. Petitions denied.

For former opinion, see 188 Pac. 960.

Louis E. Schmitt, of Portland (George M. Brown, Atty. Gen., and Walter H. Evans, Dist. Atty., of Portland, on the brief), for appellants.

John W. Kaste, of Portland, for respondent.

McBRIDE, C. J. The original opinion in this case will be found in 188 Pac. 960, not being as yet published in the Oregon reports.

Both parties file petitions for rehearing. The relator objects to that part of the opinion which contains the following language:

"It is the evident purpose of the proviso to permit such individuals to manage or conduct a dental office or parlor, as distinguished from those who may actually engage in the practice of dentistry; but a license merely to conduct an office does not carry with it the right to practice dentistry. They are separate and distinct, and the one does not include the other. If at any time the relator should fail to comply with the limitations of his license, he would violate the law and subject himself to the prescribed penalties."

[1] It is objected that this language is dictum and not necessary to a decision of the case. We do not so regard it. It was necessary and proper for this court to construe chapter 120 of the Laws of 1919, and particularly pertinent for it to construe the proviso under which, if at all, the relator had authority to conduct a dental parlor. The opinion specifies the exact limitations under which the relator must conduct such business. In our view of the law there is no substantial distinction between "conducting" a dental parlor and "maintaining" or managing one. To put the case plainly, the relator, under a license or privilege to "conduct, manage, or maintain a dental parlor," must confine himself strictly to those duties. He may maintain a dental office, have all the instruments and appliances for the extraction, filling, or treatment of teeth, and to manufacture false teeth, and employ competent dentists for that purpose, but can no more engage in the actual practice of dentistry, or in the examination of patients, or advise them in relation to their treatment, than if he had no license whatever. These things must be done by properly licensed employés, and if he even pulls or plugs a tooth, or advises as to its treatment, or manufactures or helps to manufacture false teeth for patients, he is a violator of the law against practicing dentistry without a license. We trust we have made ourselves sufficiently plain upon this point.

[2] We see no constitutional objection to chapter 120, supra, and assume, without deciding, that a license issued to conduct a dental parlor is subject to revocation, the same as a license to practice medicine. The distinction between maintaining a dental parlor and engaging in the practice of dentistry seems to us plain. The person conducting a dental parlor furnishes the place and the appliances, by means of which persons actually licensed to practice dentistry can carry on that business; but unless such person, in addition to being licensed to conduct such parlor, is also licensed to prac-

Digitized by Google

tice dentistry, he cannot personally do a single act toward the relief of persons who resort to his parlors for treatment.

Both petitions are denied.

BEAN, JOHNS, and BENNETT, JJ., concur.

HARTMAN et al. v. CITY OF PENDLETON et al.

(Supreme Court of Oregon. June 15, 1920.)

Charities ⇐=48(1)—Funds accumulated during controversy as to beneficiary will be treated as capital.

Where, owing to controversy as to who was beneficiary of a library fund, intended annual expenditures were halted and accumulations not expended, so that the amount accrued, not including the principal, aggregates more than double the amount of the original fund, such fund will not be used all at once in the purchase of books, thus leaving the library to depend on a small income provided by an amount of $5,000 bequeathed for its support, but the whole amount will be treated as principal, and the annual income applied to purchase of books and supplies.

Department 1.

Appeal from Circuit Court, Umatilla County; Gustav Anderson, Judge.

On petitions for rehearing. Former opinion modified and affirmed.

For former opinion, see 186 Pac. 572.

James A. Fee, of Pendleton, R. W. Montague, of Portland, and Stephen A Lowell, of Pendleton, for appellants.

J. H. Raley, of Pendleton (of Raley & Raley, of Pendleton), for respondents.

McBRIDE, C. J. In our original opinion we held, after disposing of the question of costs as to the trustee, that the accumulations of the fund should be applied to the purchase of books for the library of the Commercial Association of Pendleton.

Upon petitions for rehearing filed by both parties, we find this practical difficulty in the way of carrying out such a decree: The amount now accumulated, not including the principal, aggregates more than double the amount of the original fund. To use this large sum at once for the purchase of books would be to fill it with additions which would soon be superseded, and leave the library to depend on the small income provided by annual interest on the original $5,000 bequest for its support.

This being the case, it is the part of prudence to act with reference to conditions as they are, rather than to attempt the impossible task of enforcing the technical terms of the will. We say impossible, because the will substantially provided that the accumulations of the fund should be expended annually, and, owing to this controversy as to who was the beneficiary, such expenditure was halted; the accumulations were not expended annually, or at all for several years; hence the large sum now on hand.

We are of the opinion, under the circumstances, that it would be to the best interest of the library fund to add these accumulations to the principal, with certain deductions hereafter mentioned, and to treat the whole amount so accruing as principal, and apply the income thereafter arising annually to the purchase of books and supplies for the library. This course will furnish a larger annual income for the use of the library hereafter, and seems to us a much better business proposition than putting the whole sum now on hand immediately into the purchase of books.

From the accumulated income now on hand, it will be directed that $1,200 be applied during the current year, ending December 30, 1920, for the purchase of books and such other supplies as the trustee may deem proper. In addition, it is ordered that the plaintiffs be paid from the fund $300 as attorney's fees. The trustee, being somewhat in the position of a stakeholder between the city and the Commercial Association in this litigation, should not be required to pay his attorney wholly from his own funds, and will be allowed to compensate himself to the extent of $250 from the accumulations to the fund. The plaintiffs will have a decree against the city for their costs and disbursements herein to the extent of $150, or such lesser sum as may be taxed; otherwise the decree will be as indicated in our original opinion.

This disposes of the case, and we trust the animosities that this controversy has engendered will now be laid aside, and that all parties to it will work together to make the bequest of Mr. Sturgis an instrument of good in the community which he so generously remembered in his hours of sickness and in the shadow of impending death.

HARRIS, BENSON, and JOHNS, JJ., concur.

⇐=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

JANSON v. PACIFIC DIKING CO.

(Supreme Court of Oregon. June 15, 1920.)

1. Contracts ⟸332(2)—Complaint held to state cause of action upon contract.

Complaint *held* to state a good cause of action founded upon a contract between the plaintiff and defendant under which plaintiff was to do certain work for a specific consideration.

2. Work and labor ⟸22 — Complaint stated cause of action for reasonable value of services.

Complaint, alleging that at special instance and request of defendant plaintiff cleared right of way upon which defendant desired to and did contruct a dike by cutting and removing brush and stumps, and that plaintiff's services were reasonably worth $906.75, no part of which has been paid, *held* to state a good cause of action.

3. Evidence ⟸121(8)—Memorandum competent as res gestæ.

Where at the time parties enter into parol contract a memorandum is read containing the terms thereof, which are assented to by the parties, such memorandum becomes a part of the transaction, and in an action on the contract is admissible in evidence as a part of the res gestæ.

4. Appeal and error ⟸205—Trial court must be shown materiality of evidence offered.

No complaint can be made of the exclusion of evidence, where there was no statement or showing to the court that the evidence was material, or what it would tend to prove if it were admitted.

In Banc.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by Marius Janson against the Pacific Diking Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant is an Oregon corporation engaged in diking lands in the states of Washington and Oregon, with its principal office at Astoria. The complaint alleges that about January 23, 1915, the defendant entered into a written contract with certain named individuals, wherein it covenanted and agreed to construct and complete a certain dike 702 rods long on Gray's river in Washington, within six months, at an agreed price of $8 per rod; that 181.21 rods of the dike ran over and across the land of Mary Westerlund, one of the contracting parties, the mother of the plaintiff; and that under the terms of that contract with the defendant she was required to pay $8 a rod for the construction of that portion of the dike. It is averred that immediately after the execution of the contract between those parties, the plaintiff entered into a contract with the defendant, wherein it was agreed:

"That in consideration that defendant would construct said dike over and across the said lands of said Mary Westerlund a distance of 181.21 rods, and would charge the said Mary Westerlund therefor only the sum of $2.50 per rod, and would release her from her written obligation to pay defendant the sum of $8 per rod, and change and alter said contract so that said Mary Westerlund would not be required to pay to exceed the sum of $2.50 per rod for such dike, this plaintiff would clear the said entire right of way for the entire dike, which the defendant contracted and agreed to construct throughout its entire length, namely, 702 rods, for the sum of $2 per rod only, all of which terms the said defendant accepted and agreed upon, and thereupon, and pursuant to said contract, and not otherwise, this plaintiff, on or about said January 23, 1915, began the work of clearing said right of way, and cleared said right of way in accordance with his contract, and completed said work on the 26th day of July, 1915, at which date the said clearing was entirely completed throughout the said entire line of said dike, namely, 702 rods, fully in accordance with the terms of said contract entered into between plaintiff and defendant."

The plaintiff says that by reason thereof there became due and owing to him from the defendant $1,400, no part of which has been paid.

As a second cause of action the plaintiff alleges that between July 26 and August 24, 1915, at the special instance and request of the defendant, he cleared a right of way upon which it desired to and did construct a dike over the land of one M. Sverdrup in Wahkiakum county, Wash., for a distance of 1,100 feet, by cutting and removing brush and stumps, and that his services were reasonably worth $906.75, no part of which has been paid. As to each cause of action it is alleged that the labor was performed in the state of Washington, and that under the laws of that state the plaintiff is entitled to recover interest from the date of the completion of his contracts.

The defendant admits its corporate character and the making of the contract of January 23, 1915, with the parties therein named, for the construction of the dike on Gray's river, but denies all other material allegations of the complaint in both causes of action. As a further and separate answer it alleges that on January 23, 1915, the defendant "made a contract with said Mary Westerlund, and not this plaintiff, that it would allow said Mary Westerlund on her contract price the sum of $2 per rod for all lands cleared by said plaintiff," and that—

"Plaintiff promised and agreed to have a donkey engine in readiness to clear said land in advance of the work of defendant, and agreed to clear said land of all stumps, trees, and other obstacles, and plaintiff agreed to perform said work and labor for said sum of $2 per rod

Digitized by Google

and have the work and labor credited to and deducted from the contract price of Mary Westerlund of $8 per rod for completing said dike, and no other or different contract was made between plaintiff and defendant and said Mary Westerlund."

The defendant charges that the plaintiff failed to have the donkey engine ready at the agreed time, and neglected to clear the lands properly or to perform his agreement; that by reason thereof the defendant was delayed in the performance of its contract; and that at its own expense it was compelled to and did clear a large portion of the lands which were diked. It is then averred that under her contract Mary Westerlund was to have paid the defendant $500 when the dike was half completed, $500 when it was finished, and the balance within six months thereafter, but that she failed and neglected to pay any part thereof or otherwise comply with her contract; that the defendant was forced to file a lien upon her lands and bring suit to foreclose it; that upon the completion of the contract there was due and owing from Mary Westerlund $2,091.20; that pursuant to the contract pleaded in the answer a credit of $1,044 upon the lien against her was given to Mary Westerlund, as an allowance in full for all work performed by the plaintiff in clearing land for the defendant at the agreed price of $2 a rod; and that "thereafter a settlement was had with said Mary Westerlund, by and with the knowledge of plaintiff, wherein and whereby defendant agreed to allow said Mary Westerlund and this plaintiff the further sum of $544.20 as a credit on said contract price for diking said lands, and said Mary Westerlund settled with defendant by paying it the sum of $500 in full settlement and satisfaction of all claims and demands by either party on both of said contracts." It is finally said that the plaintiff cleared only 522 rods of land; that the sum of $1,044 so credited was in full payment thereof, and that no other or further sum "is due either plaintiff or Mary Westerlund upon either or both of said contracts." The reply denied all of the new matter in the answer.

A trial was had, and the jury returned a verdict in favor of the plaintiff and against the defendant for $1,540, upon which judgment was entered. The defendant appeals.

Norblad & Hesse, of Astoria, for appellant.

G. C. & A. C. Fulton, of Astoria, for respondent.

JOHNS, J. (after stating the facts as above). The only errors assigned are based on the admission and ruling out of evidence, and that the complaint does not state facts sufficient to constitute a cause of action.

[1, 2] When analyzed, the first cause of action is founded upon a contract between the plaintiff and the defendant, in which the plaintiff promised to clear 702 rods of land for diking purposes at the agreed price of $2 per rod. He claims that he was induced to make that price by reason of the fact that the defendant modified its contract with his mother, Mrs. Westerlund, to the effect that she should pay only $2.50 per rod for the diking of her lands by the defendant, instead of $8, as provided in the original contract to which she and certain other landowners were parties. The defendant denies the making of any contract whatever with the plaintiff, and pleads that it made an agreement with Mrs. Westerlund to allow her $2 per rod on her contract price for all the land cleared by her son, the plaintiff; that it had settled with her, and that with the plaintiff's knowledge she had received credit in full on her contract for all of the clearing which had been done by him. The second cause of action is for the alleged value of services performed by the plaintiff for the defendant at its special instance and request, which the defendant denies. The pleadings are in the usual form, and there is no merit in the defendant's contention that the complaint does not state sufficient facts.

[3] It is admitted that after extended negotiations the defendant and the landowners entered into a written contract for the diking of their property, dated January 23, 1915, to which Mrs. Westerlund was a party. In this the landowners agreed to pay $8 per rod for the diking of their respective premises. It appears that the plaintiff and Frank Behnke as manager for the defendant met at the office of W. T. Eakin at Astoria, and that there was then prepared a writing between the defendant and Mrs. Westerlund, dated "this ——— day of ———, 1914," wherein the defendant is known as the party of the first part and Mrs. Westerlund as the party of the second part, which was never signed by either party and never witnessed, and of which the material provisions are as follows:

"That the party of the first part is to top off and complete the dike along the river front, abutting upon my farm on Gray's river, making it conform to the rest of the dike being built around my farm, for the consideration of $2.50 per rod for all old dike so improved; also the first party is to employ the son of said Mrs. Mary Westerlund to clear the right of way for the building of the dike for the entire dike this day agreed upon by and between said first party and said second party together with others, for diking certain lands on Gray's river, for and in consideration of $2 per rod for each rod so cleared. The second party hereto and her son, Maurice Westerlund, who is to clear said right of way, agree to the above conditions."

After the plaintiff had introduced testimony tending to show that this unsigned instrument had been ratified and approved, and

Digitized by Google

that it was the basis and consideration of his alleged contract with the defendant, he offered the written memorandum in evidence as tending to prove the making of his contract with the defendant as alleged in his complaint. Objection was duly made to its introduction, but was overruled, and this is assigned as error. In Humphrey v. The Chilcat Canning Co., 20 Or. 209, this court held that:

"Where at the time parties enter into a parol contract, a memorandum is read containing the terms thereof which are assented to by the parties except in two particulars, such memorandum becomes a part of the transaction, and in an action on the contract the same is competent evidence as a part of the res gestæ, and may be considered by the jury for the purpose of assisting them to determine what the terms of the contract were."

Although this memorandum is dated "the ——— day of ———, 1914," and the written contract bears date of January 23, 1915, yet the proof indicates that both of them were prepared by W. T. Eakin at or about the same time, and they both relate to the same subject-matter. The plaintiff's evidence tends to show that both instruments were accepted and approved by the defendant at the time they were prepared, and that in consideration thereof he made his contract with the defendant to clear the land at the price of $2 per rod. Counsel for plaintiff then stated that the memorandum was not offered as "the finished contract of the parties, but as expressing the contract at the time, as a memorandum read over by the parties and consented to," or "for the purpose of showing that it was the contract, but it is part of the transaction, part of the res gestæ." In the condition of the record, we must assume that it was received for such purpose only, and that the jury was properly instructed concerning it. The facts bring this case within the rule and reason of the above decision.

[4] There were no objections to the charge or the refusal to give requested instructions, and the jury found for the plaintiff. There was evidence to support the verdict and we must assume that the jury was correctly instructed. The issues were clearly defined by the pleadings. The fact that the defendant had a dispute with Mrs. Westerlund over the amount of its claim against her, that it was forced to file a lien upon her property to secure the same, or that it afterwards settled with her would not be a defense to the plaintiff's cause of action. The plaintiff sought to recover upon an alleged contract, and as the jury found for him it must follow that there was such a contract. It does not appear that the testimony which was offered and refused would tend to prove that no such contract was made. Neither does it tend to show that the defendant entered into a contract with Mrs. Westerlund by which she would receive credit of $2 per rod on her diking contract, for all of the land which the plaintiff cleared. Those are the issues made by the pleadings. Moreover, there is no statement or showing to the court that the evidence which was refused was material, or what it would tend to prove if it were admitted.

Without going into the details of each assignment of error, after a careful reading of the record we do not find any prejudicial error in the ruling of the court in the admission or exclusion of evidence.

The judgment is affirmed.

WINN v. TAYLOR.

(Supreme Court of Oregon. June 15, 1920.)

1. Covenants ⇐96(3)—Outstanding lease is an "incumbrance."

An outstanding lease was an "incumbrance" within the meaning of the covenant of a warranty deed against incumbrances. (Citing Words and Phrases, Second Series, Incumbrance.)

2. Covenants ⇐118—Defendant grantor, admitting receipt of rental from third person and execution of warranty deed, had burden of proving right to retain rent.

In an action by grantee in a warranty deed, where defendant admitted the execution of the warranty deed and the receipt of rental from a lessee for the ensuing year, it devolved upon him to prove his right to retain such rent.

3. Appeal and error ⇐1033(1)—Assumption of burden by plaintiff favorable to defendant not error of which latter may complain.

Where real question in dispute in action by grantee against grantor for breach of a covenant against incumbrances was whether defendant or plaintiff was entitled to rent which accrued after the execution of the warranty deed, defendant cannot complain that case was tried on the theory that plaintiff must show that his title was to relate back prior to the time lessee made a payment to defendant of rent for the ensuing year.

4. Covenants ⇐127(6)—Measure of damages for breach of covenant against incumbrances.

When the breach of a covenant against incumbrance in a warranty deed consists of the existence of an unexpired term or lease, the measure of damages, in the absence of any special circumstances, is the value of the use of the premises for the time during which the grantee has been deprived thereof.

5. Pleading ⇐403(2)—Complaint sufficiently broad enough to support and sustain judgment after verdict.

A complaint which was not specific was broad enough after verdict to sustain a judgment, where the defendant met the issue and

Digitized by Google

affirmatively pleaded his rights in the matter and admitted necessary facts.

6. Covenants ⟸131—Interest allowed grantee in action against grantor collecting rents.

Where grantor in warranty deed breached covenant against incumbrances, in that a lease existed, and collected the rental for the ensuing year, to which grantee was entitled, the grantee in an action to recover such rental was entitled to interest on the amount of the rent from the date of collection by the defendant, in view of L. O. L. § 6028.

In Banc.

Appeal from Circuit Court, Umatilla County; Fred W. Wilson, Judge.

Action by Iley Winn against Moses Taylor. Judgment for plaintiff, and defendant appeals. Affirmed.

On April 21, 1914, the defendant was the owner of a 600-acre farm in Umatilla county, and executed a lease thereof to M. W. Hansell for a period of 4½ years from that date to October 1, 1919, at a stipulated cash rental of $5,100 for the first year, which also paid for the summer fallow and alfalfa, then growing on the premises, and which was given in advance. The lease further provided for the payment of "the sum of $6.00 per acre due and payable on October 1, 1914; and on all land cropped in the summer of 1914; and $6.00 per acre due and payable on October 1, 1915, and each October 1 thereafter during the life of this lease on all the above-described premises." Pursuant to the terms of the lease Hansell at once took possession, ever since has been, and now is, holding the premises, and in all respects has complied with the terms and provisions of that agreement.

On August 21, 1917, the defendant executed to the plaintiff this writing:

"Received of Iley Winn ten thousand dollars, which I accept as earnest money on the purchase price of following described lands which I agree to deed to said Iley Winn on the further payment of forty thousand dollars on or before November first, nineteen hundred seventeen, and balance of fifty thousand four hundred forty dollars in cash or by note secured by first mortgage on said lands, said note if given to draw 6½ per cent. interest from November first payable annually and said note payable on or before ten years after date of same."

Then follows a description of the land, which is identical with that leased to Hansell except for the addition of a 40-acre tract of timber. The complaint alleges:

"That under said contract * * * the defendant agreed to sell and the plaintiff agreed to purchase the above-described land, the defendant sold and assigned to the plaintiff all the defendant's rights, titles, and interest in and to said described land, and that it was further made a part of the contract that the defendant should execute a warranty deed of conveyance to said property to the plaintiff as soon as was convenient, and the plaintiff should make the payments upon said premises agreed to between the plaintiff and defendant.

"That under the terms of agreement entered into between the plaintiff and defendant, wherein the plaintiff agreed to purchase said described land, the plaintiff was to be deemed the owner of said described land as of the date of the contract of purchase, which was August 21, 1917."

It is then averred that on October 17, 1917, the defendant made to the plaintiff a deed to the said lands, with the following covenants:

"Together with all and singular the tenements, hereditaments and appurtenances hereunto belonging or in any wise appertaining and also all his estate, right, title and interest in and to the same, including dower and claim of dower.

"To have and to hold the above-described and granted premises unto the said Iley Winn, his heirs and assigns forever. And the said Moses Taylor, grantor above named, does covenant to and with the said Iley Winn, the above-named grantee, his heirs and assigns, that the above-granted premises are free from all incumbrances, except the right of way of the Oregon-Washington Railroad & Navigation Company through the lands described in said sections sixteen (16) and seventeen (17) and that he will, and his heirs, executors and administrators shall warrant and forever defend the above-granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, save and except as to incumbrance above mentioned."

Concurrent therewith and in accordance with the agreement of August 21, 1917, the plaintiff gave to the defendant a mortgage on the said lands in the sum of $50,000 to secure a promissory note of the same date for that amount, payable on or before five years after date, with interest at the rate of 6½ per cent. per annum.

The complaint says that under the terms of the lease Hansell paid the rental on October 1 of each and every year; that in the fall of 1917, on account of such rent, he paid the defendant the sum of $3,522 without the consent or authority of the plaintiff; that according to the contract between them the plaintiff was entitled to that sum; that after its receipt he demanded payment of it from the defendant; and that the defendant has neglected and refused to pay the same or any part thereof to the plaintiff.

For a second cause of action the plaintiff claims $52 on account of a pasture bill, and prays for judgment for $3,522 with interest at 6 per cent. per annum from October 2, 1917, and the further sum of $52 and costs.

The answer admits the making of the lease to Hansell; that on August 21, 1917,

Digitized by Google

the defendant agreed in writing to sell the real property to the plaintiff; that the latter then paid to the defendant "the sum of $10,000 on the purchase price"; that he "agreed to deed said land to the said plaintiff on payment of the balance of the purchase price" and that the warranty deed of October 17, 1917, was executed by the defendant. It is also admitted that "under the terms of the said lease the said M. W. Hansell paid lease money about the 1st day of October each year: that on or about the 2d day of October, 1917, the said M. W. Hansell paid as lease money the sum of $3,522 to the defendant;" and that the latter refuses to pay the same, or any part thereof, to the plaintiff.

As a further and separate answer the defendant alleges that, at the time of making the written contract with the plaintiff, on August 21, 1917:

"It was specifically understood and agreed prior thereto and at said time and as a part of the same transaction, though not so stated in said writing, that the defendant would be entitled to collect the lease money coming due and payable on account of said real property from said M. W. Hansell on the 1st day of October, 1917, and he did collect it. Thereafter, on October 18, 1917, at the time when the plaintiff paid another portion of the purchase price and secured the payment of the balance of it, thereby completing the purchase of the said real property, defendant executed and delivered to the plaintiff a warranty deed to it; but before doing so it was expressly and specifically understood and agreed by and between plaintiff and defendant that the lease money which was due and payable on the said 1st day of October, 1917, should belong to the defendant."

Replying, the plaintiff made a general denial of all new matter in the further and separate answer.

At the trial 10 of the jurors signed a verdict in favor of the plaintiff for the full amount of his claim, upon which judgment was entered against the defendant, and the latter appeals. He had filed a motion for judgment notwithstanding the verdict, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and a motion for a new trial, both of which were overruled. He makes 22 assignments of error, founded upon the admission of verbal testimony, the instructions of the court, and the overruling of his motions.

Peterson, Bishop & Clark, of Pendleton, for appellant.

Homer I. Watts, of Athena, and Raley, Raley & Steiwer, of Pendleton, for respondent.

JOHNS, J. (after stating the facts as above). It is admitted that on April 21, 1914, the defendant executed the lease to Hansell for a period of 4½ years, for a stipulated yearly cash rental; that on August 21, 1917, for a consideration of $10,000 the defendant contracted in writing to convey the lands to the plaintiff on or before November 1, 1917; that pursuant to such agreement, on October 17, 1917, he executed to the plaintiff his warranty deed, and that in consideration thereof the plaintiff gave him his note for $50,000, dated August 21, 1917, and a mortgage on the conveyed realty to secure the payment thereof. Although the lease recited that the first year's rent was paid at the time of execution, there was no stipulation as to when rent for the remaining years should be paid. But it is admitted that after the execution of the contract and prior to the giving of the deed Hansell paid the defendant rent in advance from October 1, 1917, to October 1, 1918.

There are no reservations or exceptions in the conveyance from the defendant to the plaintiff. The execution of the lease and the warranty deed and the payment of the rent in question are all set forth and alleged in the complaint; and in legal effect the plaintiff claims that he is entitled to the rent from October 1, 1917, to October 1, 1918, which Hansell paid in advance to the defendant.

It is admitted that at the time of executing the lease Hansell took possession of the premises, that he has held them ever since, and that his possession is lawful; and it inferentially appears that the lease was of record.

[1] Although the contract between the plaintiff and the defendant does not specify the nature of the conveyance to be made by the defendant, yet, pursuant thereto the defendant executed a warranty deed, covenanting that the premises were "free from all incumbrances" except the railroad right of way, and that he would "warrant and forever defend the above-granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, save and except as to incumbrance above mentioned," meaning the right of way. Concurrent with the execution of the deed the plaintiff became the owner of the lands in fee simple, and through its legal force and effect would be entitled to the use, possession and enjoyment thereof. But at that time the premises were subject to the Hansell lease and the defendant had collected rent in advance for the year beginning October 1, 1917. In Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94, it is said:

"An 'incumbrance,' within the meaning of a covenant against incumbrances, includes any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance. * * * Hence an outstanding lease is an incumbrance."

Crawford v. McDonald, 84 Ark. 415, 106 S. W. 206, holds that:

Digitized by Google

"The statutory covenant against incumbrances, implied by the use of the words 'grant, bargain and sell' in a deed, was broken at the time the deed was executed where the grantor had previously executed a written lease of the land which had not expired."

Brass v. Vandecar, 70 Neb. 35, 96 N. W. 1035, upholds the doctrine that:

"An unexpired term or lease, which prevents the grantee in the deed from recovering possession of the land described therein, is an incumbrance."

Defining "incumbrance," we find the following in 22 Cyc. p. 73:

"It is an interest in or chargeable on land, which may subsist in, or in favor of, a third person consistently with a transfer of the fee, but diminishes the value of the estate to the occupant. It is an estate, interest or right in lands, diminishing their value to the general owner; a paramount right in or weight upon the land, which may lessen its value."

See, also, 2 Words and Phrases, Second Series, p. 1021, and authorities there cited. In Friendly v. Ruff, 61 Or. 42, 46, 120 Pac. 745, 746, this court, speaking through Mr. Justice Burnett, said:

"An incumbrance, within the terms of such a covenant, includes any right to or interest in the land to the diminution of its value, but consistent with the passage of the fee by the conveyance. * * * Within the rule thus laid down, any adverse right or privilege which would interfere with or curtail the full and exclusive enjoyment of the fee-simple title by the grantee in the contract would justify the allegations of a breach of such a covenant."

We hold that the outstanding lease to Hansell was an incumbrance within the meaning of the covenants in the deed, for which an action would lie for breach.

[2-5] As the defendant admitted the execution of the deed and the receipt of the rental, it devolved upon him to prove his right to retain the sum in question. That matter was fairly submitted to the jury under instructions favorable to the defendant, and the jury found for the plaintiff. The latter assumed the burden of proof, and undertook to show that when the deed was executed on October 17, 1917, his title related to his contract of August 21, 1917, and that for such reason he was entitled to the rent which the defendant thereafter collected from Hansell. It will be noted that when the deed was executed the plaintiff gave his note for $50,000 to the defendant as of August 21, 1917, the date of the contract, and that it drew interest from that date. That was strong evidence tending to show that it was intended that the plaintiff's title should relate back, and that he should become the owner of the property as of August 21, 1917. Although the case was tried, and the jury was instructed, upon that theory, it was not prejudicial to the defendant, was a matter about which he had no right to complain. The real question in dispute is whether the defendant or the plaintiff was entitled to the rent which accrued after the execution of the warranty deed. Although he was not bound by that rule, yet in his complaint the plaintiff adopted the amount of rental collected in advance by the defendant, as the measure of his recovery. Such a measure was sustained in Fritz v. Pusey, supra, where it was held that:

"When the breach of either of the above covenants consists of the existence of an unexpired term or lease, the measure of damages, at least in the absence of any special circumstances, will be the value of the use of the premises for the time during which the grantee has been deprived of such use."

The same rule is laid down in Brass v. Vandecar, supra. Although the complaint might have been more specific, the defendant met the issue, and affirmatively pleaded that under an oral agreement with the plaintiff he had a legal right to the advance rental which he received, and according to the admitted facts that pleading is broad enough after verdict to sustain the judgment.

[6] It is also contended that the plaintiff was not entitled to interest upon the amount of his claim prior to the rendition of judgment. The jury found substantially that the advance rental collected from Hansell by the defendant in October, 1917, belonged to the plaintiff. The action was commenced on October 1, 1918, about one year afterwards. Section 6028, L. O. L., provides:

"The rate of interest in this state shall be six per centum per annum * * * on money received to the use of another and, retained beyond a reasonable time without the owner's consent, expressed or implied."

There is no dispute concerning the amount of the rent involved or the time of collection. Under such a state of facts the plaintiff was entitled to interest.

The judgment is affirmed.

Digitized by Google

NAULT v. PALMER et al.

(Supreme Court of Oregon. June 15, 1920.)

1. Judgment ⟸710—Decree as to water rights binding only on parties to litigation.

A decree fixing the rights and priorities of parties to a litigation over water rights did not affect other users of the waters of the river and its tributaries who were not parties to the suit, so that it was competent for the water board subsequently, on proper petition, to determine the rights and priorities of all users of the water system.

2. Waters and water courses ⟸152(12)—Supreme Court cannot affect water master in his absence as party.

Where, under the present status of adjudication of certain water rights, the only dispute that can arise concerns the administration of a prior decree regulating priorities, the Supreme Court, plaintiff having voluntarily dismissed the suit as to the water master, the official in charge of administration of the prior decree, can do nothing which would affect him.

3. Injunction ⟸105(2)—Public officers undertaking to enforce void statute by criminal prosecution may be restrained.

The general rule is that a court of equity is without jurisdiction to restrain by injunction the enforcement of criminal proceedings, the exception being that, where public officers are undertaking to enforce a void statute, injunction will lie against them, though not against the state.

4. Waters and water courses ⟸144—One having use of water cannot benefit junior tract to injury of intermediate user.

One having priority in the use of water is entitled to use it so that its highest duty will be effected, and can employ it to the best advantage of the tract to which it is appurtenant, but cannot postpone the use of water at its best on such tract in favor of a separate parcel junior to another which is junior to the first, and, having used it on the tract junior to all, take it up and give a belated use on the first tract to the injury of the intermediate user.

5. Waters and water courses ⟸217—Water master must preserve priorities and quantities consistently with duty of water.

It is the duty of a water master, under L. O. L. §§ 6617, 6618, to preserve the priorities and the quantities of irrigation water consistently with the highest duty of water as applied to all concerned.

6. Waters and water courses ⟸152(11) — Court determining priorities could not establish rule of evidence or prescribe penalties in advance.

The circuit court, in suit concerning water rights and priorities in certain streams, was without authority to establish an arbitrary rule of evidence or to prescribe penalties for future violations of priorities by declaring a voluntary diversion to a tract to which the water was not appurtenant would be conclusive evidence it was not needed by a prior appropriator for 15 days.

7. Appeal and error ⟸17—No appeal from circuit court to circuit court.

There can be no appeal from the circuit court to the circuit court, especially to the same circuit court.

In Banc.

Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Suit by Victor Nault against R. R. Palmer and others. From decree of dismissal, plaintiff appeals. Affirmed.

Narrating that he is the owner of certain lands in Baker county, which we shall call the Nault place, and that the defendants Palmer and Denham are the owners of another tract designated as the McCulloch place, the plaintiff says in his complaint that in a suit between Palmer and Denham as plaintiffs and himself and others as defendants in the circuit court for Baker county, brought for the purpose of determining the priorities among the users and appropriators of the waters of Sutton creek and its confluent, Ebell creek, on March 28, 1912, a decree was duly rendered giving to Palmer and Denham the first right, amounting to 100 inches of water, to be used upon the McCulloch place, which right dated from an appropriation in 1872 and 1873, and a second permit for use to the Nault place, and another called the Richardson and Gilliam place, in the proportion of 35 inches to Nault and 65 inches to Richardson and Gilliam, but otherwise equal in right and time as between the last two farms. The complaint recited the full decree in detail, unnecessary to repeat; but it is sufficient to say that it confined the appropriation to each tract to that particular plot, and prescribed as to each one in effect that, if the appropriation to any tract should be diverted to another at a time when adverse appropriations were not satisfied, it should be conclusive evidence that the water so diverted was not required on the premises to which it was applicable for 15 days thereafter, and during that time should become a part of the water subject to the other priorities as adjudicated in the decree.

It seems from the pleadings and evidence that the Nault holding is highest up the stream system in question and the McCulloch farm is lowest, and between them there intervenes what is called the Gossett place, now owned by Palmer and Denham, the water right appurtenant to which is junior to that of Nault. The complaint charges that Palmer and Denham plowed up the ditches originally constructed and in use at the time of that decree, whereby water was conveyed to the McCulloch place, and changed the point of their diversion so as to make the water available for irrigating not only the McCul-

Digitized by Google

loch place, but also the Gossett place, and says, in substance, that they postponed the irrigation of the McCulloch place, although it needed water, used the water on the Gossett place and afterwards availed themselves of their priority over Nault and irrigated the McCulloch place to the exclusion of his right, to his great damage. The plaintiff avers that, inasmuch as they had diverted the water from the McCulloch ranch to the Gossett place when his appropriation was not satisfied, he assumed, as he had a right to do, that this was a violation of the decree and conclusive evidence of that fact, giving him the right to use the water for 15 days, and hence he opened his gates and was irrigating his place when the defendants caused his arrest in pursuance of a conspiracy between Palmer and Denham as appropriators and McKinney as water master to deprive him of the use of the water. He also says that immediately upon his arrest by McKinney, as water master, the defendants, against his consent and over his protest, closed his headgates and prevented him from using the water, and that it is their intention to cause his arrest whenever he attempts to irrigate his land. He prays for damages, that the defendants be prohibited from using their appropriation for any other than the McCulloch place, that they be restrained from increasing the irrigable area of land upon that farm, that the arrest of the plaintiff be enjoined, and for other general relief.

The defendants deny the whole complaint, except the ownership of Palmer and Denham in the land, water, and water rights described therein. They reiterate that ownership and aver that upon a petition filed by the water users of Powder river and its affluents, among which are Sutton creek and Ebell creek, the state water board surveyed the river and its tributaries, ascertained the rights of the users of those waters, and found and determined the rights of the plaintiff and others, among them Palmer and Denham, incorporating the same in its findings, which in due time were reported to the circuit court, which rendered a decree accordingly on May 18, 1918. The answer says that Nault participated in that proceeding, was notified of the time and place of the filing of the findings and order of determination, and was given opportunity to enter objections to the same, but that no objections whatever were filed; that the decree of the circuit court upon the board's findings has not been appealed from; that prior to the times mentioned in the complaint the water board had appointed the defendant McKinney water master for the district in which the premises here involved are situated; and that in his endeavor to distribute the water in conformity with the decree McKinney was compelled to arrest the plaintiff for interfering with the waters and the distribution thereof according to the decree. Palmer and Denham claim that the plaintiff's diversion of the water damages them by depriving them of its use for irrigating their growing crops, and that by reason of his ignoring the decree they have incurred loss of time and expenditure of money, to their further damage. They pray that his suit be dismissed, and that Palmer and Denham have judgment against him for costs and disbursements.

The reply admits all the answer up to and including the decree of the circuit court on the findings of the water board, but denies all other allegations of that pleading. The plaintiff further alleges in his final pleading that the decree in the original suit was made long prior to any determination by the board of relative rights in the water; that all the parties presented their claim based upon that decree; and that nothing was intended in that proceeding to supersede the former adjudication. At the beginning of the hearing of this suit the plaintiff dismissed the same as to the defendant McKinney, the water master. After testimony had been taken and argument had, the circuit court entered a decree dismissing the suit, and the plaintiff appeals.

A. A. Smith and William Smith, both of Baker (A. A. Smith and Smith & Smith, all of Baker, on the brief), for appellant.

McColloch & McColloch, of Baker (W. H. Strayer, of Baker, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). [1] From the record it appears that the rights and priorities of the parties were fixed and determined in the original decree. This, however, could not affect other users of the waters of Powder river and its tributaries who did not participate in that suit. The decree was binding only upon the parties to it. It was competent, therefore, for the water board on proper petition, as is admitted, to examine and determine the rights and priorities of all users of that water system, including the creeks mentioned. The water rights and priorities of the immediate parties to this suit were preserved, not impaired, but declared, by the ensuing decree of the circuit court. From that point on it became a question of the administration of those rights. We cannot give to either of the users of the water any right separate or different from that which the decree has declared. Nothing is gained by piling decree upon decree.

So far as the users themselves are concerned, one means for the enforcement of the decree is found in the provisions of section 414, L. O. L., reading thus:

"A decree requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party do not comply therewith, be deemed and taken to be equivalent thereto. The court or judge thereof may enforce an or-

Digitized by Google

der or decree in a suit, other than for the payment of money, by punishing the party refusing or neglecting to comply therewith, as for a contempt."

Another method of executing the terms of the decree is through the operations of the water master as hereinafter noted. The part of the water code embodied in chapter 6 of title 43, L. O. L., treating of the administration of water rights, provides substantially that the water board shall cause a survey of a stream system to be made upon the petition of individuals interested, and that, after giving a proper notice and hearing to all parties concerned, it shall make a report to the circuit court, setting forth the rights and priorities of all users of water involved. Notice of the filing of such report is provided for and opportunity is given to be heard in support of or objection to the report, with the final result of a decree rendered upon the report, either affirming or modifying the same, and that decree is a determination of the rights and priorities of all parties to the proceeding the same as any other adjudication of that tribunal. For the administration of the rights thus perpetuated, a water master is provided, whose duty it is to see that the water is used in accordance with the court's determination. His duties are summed up in sections 6617 and 6618, L. O. L., as they stood at the times narrated in the pleadings herein. They are here set down:

"Sec. 6617. It shall be the duty of the said water master to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from said streams of his district. The water master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. Whenever, in the pursuance of his duties, the water master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the division superintendent or any water master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

"Sec. 6618. Said water master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water."

[2] It is true enough that under the latter section injunction will lie against the water master if he fails to carry into effect the decree of the court determining existing rights to the use of the water. It is true also that the adverse owners of water rights would be proper parties to such a suit as far as their rights were involved. But the essential party to such proceeding for injunction would be the water master. Conceding, without deciding, that the pleadings here show malfeasance by that officer, yet, as the plaintiff has voluntarily dismissed the suit as to him, no relief can be awarded against him in this litigation. As stated, the rights of Palmer and Denham and of the plaintiff have been adjudicated by the decrees already rendered, beyond our power of change. Under the present status of adjudication, the only dispute that can arise concerns the administration of the decree; and, not having before us the only official in charge of that administration, we cannot do anything which would affect him.

Complaint is made in a general way that the plaintiff has been arrested, and that the defendants propose to arrest him as often as he opens his headgate. In Hall v. Dunn, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193, it is said:

"The rule is quite general that a court of equity has no jurisdiction by injunction to restrain the enforcement of criminal proceedings."

[3] The exception to that rule is also pointed out in the same case, and can be stated generally to be that, where public officers are undertaking to enforce a void statute, injunction will lie, not against the state, but against them, because they do not in fact represent the state, for it has not sanctioned any such proceeding; the supposed statute being void and constituting no genuine utterance of the lawmaking power. See, also, Denton v. McDonald, 104 Tex. 206, 135 S. W. 1148, 34 L. R. A. (N. S.) 453. Here no attack is made upon the validity of the legislation under which the water master is proceeding. The regularity of the decree which he is supposed to enforce is confessed. It is plain, therefore,

Digitized by Google

that the case made by the plaintiff is not within the exception to the general rule that equity will not undertake to control criminal proceedings. The guilt or innocence of a criminal charge can be successfully established by the ordinary course of the law.

[4, 5] Any one having priority in the use of water is entitled so to use it that its highest duty will be effected. He can employ it to the best advantage of the tract to which it is appurtenant. He cannot be compelled to use it in advance of such a situation. On the other hand, he cannot postpone the use of water at its best upon that tract in favor of a separate parcel junior to another which in turn is junior to the first tract, and then, after having used it on the tract junior to all, take it up and give belated use on the first tract, to the injury of the intermediate user. This would be a perversion of the order of priority, constituting a legal waste; in other words, it would be wasting the senior appropriation as against the immediate junior and in favor of one junior to all others. It is the duty of the water master under the statute to preserve the priorities and the quantities consistently with the highest duty of water, as applied to all concerned.

[6] Great stress is laid by the plaintiff on the provisions of the original decree declaring that the voluntary diversion of water to a tract to which it was not appurtenant would be conclusive evidence that the water was not needed by the prior appropriator for 15 days thereafter, and it is upon this assumed state of facts that the plaintiff predicates his right to open his headgate. So far as that is concerned, the circuit court in the original suit was called upon to determine the rights and priorities of the parties respecting the streams there involved. It had no authority to establish an arbitrary rule of evidence or to prescribe penalties for future violations of priorities. Those matters were not pertinent to or included in the issues in that case.

[7] The only questions that arise on the record as here disclosed are those of administration of the previous decree. The administrator, namely, the water master, is not before us. As to the parties who remain in court, we cannot make any adjudication additional to or different from those already rendered by a court confessedly having jurisdiction of the parties and of the subject-matter. The same was true of the circuit court as to this suit; for there can be no appeal from the circuit court to the circuit court, and especially to the same circuit court.

Under the circumstances, the trial court was right in dismissing the suit, and its order will be affirmed, without prejudice to the rights of any party to operate by injunction or other proper procedure against the water master or any party to the decree as to the administration thereof. Neither party will recover costs or disbursements from the other here or in the circuit court.

JOHNS, J., was present at the hearing, but did not participate in the decision of this case.

LOGAN v. CHAS. K. SPAULDING LOGGING CO.

(Supreme Court of Oregon. June 15, 1920.)

1. Navigable waters ⟸1(5)—Stream practicable for floating timber products navigable to such extent; "navigable stream."

A stream which at certain periods of the year it is practicable to use in its natural state for the purpose of floating timber products is a navigable stream for such purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

2. Eminent domain ⟸84—Logging company's interference with stream a "taking of property" within guaranty of compensation.

Interference by logging company with natural flow of a stream, in so far as it injures a riparian proprietor, or interference with his right to the use of a stream, is a "taking" pro tanto of his property, governed by Const. art. 11, § 4, prohibiting such taking without compensation first made or secured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking.]

3. Navigable waters ⟸43(1)—Use of splash dams proper in so far as not injuring riparian owners.

In so far as the use of splash dams does not work injury to the rights of riparian owners, their use is proper.

In Banc.

Appeal from Circuit Court, Polk County; H. H. Belt, Judge.

Suit by John P. Logan against the Chas. K. Spaulding Logging Company. From decree for plaintiff, defendant appeals. Decree modified, and decree directed to be entered as modified.

This is a suit to declare null and void an order of the Public Service Commission granting to the defendant, the Charles K. Spaulding Logging Company, a franchise for the improvement and use of the Luckiamute river for floating logs and other forest products thereon, and to restrain the defendant logging company from increasing or decreasing the natural flow of the water in the river, or in any manner interfering with plaintiff's property or water rights. A demurrer to the complaint was filed by the Public Service Commission, which being sustained by the trial court, the suit proceeded as be-

Digitized by Google

tween plaintiff and the defendant logging company, which will hereafter be referred to in the opinion as the defendant. A trial was had, resulting in a decree enjoining the defendant "from increasing, decreasing, altering, changing, or otherwise interfering with the natural flow of the Luckiamute river above the milldam of the plaintiff, J. P. Logan." The facts, so far as essential to the discussion, are stated in the opinion.

J. P. Winter, of Portland (Winter & Maguire, of Portland, on the brief), for appellant.

Arthur Clarke, of Corvallis (McFadden & Clarke, of Corvallis, on the brief), for respondent.

BENSON, J. (after stating the facts as above). For 50 years the plaintiff and his predecessors in interest have been the owners of a tract of land through which the Luckiamute river flows, and upon which, during all of that time, there has been maintained and operated a gristmill, for which the power is obtained by a dam across the river, using the waters of the stream, by means of turbine wheels, to drive the machinery of the mill. For 20 years past the stream has been used also by the defendant and others for floating logs and other forest products. In this connection the defendant maintains two dams across the river, one being about 12 miles above the gristmill, and the other about 16 miles above the same. The upper one of these dams has not been used by the defendant for about 10 years. The lower one, which is about 30 feet high, is used for the purpose of accumulating water for the storage of logs and for sluicing logs down the river. It has two sluice gates, each about 16 feet wide and 14 feet deep. The supply of water accumulated by this dam is sufficient for the storage of above 10,000,000 feet of logs. During the summer and fall the storage pond is filled with water and the logs deposited therein. During the winter the sluice gates are raised, thereby releasing the stored logs and, with them, the additional water, thereby raising the water in the bed of the stream about 6 feet, which accomplishes the desired floating of the logs. After the gates are thus opened, it requires about 4 hours for the increased flow and its burden of logs to reach the milldam, and about the same length of time to pass the mill. During this passage the increased volume of water in the stream "drowns" the water wheels, and the plaintiff's mill is compelled to suspend operation until the drive is concluded. During the periods when the storage pond at the dam is filling the supply of water is cut off from the gristmill for several hours at a time, at which times the milling operations must be suspended. In 1905 the plaintiff began suit to enjoin the defendant's sluicing operations, but before a trial was had the parties entered into a contract whereby the defendant paid to plaintiff certain sums as compensation for past damage, and agreed to make stipulated payments in the future. This agreement was to be in force for 5 years, and expired on December 20, 1912, but was extended by parol agreement for 2 years longer. Thereafter the plaintiff declined to negotiate further, and insisted that sluicing should cease.

In 1917 the Legislature passed the act set out in General Laws of Oregon for 1917, at chapter 128 thereof, and shortly thereafter the defendant made application thereunder to the Public Service Commission for a franchise "to raft, drive, float, boom, sort and hold logs, lumber, or other timber products in the Luckiamute river in Polk and Benton counties within the state of Oregon." Thereafter, on March 29, 1918, the Public Service Commission made an order granting the franchise and formulated rules and regulations for defendant's conduct thereunder, whereby, inter alia, the defendant is limited to "not more than three floods or splashes daily, at stated times, to be fixed and determined by the applicant," etc. The use of splash dams is also limited to the period between the 1st day of November and the 1st day of May of each year. Thereupon plaintiff commenced this suit. It is plaintiff's contention that the act of 1917 supra is in violation of section 4 of article 11 of the contention of Oregon, which reads as follows:

"No person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law."

Plaintiff's attack upon the validity of the statute is directed to the provisions therein which permit the use of splash dams and the entrance of loggers upon riparian lands for the purposes of reclaiming stranded logs, etc., without providing for the prior assessment and tender of compensation to the owner therefor.

The defendant concedes, of course, that neither the state nor the defendant, as its agent, has the right to take private property, even for a public use, without compensation being first made or secured, but it very earnestly maintains that increasing or decreasing the natural flow of the water in the stream, and going upon the riparian owner's private lands for reclaiming stranded logs, or aiding with their peevys the passage of the logs in the stream, do not constitute a taking of property.

[1] There is no question but that the Luckiamute river is a navigable stream for the purpose of floating timber products, not by virtue of the declaration of that fact in the act of 1917, but by reason of the fact that at certain periods of each year it is practicable to use it, in its natural stage, for such purposes. 1 Farnham, Waters, § 24; Kamm

Digitized by Google

v. Normand, 50 Or. 9, 91 Pac. 448, 11 L. R. A. (N. S.) 290, 126 Am. St. Rep. 698. In the case last cited Mr. Chief Justice Bean discusses nearly every question which might conceivably arise in a controversy like the one at bar. In discussing the elements which are requisite to establish the navigability of a stream for floating logs, he uses this language:

"But a stream which is not such a highway cannot be made one by the use of dams or other artificial means, without first acquiring the rights of riparian proprietors. 1 Farnham, Waters, § 139. Nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. No one has a right to store water, and then suddenly release the accumulation, and thus increase the natural volume of the stream, and overflow, injure or wash the adjoining banks, or otherwise interfere with the rights of riparian owners. The riparian proprietor is entitled to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means. [Citing a number of cases.]

"Dams, dikes, embankments, and the like may be constructed in or along floatable streams to facilitate their use (Union Power Co. v. Lichty, 42 Or. 563, 71 Pac. 1044), but not to the extent of injuring the riparian proprietors by retarding the flow of the water or sending it down in increased volumes to his injury or at times when the stream would not otherwise be navigable. And this rule is not changed by the fact that a stream cannot be successfully used for logging purposes without such artificial aids to navigation on the ground of necessity."

[2] It will be observed that the doctrine thus announced clearly asserts that interference with the natural flow of the stream, in so far as it injures the riparian proprietor, or interferes with his enjoyment of his right to the use of the stream, is a taking pro tanto of his property, which is governed by the constitutional provision above quoted. This statement of the law has been reaffirmed by this court in Trullinger v. Howe, 53 Or. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545, and Flinn v. Vaughn, 55 Or. 372, 106 Pac. 642, and must be taken as the settled law in this state, regardless of what may have been the holding in some other jurisdiction.

[3] It should be observed, however, that the prior holdings of this court expressly limit the inhibition upon the use of splash dams to such a use as works an injury to the rights of the riparian owner, and this limitation we think is a proper and just one. The decree of the lower court is an absolute restraint upon any increase or decrease of the natural flow of the stream, and it should be modified so as to enjoin any such increase or diminution of the natural flow of the stream to the injury of the plaintiff, and a decree will be entered here to that effect; neither party to recover costs in this court.

BURNETT and HARRIS, JJ., not sitting.

STATE v. ROBERTS. (No. 2451.)

(Supreme Court of Utah. May 27, 1920.)

1. **Criminal law ⟸1022—No appeal from conviction in district court on appeal from city court, where constitutionality or validity of statute is not involved.**

District Court's judgment of conviction for violation of the Prohibition Act on an appeal from conviction in the city court under Comp. Laws 1917, § 1717, re-enacted in Laws 1919, c. 34, is not appealable to Supreme Court unless the constitutionality or validity of a statute is involved; the district court's judgment being final in such case.[1]

2. **Statutes ⟸225¾—Legislature having re-enacted statute will be presumed to have been satisfied with court construction prior to re-enactment.**

The Supreme Court must assume that the Legislature in re-enacting a statute was satisfied with the construction the Supreme Court placed on the statute prior to its re-enactment.

Appeal from District Court, Weber County; A. W. Agee, Judge.

James H. Roberts was convicted of unlawfully having in his possession intoxicating liquors, and he appeals. Appeal dismissed.

A. G. Horn, of Ogden, for appellant.

Dan B. Shields, Atty. Gen., and O. C. Dalby, James H. Wolfe, H. Van Dain, Jr., and D. M. Draper, Asst. Attys. Gen., for the State.

FRICK, J. The defendant was charged in the city court of Ogden City with having in his possession intoxicating liquors contrary to the provisions of the Prohibition Act of this state (Comp. Laws 1917, § 3343), and was convicted. He appealed to the district court of Weber county, and was in that court again convicted. He now appeals to this court from the latter conviction, and assigns numerous errors relating to the admission of evidence against him, to the exclusion of certain evidence proffered on his behalf, to some of the instructions given by the court, to the refusal to instruct as requested, and that the district court erred in taxing costs against him.

[1] The state has interposed a motion to dismiss the appeal upon the ground that this court is without jurisdiction for the reason that under the statutes of this state the judgment of the district court on an appeal

[1] Salt Lake City v. Lee, 49 Utah, 197, 161 Pac. 926; State v. Falsetta (no opinion).

Digitized by Google

from the city court is final, unless the constitutionality or validity of some statute which is material to the conviction is drawn in question. There being no assignment which assails the constitutionality or validity of any statute, the state insists that the judgment of the district court is final, and hence that this appeal cannot be sustained. The motion is based upon the decision of this court in the case of Salt Lake City v. Lee, 49 Utah, 197, 161 Pac. 926, and the case of State v. Falsetta, in which case the appeal was dismissed upon the ground stated in the motion in this case. In the Falsetta Case, no written opinion was filed. We are of the opinion that the motion to dismiss the appeal should prevail.

[2] The case of Salt Lake City v. Lee, supra, was a prosecution for the violation of a city ordinance of Salt Lake City. The action was commenced in the city court, where the defendant was convicted. He appealed to the district court of Salt Lake county, where he was again convicted, and from which conviction he appealed to this court. The appeal in that case was based upon the identical statute upon which the appeal is based in the case at bar, and on which the appeal in the Falsetta Case was based. See Comp. Laws Utah 1917, § 1717. The section referred to is set forth at length in the case of Salt Lake City v. Lee, supra, and need not be repeated here. After that decision was handed down the Legislature re-enacted the section in the precise language as it was when it was construed in the Lee Case. Laws Utah 1919, c. 34, p. 57. The act relating to city courts of this state was amended by chapter 34, supra, and one of the principal changes made in said amendment was to make the section to which we have referred, giving the right of appeal from city courts of cities of the first class, and which was construed in the Lee Case, applicable to all the city courts of this state, whether of the first or second class, whereas, before that time, that section had applied only to the courts of cities of the first class, which included Salt Lake City. By re-enacting said section we must assume that the Legislature was satisfied with the construction this court placed upon the statute in the Lee Case and therefore adopted the same and made it applicable to all the city courts of this state. It is needless, therefore, to enlarge upon the reasons why this appeal cannot be sustained.

Counsel for the appellant, at the hearing, however, suggested that in view that the district court had taxed the costs against the appellant without an express statute authorizing that to be done, for that reason the appeal should be considered by this court. If it were conceded that the district court had erred in that regard it would, however, constitute an error of law merely, and not one which involved the constitutionality or validity of any statute. An error of judgment in that respect, if it were such, would, in the eye of the law, be no different from any other error of judgment respecting any other question of law or fact, and hence that assignment is not reviewable by this court.

For the reasons stated, the appeal should be, and it accordingly is, dismissed.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

DIXON v. SECOND JUDICIAL DIST. COURT OF NEVADA IN AND FOR WASHOE COUNTY. (No. 2370.)

(Supreme Court of Nevada. June 8, 1920.)

1. Costs ⟸3—Not allowable in absence of statutory authority.

Costs are wholly the creature of statute, and are not allowable in the absence of the statute permitting such allowance.

2. Costs ⟸172—Attorney's fees not allowable in action for services appealed from justice court.

An action to recover attorney's fees, appealed from a justice of the peace to the district court, is tried as other trials in the district court under Rev. Laws, § 5794, and, since there is no statute authorizing allowance of attorney's fees to the successful plaintiff in such an action, none can be allowed in view of Rev. Laws, § 5376, providing that the compensation of the attorney is governed by agreement, express or implied.

3. Certiorari ⟸64(2)—Inquiry limited to jurisdiction of lower court.

In original proceedings in certiorari to review a judgment including attorney's fees because the court had no jurisdiction to allow such fees, the inquiry will not be extended further than to determine whether the lower court had jurisdiction to make the order complained of.

Original proceeding in certiorari by J. B. Dixon against the Second Judicial District Court of the State of Nevada in and for the County of Washoe. Writ granted, and judgment of court modified by striking therefrom the allowance of the attorney's fees.

See, also, 183 Pac. 312.

J. B. Dixon, of Reno, for petitioner.

Anthony M. Turano, of Reno, for respondent.

SANDERS, J. This is an original proceeding in certiorari. The return to the writ shows that A. Grant Miller and Gray Mashburn, copartners doing business under the firm name and style of Miller & Mashburn,

Digitized by Google

brought an action in the justice's court, Reno township, county of Washoe, against J. B. Dixon, to recover the sum of $138.88 for legal services rendered the defendant under a special contract of employment. The justice rendered judgment for the full amount and taxed and included in the judgment the costs allowed by law. J. B. Dixon appealed the case to the district court, where a trial was had de novo before said court without a jury. The court, in accordance with its findings of facts and conclusion of law, gave judgment as follows:

"Now, therefore, by reason of the premises, it is ordered, adjudged, and decreed that the plaintiffs herein have and recover from the said defendant the sum of $138.88, and also costs of this action and an attorney's fee of $75."

The relator contends that the trial court was without jurisdiction, power, or authority to include in its judgment the item of $75 as an attorney's fee. That this contention is correct we fully agree.

[1] Costs are wholly the creature of statute, and hence are not allowable in the absence of a statute permitting such allowance. 20 Cyc. 24; 5 Encyc. Pl. & Pr. 110; 7 R. C. L. 792.

[2] The compensation of an attorney and counselor for his services is governed by agreement, express or implied, and is not restrained by law. Section 5376, Rev. Laws.

The general rule is that counsel fees are not recoverable by a successful party either in an action at law or in equity, except in the enumerated instances where they are expressly allowed by statute. Mooney v. Newton, 43 Nev. —, 187 Pac. 721; Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485. And, in the absence of a statute authorizing it in plain terms, no such fee can be taxed on appeal. 11 Cyc. 231; 5 Standard, 1009.

Turning to our statute, we find no warrant therein for the allowance of an attorney's fee on appeal from a justice's court. When an action commenced in said court is tried anew on appeal, the trial must be conducted in all respects as other trials in the district court. Section 5794, Rev. Laws. But there is nothing in this provision or under any other section of the Practice Act that confers upon the district court power to award costs not expressly authorized by statute.

[3] The inquiry on a writ of certiorari will not be extended further than to determine whether the inferior tribunal has jurisdiction to make the order complained of.

Being of the opinion that the court exceeded its jurisdiction in awarding an attorney's fee, the judgment will be modified according to the views here expressed. As thus modified the same will be and is hereby affirmed.

COLEMAN, C. J., and DUCKER, J., concur.

STATE ex rel. SANDOVAL v. BOARD OF COM'RS OF GUADALUPE COUNTY. (No. 2375.)

(Supreme Court of New Mexico. May 27, 1920.)

(Syllabus by the Court.)

Appeal and error ⟸555—Where assignments follow exceptions stricken, the cause will be affirmed.

Where assignments of error are based solely upon matters shown by the bill of exceptions, and the bill of exceptions is stricken, the cause will be affirmed on motion.

Appeal from District Court, Guadalupe County; Leahy, Judge.

Proceeding between State of New Mexico, on the relation of Benito D. Sandoval for himself and others similarly situated, and the Board of County Commissioners of the County of Guadalupe, State of New Mexico, sitting as a canvassing board. Judgment for the former, and the latter appeals. Affirmed.

Patton & Hatch, of Clovis, for appellant.
F. Faircloth, of Santa Rosa, for appellee.

ROBERTS, J. Heretofore the bill of exceptions in this case was stricken. Appellee moves for an affirmance of the judgment of the trial court, because the assignments of error are all based upon matters shown only by the bill of exceptions. This contention is correct, and the cause will therefore be affirmed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

ROBERSON, Treasurer, v. CITIZENS' LUMBER CO. (No. 2426.)

(Supreme Court of New Mexico. May 27, 1920. Rehearing Denied July 1, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸534—Grant of appeal should be shown by the record proper, and not in the bill of exceptions.

The granting of an appeal to the Supreme Court by the judge of the district court does not occur "in the trial of the cause"; consequently should be shown by the record proper and not in the bill of exceptions.

2. Appeal and error ⟸395 — Circuit court cannot entertain appeal where cost bond is not duly filed.

Under section 15, chapter 43, Laws 1917, where no cost bond is filed within 30 days, the appeal or writ of error abates, and the Supreme Court has no power to entertain an appeal where the cost bond is not filed within the time limited.

Digitized by Google

3. Appeal and error ⟸574(2) — Exceptions, bill of ⟸39(1)—Time after which district court judge cannot certify transcript or settle bill of exceptions stated.

The judge of the district court has no power to certify to the transcript of the testimony, or to sign and settle the bill of exceptions, more than 80 days after the appeal is allowed, unless the time for signing the same has been extended as authorized by the statute.

Appeal from District Court, Guadalupe County; Edwin Mechem, Judge.

Suit by Harry R. Roberson, Treasurer of the Village of Santa Rosa, N. M., against the Citizens' Lumber Company. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

W. T. Brothers, of Santa Rosa, for appellant.

F. Faircloth, of Santa Rosa, for appellee.

ROBERTS, J. Appellant, as treasurer of the village of Santa Rosa, brought suit against the Citizens' Lumber Company, a corporation doing business in the village, for the recovery of an occupation tax alleged to be due the village. From a judgment in favor of appellee, the town treasurer evidently attempted to prosecute an appeal, and has filed in this court an alleged transcript of record. Appellee moves to strike out the bill of exceptions and practically all the other portions of the record proper because of the failure of the transcript to show that any of the papers, such as the complaint, demurrer, answer and reply, and bill of exceptions, were ever filed in the office of the clerk of the district court. The method of preparing the transcript of record is subject to condemnation. There is nothing to show when any paper was filed in the office of the clerk, and, if such papers were ever filed, it is shown only by the certificate of the clerk to the transcript, in which he certifies that the foregoing papers are on file in his office. Certainly the transcript shows lack of care and attention on the part of both the clerk of the district court and the attorney for the appellant. But, if this were the only defect in the transcript, we would be inclined to hold that the certificate of the clerk showed that the papers certified to were on file in his office. There is a fatal defect, however, in the transcript which requires a dismissal of the appeal.

If an appeal was taken from the judgment, it is shown only by the bill of exceptions, and was taken on April 12, 1919. The bill of exceptions recites:

"Plaintiff in open court excepts to the findings of fact and judgment filed by the court in said cause, and gives notice (in open court) that it will appeal said cause to the Supreme Court of the state of New Mexico, which appeal is granted by the court."

[1, 2] The granting of an appeal does not occur "in the trial of the cause"; consequently should be shown by the record proper and not in the bill of exceptions. But, if the failure of the record proper to show the granting of the appeal should be overlooked, and we should hold that, because such fact did appear in the bill of exceptions, the appeal would be entertained, nevertheless the appeal would be dismissed because no cost bond was filed within 30 days as required by section 15, c. 43, Laws 1917. Cost bond in this case was filed, or apparently was filed, some time after the 27th day of August, 1919, because that is the date upon which it was executed. If an appeal was taken in this case, it was taken on April 12, 1919, and the last day for filing cost bond was on May 12th.

[3] In the case of Hernandez v. Roberts, 24 N. M. 253, 173 Pac. 1034, we held that section 15, supra, had the effect of abating an appeal or a writ of error where no cost bond is filed within the time required by the statute. And again the certified transcript of the testimony could not be considered by the court, even if the appeal was not dismissed, because, taking April 12, 1919, as the date of the allowance of the appeal, the certified transcript of the testimony would necessarily have to be signed by the judge within 80 days thereafter, unless the time for signing the same had been extended. No order of extension appears in the record, and the transcript of evidence was certified by the trial judge August 25, 1919. The duty of having a proper transcript prepared, of course, rests upon the appellant.

Because of the failure to file a cost bond within 30 days after the allowance of the appeal, the appeal will be dismissed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

ROBERSON, Treasurer, v. MOISE BROS. CO. (No. 2427.)

(Supreme Court of New Mexico. May 27, 1920. Rehearing Denied July 1, 1920.)

(Syllabus by the Court.)

Appeal and error ⟸704(2)—Appeal presents no question without findings and conclusions in another cause stipulated to be controlling.

Where parties to a cause in the district court stipulated that the findings and conclusions in another case shall be accepted as the findings and conclusions of law in the case covered by the stipulation, there is no question for consideration on appeal from a judgment in the latter case, in the absence of the findings and conclusions of law in the cause which the stipulation provided should control.

Appeal from District Court, Guadalupe County; Edwin Mechem, Judge.

Suit by Harry R. Roberson, Treasurer of the Village of Santa Rosa, N. M., against

Digitized by Google

Moise Bros. Company. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

W. T. Brothers, of Santa Rosa, for appellant.

F. Faircloth, of Santa Rosa, for appellee.

ROBERTS, J. This is a companion case to No. 2426, Harry R. Roberson, Treasurer, v. Citizens' Lumber Co., 190 Pac. 353, and a like motion is interposed by appellant to strike certain portions of the transcript. The same inexcusable negligence in preparing the transcript in this case existed on the part of the clerk of the district court and the attorney for appellant, but the defect in this transcript of record which precludes a consideration of the case by this court is because of the following:

The parties stipulated in the lower court as follows:

"Comes now the respective attorneys in the above-entitled cause and stipulate that the findings and conclusion in cause No. 1002, Harry R. Roberson, Treasurer of the Village of Santa Rosa, New Mexico, Plaintiff, v. The Citizens' Lumber Company, Defendant, as to the issues of fact and questions of law shall be accepted in this suit, both cases being similar in the issues raised. The right of appeal is reserved by both parties."

They have failed to incorporate in this transcript of record the findings and conclusions in the case referred to, and the evidence introduced in that case is not brought into this record. For this reason there is nothing here for consideration, even if we should assume that the certificate of the clerk shows sufficiently the filing of the papers referred to in the office of the clerk of the district court.

The appeal in this case will therefore be dismissed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

LISENBY v. INTERMOUNTAIN STATE BANK et al. (No. 3080.)

(Supreme Court of Idaho. May 27, 1920.)

Appeal and error ⟸987(2) — Under statute verdict supported by conflicting evidence not disturbed.

A verdict founded upon conflicting evidence will not be disturbed, where there is substantial evidence to sustain it.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Pearl Lisenby against the Intermountain State Bank and F. M. Kerby, its cashier. Judgment for plaintiff, and defendants appeal. Affirmed as to appellant bank, and reversed as to appellant cashier.

Karl Paine and A. C. Hindman, both of Boise, and F. M. Kerby, of Cascade, for appellants.

J. P. Pope, of Boise, for respondent.

BUDGE, J. This action was instituted by respondent against the appellant bank and its cashier jointly, to recover the sum of $324.03, claimed to be the balance due and remaining on deposit to her credit in the bank. The case was tried to the court and a jury, and a verdict was returned in favor of respondent for the full amount claimed. This appeal is from the judgment entered on the verdict. Appellants have assigned several errors, but the only one discussed or relied upon for reversal is that the verdict is not supported by the evidence.

The material fact in dispute is whether respondent authorized appellant bank or its cashier to pay out of moneys, which it is admitted she had deposited in the bank, certain claims, viz., an amount known as the Warner bill and a note signed by respondent's former husband and a third party and held by the bank. It is conceded by appellants that there is a direct conflict in the evidence, and the record shows that the testimony of the respondent is clear and unequivocal that she never authorized either the bank or its cashier to make these payments out of her deposit. Appellants contend that, because of certain alleged inconsistencies in respondent's testimony and the alleged fact that the great weight of the evidence tends to show that the bank was authorized to make the payments in question, the judgment should be reversed.

It could serve no useful purpose to recite the evidence or enter upon a discussion of it, or to speculate as to the probabilities of one or more witnesses telling the truth and others having testified falsely. There is substantial evidence to support the verdict against the bank, and it is apparent that the jury believed the testimony of respondent. The case, therefore, falls within the well-settled rule, so frequently reiterated by this court, that where there is substantial evidence to support a verdict it will not be disturbed because of conflict in the evidence. The more recent cases announcing the rule are collected in Consolidated Interstate-Callahan Mining Co. v. Morton, 32 Idaho, 671, 187 Pac. 791; C. S. § 7170. As pointed out in one of the cases therein cited, and as this court has had frequent occasion to observe, the rule applies alike to findings of fact made by the trial court sitting without a jury and to verdicts where the case is tried to a jury. Davenport v. Burke, 30 Idaho, 599, 167 Pac. 481.

The evidence is not sufficient to establish any liability on the part of appellant Kerby. The specification of error, however, goes to

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

the sufficiency of the evidence to sustain the entire verdict.

The judgment against Kerby is reversed. The judgment against the bank is affirmed, with costs in favor of respondent.

MORGAN, C. J., and RICE, J., concur.

LYONS v. LAMBRIX.

(Supreme Court of Idaho. May 27, 1920.)

1. **Appeal and error ⇐616(2)—Certificate as to papers used on hearing of motion must be contained in transcript.**

If the transcript does not contain a certificate showing what papers were submitted to the judge and by him used on the hearing of a motion for a new trial, or other contested motion, the order disposing of the same cannot be reviewed.

2. **Trial ⇐295(1)—Instructions must be considered together.**

All the instructions given must be read and considered together in order to determine whether or not the charge correctly states the law applicable to the facts of the case.

3. **Appeal and error ⇐1002—Verdict supported by substantial evidence not disturbed.**

If there is substantial evidence sustaining the verdict, it will not be disturbed on appeal because of conflict.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by Barbara Frances Lyons against George A. Lambrix, administrator of the estate of Josephine Lambrix, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

T. S. Risser, of Boise, for appellant.

Ross W. Bates and Laurel E. Elam, both of Boise, for respondent.

MORGAN, C. J. This action was commenced by respondent to recover for labor performed by her as a household servant for and at the instance and request of appellant's intestate. The employment was denied, and an affirmative defense and counterclaims were alleged, in the answer. The trial resulted in a judgment for plaintiff, from which, and from an order denying a motion for a new trial, this appeal is prosecuted.

[1] Appellant has assigned as error orders overruling his motions for a continuance and for a new trial. The transcript does not contain a certificate showing what papers were submitted to the judge and by him used on the hearing of either of these motions, and therefore neither of the orders can be reviewed. Smith v. Benson, 32 Idaho, 99, 178 Pac. 480, and cases therein cited.

[2] Other assignments of error present for review the action of the judge in giving certain instructions, and question the sufficiency of the evidence to sustain the verdict. The instructions given, when read and considered together, are not in conflict with each other, and, taken as a whole, correctly state the law applicable to the facts of the case.

[3] The testimony is conflicting, but sufficient to bring the case within the rule that if there is substantial evidence sustaining the verdict it will not be disturbed on appeal because of conflict.

The judgment appealed from is affirmed. Costs are awarded to respondent.

RICE and BUDGE, JJ., concur.

GROEFSEMA v. MOUNTAIN HOME CO-OP. IRR. CO. (two cases).

GROEFSEMA et al. v. SAME.

(No. 3066.)

(Supreme Court of Idaho. May 26, 1920.)

1. **Waters and water courses ⇐263—Evidence of date for delivery of water for irrigation was admissible.**

In an action for damages for alleged failure to deliver during an irrigation season the amount of water called for by water deed, evidence of certain conversations with officers of appellant company, wherein they told witness the company would begin to deliver water the 1st day of May, was properly admitted, and, it being conceded under the warranty in the water deed that delivery was to begin on that date, no prejudice could result therefrom.

2. **Waters and water courses ⇐263—In action for damages evidence of failure to deliver water between certain dates held admissible.**

Under such circumstances evidence of failure to deliver water from the 1st until the 12th of May was properly admitted as bearing upon the matters which gave rise to respondents' alleged damages, in connection with other evidence showing that the proper amount of water was not delivered during the season.

3. **Waters and water courses ⇐263—Evidence held competent to show breach of obligation in water deed.**

Testimony of a witness that he received a certain amount of water on a portion of his land was not subject to motion to strike. It was competent to show the amount of water applied to each tract separately, and by a simple mathematical calculation to show that the obligation in the deed to furnish two acre-feet per acre had not been fulfilled.

4. **Appeal and error ⇐1047(3)—Admission of evidence as to damages for loss of pasture held not prejudicial.**

Prejudicial error cannot be predicated upon the refusal of the court to strike out the tes-

Digitized by Google

timony of a witness estimating his damages for the loss of pasture at $20 per acre where upon cross-examination he gave as his reasons therefor that it would cost him that amount to buy like pasture, or feed to take the place thereof, no other pasture being available, and there being no substantial conflict as to the estimate of damages to the pasture between the testimony of witnesses for appellant and respondent.

5. Trial ⟸419—Motion for nonsuit is not reviewable when evidence for defense afterwards introduced.

Where a motion for a nonsuit is made at the close of respondent's case, and appellant thereafter adduces evidence in support of the defense, the motion is not reviewable upon appeal.

6. Evidence ⟸215(4)—Notice published by irrigation company held admissible as bearing on quantity of water stored for a season.

A printed notice published by appellant containing the statement that it had more water in its reservoir at the close of the 1914 season than was ever stored in the reservoir at the commencement of any irrigation season in the history of the project, excepting 1914, that the tunnels and flumes had been repaired, ditches enlarged, and while the snowfall during the winter months had been a little below the average no farmer under the system had occasion to be exercised as to the water supply for 1915, was properly admitted as an admission bearing upon the quantity of water which the company actually had stored in its reservoir for the 1915 season.

7. Waters and water courses ⟸263—Evidence sustaining judgment for damages for failure to furnish water called for by deeds.

Where all the evidence affirmatively shows that appellant company had 8,000 acre-feet of water stored in its reservoir at the beginning of the irrigation season, and during the season it furnished only a fraction over one acre-foot of water per acre to 3,300 acres of land, and no explanation is offered as to what became of the remainder of the water, or why it was impossible to deliver more water to respondents, who were entitled under their water deeds to 2 acre-feet per acre, the evidence is sufficient to sustain a verdict awarding respondents damages for the failure, neglect, or refusal of appellant to deliver to respondents the amount of water to which they were entitled by their deeds.

8. Trial ⟸362—Case properly sent back to permit jury to show verdict which they found and intended to return.

Where three cases involving the same issues are tried as one case, and the jury return a like general verdict in each case, and their special verdicts in two of the cases sustain the general verdict, but the special verdict in the other case does not sustain the general verdict, all based upon the same evidence, it is proper for the trial court to send the latter case back to the jury for further consideration, upon the principle that the court may permit the jury to show the verdict which they found and intended to return, since it is apparent under all the circumstances that the rendition of the special verdict in this case was the result of inadvertence.

9. Trial ⟸359(1)—Statute providing that inconsistent special finding controls general verdict held not applicable.

Under such circumstances the provision of C. S. § 6861, which requires that, "where a special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly," is not applicable.

Appeal from District Court, Elmore County; James R. Bothwell, Judge.

Separate actions by Clay Groefsema, John Groefsema, and Cornelia Groefsema and husband against the Mountain Home Co-operative Irrigation Company. Judgment for each plaintiff, and defendant in each case appeals. Affirmed.

Sullivan & Sullivan, of Boise, and W. C. Howie, of Mountain Home, for appellant.

E. M. Wolfe, of Twin Falls, and Daniel McLaughlin, of Mountain Home, for respondents.

BUDGE, J. This appeal involves three actions raising essentially the same issues. They were tried together to the same jury and all of the evidence embodied in one record. Separate verdicts were returned in each case and judgments entered on each verdict respectively. A separate appeal was taken from each judgment, but the entire proceeding has been briefed as upon a single appeal and presented to us upon one hearing. The actions were brought to recover damages alleged to have been sustained by the loss of crops occasioned by the failure of appellant to deliver to respondents two acre-feet of water, for each acre of land owned by them, during the irrigation season of 1915. It is alleged that by the contract of purchase and deed of conveyance of respondents' water rights appellant warranted to deliver to each of respondents the above quantity of water; that during the irrigation season of 1915 appellant, disregarding its guaranty, failed, refused, and neglected to deliver to respondents water in excess of one acre-foot per acre, resulting in the damage claimed.

Appellant in its answers to the various complaints admits that it did not deliver two acre-feet of water per acre, but denies that it failed, refused, or neglected to deliver water in excess of one acre-foot per acre, and as an affirmative defense set forth the deeds to said water rights, placing especial reliance upon paragraph 4 thereof, which, so far as material, is as follows:

"In case of shortage of water in the company's reservoir or canal system through an accident, drought, or scarcity in any natural stream supplying said canal or by reason of improper diversion of water by any person, or

Digitized by Google

from any cause beyond its control, the company shall not be liable for such shortage, nor for any damage caused thereby, nor shall there be, by reason thereof, any deduction from any sum agreed to be paid to the company by the purchaser"

—and alleging in connection therewith that the failure of appellant to deliver the amount of water called for in the deeds was not due to any fault or negligence on its part, but due wholly to the fact that there was a shortage of water due to scarcity in the natural supply in the watersheds from which appellant secured water for its reservoirs.

[1-4] Error is predicated upon the refusal of the court to strike out upon motion evidence of the witness John Groefsema with reference to conversations with the officers of appellant company relating to the time in which water was not delivered between the 1st and 12th of May. However, it was conceded in the motion to strike that under the warranty in the water deed appellant was to deliver water beginning with May 1st. The conversation testified to by this witness was to the effect that the officers of the company, at the time witness paid his maintenance charge, told him that they would begin to deliver water on that date. Under such circumstances the evidence was properly admissible and could have resulted in no prejudice to appellant. In this same connection appellant urges that the testimony that water was not delivered until the 12th of May was outside of the issues, the only issue on this phase of the case, according to appellant's position, being that two acre-feet were not delivered during the season, and that no issue had been raised for a failure to deliver during any particular period of the irrigation season.

We are of the opinion that this evidence was proper, especially in connection with other evidence showing that the proper amount of water was not delivered during the season, as bearing upon the matters which gave rise to respondent's alleged damages.

The refusal of the court to strike out evidence of the same witness wherein he testified he received eleven-sixteenths of an acre-foot of water per acre on his alfalfa land is assigned as error, and it is insisted that appellant in its deed contracted to deliver the water within a quarter of a mile of respondent's land, and, when it was so delivered, the obligation was fulfilled, and the latter might apply it all to one portion of the land and none to the other if he saw fit, but the former would not be liable for damage to his crops which resulted from doing so.

The testimony was not subject to motion to strike. This respondent was the owner of 40 acres of land, 10 acres of which was in orchard and 30 in alfalfa. It was competent for him to show the amount of water applied to each tract separately, and by a simple mathematical calculation to show that the obligation in the deed to furnish two acre-feet per acre had not been fulfilled.

Testimony was introduced by one of the respondents that the value of certain pasture was $20 per acre. Upon cross-examination the witness gave as his reasons for fixing this value that it would cost him that amount to pasture hogs in some one else's field or to buy feed in lieu of pasture; it appearing that no other pasture was available. Appellant moved to strike out the testimony as to the value of the pasture for the reason that the cross-examination showed that such estimate of value had no legal basis. The refusal of the court to strike out the evidence is assigned as error.

Considering the foregoing circumstances in connection with the additional fact that there is no substantial conflict or difference of opinion as to the estimate of damages between the testimony of this witness and the witnesses of appellant, the jury could not have been misled, and no prejudice could have resulted to appellant.

[5] Error is sought to be predicated upon the denial of appellant's motion for a nonsuit at the close of respondent's case, but appellant thereafter adduced evidence in support of its defense.

Since the motion for nonsuit was not renewed on the close of all of the evidence, the ruling of the trial court on the motion is not reviewable upon appeal. Palcher v. Oregon Short Line R. R. Co., 31 Idaho, 93, 97, 169 Pac. 298, and cases therein cited.

[6, 7] The court admitted in evidence a certain printed notice published over the signature of appellant in the Elmore County Republican for Saturday, April 3, 1915, to the effect that parties were circulating stories that water users under appellant's system should not attempt to farm that year on account of scarcity of water, claiming the company had no water stored in its reservoirs. The notice asserted the stories were absolutely untrue; that there was more water in the Little Camas reservoir at the close of the 1914 season than was ever stored in the reservoir at the commencement of any irrigation season in the history of the project excepting 1914, tunnels and flumes had been repaired, ditches enlarged, and, while the snowfall during the winter months had been a little below the average, no farmer under the system had occasion to be exercised as to the water supply for 1915. The admission of the notice is assigned as error; the contention being that at best it was only the opinion of Mr. Gregory, appellant's secretary, at a time when it was not known how much water the company could conserve in its reservoirs, or what the run-off would be.

The notice was admissible in evidence as an admission bearing upon the quantity of water which the company actually had stored in its reservoirs at that time. Moreover, on

Digitized by Google

cross-examination one of the officers of the company testified that all of the statements in the notice were true except the statement that the snowfall was a little below the average, and that no farmer under the system had occasion to be exercised as to the water supply. One of the main issues in the case was whether the company had an adequate water supply for that season, and although respondents' causes of action are not predicated upon any representation made in this notice, but wholly upon the provisions of the water deeds, nevertheless the notice was competent and relevant to the main issue.

In this connection the several assignments of error based upon the alleged insufficiency of the evidence should be considered. It is not necessary to discuss all of the points of evidence which bear upon this question. It is sufficient to observe that the testimony of appellant's witnesses establishes the fact, in entire conformity with the notice above discussed, that at the beginning of the season in question appellant had impounded in its reservoirs 8,000 acre-feet of water; that it only furnished water during that season to 3,300 acres of land. It is apparent, therefore, that the company had an adequate water supply to furnish respondents during the season of 1915 all of the water to which their deeds entitled them. The evidence further shows that the company actually furnished to the water users only a small fraction over one acre-foot per acre. As to what became of the remaining 4,700 acre-feet of water or why it was impossible to deliver more water to the respondents if such were the fact, the record is silent, appellant having made no effort upon the trial to offer any explanation of these pertinent facts, and, although the evidence does show that there was a shortage in the natural supply, a scarcity in the snowfall, and a very small run-off, appellant has not shown that its failure to deliver the water in question was due to that cause, but, as already observed, the evidence is affirmatively to the contrary.

[8, 9] The remaining assignments seek to predicate error upon the action of the court in the John Groefsema case in advising the jury, after they had returned their general verdict and their special verdict answering certain interrogatories submitted to them, that their answers to the interrogatories were inconsistent with the general verdict and in directing them to retire and further consider the case and in receiving the general and special verdicts which were returned thereafter. The interrogatories bore upon the question whether the failure to deliver water was due to shortage in the natural supply or to the negligence of appellant. Interrogatories in substantially the same form were submitted in all three cases. The evidence upon these points was identical in each case. In each of the two other cases the jury had answered the special interrogatories one way, and in the John Groefsema case they had answered the same interrogatories in the opposite way. Clearly one finding or the other was wrong and must have been the result of inadvertence, and the trial court committed no error in sending the jury back to make their verdict recite what they intended and to return the verdict which they actually found. But appellant insists that, since a provision of C. S. § 6861, requires that, "where a special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly," the trial court was without authority to send the case back to the jury, but was bound to enter judgment in accordance with the special finding regardless of the general verdict.

Under all of the facts and circumstances before the trial judge at the time of the presentation and returning of these verdicts, the statute was not applicable, but a situation was presented which makes the case fall within the principle announced by this court recently in Drainage Dist. No. 2 v. Extension Ditch Co., 32 Idaho, 314, 182 Pac. 847, 850, that the court may permit the jury to show the verdict which they found and intended to return.

Finding no reversible error in the record, the judgments are affirmed. Costs are awarded to respondents.

MORGAN, C. J., and RICE, J., concur.

NEWELL-MURDOCH REALTY CO. v. WICKHAM et al. (S. F. 8725.)

(Supreme Court of California. May 22, 1920. Rehearing Denied June 21, 1920.)

1. Evidence ⟸574—Conclusions and probabilities not substantial contradiction of positive testimony.

Witness' statements of conclusions and probabilities of information having been given cannot be considered as a substantial contradiction of positive testimony that it was not given, so as to sustain a finding that it was given.

2. Brokers ⟸31—Must inform principal of interest on the side of the proposed purchaser.

Real estate agents when becoming agents for sale are under duty to inform their principal of their being financially interested on the side of the proposed purchaser.

3. Brokers ⟸94—Sale may be avoided for failure of agent to disclose his interest in purchaser.

Contract of sale may be avoided by the vendors because of the broker, their agent, failing to inform them, as known by the purchaser,

Digitized by Google

that he was financially interested on the side of the purchaser.

4. Brokers ⟸31—Must inform principal that they are stockholders in proposed purchaser.

Interest of brokers as stockholders in the proposed purchaser is such an interest as to require them to inform their principal, the vendor, thereof.

5. Corporations ⟸428(6) — Charged with knowledge of its managing officers making sale to it as agents of vendor.

The brokers who made sale to a corporation being its managing officers, it is charged with knowledge of the equities of the vendor, because of the brokers not informing him of their interests as stockholders in the purchaser.

6. Specific performance ⟸12—Avoidance of contract by agent not disclosing interest available as defense without revocation.

Option of vendor to avoid contract of sale because of the brokers, his agents, not disclosing to him their interests as stockholders in the purchaser, remains complete till purchaser brings action for specific performance, and then is available as a defense without prior revocation.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by the Newell-Murdoch Realty Company against Jessie E. Wickham and others. Judgment for plaintiff, and defendants appeal. Reversed.

Ornbaun & Fraser and John W. Preston, both of San Francisco, Robert Duncan, of Ukiah, Lovett K. Fraser, of San Francisco, and Abe P. Leach, of Oakland, for appellants.

Walter H. Linforth, of San Francisco, for respondent.

SHAW, J. The defendants appeal from a judgment directing the specific performance of an agreement to exchange real property, alleged to have been made between the plaintiff and the defendants.

The complaint alleged, in substance, that the agreement to exchange real properties, which is set forth in full therein, was made between the parties on August 11, 1916; that it was fair and reasonable in its terms; that plaintiff had offered to perform; but that the defendants, although duly requested so to do, had refused to perform their part thereof. The property of plaintiff consisted of a number of lots in the Forest Hill tract in San Francisco. The property of the defendants, which it is claimed they agreed to exchange for said property of plaintiff, consisted of an improved corner lot at Jones and Jackson streets in San Francisco.

We are of the opinion that the findings and judgment are contrary to and unsupported by the evidence upon certain points essential to the judgment. The question involved is the duty of the agent of the vendor to disclose to such vendor everything within his knowledge relating to the advisability of the sale of the property which the agent is employed to sell for the vendor and whether or not a sale can be enforced by the vendee against such vendor when the agent who makes the sale is himself interested with the vendee in accomplishing the same, but fails to fully inform the principal of such interest and the vendee had knowledge of such failure at the time.

During the time of the transactions under inquiry the Newell-Murdoch Realty Company was a corporation, having 2,000 shares of stock outstanding, and the Newell-Murdoch Company was a partnership of which R. C. Newell and William C. Murdoch, Jr., were the only members. This partnership was also the owner of 1,050 shares of the stock of the Newell-Murdoch Realty Company being a majority of the outstanding issue thereof. Newell was the president and Murdoch the secretary of the corporation, and under the resolutions and by-laws of the corporation they were in control of its affairs and were authorized to contract in its behalf for the purchase or sale of real estate. They were also the actual managers of the corporation and in control of its affairs. The three defendants were brother and sisters and owners in common of the Jackson and Jones streets property. An agent of the firm of Newell-Murdoch Company proposed to them an even exchange of the Forest Hill lots for their property aforesaid. Because of this proposal, the defendants visited the office of the Newell-Murdoch Company in San Francisco on August 11, 1916, and there signed a proposal to make such exchange. Murdoch then produced a blank form of agreement for exchange which they duly filled up and it was then signed by the defendants. This document in form was a proposal to be signed by one party to exchange the property, followed by a blank form of an acceptance of the proposal by the other party. The defendants signed the part constituting the proposal. It provided that "the undersigned hereby authorize Newell-Murdoch Company to act as their agents in negotiating an exchange, and agree that if they shall secure an acceptance of the above proposition to exchange the above described property on the above terms," each party should furnish an abstract of title within ten days and that the defendants should pay Newell-Murdoch Company $525 as commission for such services and "it is understood that said agent may also act as agent for the owners of the above secondly described property, from whom they may also receive a commission." The said agents were allowed four days within which to procure the acceptance of the proposal by the owners of the Forest Hill lots. This document, so signed, was delivered by the defendants to said Newell-

Digitized by Google

Murdoch Company, as agents as aforesaid, about 4 o'clock in the afternoon of August 11, at which time a carbon copy thereof was delivered by said agents to the defendants. The part of the document providing for the acceptance of the owners was not then signed or filled in. No consideration was paid or rendered at the time of this transaction. Upon reaching home the defendants decided not to carry out the contract, whereupon Jessie E. Wickham, wrote and mailed a letter to the Newell-Murdoch Realty Company, stating that she could not sign any deed for her undivided interest in the Jackson street property and "hence we will consider the matter closed." All this occurred on a Saturday. The letter was received by Newell-Murdoch Realty Company early on the following Monday morning. The Newell-Murdoch Realty Company and the Newell-Murdoch Company were both managed and operated by Newell and Murdoch, and the offices of the two concerns were in the same rooms. Immediately after the departure of the defendants from the office, Murdoch filled up the form for the proposed acceptance on behalf of the plaintiff and signed the same as secretary thereof. It was afterwards signed by Newell as president, but whether before or after the receipt of the letter from Jessie E. Wickham revoking the agreement does not appear.

[1, 2] During the interview in which the proposal was made by the defendants, they were not informed by Newell-Murdoch Company, or either of them, that the Newell-Murdoch Company owned stock in the Newell-Murdoch Realty Company, or that that firm had any interest in the property in the Forest Hill lots, except as agents for the owner. It is claimed by the plaintiff that there is a conflict of evidence on this point. Each of the three defendants testified positively that no statement of that sort was made and that they knew nothing of the interest of Newell and Murdoch in the plaintiff corporation until the suit was begun. Murdoch, when questioned about the matter as a witness and asked if he told defendants that he had any interest in that corporation, said:

"I don't know—I don't believe that the subject was touched on at all. I don't remember that it was."

Asked if he disclosed to them what connection the partnership had with the corporation, he said:

"I don't know that we did. It may have come out in the general conversation; it probably did; I told them we were interested in the company I am sure. I didn't say to what extent. Our names were—the names were exactly similar; it was generally known, and they knew, I am sure, that Newell-Murdoch Realty Company was the product of this company."

These statements of the witness, which are but statements, of conclusions and probabilities, following his emphatic statement that the subject was not touched upon, cannot be considered as a substantial contradiction of the positive testimony of the defendants that nothing of the kind was said. Furthermore there were other statements made in the course of conversation indicating that they held out to the defendants throughout the interview that it would be necessary for Newell-Murdoch Company to enter into some negotiations with the owners. Neither before nor after the delivery of the proposal appointing the firm agents of defendants to negotiate the exchange did that firm disclose the fact that they were themselves officers of the Newell-Murdoch Realty Company and that they could, as such, then and there immediately close the transaction. There is no pretense whatever that they ever stated to the defendants that they were the owners of the majority of the stock of the corporation and to that extent interested in the purchase of the property and personally benefited by the transaction. The similarity of names did not put the defendants on inquiry, under these circumstances. The moment the firm became agents for defendants, if not before, its duty arose to inform defendants of the interest it had in the corporation, which was adverse to the interests of the defendants. The findings were contrary to these facts, and to that extent they are not sustained by the evidence.

[3] A contract made under these circumstances cannot be specifically enforced. Where an agent is employed by a vendor to negotiate a sale, and he is himself financially interested on the side of the vendee, by reason of a direct or indirect property interest which he has or will have in the property when it is acquired by the vendee, or in the price to be paid by the vendee, he must disclose that interest fully to the principal and the principal with full knowledge of all the facts known to the agent, bearing upon its advisability, and of such interest, must act freely and of his own volition in making the deal, and if the agent fails to make such disclosure, where, as here, the vendee is aware of such failure, the sale may be avoided at the option of the vendor. A similar question arose in Burke v. Bours, 92 Cal. 108, 28 Pac. 57. The court said:

"Where a person buys for himself as the agent of his principal, danger surrounds the best interest of the principal, and it is the policy of equity to remove every temptation from the agent, by rigidly discountenancing all such transactions; and under the broad principles heretofore referred to, relating to the duties and obligations of trustees and agents, defendant's purchase of the realty cannot be sanctioned. * * * It matters not that there was no fraud in this transaction, or that no injury resulted to Arguello from the sale. The rule is intended to prevent the possibility of wrong; and assuming that Bours paid full value for the property, and even acted in entire good faith throughout the transaction, still, such facts form no defense where the purchase was made

Digitized by Google

by the agent without knowledge of his principal. * * * It necessarily follows that he is not the vendee under an executed contract of sale, is not in a position to enforce specific performance, and possesses no equity sufficient to defeat plaintiff's right to the recovery of the possession of this tract of land."

In that case the vendor had brought suit in ejectment against a subagent of his own selling agent, which subagent had purchased the property for himself, without informing the seller that he was doing so. He had paid in full the purchase price asked and he set up this equity in opposition to the suit in ejectment by the seller. The same question arose in Wickersham v. Crittenden, 93 Cal. 29, 28 Pac. 790, where the court laid down the rule concerning the relations of the principal and agent, trustee and beneficiary, as follows:

"For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside, at the mere option of the cestui que trust."

The proposition is too well settled to require further discussion or authority.

[4] A stockholder in a corporation has a beneficial interest, in proportion to the amount of his stock, in all the property of the corporation. While he has not the legal title thereto he has an equitable interest therein. It has been expressly held that this interest is sufficient to defeat an action for specific performance where the corporation, as the purchaser, is seeking to enforce a contract of sale negotiated by its own agent, acting as the agent of the vendor, whereby the latter agreed to sell to the corporation. Foss Investment Co. v. Ater, 49 Wash. 446, 95 Pac. 1017. In that case the court said:

"An agent to sell cannot himself become the purchaser directly or indirectly, without the knowledge and consent of his principal. Louis Foss, defendant's agent, was so closely identified with, and in such complete control of the plaintiff corporation, that practically he would have become the sole beneficiary of all profits and benefits that might accrue to the plaintiff as purchaser."

In that case Foss, the agent, was the owner of 998 of the 1,000 shares issued by the plaintiff company. In no other respect is there any difference between that case and this. The extent of the interest, however, is not to be weighed or measured in deciding a case of this kind. The agent must disclose his interest, whatever it be, or the deal will be voidable by the vendor whose property is the subject of the sale.

[5, 6] It matters not whether the revocation of the authority by the defendant Wickham was received by the plaintiff company before its president had signed the acceptance or afterward. The managing officers of the corporation were the persons who, as agents, procured the proposal to be executed. The corporation, therefore, must be presumed to have had full notice of everything which was known to said persons, if any notice was necessary under the circumstances. The corporation is chargeable with full knowledge of the equities of the defendants in the matter and can no more be allowed to enforce the contract than could the agents who attempted to negotiate the same. No revocation of the proposal was necessary to the defense pleaded. The option to avoid the contract remained complete until the action was begun and was then available as a defense to the action.

For these reasons the judgment of the court below cannot be sustained. Several other questions are argued in the briefs, but this conclusion renders it unnecessary to consider them.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; WILBUR, J.; OLNEY, J.; LENNON, J.

KNAPP v. KNAPP. (L. A. 6084.)

(Supreme Court of California. May 26, 1920.)

Divorce ⟸124—Evidence held to show plaintiff wife at fault in associating with men.

In a wife's action for divorce for extreme cruelty, evidence that the wife was at fault, in that through association with her sister she acquired the habit of visiting cafés in company with men without her husband's knowledge or consent, remaining away from home until late at night, *held* sufficient to justify denial of divorce.

Department 2.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action for divorce by Louisa M. Knapp against Michael Knapp. From judgment denying decree, plaintiff appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

William L. Kuehn, of Los Angeles, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District, who was sitting pro tempore at

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

the time of the hearing and order for submission of this cause, in place of Mr. Justice MELVIN of this court, is adopted as the opinion of this court in the cause.

This is an appeal from a judgment denying the plaintiff a decree of divorce, her alleged cause of action being based on the ground of extreme cruelty. A trial being had, the court found that the defendant had committed none of the acts of cruelty charged, except that on one occasion, when assaulted by the plaintiff, he took such physicial action as was necessary to compel her to desist, without, however, inflicting any injury upon her. On the other hand, the court found, as alleged by the defendant in effect, that much of the domestic trouble between him and his wife was caused by a sister of the latter, who came to live with them at their home about a year before the commencement of this action. The evidence in the case showed that this woman, though married, held herself out to be single, assumed a false name, and conducted herself in a manner widely at variance from the standard generally accepted as incumbent upon a married woman; that she exercised over the plaintiff an evil influence, as a result of which the plaintiff acquired the habit of visiting cafés in company with men and without her husband's knowledge or consent, remaining away from home until late and unusual hours of the night.

The sole point made by the appellant is that the evidence is insufficient to sustain the findings of the trial court. In this we emphatically disagree, but think a review of the evidence unnecessary. Some of the testimony given by the plaintiff for the purpose of sustaining certain of the allegations of cruelty was of a sordid character, and found no credence with the trial court, and justly so. the charges to which such testimony referred being apparently made for the purpose of intimidating the defendant in defending the action. Under the circumstances of this case we think it sufficient to say that we have carefully read the evidence, and are satisfied that it abundantly sustains the findings of the court.

Judgment affirmed.

KIPP v. REED. (L. A. 6072.)

(Supreme Court of California. May 26, 1920.)

1. Judgment ⟸948(1) — Plaintiff did not waive benefit of estoppel by failure to plead former judgment.

Plaintiff in an action to quiet title did not waive the benefit of any estoppel in his favor against the defendant, which might have been available to him under a judgment in a former action against the same parties to quiet title, by failing to plead such judgment; the defendant still being in possession of the premises.

2. Judgment ⟸950(1)—In former case between same parties admissible as muniment of title.

Plaintiff, in an action to quiet title, was properly permitted to introduce in evidence the judgment roll in a former action against the same defendant to quiet title, though not pleaded; such former judgment being a muniment in plaintiff's chain of title, and admissible as such, defendant still being in possession of the premises.

Department 2.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Sylvester Kipp against David C. Reed, also known as D. C. Reed. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles C. Crouch and Crouch & Chambers, all of San Diego, for appellant.

Abram Rosenthal and Sylvester Kipp, both of San Diego, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District, who was sitting pro tempore at the time of the hearing and order for submission of this cause, in place of Mr. Justice MELVIN of this court, is adopted as the opinion of this court in the cause:

This action was brought to quiet title to the lands described in the complaint. The defendant filed an answer and cross-complaint, wherein he alleged himself to be the owner and in the possession of the premises and he prayed for judgment accordingly. At the trial the only evidence presented upon the issue of ownership was that offered by plaintiff. No evidence was offered by defendant. To sustain his alleged title, plaintiff introduced certain United States patents issued to defendant to the land in controversy. Over objection, he then offered in evidence a judgment roll in a former action to quiet title brought by him against the defendant concerning the identical lands described in complaint herein. Plaintiff then rested his case, whereupon defendant moved for a nonsuit, which was denied. Judgment went for plaintiff. As ground for reversal, it is claimed that plaintiff waived the benefit of any estoppel in his favor against the defendant, which might have been available to him, arising out of the former adjudication of the same issue between the same parties, for the reason that he did not plead or rely upon such judgment.

[1, 2] Under these circumstances, appellant claims the question of title should be relitigated upon the merits, without the aid of the former judgment. We see no merit in this con-

Digitized by Google

tention. The former judgment between the parties is dated July, 1909. The complaint in the present action was filed July 24, 1918. The verified answer of defendant alleges that at the commencement of the action he was the owner and in the possession of the premises. There is nothing before us to show why plaintiff did not rely upon his judgment as an estoppel against the defendant, but the recital in defendant's pleadings as to possession and ownership would indicate that defendant claimed some new right or title that had been acquired by him subsequent to the rendition of the former judgment. His pleadings, however, do not disclose the source of any new title, and he introduced no evidence upon the subject. But, in any event, so far as the record shows, plaintiff was entitled to maintain this action. In Southern Pacific R. R. Co. v. Purcell, 77 Cal. 69, 18 Pac. 886, it is held that the fact that a former judgment in ejectment was given against a defendant in favor of a plaintiff did not prevent such plaintiff from bringing a second action against the defendant, if the latter was in possession of the property. The admission of the judgment roll in evidence did not, as claimed, constitute error. It was a muniment in plaintiff's chain of title, and admissible as such. Chapman v. Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130.

The conclusion we have reached makes it unnecessary to pass upon plaintiff's motion to dismiss the appeal.

For the reasons given the judgment is affirmed.

In re HALL'S ESTATE.

Appeal of O'BRIEN.

(S. F. 9144.)

(Supreme Court of California. May 27, 1920. Rehearing Denied June 25, 1920.)

1. Wills ⟸832—Property not disposed of by will must first be resorted to for payment of claims.

Property not disposed of by a will must first be resorted to for the payment of demands against the estate because the law endeavors to carry out the intent of the testator as far as possible, and therefore property not disposed of by the will should be so applied as to render it certain that the dispositions actually made by testator will be effective.

2. Wills ⟸832—Charges against estate held properly deducted from lapsed legacies.

In view of Civ. Code, §§ 1357–1359, and Code Civ. Proc. §§ 1516, 1562, 1563, where the residue of a testator's estate is left to ten residuary legatees, three of whom have predeceased testator, so that their legacies have lapsed, charges against the estate are properly deducted from such lapsed legacies alone.

Department 2.

Appeal from Superior Court, City and County of San Francisco; J. T. Nourse, Judge.

In the matter of the estate of Margaret Hall, deceased. From a portion of the decree of final distribution, Michael O'Brien, by and through Eugene W. Levy, his guardian, appeals. Affirmed.

Shelton & Levy and Steinhart, McAtee & Levy, all of San Francisco, for appellant.

Stanislaus A. Riley and Robert C. Porter, both of San Francisco, for respondent.

LENNON, J. This is an appeal from that portion of the decree of final distribution in the estate of Margaret Hall which directs that the debts and expenses of administration be paid exclusively out of certain residuary legacies which failed of disposition by reason of the death of some of the residuary legatees prior to that of the testatrix. The will of decedent, after creating a number of specific and general legacies, contains the following residuary clause:

"All the rest, residue and remainder of my estate, I give, bequeath and devise in equal shares to the following ten persons. * * *"

Three of the ten persons named predeceased the testatrix. As they were not related to the testatrix, and there was no provision in the will for the disposition of their shares in the event of their death, the legacies lapsed, and as to three-tenths of the residue deceased died intestate. Estate of Kunkler, 163 Cal. 797, 127 Pac. 43. The trial court directed that the debts and expenses of administration be paid entirely out of the three lapsed legacies. Appellant is the brother of the testatrix and entitled as one of the heirs at law to participate in the lapsed three-tenths of the residue. The sole question presented on appeal is whether the debts and expenses of administration should be paid entirely out of the lapsed residue, or whether the shares of the seven surviving residuary legatees should abate equally with the three lapsed shares which go to the heirs at law.

Appellant asserts that the charges against the estate must be paid from the general assets of the estate, that it is a solecism to speak of paying debts and charges out of part of the residue because the residue cannot be ascertained until all debts and expenses of administration as well as legacies have been paid, and that, by charging the debts against the lapsed portion of the residue, the decree has, in effect, distributed to the surviving residuary legatees a substantial part of the shares which lapsed.

[1] The general rule is that property not disposed of by the will should be first resorted to for the payment of all demands against

Digitized by Google

the estate. This is so for the reason that the law endeavors to carry out the intent of the testator as far as possible, and therefore property not disposed of by the will should be so applied as to render it certain that the dispositions actually made by the testator will be effective. In re Bradley's Will, 123 Wis. 186, 101 N. W. 393, 3 Ann. Cas. 716. There are cases which hold, however, that, when the undisposed property constitutes part of the residue, there is an exception to the general rule that the demands against the estate are paid out of the property undisposed of by the will. In re Bradley's Will, supra; Tretheway v. Helyar, L. R. 4 Ch. Div. 53; Eyre v. Marsden, 4 My. & Cr. 231, 243, 41 Eng. Rep. 91. This exception does not prevail in California.

Section 1516 of the Code of Civil Procedure and section 1358 of the Civil Code of California make the entire estate chargeable with the debts and expenses of administration "except as otherwise provided" in the Civil Code or Code of Civil Procedure. In the absence of any other statutory regulation in regard to the payment of debts, it is apparent that all legacies would be reduced in equal proportion by the charges thus imposed. These sections, however, are supplemented and modified by other Code sections; the obvious aim of the arrangement being to satisfy the charges against the estate with the least possible interference with the express dispositions of the testator. Accordingly, section 1563 of the Code of Civil Procedure contains the provision that "specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate." Section 1562 of the Code of Civil Procedure provides:

"If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter."

The most specific provision for the order of resort for the payment of debts and expenses of administration is contained in section 1359 of the Civil Code, and that order is as follows:

"One. The property which is expressly appropriated by the will for the payment of the debts;
"Two. Property not disposed of by the will;
"Three. Property which is devised or bequeathed to a residuary legatee;
"Four. Property which is not specifically devised or bequeathed; and,
"Five. All other property ratably."

A lapsed legacy, whether residuary or otherwise, is property not disposed of by will, and it is for that reason alone that it goes to the heirs. Section 1343, Civ. Code. It would therefore seem in consonance with the above Code provisions and the underlying theory of distribution and administration that the charges against the estate should be paid entirely from the lapsed residuary legacies.

The theoretical objection urged against this conclusion is that there can be no "residue" in an estate until all charges against the estate, as well as all specific and general legacies, have been discharged and satisfied. That this is not the necessary connotation of "residue" is evidenced by the Code definition of the term "residuary legacy." Section 1357, subd. 4, of the Civil Code defines a residuary legacy as follows:

"A residuary legacy embraces only that which remains after all the bequests of the will are discharged."

In other words, "residue" in its broadest sense includes all the property which is not otherwise devised or bequeathed. It is true that the term "residue" is often applied to "that part of it [the estate] left after paying the debts of testator and the expenses of administration and undisposed of by the rest of the will." Page on Wills, § 507. This is frequently the significance of the word, for the reason that in many cases there is a general residuary clause into which all of the property otherwise undisposed of falls. O'Connor v. Murphy, 147 Cal. 148, 153, 81 Pac. 406. In such a case there is no property undisposed of by the will, and, if there is no provision for the payment of debts in the will, property which would otherwise go to the residuary legatees is, under the law, appropriated to the payment of debts. However, section 1359 of the Civil Code, as we have seen, provides, in effect, that if there is any property not disposed of by the will, that is to be taken for the payment of debts before the property which is bequeathed to a residuary legatee. Under the definition adopted by section 1357, it is not necessary to deduct the charges against the estate before the residue is ascertainable.

[2] There is no inconsistency, therefore, in holding that portions of the residue undisposed of by the will must be used for the payment of charges before resort may be had to the residuary legacies effectually devised or bequeathed. The fallacy in the position of appellant arises from a failure to distinguish between the distribution of the property in accordance with the terms of the will and the payment of debts as provided by law. The court first determines the rights of the parties under the will, and then applies the law with relation to the payment of indebtedness. The latter is purely an incident of administration enforced by the law, and should so operate as to cause the minimum

Digitized by Google

amount of disturbance to the rights of the parties under the will.

The charges must be paid entirely from the property undisposed of by the will, namely, three-tenths of the residue, and the decree is therefore affirmed.

We concur: WILBUR, J.; SLOANE, J.

WILSON v. TRAVELERS' INS. CO. (S. F. 8881.)

(Supreme Court of California. May 27, 1920.)

1. **Insurance ⇐451(1)—Clause in accident policy that it should not cover injury resulting from explosives did not apply only to voluntary exposure.**

Clause in an accident policy, providing that it should not cover injury resulting wholly or partly from explosives of any kind, *held* not to apply only to voluntary exposure to explosives.

2. **Insurance ⇐146(3)—Ambiguities in accident policies construed against insurer.**

Ambiguities in accident policies are to be construed against the insurer.

3. **Insurance ⇐452 — Injury occasioned by "wreckage" of passenger car and not explosion causing wreckage.**

Under an accident policy, providing that it should not cover injury resulting from explosions, but should cover injury resulting from "wreckage" of a passenger car, where there was an explosion in toilet room, causing the walls thereof to burst and injure insured, who was sitting in the interior of the car, the injury was the result of the "wreckage" of the car and not of the explosion; the word "wreckage" implying that the car is a passive instrumentality, acted upon by some force which wrecks it.

4. **Insurance ⇐530—Recovery could be had only on one daily ticket accident policy.**

Only recovery on one ticket policy could be had by a passenger, although he had purchased two daily ticket policies, which overlapped at the time of the injury, where the policies provided that "insurance on any person under ticket policies is limited," etc., naming the amount of the policy.

5. **Customs and usages ⇐19(2)—Subsequent acts not competent to prove uniform custom.**

Evidence that an accident insurance company sold more than one daily ticket policy to a passenger in December, 1917, was not competent to show that it was the custom in 1916 to sell more than one daily ticket policy to a passenger.

6. **Insurance ⇐530—Issuance of several accident tickets held not to estop insurer from limiting liabilities to one ticket; custom not influencing action does not estop.**

An insurer engaged in selling daily ticket accident policies to passengers was not estopped by custom of selling more than one such policy to a traveler from setting up as a defense in an action on two policies a clause in the policies, limiting liability to the amount specified in one of them, unless the conduct of the insured in taking out more than one policy was in some manner influenced thereby.

In Bank.

Appeal from Superior Court, Alameda County; Denver Sevier, Judge.

Action by John H. Wilson against the Travelers' Insurance Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Coogan & O'Connor, of San Francisco, for appellant.

L. Ernest Phillips, of Oakland, for respondent.

WILBUR, J. Plaintiff recovered from defendant for bodily injuries, accidentally received, double weekly indemnity on each of two one-day ticket policies of accident insurance purchased by him for 25 cents each. The first was purchased at 6:30 p. m., June 29, 1916, and the second at 6:15 p. m., June 30, 1916, from a ticket agent of the Atchison, Topeka & Santa Fé Railway Company. The accident occurred at 7:30 p. m., June 30, 1916, while plaintiff was aboard a Southern Pacific passenger train. As each policy by its terms expired at midnight of the next day after date, both were in effect at the time of the accident. The amount recovered on each policy was $1,300, being double the weekly indemnity of $12.50 for 52 weeks. The defendant appeals from the judgment. The only fact in dispute is as to whether the injury resulted from an explosion within the meaning of that term as used in the policy. All other questions involve the interpretation of the policies and their application to the admitted facts. The plaintiff, a passenger, was seated in a passenger car which was standing at the Southern Pacific Company's Sixteenth street depot, in Oakland, when a violent explosion in the toilet room occurred, by which the car was wrecked. The trial court finds that—

"In and by the wreckage of said passenger car and by reason of the same and as a result thereof the plaintiff sustained bodily injuries;" "that such external and internal injuries of plaintiff were occasioned wholly and solely by the wreckage of the said passenger car."

The policies contained the usual terms insuring the holder against injuries effected by accidental means, "subject to the conditions herein contained, to wit." Then follow clauses lettered consecutively from (a) to (k). Clauses (a), (b), (c), fix the amount of insurance to be paid for injuries. The double indemnity clause (d) is as follows, to wit:

"(d) If the insured be a male, and such injuries shall be caused by the wreckage or burning of a railway passenger car or vessel licensed

Digitized by Google

for the transportation of passengers, provided in either case by a common carrier and propelled by mechanical power, while the insured is a passenger and actually within the car or on board the vessel, then the company will pay double the amount otherwise payable under clause (a), (b) or (c) of this policy."

Clause (g) contains the provision with reference to explosives, relied on by appellant to defeat plaintiff. This clause reads as follows:

"(g) This insurance shall not cover disappearance nor injuries of which there is no visible contusion or wound on the exterior of the body of the insured, nor shall it cover accident, injury, disability or death resulting wholly or partly, from any of the following, to wit: Voluntary overexertion, or voluntary exposure to unnecessary danger, medical or surgical treatment, hernia, disease in any form, fits, vertigo or sleepwalking, gas or poison in any form or manner or contact with poisonous substances, sunstroke or freezing, firearms, fireworks, or explosives of any kind, horse, automobile or bicycle racing, aerial navigation, lacrosse, football, dueling or fighting, war or riot, nor shall this insurance cover suicide sane or insane, or injuries, fatal or nonfatal, inflicted intentionally by the insured or by any other person, sane or insane, or sustained by the insured while insane or intoxicated, while violating law, resisting arrest or fleeing from justice, or while entering or leaving any moving conveyance or trying so to do, or happening while in or on any part thereof not provided for occupancy of passengers or while on the steps or platform of any moving car (street cars excepted) or while on the right of way or bridge of any railway."

[1] Respondent contends that this clause should be construed to apply only to the voluntary exposure to explosives. The policy is hardly susceptible of such construction. Omitting inapplicable clauses the proviso reads:

"Nor shall it cover injury resulting wholly or partly from any of the following, to wit: * * * firearms, fireworks, or explosives of any kind."

The punctuation as well as the context remove these clauses from the operation of the words "voluntary exposure."

[2, 3] The next question arises from the fact that the plaintiff was injured by the wreckage of a passenger car, to which clause (d) applies. This clause being specific and applicable by its terms to the manner in which the plaintiff was injured, it is claimed that it should control the general exception in clause (g) of injury by explosives. The point is not free from difficulty. "Wreckage" is defined as "the act of wrecking." The word implies that the car is a passive instrumentality, acted upon by some force which wrecks it. This force must always be a proximate cause of the injury. Therefore where an explosive wrecks the car, it is proper to say that an injury resulting from the wreckage of the car was "caused" by the explosion. This would be true if the explosion was only sufficient to derail a moving train. The difficulty with such a construction arises from the fact that it would completely nullify clause (d) which is evidently intended to secure the patronage of intending passengers. If we must look for the cause of the injuries to the first cause, it would never be the wreckage of the car, which is itself a result, and not a cause. In the case at bar, if the car had remained intact, that is, if the walls of the toilet room had been sufficiently strong to resist the explosion, or to have directed its force away from the interior of the car, the plaintiff would have suffered no greater injury than a bystander at great gun target practice. The wreckage of the car intervened between the explosion and the plaintiff. The defendant has chosen to use the phrase "wreckage of the car" as a cause of injury for which they hold themselves responsible. Although the explosion was the proximate cause of the injury, it was, by the peculiar terms of the policy, made a remote cause, or secondary cause where the wreckage of the car intervened. No doubt if an explosive bomb had been placed in the plaintiff's lap and there exploded, killing him and wrecking the car, the wreckage of the car would not be a "cause" of the accident within the meaning of the policy. But where it was necessary for the explosive to first destroy or wreck the car to reach the passenger, or where parts of the wrecked car striking the passenger cause the injury, the terms of the policy would warrant a recovery. The defendant is privileged to frame its contracts of insurance in any terms it may choose, and in the absence of ambiguity the courts enforce such contracts as written. But they are offered to the public, and are intended to be sufficiently attractive to secure purchasers. The established rule of construction of such contracts require us to settle the ambiguity arising from the inapt phraseology "caused by the wreckage or burning of a railway passenger car" against the insurance company, and therefore to hold that where the injury is caused by the "wreckage" of the car which is in turn caused by the explosion of an explosive, the insured can recover under clause (d), for the reason that such "wreckage" is itself a "cause" of injury within the meaning of the latter clause. In view of the foregoing conclusion, in which we have assumed that the explosion was that of an "explosive" within the meaning of that term as used in the policy, it is unnecessary to consider the points made with reference to the evidence or findings in that connection.

[4-6] It is contended by appellant that the plaintiff in any event is entitled to recover for his injuries on only one policy, and on the other to be refunded the premium, which

Digitized by Google

has been tendered to him, under proviso (e) which is as follows:

"(e) Insurance on any person under ticket policies is limited to the principal sum of $2,500.00 indemnity for injuries resulting in death, and to males, $1,250.00 for dismemberment, $12.50 weekly indemnity for wholly disabling injuries and the extra insurance provided for in clause (d); the company will return on demand to the insured or to his or her executors, administrators or assigns, all premiums paid for ticket policies in excess thereof."

In view of the fact that each policy provides for $2,500 for death, $1,250 for dismemberment, and $12.50 weekly indemnity, the words "ticket policies" must refer to other policies of the same company, for each separate policy is already so limited, and if this were doubtful the last sentence, by which the company agrees to return all premiums paid for ticket policies in excess thereof makes clear the purpose of the company to limit its liability to the face of the single policy. It is claimed, however, that the defendant is estopped to deny its full liability on the second policy because it is alleged to be the custom of the defendant to issue as many separate policies as may be requested, charging full premium for each. In proof of this alleged custom one witness testified that on December 12, 1917, he purchased four ticket policies from the defendant's agents, two at Seventh and Broadway, and the others at the main office at Thirteenth and Broadway. The policies were admitted in evidence, and it appears therefrom that two were dated 4 p. m., December 11, 1917, one 6:30 p. m., December 12, 1917, and another December 13, 1917. This evidence is far short of proving a uniform custom of the company or of its agents in June, 1916, at the time of the issuance of plaintiff's policies, or at any time, and was not competent evidence to show the custom in 1916, nor could defendant be estopped by such a custom, even if proved, unless the conduct of the plaintiff was in some manner influenced thereby, and no evidence was offered that he even knew of such custom. Plaintiff bought these two policies, each good for one day, at an interval of 24 hours, and by reason of the fact that the policies were good for more than 24 hours they overlapped for a period of 5½ hours. During that period he was injured. The policies make provision for such a contingency by providing for a refund of the premium on demand, a method of adjustment no doubt made necessary by reason of the fact that these tickets were issued to all applicants at every ticket office of the railroad company, and that a purchaser could for that reason secure a number of policies covering substantially the same period and loss. The plaintiff was entitled to recover $1,300 upon but one policy, and upon the other 25 cents.

The trial court is directed to modify the judgment by striking out the amount of $2,600, and inserting in lieu thereof the amount of $1,300.25, and as so modified the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J; SHAW, J.; LAWLOR, J.; OLNEY, J.

SUMNER v. MOHN. (Civ. 2830.)

(District Court of Appeal, Second District, Division 1, California. April 17, 1920. Hearing Denied by Supreme Court June 14, 1920.)

1. Husband and wife ⟸23¾—Evidence held insufficient to justify finding wife authorized by husband to employ attorney.

Wife's testimony *held* insufficient to justify finding that she was authorized to act for defendant husband in employing plaintiff attorney as her attorney at the expense of her husband in matters adverse to him and to institute an action against him.

2. Husband and wife ⟸19(18)—Legal services not "articles necessary for wife's support," to render husband liable; "necessaries."

Legal services cannot be deemed "articles necessary for a wife's support," to render her husband liable therefor, under Civ. Code, § 174; "necessaries" at common law consisting only of necessary foot, drink, clothing, washing, physic, instruction, and a convenient place of residence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

3. Husband and wife ⟸19(18)—Code gives wife remedy for means to prosecute action for separate maintenance.

Civ. Code, § 137, providing that the court may require the husband to pay money necessary for prosecution of the wife's action for separate maintenance, guarantees the wife the means necessary for securing her rights, so that, in the absence of necessity for pledging the husband's credit for legal services, no implied power to do so exists.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Charles E. Sumner against George F. Mohn. From a judgment for plaintiff, defendant appeals. Reversed.

Adam Thompson, Iverson L. Harris, and Patterson Sprigg, all of San Diego, for appellant.

Wright & McKee, of San Diego, for respondent.

Digitized by Google

SHAW, J. In this action plaintiff sued for the reasonable value of legal services alleged to have been performed for defendant at his special instance and request. The case was tried by a jury, which gave a verdict in favor of plaintiff for $1,100. Judgment followed accordingly, from which defendant appeals, presenting in lieu of a bill of exceptions a typewritten record, as provided in section 953a, Code of Civil Procedure, and in their briefs the parties have printed portions of the record upon which they rely in support of their respective contentions.

Though nothing appears in the complaint or bill of particulars rendered by plaintiff on demand of defendant to indicate such fact, it nevertheless appears from the evidence received that plaintiff's claim for compensation is based upon services not in fact rendered to or performed for defendant, but for the latter's wife, who, as claimed by plaintiff, was agent of the husband, and being thereunto, at the expense of defendant, expressly authorized so to do, employed plaintiff as her attorney, from whom she sought advice as to marital differences existing between herself and husband, as a result of which, after some 80 or 90 separate consultations, covering a period of 3 or 4 months, plaintiff for the wife brought an action against defendant for separate maintenance.

[1] The existing agency and the fact that the wife of defendant was by him expressly authorized to employ plaintiff as an attorney, and thus obligate him to pay for the services rendered his wife, depends solely and alone upon the latter's testimony, who, notwithstanding the provisions of section 1881, Code of Civil Procedure, was permitted to testify against her husband without objection interposed by defendant, who now for the first time claims that it was error. Without considering the point, we may say that her testimony is insufficient to justify the finding implied by the verdict that she was authorized to act for defendant in employing plaintiff as her attorney at the expense of her husband in matters adverse to him and for the purpose of instituting an action against him. Her testimony, after stating at great length the existing marital differences and causes thereof, is that on the evening of October 11, 1917:

"Dr. Mohn [the defendant] said to me, 'Well we had better settle up and separate.' He said, 'You go ahead and get your counsel and I will get mine.'"

And again:

"On the afternoon of October 15th, Dr. Mohn told me to go ahead and get an attorney, and we would settle this thing up."

This testimony, and this alone, not, however, communicated to the plaintiff, constitutes the only evidence in support of plaintiff's claim that, in employing him as an attorney against defendant, his client acted merely as agent of the defendant, who was obligated to pay for the services so adversely rendered. Conceding the statements, the making of which defendant denies, were in fact made, they could not under the circumstances have been reasonably understood by Mrs. Mohn or intended by defendant to have been made with the intent and purpose of conferring authority upon the wife as agent of her husband to obligate him upon the alleged contract. Suppose, in a dispute over a boundary line between A. and B., the former should say to the latter, "You go ahead and get your attorney, and I will get mine, and we will settle this matter," manifestly B.'s attorney could not recover from A. for services rendered B. upon the theory, based upon the language used, that in employing him B. was acting as the agent of A., having authority to engage counsel for himself at A.'s expense. This being true, it follows that since, as to existing differences between the husband and wife, their relation was that of strangers, what was said by Dr. Mohn cannot be construed as creating an agency in the wife, with power to make a contract in his name, and binding him to pay for services rendered to her alone and against the husband as principal.

Conceding the evidence insufficient to show express authority conferred upon defendant's wife to make the alleged contract, plaintiff nevertheless insists that the services rendered must be deemed necessaries furnished her, and hence, under the provisions of section 174, Civil Code, the husband is, regardless of the question of express agency, liable for the value thereof. The section provides that, in case the husband—

"neglect to make adequate provision for the support of his wife, * * * any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband."

The services rendered, according to respondent—

"were for investigation, consultation, preparation, and the beginning of a suit for separate maintenance, and covered a period extending from October 12, 1917, to April 3, 1918."

[2] While cases may be found tending to support respondent's contention, the overwhelming weight of authority is to the contrary. The statutory liability of the husband is for articles necessary for the wife's support. In our opinion, legal services cannot be deemed such articles. The common law defines necessaries to consist only of necessary food, drink, clothing, washing, physic, instruction, and a convenient place of residence. 2 Kent's Commentaries, 124; Shelton v. Pendleton, 18 Conn. 417; Coffin v. Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769;

Digitized by Google

Clarke v. Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631, and cases referred to in note in L. R. A. 1915C, p. 467.

[3] Moreover, the services rendered pertained to the bringing of a suit for separate maintenance, and the statute (section 137, Civ. Code) provides that the court may require the husband to pay such money as may be necessary for the prosecution of the action. This statute guarantees the wife full and complete relief, and provides the means necessary for securing her rights, and hence, in the absence of necessity for pledging the husband's credit, no implied power to do so exists. Meaher v. Mitchell, 112 Me. 416, 92 Atl. 492, L. R. A. 1915C, 467, Ann. Cas. 1917A, 688. In the action for separate maintenance the court had before it the parties, their property, their merits and delinquencies, and was thus, as intended by the statute, not only in a position to fix the compensation of plaintiff for the services rendered to the wife, but presumably did require the husband to pay such sum as it deemed just and equitable therefor. In view of the Code provisions of this state, a wife has no implied power to make a contract for legal services to be rendered for her sole benefit in matters adverse to the husband. Hence it follows that the attorney rendering such service at her request cannot recover therefor in an independent action against the husband. To so hold would not only jeopardize the marital or separate estate of the husband, thus violating a sound public policy, but ignore the great weight of opinion elsewhere expressed upon the subject.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

MICHELS v. BURKHARD et al. (Civ. 3189.)

(District Court of Appeal, Second District, Division 2, California. April 20, 1920. Hearing Denied by Supreme Court June 17, 1920.)

1. Homestead ⟹57(1)—Claimant has burden of proof.

In action to quiet title, a defendant, claiming homestead rights in property, has burden of showing, not only the declaration of the homestead and the recording of the declaration, but also that she was a resident on the property at time declaration was made and recorded.

2. Homestead ⟹57(3)—Facts held to show residence on property by person making and recording homestead declaration.

In action to quiet title, facts *held* to show that defendant, claiming homestead rights in the property, was a resident on the property at the time the declaration was made and recorded.

3. Homestead ⟹47 — Wife's declaration of homestead held sufficient, irrespective of her motive or absence of husband.

The making and filing of homestead declaration by wife, which fully complied with Civ. Code, § 1263, placed the property beyond the reach of husband's creditors, or sale on execution for his debts, etc., as effectively as though husband had filed same himself, though her purpose in so doing was to harass and annoy husband, and to cloud the title to the property, and though husband was not living on the property at the time of such declaration; wife's motive in making such declaration being immaterial, and husband's residence on the property being unnecessary, in view of subdivision 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by John Michels against John F. Burkhard and Emma A. Burkhard. Judgment for plaintiff, and the last-named defendant appeals. Reversed.

W. S. Knott, of Los Angeles, for appellant.
Samuel D. Weil, of Los Angeles, for respondent.

THOMAS, J. This is an action to quiet title. The complaint is in the usual form. The answer of the defendant Emma A. Burkhard is a general denial of the material allegations of the complaint. By way of further defense she sets up an alleged declaration of homestead, made, executed and recorded by her in the year 1912, covering the property involved in this action, which declaration contains recitations that she is actually residing on such property with her family, a son, and that her husband has never made a declaration of homestead on said property, or "executed any document claiming a homestead" therein, alleging that there has been no abandonment or conveyance of the same, that it is in full force and effect, and that all the property described in said declaration of homestead is community property, having been acquired by defendants after their marriage otherwise than by gift, devise, or descent.

As a "third defense," defendant Emma A. Burkhard alleges that on January 6, 1914, a certain action was pending in the superior court of Los Angeles county, in which she was plaintiff and John F. Burkhard, her co-defendant here, was defendant; that said action was an action for her own support and maintenance; that on said last-mentioned date said cause was tried; that the court gave judgment therein, decreeing that said defendant pay to said plaintiff the sum of $35 per month, and decreeing said judgment a first lien on the land referred to in the present proceeding as well as other real property not in controversy here; that said judgment was, on the 16th day of June, 1914,

Digitized by Google

duly recorded, etc.; and that the same has never been reversed, modified, or appealed from. Defendant John F. Burkhard did not answer.

The court found for the plaintiff, after trial, of the issues so presented, holding plaintiff to be the owner of the land described in his complaint, "subject only to the lien of a certain decree"—the decree granting support, etc., above referred to. The findings further declare:

"That claim of defendants, and each and either of them, of any estate or interest in or to any" of said land, "except by virtue of said lien," is without any right whatever; that defendants are now, and at all times mentioned in the complaint were, husband and wife; that defendant Emma A. Burkhard executed said declaration of homestead; and "that all the facts stated in said declaration are true, except as follows: It is not true that the said defendant Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since, made the said declaration with the intention that it was or should be for the joint benefit of herself and her husband, John F. Burkhard, but she made the said declaration for her sole benefit, and for the purpose of harassing and annoying her said husband, and to cloud the title of the real property therein sought to be claimed as a homestead."

Judgment was entered accordingly. Defendant Emma A. Burkhard appeals from that portion of the judgment adverse to her.

[1, 2] The only point before us is the validity of the alleged homestead. It is urged by appellant that the finding of the lower court that "it is not true that said defendant Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since, made the declaration with the intention that it was or should be for the joint benefit of herself and her said husband, John F. Burkhard, but she made the said declaration for her sole benefit, and to cloud the title to the real property therein sought to be claimed as a homestead," is not supported by any evidence and is against the law. Many cases are cited by appellant, presumably in support of this contention. All, however, go to the question of disclosing the object and purpose of the homestead laws, and give reasons why the description of the property in controversy in the various cases was sufficient—neither of which propositions is at issue here. We therefore consider none of the cases cited in point.

"The burden of showing not only the declaration of the homestead and the recording of the declaration, but also of showing that she was a resident upon the property at the time the declaration was made and recorded, rested upon the plaintiff." Machado v. Machado, 36 Cal. App. 646, 172 Pac. 1124.

We think this requirement was fully met in this case. It is stipulated that ever since November 6, 1901, up to and including November 30, 1912, the record and legal title to this property was in the said defendant husband, and that the latter had not at any time declared or selected the same as a homestead. The record shows that the defendant Emma A. Burkhard brought an action against her husband, John F. Burkhard, in August, 1912, and secured from the court an order excluding him from the premises occupied by them jointly as their home, and that he, the said husband, had complied with said order, having promptly left the premises in question. This order was in full force and effect in November, 1912, the date when the alleged declaration of homestead was executed and recorded by the defendant Emma A. Burkhard. The divorce case was tried in January, 1914, and by the trial court in that action the defendant Emma A. Burkhard, plaintiff there, was ordered from the premises in controversy here to other property, known as the "Elm property," and immediately thereafter she complied with such order, since when she nor her son, or either of them, has resided on said premises. On March 21, 1917, the defendant John F. Burkhard made, executed, and delivered to the plaintiff here a deed to the property in question, which instrument was recorded the next day.

[3] As we have already seen, the court found:

"That all the facts stated in said declaration are true, except as follows: *It is not true that said defendant Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since made the said declaration with the intention that it was or should be for the joint benefit of herself and her said husband, John F. Burkhard, but she made the said declaration for her sole benefit, and for the purpose of harassing and annoying her said husband, and to cloud the title to the real property therein sought to be claimed as a homestead.*" (Italics ours.)

We think this finding in effect says:

"The declaration of homestead as made and recorded complied in every way with the statutory requirement, but the motive prompting the making of the same is questioned."

In our opinion it is immaterial what the motive of the wife may have been, as it is not legally incumbent upon her to give any reason for her action. All she needs to do is to comply with the statute. Farley v. Hopkins, 79 Cal. 203, 21 Pac. 737. This she unquestionably did. Even although we assume that the wife's motive was entirely bad, as found by the court, the fact still remains that, as a matter of law, when the said declaration of homestead was so made and recorded, it actually placed the property

Digitized by Google

described therein beyond the reach of creditors of her husband, or sale upon execution for his debts, etc., as effectively as though he had filed the same himself. To this extent, therefore, the declaration was made for their joint benefit. We think this legal implication, even standing alone, sufficient to support the statement that the declaration was made for their joint benefit. To hold otherwise would be tantamount to denying the very right vouchsafed the wife under the specific terms of the statute. Subdivision 2 of the section covering this phase of the matter, too, would seem to preclude the idea that residence on the property in question by both spouses is necessary. At any rate, it is conceded that the declaration here involved complies with section 1263 of the Civil Code in every particular.

For this reason we hold that the court erred in concluding from the legal facts found that the declaration in question was "null and void and of no effect," and that such error was prejudicial to the rights of this appealing defendant.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

PRATT v. HARROLD. (Civ. 3188.)

(District Court of Appeal, Second District, Division 2, California. April 20, 1920.)

1. Husband and wife ⇐333(4)—Defendant's letters to wife intercepted by husband admissible to rebut the claim that wife tempted defendant.

In an action for alienation of wife's affections, where defendant claimed that he was the victim of a conspiracy, and that the woman tempted him, letters written by him to plaintiff's wife, which were intercepted by plaintiff so that they could not have alienated the affections of the wife, were nevertheless admissible to corroborate the wife's testimony that defendant had made love to her and encouraged her to obtain divorce from her husband and marry defendant.

2. Witnesses ⇐53(1)—Wife's testimony in husband's behalf admissible to show alienation of affection.

If Code Civ. Proc. § 1881, disqualified the wife as a witness for her husband in an action for alienation of her affections, that disqualification was removed by the amendment of 1907, which permits such testimony in an action brought by husband or wife against another person for alienation of the affections.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Arthur H. Pratt against Alvin H. Harrold. Judgment for plaintiff, and defendant appeals. Affirmed.

Earl Newmire, of Los Angeles, for appellant.

Wm. M. Morse, Jr., and S. M. Johnstone, both of Los Angeles, for respondent.

SLOANE, J. This is an appeal by the defendant from a judgment for $1,500 for the alienation of the affections of plaintiff's wife.

The only points raised on the appeal are upon the rulings of the court in the admission of evidence. Exception is taken to the introduction of certain letters written by the defendant to plaintiff's wife, a number of which were intercepted by the husband before their delivery through the mails to the wife, and also to the admission in evidence of the wife's testimony. Appellant's brief is very meager in elucidating his points, and there is no brief for respondent.

[1] We think the letters were relevant and competent evidence. They, it is true, not having reached the wife, could not have been influential in diverting her affections from her husband, although they were fervently directed to that end. However, the defendant, for defense to the action, had pleaded and attempted to prove that he was the victim of a conspiracy, and that the woman had tempted him. These letters were calculated to show, by their ardent declarations and admissions, that he was and for some time past had been by no means a passive agent in the love-making, and tended to corroborate the wife's testimony that defendant had made love to her, gained her affections, and encouraged her in a plan to obtain a divorce from her husband and marry him.

[2] The objection that the wife was not a competent witness, under the prohibitions of section 1881 of the Code of Civil Procedure disqualifying a wife as a witness under certain conditions, is not well taken. If this section has ever applied to testimony such as here offered, the limitation has been removed ever since the amendment of 1907, which permits such testimony in an action brought by husband or wife against another person for alienation of the affections of either the husband or the wife.

The wife's testimony was rather perfunctory, and not very conclusive; but appellant concedes that it was, with other evidence in the case, sufficient, if admissible, to sustain the findings and judgment, and in this we agree with him.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

SCHILLING v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3385.)

(District Court of Appeal, First District, Division 2, California. April 21, 1920. Rehearing Denied May 13, 1920.)

1. **Master and servant ⟸420—Compensation act authorizes commission to fix fees of claimant's attorneys.**

The Industrial Accident Commission has authority, under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1), and 24(d), to fix the fees of attorneys representing a claimant.

2. **Master and servant ⟸420—Compensation act merely authorizes determination of reasonableness of attorney's fee.**

In fixing the fee of claimant's attorney under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1) and 24(d), the jurisdiction of the Industrial Accident Commission is confined to determination of the reasonableness of the fee for the services in the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for services in independent proceedings, though the contract is made payable out of the award of compensation made by the commission.

3. **Master and servant ⟸420—Compensation commission bound to give attorney fair hearing on question of reasonableness of fee.**

If a claimant under the Workmen's Compensation, Insurance, and Safety Act, who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered, seeks to avoid the obligation of the contract after the services have been rendered and the profits retained by him, the attorney is entitled to a fair hearing before the commission on the question of the reasonableness of the fee agreed to be paid.

Proceeding by John B. Costello under the Workmen's Compensation Act to obtain compensation for personal injuries. Application by Frank Schilling for certiorari to review an order of the Industrial Accident Commission fixing his compensation for legal services. Order annulled.

Frank Schilling, of San Francisco, pro se.
A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. Petitioner instituted this proceeding in certiorari to review the order of the Industrial Accident Commission fixing his compensation, after rehearing, for legal services rendered to an applicant for compensation under the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831).

It appears from the record that the applicant, having been injured while in the course of his employment, consulted petitioner, who is an attorney at law, and through his advice and counsel procured temporary compensation from the insurance carrier; that thereafter he obtained other employment, during the course of which he was again injured and again consulted petitioner; and that thereafter, as the result of further consultation with petitioner, he was advised that he might apply for permanent compensation as the result of the first injury upon medical testimony which it was deemed possible to procure at that time. This application was made through the advice and assistance of petitioner, and a partial hearing was had thereon before the commission, wherein the evidence was very unfavorable to the applicant; but thereafter, through the advice and activities of petitioner a settlement was made with the insurance carrier for $650, which was approved by the commission and subsequently paid. It further appears that at the time of the approval of this settlement the commission fixed the compensation for petitioner's legal services at $45 without a hearing; that at the request of petitioner a rehearing was granted by the commission for the purpose of determining the reasonableness of the order fixing such fee. Petitioner claimed that he had an oral contract with the applicant for the payment of one-third of the amount recovered from the insurance carrier, which amount included payment for legal services rendered by him to the applicant in matters not directly connected with the proceeding in which the recovery was had. He insisted that this contract should not be declared void in toto, and that in any event the allowance of $45 was wholly unreasonable in payment for the legal services which he had rendered in the proceeding before the commission.

As disclosed by the record filed by respondent herein, the attitude of the referee to whom the rehearing had been referred by the commission was extremely hostile and prejudicial to petitioner throughout the entire proceedings. Immaterial and irrelevant testimony was taken for the purpose of attacking the professional standing of petitioner; the referee took petitioner's witnesses out of his hands, conducted their examination in his own way, refused to permit petitioner to cross-examine witnesses who were antagonistic to him, and studiously obstructed petitioner in his attempts to produce testimony favorable to his cause.

[1, 2] Counsel for respondent states that there is but one question involved in this proceeding, "What was the value of the services performed by petitioner, * * *" or "Has the Industrial Accident Commission authority under sections 24 (b) (1) and 24 (d) of the Workmen's Compensation, Insurance, and Safety Act, to fix the fees of attorneys representing applicants before it?" This court is unable to determine the value of the services performed by the petitioner because the ref-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

eree to whom that matter was referred for adjudication failed to give petitioner a fair opportunity to make proof of such value. That the Industrial Accident Commission has authority under the sections cited to fix fees can scarcely be questioned. Section 24, subdivision (b) (1), authorizes the commission to fix and determine a reasonable attorney's fee for legal services pertaining to any claim for compensation or application filed therefor. No constitutional objection has been raised to this provision of the act, and it may therefore, in this proceeding, be taken for granted that the power is one which the commission may lawfully exercise. Subdivision (d) of the same section provides that "no claim or agreement for the legal services or disbursements * * * in excess of a reasonable amount, shall be valid or binding in any respect, and it shall be competent for the commission to determine what constitutes such reasonable amount." No constitutional objection has been raised to this provision of the act, and for the purpose of this proceeding it also may be assumed to be valid. But it must be evident that if the obligation of a contract to pay for legal services, which has been executed by parties legally competent to contract, is to be impaired by the order of the commission solely on the ground that it is unreasonable, some semblance of a judicial hearing must be accorded the contracting parties before such order is made. Furthermore, the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission.

[3] An applicant for compensation is entitled to be represented by counsel in proceedings before the commission. There is no odium attached to counsel who render such services. Though the efforts of the commission to protect the interests of applicants for compensation are highly commendable, it is just as important that other persons coming within its jurisdiction be treated with equal justice. If a party who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid.

That petitioner in this case did not receive such a hearing is too plain to question. The award of $45 as compensation to petitioner for the services admitted to have been rendered by him in the proceedings before the commission is less than the ordinary charge made by attorneys for the collection of a promissory note without any form of legal proceedings. Upon the meager showing petitioner was permitted to make it is apparent that the fee allowed was unreasonably low for the services rendered. But, as heretofore stated, it is impossible for this court to determine what allowance should be made for the services rendered, because the referee failed to permit petitioner to fairly present his evidence on that issue.

For these reasons the order of the commission is annulled.

DREW v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MENDOCINO COUNTY et al. (Civ. 2126.)

(District Court of Appeal, Third District, California. April 19, 1920. Hearing Denied by Supreme Court June 17, 1920.)

1. Execution ⟸388 — Order of examination misnaming party to action held sufficient notice.

An order of examination after judgment entitled "Paul Lobree, Plaintiff," instead of "Phil" Lobree, *held* sufficient notice to the party sought to be examined; the error being merely clerical, and the papers served clearly identifying the action.

2. Pleading ⟸129(2)—Failure to deny in answer an admission of truth.

Where complaint alleged that defendant was a corporation duly organized and existing, such allegation was admitted by an answer of the corporation which failed to deny the same.

3. Contempt ⟸21—Judgment against corporation not open to attack in a proceeding against officer for contempt.

Where an allegation in the complaint that defendant was a duly organized and existing corporation was not denied in the answer, a judgment entered against the corporation was conclusive as to the corporate existence of the defendant and not open to attack in a proceeding in contempt against an officer thereof.

Petition by F. C. Drew for a writ of review to have an order of the Superior Court of the State of California in and for the County of Mendocino, Hon. J. Q. White, Judge, adjudging him guilty of contempt of court, annulled and set aside. Writ of review dismissed.

See, also, 185 Pac. 680.

W. H. Metson and R. G. Hudson, both of San Francisco, for petitioner.

Robert Duncan, of Ukiah, for respondents.

Digitized by Google

NICOL, Presiding Judge pro tem. This is a petition for a writ of review, by which the petitioner seeks to have an order of the superior court of Mendocino county, adjudging him guilty of contempt of court, annulled and set aside.

The material facts of the matter may be briefly stated as follows: On the 28th day of October, 1918, in an action then pending in the said superior court of Mendocino county, entitled "Phil Lobree, Plaintiff, v. L. E. White Lumber Company, a Corporation, and Goodyear Redwood Company, a Corporation, Defendants," judgment was rendered in favor of the plaintiff and against the defendants for the sum of $7,150, with interest and costs. On the 4th day of August, 1919, Robert Duncan, the attorney for the plaintiff in said action, filed and presented to the judge of said court his affidavit wherein he set forth the rendition of the said judgment; the issuance on November 30, 1918, of an execution against the property of the said judgment debtor, L. E. White Lumber Company, and that the execution was afterwards returned wholly unsatisfied; that the said L. E. White Lumber Company had its principal place of business in the city and county of San Francisco; that said F. C. Drew was at the time of the commencement of said action and at all times since has been the president and general manager of the said L. E. White Lumber Company, and that he resides in and has his office in the said city and county of San Francisco; that the said company owned property and had it in its possession or under its control, not exempt from execution, which it unjustly refuses to apply to the satisfaction of said judgment, and that said Drew, as president and general manager, had property of said company in his possession and under his control, which he unjustly refuses to apply to the satisfaction of said judgment; that the said company had books of account, which were in the possession and under the control of the said Drew, as president and manager thereof, showing the properties belonging to the said company, and also showing the receipts and disbursements of said corporation, and particularly showing the receipts of moneys from the sale of its properties to the Goodyear Redwood Company and the amounts and disbursements thereof; that the said L. E. White Lumber Company claimed to have received from said Goodyear Redwood Company a large amount in cash within two or three years before the making of said affidavit; that the said company and its said president, F. C. Drew, claimed that the said company was solvent and able to pay all its debts, including the said judgment. The said affidavit prayed for the appointment of a referee in the city and county of San Francisco, and that an order be made requiring said judgment debtor L. E. White Lumber Company, by its president and general manager, F. C. Drew, and by its other officers and directors, to appear before the said referee, and to answer concerning the property of said company, and to produce before the referee its books showing the property and moneys belonging to the said corporation.

Upon the presentation of this affidavit the court on the 4th day of August, 1919, made its order appointing one Casper A. Ornbaum referee, and ordered the said judgment debtor L. E. White Lumber Company, by its president and general manager, F. C. Drew, and said F. C. Drew, to appear before the said referee on the 14th day of August, 1919, at 2 o'clock p. m., and submit to examination and make discovery under oath concerning the property of the said company, and to bring before the referee the books of account of the said company. This order of the court, together with the said affidavit of Robert Duncan, was duly served on F. C. Drew on the 9th day of August, 1919, and he failed to appear for examination and no appearance was made for or on behalf of the said L. E. White Lumber Company. The petitioner, F. C. Drew, was thereafter adjudged guilty of contempt of court for failing to obey said order.

The petitioner claims that the superior court of Mendocino county was without jurisdiction to render its judgment in contempt against him, because: (1) The order made by the court for him to appear and submit to an examination was entitled in an action not pending in said superior court, in this, that the said order was entitled "Paul" Lobree v. L. E. White Lumber Company, a Corporation, et al.; (2) because the judgment sought to be enforced in the supplement proceedings, in which petitioner was adjudged guilty of contempt, was null and void by reason of the fact that said judgment was made and entered in an action brought against L. E. White Lumber Company, which action was instituted after the said company had forfeited its charter by reason of its failure to pay its annual franchise tax, which forfeiture occurred on March 3, 1917.

[1] 1. The affidavit of Robert Duncan above referred to, and upon which the said order to appear for examination was based, was properly and correctly entitled, as follows, to wit: "Phil Lobree v. L. E. White Lumber Company et al." This affidavit gave the correct date of the judgment and the amount thereof, and also the date when the judgment was entered and docketed. It recited also the date of the issuance of the execution and the fact that the execution was returned wholly unsatisfied. The order of examination made on this affidavit, as before stated, was entitled "Paul Lobree, Plaintiff,"

Digitized by Google

and concerning plaintiff. Punitive damages being recoverable under section 3294, Civil Code, as punishment for the motive of the act complained of after compensation for the injuries suffered by the act has been made, malice is essential to recovery. Such malice may be proved directly or indirectly by direct evidence of the evil motive or intent or by inferences which may be drawn from the facts proved. Davis v. Hearst, 160 Cal. 143, 163, 116 Pac. 530. Malice, therefore, is always an issue in an action for slander where plaintiff seeks punitive damages. And though, in awarding punitive damages, the jury may infer malice from an unprivileged utterance of a false charge slanderous per se, such inference must be drawn by the jury from the facts proved; it is not a presumption of law which the court itself can make. The failure to so instruct the jury was error.

[4] Criticism is also made of the instruction given at the request of the plaintiff relating to the special defense interposed by the defendant to the first cause of action that the prosecution was not instituted by him until after he had made a full and fair disclosure of all the facts relating thereto to counsel and had been advised by counsel that in his opinion plaintiff was guilty of the crime of embezzlement. The undisputed facts were that, prior to the institution of the criminal proceeding complained of, defendant consulted his own counsel and was by him advised that in his opinion the plaintiff was guilty of embezzlement, and that the defendant and his counsel then presented the facts in their possession to the district attorney of Los Angeles county, who gave defendant the same advice, but suggested that he also present the facts to one of his deputies in order that a thorough investigation might be made before a warrant should issue for plaintiff's arrest. This was also done, and the deputy district attorney gave defendant the same opinion as to plaintiff's guilt.

The instruction complained of was that the jury should disregard said defense "if you believe from the evidence that the said defendant did not state to his attorney or to the district or deputy district attorney, or any or either of them, all the facts within his knowledge," etc.

The vice of this instruction is that it required the jury to find that defendant had made a full and fair disclosure of all the facts within his knowledge respecting the transactions complained of to each one of the three attorneys consulted by him, whereas proof of a full and fair disclosure of such facts to any one of the three would have been sufficient to sustain this defense if defendant had acted upon the advice of the attorney to whom such disclosure was made.

Other errors complained of do not require discussion, as it is unlikely that they will occur upon a new trial.

For the reasons given, the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

COREY v. MATOT et al. (Civ. 2563.)

(District Court of Appeal. Second District, Division 2. California. April 20, 1920.)

Homestead ⟸117—Mortgage before declaration of homestead cannot afterwards be extended by husband alone.

Where a wife filed a homestead declaration on property covered by a mortgage given by herself and husband, a new estate was created which was subject to the mortgage, under Civ. Code, § 1241, subd. 4, but which could not be affected without the consent of the wife by any subsequent proceedings, so that an extension of the mortgage by the husband without the wife's knowledge or consent could not affect the homestead and would not permit foreclosure after the time limitations from the maturity of the original mortgage had expired.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Mrs. Manima Burton Corey against John E. Matot and others. From a judgment for plaintiff, defendants appeal. Reversed.

Kenneth E. Matot, of Los Angeles, Hert & Watt, and Porter, Morgan & Parrot, of Los Angeles, for appellants.

Allison & Dickson, of San Bernardino, for respondent.

SLOANE, J. In this case the defendants John E. Matot and Mary E. Matot, husband and wife, had executed to the plaintiff their promissory note secured by mortgage upon certain real property. Thereafter, and before the maturity of the note, the defendant Mary E. Matot declared and filed a homestead on the property in conformity with section 1263 of the Civil Code, for the benefit of herself and family. After the maturity of the note, but before the running of the statute of limitations, the defendant John E. Matot, without the knowledge or consent of his wife, entered into a stipulation and agreement in writing with the payee of the note and mortgagee of the property extending the time of payment on said note and mortgage. After the statute of limitations had run on the obligation as originally evidenced by the promissory note, but prior to the date of payment as covered by the extension, this action was brought to foreclose the mortgage, in satisfaction of the liability on the note.

Digitized by Google

The court found that the defendant John E. Matot was liable under the obligation of the note as extended, and decreed the foreclosure and sale of the property to pay the amount of such indebtedness. The appeal is taken by both defendants from the judgment of foreclosure. The only question to be decided is whether the extension of the liability of the defendant John E. Matot upon the promissory note preserved the lien of the mortgage as against the homestead after the statute of limitations, which was pleaded, had run against the liability as originally created.

The contention of appellants is that the husband alone had no right to extend or prolong the period of the lien, as affecting the homestead, beyond the liability as defined by the note and mortgage at the date of filing the declaration of homestead. In support of this contention they cite and rely upon the rulings of the Supreme Court in Barber v. Babel, 36 Cal. 11, Wells v. Harter, 2 Cal. Unrep. Cas. 52, Hart v. Church, 126 Cal. 476, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195, and Ainsworth v. Morrill, 31 Cal. App. 510, 160 Pac. 1089. Only the first of the decisions cited is closely in point. In Wells v. Harter, the facts are not very fully stated, but it appears from the opinion that the four-year period of limitation had run before the agreement for extension, by the husband alone, of the time of payment was entered into. Presumptively the bar of the statute, which was pleaded, applied. It is clear that an agreement made after the cause of action was barred by the statute of limitations was the creation of a new liability, not a mere extension of the old one, and would not be effective as to a homestead without the consent of the wife. Hart v. Church, while it quotes with approval Barber v. Babel, is quite different in its facts from those set out in that case or in the case at bar, and all that the court decides is that a homestead cannot be relinquished, alienated, or incumbered without the joint and concurrent act of both husband and wife. If the question here arose upon the admitted creation of a new lien, the citation would be conclusive against it. But the ground upon which the decree of foreclosure here is sought to be upheld is that the extension of the mortgage lien was not the creation of a new lien, but a continuance of the old. Ainsworth v. Morrill only declares the same rule, that the homestead right can only be affected by the joint act of husband and wife.

We are of the opinion, however, that the decision of the Supreme Court in Barber v. Babel, supra, is controlling in appellants' favor in this case. There, as here, the premises in question had been mortgaged by husband and wife to secure their joint note. They subsequently, before maturity of the note, filed a declaration of homestead on the property. Later, before the statute of limitations had run, the husband, without the wife joining therein and without her knowledge or consent, executed a new note and mortgage for the debt, and the old mortgage was satisfied of record. Suit was brought to foreclose the new mortgage after the statute of limitations had run on the old, and it was held that the new mortgage did not create a lien on the homestead. If this were the end of the matter, respondent's contention that the decision is not in point would be beyond dispute. The new mortgage was an attempt of the husband alone to create a new lien on the homestead property. But this case goes further. The plaintiff in the foreclosure action alleged fraud on the part of Frederick Babel, the husband, in securing the release of the old mortgage by representing that there was no homestead on the property, and it was sought to have the fraudulent satisfaction of the old mortgage disregarded and set aside and to grant plaintiff relief by foreclosure under the first mortgage. That the giving of this new note under the circumstances stated was in effect an extension of the old debt as to the husband, there can be no doubt, and the court in that case so recognizes it. But it further holds that the wife was not estopped by the acts of her husband, and that he could not by such means prolong the lien on the homestead. As is said by the court in this connection:

"The giving of the new note, and extending the time of payment, were, also, the act of the husband alone, to which the wife was no party. Under the authorities cited, he could no more * * * effect the same purpose by continuing the old lien beyond the time when the action would be barred, as to the wife, than in the direct mode attempted of executing a new mortgage and discharging the old."

And again:

"Had the suit now under consideration been brought before the action on the old note and mortgage was barred, and no question under the statute of limitations had arisen, then there would have been some analogy between the cases, for it could well have been said that the execution of the second note and mortgage, and surrender of the first, and cancellation of the mortgage upon the record, had been procured by fraud, and the transaction being void on that ground, the old note and mortgage would be still alive, and unaffected by it. The satisfaction being void, there would then have been a valid, live mortgage. * * * But in this case, if we consider the new note and mortgage, and the discharge of the old mortgage void, on the ground of fraud, the old cause of action is itself barred, by the statute, and no action can be maintained upon the mortgage, unless a new right has been acquired as against the wife and the homestead estate, and this new right could not be created by the act of the husband alone in any form."

Counsel for respondent, in contesting this doctrine, cite a number of decisions from other states: Jackson v. Longwell, 63 Kan. 93,

Digitized by Google

64 Pac. 991; Billingsley v. Niblett, 56 Miss. 537; Hambrick v. Jones, 64 Miss. 240, 8 South. 176; Roberts v. Roberts, 10 N. D. 531, 88 N.W. 289. The first of these does not involve a homestead right, and all the others are cases in which the mortgage was originally executed by both husband and wife after the homestead was created. These decisions do hold that a mortgage so executed may be foreclosed against the homestead so long as the principal debt exists against the husband, although barred as to the wife. To the contrary, in a Texas case (San Antonio Real Estate, etc., Ass'n v. Stewart, 27 Tex. Civ. App. 299, 65 S. W. 665), it is held that a husband cannot waive the wife's rights or extend a lien created on the homestead by a joint mortgage by an act in which the wife does not join. In none of these cases is the state law governing the homestead set forth, and their applicability under the homestead laws of California is therefore left somewhat obscure. They in no event touch the distinction which exists in the case at bar and in Barber v. Babel, supra. The opinion in the latter case is a well-considered discussion of the nature of the homestead estate by Chief Justice Sawyer, and the doctrine there laid down does not seem to have been questioned in any subsequent California decision.

The ground of distinction between a mortgage executed by both husband and wife upon an existing homestead and one where the homestead is declared subject to a previously executed mortgage would seem to be that in the instance of a pre-existing homestead the mortgage is an express incumbrance of the homestead interest, evidenced as required under the homestead laws. The homestead is thereby dedicated to the payment of the debt, and is subject to the continued existence of the debt as to either of the parties to the mortgage; while in the case of a mortgage made prior to the homestead declaration only the title as it then stands is pledged. The subsequent declaration of a homestead creates a new and distinct species of title in the property. This newly created interest is under the statute subject to the existing mortgage, but only within the application of the strict terms of the mortgage liability. It cannot be extended or prolonged by implication or by the acts of one alone of the makers, but only in the manner provided by the statute for incumbrancing or alienating a homestead. The effect of grafting the new homestead right upon the title is similar to the effect of a conveyance of the mortgaged premises to one not bound by the contract of the note and mortgage. The rule is stated, in discussing this point, in Barber v. Babel, supra, as follows:

"The cases of Lord v. Morris, 18 Cal. 482; Lent v. Morrill, 25 Cal. 499; Lent v. Shear, 26 Cal. 370; Low v. Allen, 26 Cal. 141, and other cases to the same effect, establish the principle that after a conveyance of the mortgaged premises, or the transfer of any interest therein, the mortgagor has no power to create, revive, renew, or prolong a charge upon the premises or interest therein, so conveyed or transferred, while such interest remains in another party. * * * The principles established by these cases directly apply to the case under consideration. The original note and mortgage were valid, but subsequent to the making of this mortgage the defendants duly recorded their declaration of homestead, and thereby became jointly vested with new and important rights, which were inalienable, except in the mode prescribed by the statute. The wife acquired a new, distinct, personal interest, which she did not before have, and which she could not afterward be deprived of by any act of the husband."

Under subdivision 4 of section 1241, Civil Code, the homestead is made subject to "debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." The same is true of conveyances of estates subject to debts secured by mortgage; but in neither instance can the liability against the interest created by the homestead declaration or the conveyance be enlarged or extended without the consent f the parties in interest. And in the case of a homestead right, such consent can only be evidenced by writing, jointly and concurrently executed by the homestead parties. Sections 1242, 1243, Civ. Code.

We find nothing in the case of First National Bank v. Merrill, 167 Cal. 392, 139 Pac. 1066, cited by respondent, that affects our conclusion in this matter. In that case the alleged mortgage was executed in a manner to create a valid lien on the property described, which was not at the time of the execution of the instrument covered by a homestead. It was held that a subsequent homestead filing on the property was subject to this mortgage, although it had not been executed in a manner that would have created a lien had the homestead existed at the time of its execution. This view of the law is unquestioned. There is no claim, however, that the original lien in that case had expired or in any way become ineffective, and it does not involve the effect of any attempt to prolong or extend its operation.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

Digitized by Google

COHN v. THOMPSON et al. (Civ. 2083.)

(District Court of Appeal, Third District, California. April 15, 1920. Hearing Denied by Supreme Court June 14, 1920.)

1. Municipal corporations ⟸515(1)—Defect in street improvement proceedings relating to bonds relieved by curative provision.

Under the Bond Act of 1911, § 2, amending St. 1893, p. 33, § 4, a property owner who did not appeal to the board of trustees cannot complain of the action of the superintendent of streets in fixing in his warrant the period of time over which street improvement bonds should extend, it being the statutory duty of the board of trustees to fix such period; the curative provisions remedying the defect.

2. Municipal corporations ⟸488, 489(5)—Validity of bonds cannot be questioned by property owner who did not appeal.

A property owner, after failing to appeal and complain that the superintendent of streets in his warrant for expenses of a street improvement, and not the board of trustees, fixed the period over which improvement bonds should extend, cannot question the validity of the bonds.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. Cohn against C. M. Thompson and E. O. Thompson, as copartners doing business under the firm name of Thompson Bros., and others. From judgment for plaintiff, defendants appeal. Reversed.

Arthur M. Ellis, of Los Angeles, and Everts & Ewing, of Fresno, for appellants.

Matthew S. Platz and C. E. Arnold, both of Bakersfield, for respondent.

BURNETT, J. The appeal is on the judgment roll, and the contention of appellants is that, upon the findings, the judgment should have been in their favor. It appears that proceedings for certain street work in the city of Bakersfield were instituted and carried through under the provisions of the Vrooman Act (St. 1885, p. 147) and the Bond Act of 1893 (St. 1893, p. 33). All the proceedings were entirely regular, except that the city council did not definitely designate the period of time over which the bonds should extend, the declaration of intention simply stating as to this that "said serial bonds shall extend over a period not to exceed five years from their date." After the completion of the work the superintendent of streets made out an assessment, diagram, and warrant covering the expenses of the work, and recorded them in his office. The warrant contained the following:

"Serial bonds bearing interest at the rate of eight per cent. per annum and extending over a period of time ending four years from and after the second day of January next succeeding their date are to be issued to represent the cost and expense of the work described in the assessment," etc.

No person filed with the city clerk any objection in writing or appealed to the said board from or concerning said assessment or any act, or determination of the superintendent of streets concerning said assessment or otherwise. After the expiration of 30 days from the recording of the assessment, diagram, warrant and return of the superintendent of streets, he made out and certified to the city treasurer a complete list of the unpaid assessments, and thereupon the treasurer made out, signed, and issued to Thompson Bros., the contractors named in said warrant, bonds in proper form for said assessment on each lot of land designated. These bonds were issued August 23, 1912. The complaint herein was filed a few days later. A general demurrer to the complaint was sustained January 18, 1913, and an amended and supplemental complaint, bringing in new parties plaintiff and defendant, on account of the conveyance and transfer of the land and of the bonds, was filed March 13, 1916, more than three years after said demurrer was sustained. A general demurrer to the amended complaint was overruled. The defendants answered, and, upon a stipulation of the facts, the trial court concluded that the assessment was legal and valid, but that the warrant and the bonds were illegal and void for the reason that the city council never at any time fixed the term of the bonds. This view of the court that the bonds were invalid involves the only question on this appeal.

Two points are made by appellants:

"(1) The failure of any person to appeal from the action of the superintendent of streets in fixing in the warrant the period of time over which the bonds should extend constituted a waiver of the objection. (2) It being found that the assessment itself is valid, and that it still constitutes a lien, the irregularity with respect to the warrant was cured by the issuance of the bonds."

It is conceded that it was the statutory duty of the board of trustees to fix the period over which the bonds should extend, and that the superintendent of streets had no such authority. But it appears by the decision in Cohn v. Federal Construction Co., 171 Cal. 547, 153 Pac. 916, which involved a similar resolution by the board of trustees of Bakersfield, that said board had authority at any time to fix said period definitely, and that thereafter another warrant and bond of binding force and effect could be issued. Hence it is strongly insisted by appellants that the case falls clearly within the doctrine of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, stated as follows:

Digitized by Google

"By a long line of decisions it has become the settled doctrine that, with respect to any material defect or irregularity which could be cured by the council, the remedy by appeal is the only remedy; so that if the party does not appeal he waives the objection, and if he does appeal the judgment of the council is conclusive."

Herein, the defect was material, it could have been corrected by the trustees, and no doubt would have been if application had been made, but the property owner chose to sit idly by and decline to avail himself of the very remedy that has been provided to prevent such expensive and protracted litigation as this.

[1] But if the defect herein be considered too serious for the application of said principle, then, as we understand the decisions of the Supreme Court, it must be held that the situation is relieved by the operation of the curative provision of said bond act. Section 4 thereof, as amended by Stats. 1911, p. 1201, provides:

"Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and under this act, previous to the making of the certified list of all assessments unpaid to the amount of twenty-five dollars or over by the street superintendent to the city treasurer, and of the validity of said lien up to the date of said list."

The effect to be given to such curative measures is very fully considered in Chase v. Trout, supra, and little more can be said. Therein it is stated:

"The correct proposition is that as the Legislature has power to devise any scheme for the assessment and levy of taxes for local improvements, provided such scheme includes such notice and opportunity for hearing to the owner of property taxed as will be sufficient to constitute the due process of law required by the Constitution, and otherwise complies with constitutional limitations and restrictions, so the Legislature, by a curative clause in the law establishing the scheme, may provide that the issuance of a bond, or the execution of a deed, in the enforcement of such levy or assessment, shall be conclusive evidence of the regularity of the performance of all the required steps in the proceeding, excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite. As to all these other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax, and that no inquiry may be made concerning them. This is substantially the effect of the statute in question here. The conclusive evidence clause of section 4 of the Bond Act is a part of the law under which the proceeding was carried on, and its effect is the same as if it declared that, although all of these intermediate steps are directed, yet, if they are not performed as required, and the owner permits the matter to proceed until the bond is issued, he shall be thenceforth precluded from proof of such nonobservance and the requirements shall be conclusively presumed to have been complied with, excepting those which are necessary to comply with constitutional mandates."

The court proceeds to state with more particularity the essentials the nonobservance of which cannot be cured, but it is manifest that there has been herein no violation of any constitutional right, nor can it be said that the owner has not had the notice which constitutes due process of law. The defect herein had merely to do, as appellant suggests, "with the technical details of the process whereby the plaintiff was extended a substantial period of credit before meeting the obligation of an assessment regularly levied." Not one of his fundamental rights was violated or infringed, and it seems strange that he should attempt, upon the basis of an irregularity which has caused him no prejudice, to defeat these important memorials of a valid indebtedness held by purchasers for value, who had a right to rely upon said rule of the statute.

[2] The most recent consideration of the question by the Supreme Court is found in Watkinson v. Vaughn, 59 Cal. Dec. 76 (syllabus), wherein it is held that—

"In the matter of street improvement proceedings under the 'Improvement Act of 1911,' * * * the failure of the resolution of intention to expressly declare, as required by section 4 of the act, that the district described and to be assessed is the district to be benefited by the work of improvement is cured by the failure of the property owners, as provided by section 16 of the act, to make objection to such omission, and by the issuance, without objection, of bonds to pay for the improvement, which bonds, by section 66 of the act, by their issuance, are made conclusive evidence of the regularity of the proceedings."

Assuredly, the defect in that case was as serious as in this, and we feel no doubt that under the authorities and upon principle the respondent should not be permitted at this late date to question the validity of said bonds.

We think the judgment should be reversed as far as said bonds are concerned, and a judgment upon the findings be rendered, declaring said bonds to be valid and legal and for appellants' costs.

It is so ordered.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

Digitized by Google

MAYR v. REYNOLDS et al. (Civ. 3353.)

(District Court of Appeal, First District, Division 2, California. April 20, 1920.)

Corporations ⟸432(12)—Finding that pledge holder corporation and officer were estopped to claim prior lien proper under evidence.

Evidence *held* to sustain a finding that a pledge holder corporation was estopped to deny that it was bound by a contract made by its president to hold the pledge unconditionally for the pledgee, and that the president was also estopped to deny that he was bound to so hold for pledgee, in view of Code Civ. Proc. § 1962, subd. 3.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Walter A. Mayr against W. J. Reynolds and others. From a judgment in favor of plaintiff, defendants R. H. Raphael and the R. H. Raphael Realty Company appeal. Affirmed.

Hollzer & Greenberg, of Los Angeles, for appellants.

Stephens & Stephens, of Los Angeles, for respondent.

NOURSE, J. This is an appeal by defendant R. H. Raphael from a judgment in favor of plaintiff establishing a first lien in plaintiff upon certain automobile material, and decreeing foreclosure thereof to satisfy plaintiff's claim.

The facts material to the opinion are:

That on the 25th day of July, 1916, the Merchants' Finance Company, a corporation, loaned to the Beardsley Electric Company, a corporation, $1,926.45, evidenced by a promissory note in that amount secured by a pledge of the automobile material which by agreement of the parties was deposited with the defendant R. H. Raphael Realty Company, a corporation. That on the 25th day of August, 1916, a month after this property had been so pledged and stored in premises leased by and under the possession of the realty company, the Beardsley Electric Company borrowed from plaintiff the sum of $5,000, evidenced by its four promissory notes and secured by a pledge of the same material. That before this loan was made the plaintiff learned of the existing claim and lien of the Merchants' Finance Company, and demanded that the property be cleared either by payment of the existing loan or by release of the security. This he was assured had been done, and as evidence thereof a receipt in the words following was delivered to him by a representative of the Beardsley Electric Company upon his payment to that company of the sum of $5,000:

"Received of Walter A. Mayr $35.00, being one month's rent of one-story brick building located at Eighth & Kohler streets. In addition to the rental for the use of this building, I agree to act as custodian for the electric vehicle material stored therein with respect to count and delivery of it, and I agree to honor only such orders as said Walter A. Mayr may issue to me as to the delivery of said material. R. H. Raphael Realty Co., by R. H. Raphael, Pres."

That on the 20th day of March, 1917, the Merchants' Finance Company sold and assigned to the defendant Raphael as an individual the note of the Beardsley Electric Company which it held, together with its interest in the pledge of the security. That thereafter the Beardsley Electric Company became insolvent, and the defendants Raphael and Raphael Realty Company, without notice to plaintiff or to any other person than certain individuals who were acting as agents and employés of these defendants, caused a pretended sale of said property to be made to an agent and employé of said Raphael for $2,000, although on numerous occasions Raphael had represented to the plaintiff that the value of said property was more than $20,000. The trial court found that the Raphael Realty Company, without consideration and in violation of its duty to plaintiff, and for the purpose of defeating the rights of plaintiff, had parted with the possession of the pledged property; that by reason of the circumstances heretofore recited the pretended sale was void and of no effect; that the property was actually in the possession of agents and employés of the defendant Raphael; that said defendant was estopped to deny that he held the security unconditionally for the plaintiff; and that the defendant Raphael Realty Company, by its failure to repudiate the action of its president, and by its retention of the property without any attempt on its part to exonerate itself after having full knowledge of plaintiff's claims and the assurances given to him, was further estopped to deny the binding character of the contract referred to as the "receipt" executed in the name of the company by R. H. Raphael. Upon these findings the court drew the conclusion that plaintiff's claim constituted a lien upon the pledged material prior and superior to any lien of any of the defendants, and gave judgment accordingly. The defendant R. H. Raphael alone appealed.

He attacks the judgment upon the ground that the trial court erroneously held that he was estopped to deny the validity of the pledge of the property made to respondent. The position of the trial judge upon this branch of the case is made clear by his oral opinion rendered at the close of the trial as quoted in appellant's opening brief:

"Then the question as to the priority of liens —there is no conflict in the evidence. It appears, as it seems to me, without any conflict,

Digitized by Google

that at this time the Merchants' Finance Company did have a valid pledge of these goods which was made in good faith and for value. The Merchants' Finance Company itself has never done anything to surrender that pledge or to give any one else priority, and if it still held that note or if it had conducted that sale and bought in the property itself, or caused it to be sold by some process to any third party, who bought it without notice or knowledge of the peculiar circumstances existing between Mr. Raphael and Mr. Mayr, there would be no question in my mind whatever but that it took precedence of Mr. Mayr's claim here. But we have the curious circumstance that the only man claiming under or by virtue of that Merchants' Finance Company lien at this time is Mr. Raphael himself, and, as I have said, it appears to me that he is estopped to deny that Mr. Mayr's pledge was a valid pledge. He is estopped to deny that the Raphael Realty Company did take and hold this property as pledge holder for Mr. Mayr, undertaking to deliver it solely upon his order, which, as it now seems to me, would warrant this court in finding as against Mr. Raphael that the Raphael Realty Company was then the pledge holder for Mr. Mayr, and, if that finding is warranted, then it seems to me it follows, as a rule of law or a rule of equity rather, that not merely the Raphael Realty Company, but Mr. R. H. Raphael, as president of that company and the mouthpiece through which it spoke and the arm through which it acted, are estopped by the relationship of trust and confidence thereby created by them existing between him and his company, on the one hand, and Mr. Mayr, on the other, from secretly obtaining any advantage to himself adversely to Mr. Mayr."

The relationship of the appellant during the entire transaction is clearly presented by the evidence. He was vice president of the Beardsley Electric Company, the borrower of the first loan from the Merchants' Finance Company, of which he was also vice president. He was also vice president of the Beardsley Electric Company when it negotiated the loan from respondent. He was president of the R. H. Raphael Realty Company, the pledge holder under both pledges, president of the lessor of the warehouse where the goods were stored, member of the partnership whose employé was the nominal purchaser at the invalid sale, and was the real purchaser at that sale, which was conducted and participated in by persons wholly under his direction and control. Respondent knew of the relation of appellant to these various concerns, and had every reason to believe and rely upon the promises and assurances given him by appellant. That respondent made the loan only upon the written assurance of appellant that he would hold the material in controversy subject only to respondent's order, and upon the repeated assurances that the property was free from all other claims excepting freight and other minor charges which respondent was assured would be immediately paid, is not controverted. All the facts necessary to estop appellant were present.

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ. Proc. § 1962, subd. 3.

Appellant attempts to escape the unavoidable conclusion that he was estopped under these circumstances by the argument that, if any estoppel exists, the corporation realty company, and not the appellant individually, is estopped; but at the trial he urged that the realty company was not estopped because the receipt given respondent was executed by him without authority to the corporation. But the court found that he was the president of the corporation, and that the other stockholders left the affairs of the corporation to him, and that it was the custom and practice of the corporation not to question his acts; furthermore, in this particular instance, the corporation, well knowing that the receipt had been issued, made no attempt to repudiate it until an amended answer was filed in this proceeding by a minority stockholder acting without authority of the other stockholders, but under advice of counsel for the appellant. The corporation thus ratified the acts of its president and retained the benefits of his contract.

Upon this evidence the trial court correctly concluded that the corporation was estopped from denying the binding character of the contract made by the appellant as its president, and that appellant, as an individual, was estopped to deny that he was bound by the contract to hold the goods unconditionally for respondent.

For these reasons, the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

Digitized by Google

ST. LOUIS SAN FRANCISCO RY. CO. v. JONES. (No. 10671.)

(Supreme Court of Oklahoma. May 4, 1920.)

(Syllabus by the Court.)

1. Negligence ⟸1—"Actionable negligence" defined.

To constitute "actionable negligence," where the wrong is not willful and intentional, three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff proximately resulting from such failure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

2. Negligence ⟸136(9)—Jury case defined.

Where the evidence on the primary negligence of the defendant is such that reasonable and intelligent men might differ as to the facts and inferences to be drawn therefrom, the case is one for the jury.

3. Railroads ⟸370, 372(5)—Duty at places used by pedestrians defined.

It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person was killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track where people may be expected upon the track in considerable numbers, as where the roadbed is constantly used by pedestrians. At such places the railway company is bound to anticipate the presence of persons upon the track, to keep a reasonable lookout for them, to give warning signals such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery.

4. Negligence ⟸136(26)—Contributory negligence question for jury, under Constitution.

Under art. 23, § 6, of the state Constitution, the defense of contributory negligence is at all times a question of fact for the jury, and the court should not instruct the jury that a certain fact or circumstance or a given state of facts or circumstances do or do not constitute contributory negligence.

5. Appeal and error ⟸999(1)—Verdict on charge properly submitting applicable law is conclusive.

Instructions examined, and found that no material or prejudicial error has been committed therein.

Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by Aaron Jones against the St. Louis San Francisco Railway Company. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error.

Twyford & Smith, of Oklahoma City, for defendant in error.

JOHNSON, J. This suit was commenced by the defendant in error, hereinafter referred to as plaintiff, against the plaintiff in error, hereinafter referred to as defendant, in the district court of Oklahoma county on January 16, 1918, for the recovery of damages in the sum of $3,000, and upon a trial thereof to the court and jury resulted in a verdict in favor of the plaintiff in the sum of $1,500. The defendant filed a timely motion for a new trial, which was overruled by the court and a judgment rendered upon the verdict of the jury, to reverse which this proceeding in error was regularly commenced in this court by petition in error filed by the plaintiff in error on June 9, 1919, with case-made attached. The assignments of error are:

"(1) Error in overruling the defendant's demurrer to the plaintiff's evidence; (2) in overruling defendant's request for a peremptory instruction; (3) verdict is not sustained by sufficient evidence; (4) is contrary to law; (5) excessive damages appearing to have been given under the influence of passion and prejudice; (6) in admitting certain evidence over objection of the defendant; (7) in refusing to admit certain evidence offered by defendant; (8) errors of law occurring at the trial and excepted to by the defendant; (9) error of the court in giving to the jury instructions Nos. 1 to 8, inclusive; (10) refusing to give defendant's requested instructions Nos. 1 to 12, inclusive; (11) in overruling defendant's motion for a new trial."

Counsel for defendant in error discuss in their brief the first four assignments of error, wherein they say:

"These assignments of error present the questions (1) of the sufficiency of the plaintiff's evidence to warrant the submission of the case to the jury, and (2) whether under all the evidence plaintiff is entitled to recover."

And we think a consideration of these propositions is sufficient to dispose of this appeal.

The allegations in the plaintiff's petition and his evidence in support thereof, in substance, showed about the following situation:

The plaintiff lived south of what is known as the Robinson street and Frisco crossing within Oklahoma City, and which is the only street open between Capitol Hill and the city proper. This was a very busy and much used crossing. The plaintiff had lived

Digitized by Google

near and used the same very frequently, as often as twice a day, for a number of years. That the crossing was blocked by the railroad company very often. That the crossing was blocked in violation of the 5-minute city ordinance, and it was customary for pedestrians to go west around the blockade, and the railway company's watchman at times "motioned them around," and in going around, a worn and well-beaten path was made. According to the plaintiff this path had been in use for a number of years, and it had been the custom to go around the blocked crossing during that time. Witness Schott said that he had been using the crossing four or five years, and that it was blocked often during that time; that there was a path there in use by those going around; and that the flagman did nothing to prevent the use of the path. According to witness Hodges, the flagman "would tell the people to go around the train when blocked." He lived there six years and used the crossing every day, and there was a path there used by pedestrians going around the blocked crossing, and "the flagman motioned them to go around," and the crossing was blocked from 5 to 25 minutes many times. The path was west of the crossing and used by the persons going around, and the path then led diagonally across the several tracks back to Robinson street. The plaintiff on the date of the injury went to the crossing, found it blocked, and waited 7 or 8 minutes, and then followed the path west and north, and while in the path on one of the tracks was struck by a moving car from the west, and no warning of any kind was given him and no employé was on the end of the moving car.

"Q. As I understand you, you came up to this train and it was blocked down there, and then you went west two car lengths and then you went around the train following this path, and while you were following that path some train bumped and hit you from the west? A. Yes.

"But you do not know that it was a Frisco train?"

Dr. Lankford testified that the plaintiff had a permanent crooked neck caused from ankylosis, caused by the injury.

The defendant, as a defense, alleged that the plaintiff was a trespasser in the yards of the defendant at the time and the defendant owed him no duty except not to injure him willfully and wantonly, and to exercise ordinary care to prevent injuring him after discovering his peril.

[1-4] We have carefully examined the record and read the briefs of counsel, and we think this case comes clearly within the rule announced by this court in the case of M., K. & T. Ry. Co. v. Wolfe, 184 Pac. 765, which is stated in paragraph 8 of the syllabus, as follows:

"It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected upon the track in considerable numbers, as where the roadbed is constantly used by pedestrians. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this regard will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery." Wilhelm v. M., O. & G. R. Co., 52 Okl. 317, 152 Pac. 1088, L. R. A. 1916C, 1029; St. Louis & S. F. R. Co. v. Hodge, 53 Okl. 427, 157 Pac. 60; Felton v. Aubrey, 74 Fed. 350, 20 C. C. A. 436.

The record presents no reversible error. The defendant's witnesses, several in number, flatly contradict the plaintiff and his witnesses as to there being a well-beaten path at the points located by the plaintiff's evidence, and the custom that prevailed of pedestrians following that path around cars standing across the street and that the defendant's watchmen at the crossing motioned them around. The law is well settled in this jurisdiction that under such circumstances it was a question of fact for the jury to determine, under proper instructions from the court, the questions of primary negligence of the defendant as well as the contributory negligence of the plaintiff.

[5] The questions were properly submitted to the jury under instructions which correctly stated the law that was applicable, and under the rules of this court the verdict is conclusive upon this court and will not be disturbed. Littlejohn v. Midland Valley R. Co., 47 Okl. 204, 148 Pac. 120; New York Plate Glass Ins. Co. v. Katz, 51 Okl. 713, 152 Pac. 353; C., R. I. & P. Ry. Co. v. Felder, 56 Okl. 220, 155 Pac. 529; C., R. I. & P. Ry. Co. v. Schands, 57 Okl. 688, 157 Pac. 349, L. R. A. 1918A, 273.

The judgment of the trial court is affirmed.

RAINEY, V. C. J., and HARRISON, PITCHFORD, McNEILL, HIGGINS, and BAILEY, JJ., concur.

Digitized by Google

CHORTNEY v. CURRY. (No. 9685.)

(Supreme Court of Oklahoma. May 4, 1920.)

(Syllabus by the Court.)

1. New trial ⟸99, 104(1), 105—Burden on party alleging newly discovered evidence stated; newly discovered impeaching or cumulative evidence is no ground.

In a motion for a new trial on the grounds of newly discovered evidence, as authorized by section 5087 of the Rev. Laws 1910, the burden is on the moving party to prove that with reasonable diligence he could not have discovered the evidence relied upon prior to the trial, and that this newly discovered evidence would probably change the result if a new trial was granted, and the evidence must be material to the issue. Ordinarily newly discovered evidence, which is merely cumulative, impeaching, or contradictory, is not sufficient for a court to grant a new trial.

2. Appeal and error ⟸706(3)—Unless evidence on former trial is brought up on appeal, probable change in result cannot be determined; evidence at former trial, considered on motion for new trial, may be so brought to Supreme Court.

Where a petition for a new trial on the grounds of newly discovered evidence is overruled, and an appeal is taken from the order overruling the same, but not from the judgment in the former suit, this court will be unable to find that the newly discovered evidence would probably change the result if a new trial was granted, unless the evidence at the former trial is brought to this court. The evidence at the former trial may be presented and considered by the trial court at the time the motion for a new trial is passed upon, and thus upon an appeal may be brought to this court.

3. Motion for new trial held properly overruled.

In the instant case the losing party in the trial court moved for a new trial on the grounds of newly discovered evidence and for the reason that it was impossible to make case-made. The trial court overruled both motions, and an appeal is taken to this court. We have examined the record, and are unable to find that there is any error in the action of the trial court in overruling the above motions, for the reasons stated in the opinion.

Error from County Court, Lincoln County; Ira E. Billingslea, Judge.

Replevin by Mose Chortney against Ash Curry for the possession of a horse. Verdict for defendant in the county court, on his appeal from a verdict for plaintiff in a justice court. Motion for new trial overruled, and plaintiff appeals. Affirmed.

Erwin & Erwin, of Wellston, for plaintiff in error.

Jarrett & Speakman, of Chandler, for defendant in error.

HIGGINS, J. The plaintiff in error, plaintiff below, instituted an action in replevin against the defendant in error, defendant below, in a justice of the peace court for the possession of a horse. The first jury failed to agree; the second, however, returned a verdict in plaintiff's favor. The defendant appealed to the county court, and the verdict of the jury in that court was in defendant's favor. On May 21st the motion for a new trial was overruled, and judgment for the defendant for the possession of the horse was entered, and time was granted plaintiff to prepare and serve case-made.

On July 2d following, there was presented to the court a petition for new trial on the grounds of newly discovered evidence as is provided by section 5037, Rev. Laws 1910. The evidence in support of this motion consisted of affidavits in which it was claimed that one of the witnesses for the defendant subsequent to the trial had made contradictory statements to those testified by him at the trial. The court overruled the petition for a new trial, and time was granted plaintiff to prepare and serve case-made. By various orders time for serving case-made was extended to October 18th. There was no case-made served on the defendant within this time. After the expiration of the time to file an appeal in this court from the judgment of May 21st, to wit, on December 22d, the court attempted again to extend the time to December 29th to serve case-made. On December 22d the plaintiff files his third motion for a new trial, and in this motion he alleges that he was prevented from appealing from the judgment entered against him on May 21st, for the reason the court reporter had failed to furnish him a case-made prior to October 18th, the last day left to him to serve the case-made. He states that he had made arrangements with the reporter to furnish him the case-made before that date in time to serve on opposing party; that the reporter forwarded him the case-made by express; that it reached the express office in the town where he resided October 19th, which was after the expiration of the time to serve the same.

The court overruled this third petition or motion for a new trial, exceptions were allowed, and notice of an appeal was given. On December 29th the court signed and settled the purported case-made, and the same was filed in this court January 2d following. The purported case-made does not contain the evidence adduced at the trial of May 21st, but does contain the affidavits presented to the court July 2d when the petition for new trial on the grounds of newly discovered evidence was overruled. It is more in the nature of a petition in error with transcript attached than with case-made attached.

The questions presented for review in this court are: First, whether the trial court erred in overruling the motion for new trial

Digitized by Google

on the grounds of newly discovered evidence; and, second, whether the court erred in overruling the petition for new trial for the reason defendant alleges that he was prevented from appealing from the judgment of the trial court of May 21st on account of the failure of the reporter to make a case-made. Both of these motions are based on section 5037, supra, which as far as the facts of this case are concerned is as follows:

"Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict or decision was rendered or made or report of the referee approved; or where the impossibility of making a case-made, without fault of the complaining party, arose after said term, the application may be made by petition filed in the original case, as in other cases, not later than the second term after such discovery or occurrence. * * *"

[1-3] Now, as to the motion for a new trial on the grounds of newly discovered evidence, the burden is on the moving party to prove that with reasonable diligence he could not have discovered the evidence relied upon, and that this newly discovered evidence would probably change the result if a new trial was granted, and must be material to the issue. Ordinarily newly discovered evidence, which is merely cumulative, impeaching, or contradictory, is not sufficient. Vickers v. Philip Carey Co., 49 Okl. 231, 151 Pac. 1023, L. R. A. 1916C, 1155, 20 R. C. L. pp. 294, 295. We have not before us the evidence adduced in the former trial of May 21st. This evidence is competent. Chicago, R. I. & P. R. R. Co. v. Mosher, 76 Kan. 599, 92 Pac. 554. Not having the evidence of that trial before us, we cannot say that this newly discovered evidence would probably change the result if a new trial was granted. Neither can we say that the trial court abused its discretion in overruling the motion for a new trial, which we must do if this case is reversed for that reason.

Now, as to the second ground for a new trial, that is, that the reporter failed to furnish a case-made within the time fixed by the order of the court, we find that to grant a new trial for that reason, under the wording of the statute, it must have been impossible to make a case-made and the complaining party must be without fault. October 18th was the last day fixed for serving the case-made. The last day for filing appeal in this court from the judgment of May 21st was November 21st; consequently the plaintiff could have asked for an additional time to serve case-made, and this could have been done without any great inconvenience, and his right of appeal could have been thereby saved to him.

The case-made in this case was made within the time that an appeal could have been taken to this court. The plaintiff permitted his time to elapse without securing additional time to serve the case-made. Consequently we cannot say that as a matter of law it was impossible to make a case-made within the time fixed by law to file a petition in error in this court, and for the reason the plaintiff permitted his time to serve case-made to elapse without asking for additional time to serve the same we cannot say that plaintiff is without fault in losing his right of appeal. We cannot review the petition in error, in so far as the judgment of May 21st is concerned, for the reason the same was not filed in this court within time fixed by law.

The appeal from the judgment of May 21st is dismissed. The judgment of the trial court of July 2d, overruling the petition for a new trial on the grounds of newly discovered evidence, is affirmed, and the judgment of the trial court of December 22d, overruling the motion for a new trial on the grounds that it was impossible to make case-made, is affirmed.

OWEN, C. J., and PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

ROCK et al. v. CRAIG & OSBORN.
(No. 11214.)

(Supreme Court of Oklahoma. May 25, 1920.)

(Syllabus by the Court.)

1. New trial ⟸150(1)—Motion on ground of newly discovered evidence filed more than three days after verdict must be accompanied by affidavit.

Unless motion for new trial is filed within three days as provided by section 5035, Rev. Laws 1910, and is on the ground of newly discovered evidence, it must be supported by affidavit making a prima facie showing that the newly discovered evidence will probably change the result of the trial and is such evidence as was discovered since the trial and which could not have been discovered prior to the trial through the exercise of due diligence.

2. New trial ⟸124(1)—Motion on ground of newly discovered evidence must set forth witness' name and residence and testimony.

To entitle the losing party to a new trial on the ground of newly discovered evidence, the motion should set forth the name and place of residence of the witness, what he would testify to, and be accompanied by the affidavit of such witness, or a sufficient showing of the reason for failure to produce such affidavit.

3. New trial ⟸97—Party cannot speculate on verdict and thereafter allege surprise.

A party to a suit will not be permitted to speculate on the verdict of the jury, and afterwards, for the first time, in his motion for new trial, raise the question of surprise.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

4. New trial ⟸102(1)—Plaintiff controlling testimony to meet defense cannot allege unoffered evidence as newly discovered evidence.

Where the record makes a prima facie showing that the plaintiff knows the defense to be offered and the basis of the counterclaim filed, and has control of the testimony which might be used to meet the defense offered and the counterclaim set up, he cannot successfully urge such unoffered testimony as newly discovered evidence on a motion for new trial, without a satisfactory showing of the reason for failure to produce such testimony at the trial, and reasonable diligence will not, under such circumstances, be presumed.

Error from District Court, Mayes County; E. B. Arnold, Judge.

Action by Charles F. Rock against C. R. Craig and J. L. Osborn, copartners doing business under the firm name and style of Craig & Osborn, and the Thomas Milling Company. Judgment for defendants Craig & Osborn, and plaintiff and defendant Thomas Milling Company bring error. Dismissed.

Graves & Seaton, of Pryor, for plaintiffs in error.

W. W. Powell, of Pryor, and Forrester Brewster, of Muskogee, for defendants in error.

KANE, J. The plaintiff, Charles F. Rock, a resident of Kansas City, Mo., is represented to be the attorney in fact of the Millers' Exchange. The Thomas Milling Company, of Weatherford, Okl., a subscriber of this organization, through its agent, W. K. Haines, on July 19, 1917, contracted in writing to sell and deliver to the defendants Craig & Osborn at Strang, Mayes county, Okl., 100 barrels of Ben-Hur flour at $11 per barrel, subject to change in specification by the buyer; shipment to be made within 20 days from date of sale. After considerable negotiations between the parties to the contract, the order was finally refused by the buyers, and on November 9, 1917, canceled by the Thomas Milling Company. Claim of the Thomas Milling Company for $90 damages was assigned to the plaintiff, Charles F. Rock, and a suit thereon was filed by him before a justice of the peace in the city of Pryor, Mayes county, Okl. Upon motion of defendants Craig & Osborn, the Thomas Milling Company was made additional party defendant. Cross-bill was filed by Craig & Osborn alleging damages for breach of contract, and judgment was rendered for them against the plaintiff, Rock, and the Thomas Milling Company, from which an appeal was prosecuted to the district court, where the case was tried to a jury, and verdict returned for the defendants Craig & Osborn, and judgment entered thereon for the sum of $180 on March 28, 1919.

The defense offered by Craig & Osborn was that the seller had breached the contract by refusal to deliver the flour when advised that the flour had been resold to C. G. Wallace at Locust Grove, and that it should either be shipped direct to Locust Grove or to Strang to be reshipped to Wallace at Locust Grove.

The ground of the cross-claim was that the seller had damaged the buyer, in that flour had declined in price after the refusal of the seller to deliver.

Defendants in error, Craig & Osborn, have filed a motion to dismiss the appeal on the ground that the motion of Rock and the Thomas Milling Company for new trial, filed May 2, 1919, 35 days after the entry of judgment, was filed out of time. This motion to dismiss is not controverted.

The motion for new trial contains the following affidavit of Charles F. Rock:

"Chas. F. Rock, of lawful age, being first duly sworn on oath, says that he is the plaintiff above named, and that one S. W. Haines was the salesman who sold the flour and brand in controversy, and that it will be possible to have the said S. W. Haines present at a new trial of said cause; that, if the said Haines were present at said trial, he would swear that said products were sold with the understanding and agreement that they were only to be sold at point of shipment, to wit, at Strang, Okl., and were not to be shipped elsewhere in the state of Oklahoma; that said fact as to shipment was well known and understood by all parties to said sale; that the said defendants well knew and understood that said products were to be sold in Strang, Okl.; that they knew the custom of said milling company to only sell to one customer in a town or city, and that the said Haines would so testify otherwise than that said products were to be sold by them in Strang, Okl., and had no reason to believe that they would testify that said Haines did not advise them that said products could not be sold by them at any other place than at Strang, Okl."

The contract, which appears to have been on one of the salesman's forms, and which is styled "uniform sales contract," contains this stipulation:

"It is understood that this contract contains all of the agreements between the parties, and no modifications thereof after the same have been confirmed will be valid, except by mutual consent of the parties, in writing."

[1] The only exception made by section 5035, R. L. 1910, for the failure to file motion for new trial within three days after the verdict, report, or decision is rendered, relied on by appellants, is "newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." This section is mandatory. Powelson v. State,

Digitized by Google

169 Pac. 1093; Joiner v. Goldsmith, 25 Okl. 840, 107 Pac. 733.

Section 5036, R. L. 1910, requires that a motion for new trial on the ground of newly discovered evidence, which attempts to come within the exception to the three-day rule, must be sustained by affidavits showing the truth of the facts alleged.

To relieve the necessity of filing motion for new trial within three days after judgment, there must be presented by motion and supported by affidavit a prima facie showing of newly discovered evidence which will probably change the result of the trial, and it must be shown that such testimony was discovered since the trial, and could not have been discovered prior to the trial through the exercise of due diligence. Eskridge v. Taylor, 75 Okl. 139, 182 Pac. 516; City of Ada v. Smith, 175 Pac. 924; Herring v. Hood, 55 Okl. 737, 155 Pac. 253; Eggleston v. Williams, 30 Okl. 129, 120 Pac. 944; Wiers v. Treese, 27 Okl. 774, 117 Pac. 182; McCants v. Thompson, 27 Okl. 706, 115 Pac. 600; Hobbs v. Smith, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697.

[2] For plaintiff in error to be entitled to a new trial on the ground of newly discovered evidence, the motion should set forth the name and place of residence of the witness, what he would testify to, and be accompanied by the affidavit of said witness, or a sufficient reason should be given for not producing the affidavit. Eskridge v. Taylor, supra; McCants v. Thompson, supra; Hobbs v. Smith, supra; Huster v. Wynn, 8 Okl. 569, 58 Pac. 736.

Movants urge that the record shows prima facie that the evidence urged as newly discovered evidence could with diligence have been produced at the trial. In this we think they are correct.

The depositions show by the record to have been taken for the trial before a justice of the peace show that both the plaintiff, Rock, and the defendant the Thomas Milling Company were familiar with the facts urged by Craig & Osborn as a defense to the plaintiff's action. Chas. F. Rock in his deposition, page 28 of the record, submitted as an exhibit a letter from Craig & Osborn stating that they offered to take the car of flour and that they had it resold to C. G. Wallace, of Locust Grove, Okl. Attached to the depositions of S. D. Hayworth, secretary and manager of the Thomas Milling Company, page 52 of the record, is the following letter from Craig & Osborn:

"I am writing you in regard to the car of flour you claim I never offered to take. I called Mr. Haines over the phone and told him to ship this car of flour to Locust Grove to C. G. Wallace. He refused to do so, and I told him to ship it to me and I would reship it, and he said he could not ship this all to be sold in Locust Grove. So I give up handling it at all and told him that over the phone. Now, if you see fit to sue me as you say you will, just go ahead, as I have done my part in this matter. I would like to do business with you in a friendly way if I could, as I always try and do business on the square. So let me here from you in regard to this matter."

Both Rock and the Thomas Milling Company, therefore, knew even prior to the trial before the justice of the peace that Craig & Osborn were relying as a defense on the resale of the flour, the thing concerning which the losing parties asked to introduce further testimony on the ground of newly discovered evidence.

The witness Haines was in the employ of the Thomas Milling Company at the time the flour was sold, and there is no evidence showing that he was not in the employ of this company at the time of the trial or that he could not have been present. There was no motion for continuance on the ground that his testimony was necessary in the case.

[3] In McCants v. Thompson, supra, we held that a party to a suit will not be permitted to speculate on the verdict of the jury and afterwards for the first time in his motion for a new trial raise the question of surprise.

[4] Where the record, as here, makes a prima facie showing that the plaintiff well knew the defense to be offered and the basis of the counterclaim filed, and has control of the testimony which might be used to meet the defense offered and the counterclaim set up, he cannot successfully urge such unoffered testimony as newly discovered evidence on a motion for new trial, without a satisfactory showing of the reason for failure to produce such testimony at the trial, and reasonable diligence will not, under such circumstances, be presumed. Eskridge v. Taylor, supra; City of Ada v. Smith, supra; McCants v. Thompson, supra; Hobbs v. Smith, supra.

For the reasons stated, the appeal is dismissed.

RAINEY, C. J., HARRISON, V. C. J., and PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

Digitized by Google

RENNIE v. RED STAR OIL CO. et al.
(No. 9684.)

(Supreme Court of Oklahoma. May 4, 1920.)

(Syllabus by the Court.)

1. **Mines and minerals ⟸73—Lessee is entitled to possession to extent necessary to perform his obligations.**

In an oil and gas lease, the lessee is entitled to the possession of the lands so leased to the extent reasonably necessary to perform the obligations imposed on the lessee by the terms of the lease.

2. **Mines and minerals ⟸77, 78(7)—Cessation of operations does not of itself show an abandonment; injunction against lessor's interference with lessee's removal of improvements held warranted.**

Where the lessee ceases operations under a lease, such cesser alone is not sufficient to establish abandonment. As to whether or not the lessee has abandoned the premises depends upon all the circumstances of the particular case. If the lessor acquiesces in the cesser of operations or fails to act in a manner indicating he considered the leased premises abandoned, he may be restrained from interfering with the lessee in removing casing, pipes, and other improvements erected by the lessee upon the premises, where the lease specifically gives the lessee the right to remove such casing, pipes, and other improvements at any time.

(Additional Syllabus by Editorial Staff.)

3. **Trial ⟸156(3)—Defendant's demurrer to plaintiff's evidence admits its truth.**

A demurrer to plaintiff's evidence admits the truth thereof, and all reasonable inferences to be drawn therefrom.

Error from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Action for injunction by the Red Star Oil Company and others against H. C. Rennie. Judgment for plaintiffs, and defendant brings error. Affirmed.

Samuel A. Boorstin and C. R. Thurwell, both of Tulsa (Carl M. Beren, of Tulsa, of counsel), for plaintiff in error.

H. B. Martin and R. A. Reynolds, both of Tulsa, for defendants in error.

PITCHFORD, J. The defendant in error was lessee in an oil and gas lease executed by W. E. Chastain on the 19th day of July, 1913, the lease containing the following provisions:

"That the lessor, in consideration of the sum of $1 in hand paid, the receipt of which is hereby acknowledged, and the payment of the sum of $5,000, payable as hereinafter stated, and of the covenants, agreements, stipulations, and conditions herein contained, does hereby grant, demise, lease, and let unto the lessee all of the oil and gas in and under the following described tract of land, and also the said tract of land, for the purpose and exclusive right of entering upon and operating thereon and removing therefrom said oil and gas, with the right to use oil, gas, and water therefrom and all rights and privileges necessary or convenient for such operations; also the right to remove at any time all property, pipes, and improvements placed or erected in or upon said land by the lessee; said land being all of that certain tract of land situate in Tulsa county, Okl."

It was further provided that—

"The lessee agrees and binds himself to forthwith commence drilling operations upon said premises, and, unless delayed by court proceedings or the act of God, to complete on said premises within 60 days from the date hereof a test for oil or gas to a depth of 1,500 feet, unless oil or gas is found at a lesser depth in paying quantities, and to complete a second test to said depth within 120 days and a third test to said depth within 180 days, unless oil or gas is found in paying quantities at a lesser depth.

"It is agreed that in the event oil or gas is found on said land in paying quantities, developed as aforesaid, that the balance of the consideration named in this contract in the sum of $5,000 may be paid by the lessee to the lessor in one-half of the gross oil or gas less royalty; proper division orders to be executed and suitable books to be kept by the lessee, so as to disclose the amount of oil or gas sold from the said premises.

"It is agreed that if the lessee shall fail to drill the three test wells above described within the time aforesaid, unless delayed by court proceedings or the act of God, or shall fail to diligently drill said wells when the excusable cause of delay shall end, this lease shall terminate and the consideration of $5,000 shall become immediately due and payable and shall draw interest from the date the same becomes due at the rate of 10 per cent. per annum until paid. Completion of said three wells and payment of said bonus shall of itself give full force and effect to this instrument.

"It is agreed that the drilling period of 180 days above set forth shall be extended in the event the lessee is delayed in drilling said premises on account of court proceedings or act of God."

It appears that the lessee entered into possession of the lands described in the lease and drilled the three wells within the specified time. The wells produced a small quantity of oil for a time, but did not prove profitable, and the lessee ceased operations. The total amount expended in developing the lease was approximately $15,000. Some time thereafter the buildings erected by the lessee upon the leased premises, together with the tanks, were destroyed by fire.

A short time prior to the institution of this action the lessor sold the land covered by the lease to plaintiff in error. After the purchase of the lands by plaintiff in error the lessee arranged to draw the casings and re-

Digitized by Google

move the pipes and other improvements placed on the land by the lessee, but when it was sought to go upon the land for this purpose it is averred that the plaintiff in error by force excluded the lessee from the premises, and further threatened to take the lives of any persons who might, on behalf of the lessee, go upon the premises for the purpose of removing said property therefrom. Thereupon the lessee filed in the superior court of Tulsa county its petition praying that the plaintiff in error be restrained from interfering with the lessee, its servants, and agents going upon said premises and removing therefrom such of the property of the lessee as was then upon said premises. Thereafter the cause came on to be heard, the court heard the testimony of witnesses and rendered judgment in favor of the lessee as prayed for, from which judgment plaintiff in error appeals.

[1, 2] The errors complained of for reversal of the judgment of the lower court may be summarized under the following heads: First, that the petition was not verified according to law; second, that the lessee had a plain and adequate remedy at law; third, that the court erred in not sustaining the demurrer to the evidence.

Section 4868, Rev. Laws of Oklahoma, provides:

"The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the county, or disqualification by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto."

The petition filed by the lessee herein was verified by H. B. Martin, an attorney, on information and belief. It was decided in Galbreath Gas Co. v. Lindsay, 35 Okl. 235, 129 Pac. 45, that a petition verified on information and belief was insufficient, that is, insufficient to justify the court to grant an injunction upon a petition so verified alone.

In the instant case the injunction was not granted until after the court had heard the testimony of witnesses. In the evidence given by the attorney who verified the petition all the facts set out in the petition are testified to by him as within his personal knowledge. The injunction was not granted alone upon the petition, but, in addition thereto, upon the testimony of witnesses in support of the statements therein set forth. The trial court would not have been justified in granting the order upon the petition alone, the verification not being as required, and we presume in the absence of the oral evidence the order would have been denied. It is strenuously contended that the lessee was not entitled to injunctive relief; that the remedy, if any, was by an action in replevin; in other words, that the lessee had a plain and adequate remedy at law.

In considering this contention, we should inquire as to the rights of the lessee under the terms of the lease. Under an oil and gas lease the possession of the leased premises by the lessor, and lessee is what might be termed a concurrent possession; that is to say, the lessee is entitled to enter upon the land leased and entitled to the possession of such parts and portions thereof necessary for developing the premises for oil and gas under the terms of the lease and to do the things necessary to make the operation successful.

In Brennan v. Hunter, 172 Pac. 49, the court said:

"The lease from Hill to Hunter and associates conferred on the lessee the right to go on the premises and search for oil within the initial period, and to commence operations within that period, and continue the same until it was determined whether the premises were barren, or oil or gas, or either of them, were found thereon in paying quantities, and while the lessee acquires no vested estate in the premises prior to the discovery of oil or gas, yet they had the right to the possession of the land to the extent reasonably necessary to perform the obligations imposed upon them by the terms of the lease."

To the same effect see Thornton on Oil & Gas, vol. 1, § 110; Westmoreland Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; Greensboro Nt. Gas. Co. v. Fayette County Gas Co., 200 Pa. 388, 49 Atl. 768; Galbreath v. McLane, 51 Okl. 754, 152 Pac. 355; Pulaski Oil Co. v. Conner, 162 Pac. 464, L. R. A. 1917C, 1190.

In the instant case it appears that the lessee went in possession of the leased premises in so far as was necessary for the purposes of the lease; wells were drilled and incased, pipes were laid, tanks were erected, and the wells operated for some time. Quite a large sum of money was expended by the lessee in developing the premises. While the operations had ceased for some time before the lessee sought to remove the property involved from the premises, its right to do so had at no time been questioned by the lessor; in fact, we find negotiations taking place between the lessor and lessee as to a settlement and a threat upon the part of the lessor to bring an action to cancel the lease.

[3] There is no denial that the title or the right of possession to the property sought to be removed from the premises was in the lessee. The demurrer admits the truth of the evidence offered by the lessee and all reasonable inferences to be drawn therefrom. Sartain v. Walker, 60 Okl. 258, 159 Pac. 1096; Rose v. Woldert Grocery Co., 54 Okl. 566, 154 Pac. 531.

No effort was made to show that the lessor or the plaintiff in error, prior to the time the

Digitized by Google

lessee sought to remove the property, from the leased premises, was holding the property adversely to the lessee or denying the right of the lessee to enter and remove the same. So far as the record discloses, the lessee was constructively in possession of all the property sought to be removed, and being in the constructive possession at the time, under the terms of the lease, neither the lessor nor the plaintiff in error was justified in attempting to exclude the servants and agents of the lessee from the premises for the purpose of removing the property therefrom. Had the plaintiff in error made it to appear that he was entitled to the property, or the right to possession, or that the lessee had abandoned the premises, or any facts showing that the lessee was not entitled to the possession thereof, we presume under that showing the injunction would not have been granted; in other words, that the trial court would have decided that the lessee was not entitled to injunctive relief for the reason that the law provided a full and complete remedy.

We have carefully examined the evidence introduced at the trial, and conclude that the lower court committed no error in granting the relief prayed for.

OWEN, C. J., and McNEIL, HIGGINS, and BAILEY, JJ., concur.

ALAMO NAT. BANK OF SAN ANTONIO v. DAWSON PRODUCE CO. et al.
(No. 9656.)

(Supreme Court of Oklahoma. April 27, 1920. Rehearing Denied May 25, 1920.)

(Syllabus by the Court.)

1. Bills and notes ⟸356—Bank giving drawer of bill of exchange credit on his deposit is not holder for value, unless deposit is checked out.

Where a bank purchases a bill of exchange from the drawer before maturity, and gives the drawer credit on his deposit account in the bank for the face value of the bill, such transaction only creates the relation of debtor and creditor, and does not constitute the bank a purchaser or holder for value; but if the deposit is drawn or checked out before the bill is accepted, the bank then becomes a purchaser for value.

2. Bills and notes ⟸356, 538(2) — Bank merely crediting proceeds of bill of exchange not a purchaser for value; question of ownership of bill of exchange rather than agency for collection held for jury.

In order to establish the fact that a bank which is the payee in a bill of exchange is not a purchaser for value, it is not sufficient to show that when the bank took the bill it simply gave the drawer credit on his deposit account for the face value of the bill, and where it is alleged by the payor that the bank was not the owner, but acted as the agent of the drawer in making the collection, the question of ownership is a question of fact, to be submitted to the jury, and not one of law for the court.

3. Appeal and error ⟸1001(1) — Verdict supported by some evidence will not be disturbed in the absence of prejudice.

In a civil action, triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict of the jury will not be disturbed on appeal.

Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by the Dawson Produce Company against the Alamo National Bank of San Antonio, Tex., and others, with garnishment against the Farmers' National Bank, which answered, remitting funds, whereupon the Alamo National Bank filed a plea claiming ownership. Verdict for plaintiff, Dawson Produce Company, motions for a new trial, for judgment non obstante veredicto, and for a discharge of the garnishment overruled, and the Alamo National Bank, interpleader, brings error. Affirmed.

C. A. Davies, of San Antonio, Tex., and Wilson, Tomerlin & Threlkeld, of Oklahoma City, for plaintiff in error.

Shirk, Danner & Fowler, of Oklahoma City, for defendant in error.

JOHNSON, J. In April, 1917, Dawson Produce Company, pursuant to certain telegrams, purchased a carload of strawberries from Flory & Albers, of San Antonio, Tex. The shipment was made open. That is to say, it was not required that the Dawson Produce Company should pay the draft for the purchase price before receiving the goods from the carrier. Prior to making the shipment, however, the Farmers' National Bank wired the Alamo National Bank, guaranteeing payment of draft as follows:

"We will pay draft on Dawson Produce Company for car of strawberries at two dollars sixty-five cents per crate.

"Farmers' National Bank."

The car arrived in Oklahoma City on or about April 7th or 9th, and was received by Dawson Produce Company on or about that date. Several days after receiving the strawberries, Dawson Produce Company paid the Farmers' National Bank the amount of the draft, and received the draft from that bank, and have ever afterwards retained possession thereof. The draft was paid on April 13th. Thereafter, and before the Farmers'

Digitized by Google

National Bank could remit the proceeds to the Alamo National Bank, from whom it had received the draft, Dawson Produce Company brought a suit in the district court of Oklahoma county against Flory & Albers, the Alamo National Bank et al. A garnishment affidavit was filed, alleging that the defendants were indebted to the plaintiff in the amount of $1,378, and that the Farmers' National Bank had money in its possession belonging to the defendants. The Farmers' National Bank filed a garnishee's answer, and in general terms stated that it had in its possession money belonging to the defendants in the sum of $2.098.80.

None of the defendants named in the petition entered any appearance in this case, except the Alamo National Bank, who filed an answer, denying that it ever entered into any kind of a contract with plaintiff for the sale of the carload of strawberries.

The Alamo National Bank also filed an interplea in the case, setting up that it was the owner of the money garnisheed, and asking judgment for the same.

Dawson Produce Company filed an answer to the interplea, denying the allegations of the Alamo National Bank's answer, and denying that the said bank purchased the draft, and alleged that it was not the holder thereof for value in good faith, but in the collection of same acted on behalf of its codefendants, Flory & Albers.

At the trial it was stipulated that the Dawson Produce Company did not ask personal judgment against the Alamo National Bank, and that it waived any claims for damages against said bank by reason of its allegations in the petition, and that the only issue in the case was ownership of the money in the hands of the Farmers' National Bank garnishee.

A trial was had to a jury before Hon. John W. Hayson, judge, and a verdict was rendered in favor of the Dawson Produce Company. Motions for a new trial and for judgment non obstante veredicto and for a discharge of the garnishment were overruled by the court, from which orders and rulings the interpleader excepted and filed its petition in error and case-made for reversal and for judgment in this court.

[1-3] As we have seen, the only parties appearing at the trial was the Alamo National Bank and the Dawson Produce Company, and by stipulation of these parties the only issue in the case was the ownership of the money in the hands of the Farmers' National Bank garnishee.

The proof in support of the allegations in the plea of intervention consisted of the deposition of the cashier of the Alamo National Bank that he knew nothing with respect to the contract and sale between Dawson Produce Company and Flory & Albers; that his bank cashed the draft drawn in accordance with the instructions of Flory & Albers, and that the amount of the draft belonged to his bank. On cross-examination he testified further that his bank had no understanding with Flory & Albers with respect to the amount of the draft being charged to their account in the event same was not paid; that they cashed drafts for produce for a stranger when accompanied by a bank guaranty; that they charged back the amount on unpaid drafts in instances where the same are not paid by the drawee; that Flory & Albers had an account with his bank; and that he regarded the firm good for the amount in case of nonpayment of the item.

The cashier of the Farmers' National Bank was next called by plaintiff in error, who testified that his bank sent the telegraphic guaranty to the Alamo National Bank at the instance of Dawson Produce Company, that the draft was received at Oklahoma City on the 9th day of April, 1917, and was not paid until the 13th day of April, 1917, and that the express receipt was attached to the draft. On cross-examination he testified that the draft came to his bank for collection, instead of a cash item.

The next witness called by the intervener, Alamo National Bank, was the Oklahoma City agent of the express company, who testified that the shipment was made and received open, and upon arrival delivered to Dawson Produce Company, and from his records gave the movements of the car. With this testimony the Alamo National Bank rested.

The Dawson Produce Company proceeded then with evidence in support of the allegations contained in its answer to the plea of the intervention of the plaintiff in error, and first offered the deposition of Mr. Flory, of Flory & Albers.

Mr. Flory testified, with respect to the contract and shipment, that it had been sued by the grower of the strawberries for the price; that his firm received a telegram from the Farmers' National Bank, guaranteeing payment of the draft directed to them; that he wired purchaser that bank guaranty should be given plaintiff in error by an Oklahoma City bank; that his firm drew the draft on payee, Dawson Produce Company, obtained the credit from the Alamo National Bank, and had not, at the time of the taking of the deposition, had the amount changed to his firm's account. On cross-examination he testified that before he issued the draft he communicated with the Alamo National Bank by telephone, and learned that it had the bank guaranty from the Farmers' National Bank; that he then issued draft, to which was attached express receipt; then took them to the Alamo National Bank, and received credit for the amount to their account; that at the time of taking of the deposition the amount of the draft had not been changed

Digitized by Google

back; that his firm had an understanding with the Alamo National Bank that if the money should be held up at Oklahoma City their account would be charged back; that the Alamo National Bank was assisting his firm in having this money released, but in the event it was not released the bank would not lose, but his firm would; that the item was not charged back because his firm had sufficient funds in the bank to cover the amount of the draft; that if his firm did not have more than enough to take care of this draft the bank would have charged the item back; that the Alamo National Bank was acting as agent in collecting the draft; that their account was credited at the time he took the draft and express receipt to the bank and deposited it, which was probably the same day the Alamo National Bank received the telegraphic guaranty from the Farmers' National Bank; that the account of his firm was credited with the amount of this draft by the Alamo National Bank because of the bank guaranty, that it deposited the draft and express receipt; and that the shipment was made open.

Defendant in error also offered the testimony of the general manager of the Dawson Produce Company, who testified with respect to the receipt of the strawberries, that the draft was paid under protest. With this testimony the case was submitted to a jury, under instruction of the court, and a general verdict returned in favor of defendants in error.

To the refusal of the court to grant to the Alamo National Bank a new trial on its motions, appeal was regularly lodged in this court. Counsel for plaintiff in error say in their brief:

"The court should have granted interpleader's motion for a peremptory instruction, and should have entered judgment, awarding the money in the hands of the garnishee to the interpleader.

"It is the contention of the plaintiff in error that the fact that the Alamo National Bank credited the draft in question to the account of Flory & Albers as a cash item, subject to the check of the latter after it had received telegram from the Farmers' National Bank guaranteeing payment of that draft, and the fact that the Dawson Produce Company paid the draft to the Farmers' National Bank, entitles the Alamo National Bank to the proceeds, notwithstanding that Flory & Albers may have intended to protect the Alamo National Bank in the event that the draft was not paid."

We cannot agree with this contention of counsel. The Produce Company in its answer to the plea of intervention of the bank alleged:

"That the defendant Alamo National Bank at no time purchased the draft and express receipt named and set out in said interplea, but at all times handled the same as any other exchange passing to said bank by its customers, and that it is not the holder thereof for value in good faith, but in the collection of same acted on behalf of its codefendants, Flory & Albers."

So we see ownership of the draft was made an issue in the pleadings, and it is disclosed by the record that upon that issue the testimony was sharply in conflict.

In the case of Morrison & Co. v. Farmers' & Merchants' Bank, of Los Angeles, Cal., 9 Okl. 697, 60 Pac. 273, the Supreme Court of the Territory of Oklahoma, announced the rule applicable to the facts of this case, which has been followed by this court in numerous cases, and is thus stated in the syllabus of the Morrison Case:

"5. Defenses available between the acceptor and drawer of a bill of exchange, are not available in an action by the payee against the acceptor, if the payee is a bona fide holder for value, and the burden of overcoming the presumption that the payee is not a bona fide holder for value is on the acceptor, who seeks to set up such defenses against the payee.

"6. Where a bank purchases a bill of exchange from the drawer before maturity, and gives the drawer credit on his deposit account in the bank for the face value of the bill, such transaction only creates the relation of debtor and creditor, and does not constitute the bank a purchaser or holder for value; but if the deposit is drawn or checked out before the bill is accepted, the bank then becomes a purchaser for value.

"7. In order to establish the fact that a bank which is the payee and holder of a bill of exchange is not a purchaser for value, it is not sufficient to show that when the bank took the bill it simply gave the drawer credit on his deposit account for the face value of the bill, and it must be further shown that the amount of the deposit at that time had not been paid * * * prior to acceptance of the bill." Forbes v. National Bank of Enid, 21 Okl. 206, 95 Pac. 785; Wood v. Stickle et al., 36 Okl. 592, 126 Pac. 1082; State National Bank of Oklahoma City v. Wood, 43 Okl. 251, 142 Pac. 1002; Marsh Mill & Grain Co. v. Guaranty State Bank of Ardmore, 171 Pac. 1122, L. R. A. 1918D, 704.

Plaintiff in error's remaining assignments are:

"(2) The court erred in his instruction to the jury; (3) the court erred in refusing to give requested instructions to the jury; (4) the court erred in not discharging garnishment."

There is no merit in the third proposition. We have examined the instructions refused, which are four in number, and all of which were, in effect, a peremptory instruction to find for the plaintiff in error, and the court did not err in refusing the same for the reason that an issue of fact was joined, upon which the testimony was sharply in conflict.

We have likewise examined the instructions given, and are of the opinion that the instructions as a whole fairly submitted the questions of law applicable to the facts and the sole issue as to the ownership of

Digitized by Google

the money in the hands of the garnishee. Under these circumstances it is the universal holding of this court that the verdict of the jury will not be disturbed on appeal. The judgment is therefore affirmed.

OWEN, C. J., and KANE, RAINEY, HARRISON, and BAILEY, JJ., concur.

ROSE v. STALCUP, County Treasurer.
(No. 10924.)

(Supreme Court of Oklahoma. June 1, 1920.)

(Syllabus by the Court.)

Taxation ⟸181—Purchaser of surface of segregated Indian land held properly assessable in the following year.

On the 28th day of October, 1917, pursuant to the Acts of Congress, approved February 19, 1912 (37 Stat. L. 67), as amended by the Acts of Congress, approved August 24, 1912 (37 Stat. L. 518–531), providing for the sale of the surface of the segregated coal and asphalt lands of the Choctaw and Chickasaw Tribes of Indians, under rules and regulations to be prescribed by the Secretary of the Interior, R. was the successful bidder for certain tracts of land offered for sale, under the rules and regulations prescribed. On the date of sale, 25 per cent. of the amount of the bid for the respective tracts was paid, and within 15 days thereafter the balance of the 75 per cent. was paid and a certificate of purchase was issued by the Superintendent for the Five Civilized Tribes, which certificate entitled the purchaser to the immediate possession of the tracts of land so purchased. *Held*, that the lands were properly placed upon the assessment rolls for the year 1918, for taxation, notwithstanding the patent was not issued until some time after the 1st of January, 1918.

Error from District Court, Haskell County; E. F. Lester, Judge.

Action by Sam Rose against R. E. Stalcup, as treasurer of Haskell County. Judgment for defendant, and plaintiff appeals. Affirmed.

E. O. Clark, of Stigler, for plaintiff in error.
Duke Frederick, Co. Atty., and Fred H. Fannin, both of Stigler, for defendant in error.

PITCHFORD, J. This is an appeal from a judgment of the district court of Haskell county. The appeal involves, in substance, the following facts: On the 28th day of October, 1917, Sam Rose purchased at a public land sale, held at Stigler, Okl., under rules and regulations prescribed by the Secretary of the Interior, certain segregated lands of the Choctaw and Chickasaw Indians, situated in Haskell county, Okl., paying therefor, on the date of sale, one-fourth of the purchase price, and the balance within 15 days thereafter, and receiving from the Superintendent for the Five Civilized Tribes a final receipt, for the final payment thereof, this final receipt being designated as a "certificate of purchase." Thereafter the county assessor of Haskell county placed the lands so purchased on the assessment rolls of said county for the year 1918, at the amount so paid by the purchaser. The purchaser paid the first half of the taxes for the year 1918 under protest, and commenced action in the district court of Haskell county to recover the amount so paid. The judgment of the district court was that the lands so purchased were liable for taxes for the year 1918.

The single question involved in this appeal is whether the surface of segregated coal and asphalt lands, upon which the full payment has been made and the final receipt or certificate of purchase has been issued to the purchaser prior to January 1, 1918, was subject to taxes for the year 1918.

Section 2, art. 1, c. 107, Session Laws 1915, p. 142, provides:

"All taxable property shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale, in the name of the owner thereof on the first day of January of each year, as soon as practicable on or after the fifteenth day of January, including all property owned on the first day of January of that year. * * * If any real estate shall become taxable during the time between the period for assessing real estate, the county assessor shall assess same for taxation and place the same upon the tax rolls."

This was the statute in force on January 1, 1918. Was plaintiff, on that date, the owner, within the meaning of this statute, of the lands involved in this action? The cause was submitted to the trial court upon an agreed statement of facts, the fifth paragraph of the same being as follows:

"That thereafter, under and pursuant to said Acts of Congress and said rules and regulations prescribed by the Secretary of the Interior, a sale of the surface of the segregated coal and asphalt lands, including the lands described in plaintiff's petition, was advertised to be held at Stigler, in Haskell county, state of Oklahoma, on the 28th day of October, 1917. That the plaintiff, Sam Rose, and the persons from whom he purchased were present at said sale, and were the highest bidders for the respective tracts of land described in plaintiff's petition; that at the conclusion of the bidding on each tract of land at said sale the successful bidder was given a statement, a blank copy of which is hereto attached, marked 'Exhibit B,' and made a part of this agreed statement of facts. That, thereafter and on the same day the successful bidder presented himself according to custom to a representative of the cashier of the Commissioner for the Five Civilized Tribes, and deposited 25 per cent. of the amount

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

of the bid for the respective tracts of land and received therefor a receipt, a copy of which is hereto attached, marked 'Exhibit C,' and made a part of this agreed statement of facts. That within 15 days from that date the plaintiff and the persons from whom he purchased the lands described in the petition deposited the balance of the 75 per cent. of his bid upon said land, and received therefor a receipt for final payment, a blank copy of which receipt is hereto attached, marked 'Exhibit D,' and made a part of this agreed statement of facts."

While the rules and regulations so prescribed reserved the right to reject any and all bids, there was a further provision that immediately after any sale, schedules of the successful bidders should be prepared and submitted to the Secretary of the Interior, or such officer as he might designate for consideration and approval, such approval to be subject to the condition that the Secretary of the Interior might by formal order set aside and vacate any proposed sale for failure of the prospective purchaser to pay any part of the purchase price or the interest thereon when the same becomes due, or for any other good reason. Also, in such case, by formal order, to forfeit to the Choctaw and Chickasaw Nations any and all of the purchase money paid as a guaranty of good faith. As we understand the regulations prescribed, the authority was given to the Superintendent for the Five Civilized Tribes to approve the sale, and by reference to "Exhibit D," we find the same is designated as "Certificate of Purchase, Surface of Segregated Coal and Asphalt Lands." In this exhibit we find that the purchaser is entitled to the immediate use and possession of the surface of the lands purchased, but that no drilling or mining for minerals thereon, including oil and gas, shall be permitted, nor merchantable timber thereon disposed of, or any stone or sand removed therefrom until the full purchase price has been paid.

It is the contention of the purchaser that the sales were not approved by the Secretary of the Interior until some time in February, 1918, and that no certificate of purchase was ever issued by the Secretary of the Interior. The failure of the Secretary of the Interior to issue the certificates of purchase convinces us that the Superintendent for the Five Civilized Tribes was the officer designated to approve the sale; consequently, there was no necessity for a certificate to be issued by the Secretary of the Interior.

The purchaser had fully performed every requirement to entitle him to a patent prior to the 1st day of January, 1918, while the patent was not issued until after the 4th day of February, 1918, but when the same was finally issued, it related back to the date of the original purchase.

Section 21 of the rules and regulations prescribed by the Secretary of the Interior provides:

"As soon as full payment is made for any tract of the land purchased under these regulations, a deed shall be issued, conveying said land to the purchaser without any reservations, except in the case of the segregated coal and asphalt land where the coal and asphalt are reserved."

In 37 Cyc. 792, it is said:

"While ordinarily the owner of property for the purpose of taxation is the person having the legal title or estate, an equitable estate or interest in land is subject to taxation, if within the terms of the statute imposing the tax. * * *"

The lands in controversy were entered upon the tax rolls at the exact amount paid by the purchaser. Either the money then in possession of the government was held in trust for the purchaser and liable to be assessed for taxes, or the purchaser was entitled to a patent. In other words, on the 1st day of January, the purchaser had complied fully with every requirement to entitle him to a patent; that is, the full purchase price had been paid, possession of the lands had been taken by the purchaser, or he was entitled to the possession.

The rule is more fully stated in Copp v. State, 69 W. Va. 439, 71 S. E. 580, 35 L. R. A. (N. S.) 670, as follows:

"The general rule obtaining as to the right of a state to tax property which has been granted or sold by the United States government, and the title thereto or a lien thereon retained in favor of the public, has been well stated by Mr. Justice Elliott, in State v. Itasca Lumber Co., 100 Minn. 355, 111 N. W. 276, as follows: 'Usually the possession of the legal title by the United States government determines both the fact and the right of ownership. With respect to the public domain, there is one exception to this general rule, which is as well settled as the rule itself. When Congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that, upon the performance of the conditions, the United States shall issue a patent to the purchaser, and all the conditions are complied with, it only remains for the United States to issue the patent, and in the meantime it holds the legal title in trust for the purchaser. When the government has no longer any right or interest in the property which would justify it in withholding the patent, and the purchaser is in possession, the latter will be treated as the beneficial owner. This exception rests upon the principle that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to escape his just share of taxation. But before the land can be taxed by the state as the property of the beneficial owner, a perfect equitable title must be vested, and the consideration fully paid to the United States.'"

Continuing on the following page is cited Cass County v. Morrison, 28 Minn. 257, 9 N. W. 761, the controversy there being as to

Digitized by Google

the taxability of certain lands embraced within a grant made by the United States to the Northern Pacific Railroad Company, and subsequently sold by the railroad to the defendant. In holding that the lands were taxable, in the hands of the defendant, notwithstanding no patent had ever issued therefor, Berry, J., said:

"From the concessions of the parties, it appears that, except as respects the payment of the cost mentioned, everything has been done required by the terms of the grant to entitle the company to a complete, perfect, and absolute title in fee to the lands in controversy, and to entitle it to receive the proper evidence of such title from the United States. In other words, the company has earned and paid for the lands by complying with the conditions of the grant, and if a formal conveyance be necessary to vest it with the legal title, it is, nevertheless, in the fullest sense, the equitable owner of the land, and the legal title is held by the United States as a naked trustee solely and simply for the company's use and benefit. This is so, irrespective of any notion of the grant in præsenti and its effect in conferring title in præsenti.

"Nor does the fact that the issuance of the patent is delayed by the government after the purchaser has entered on the land, for the purpose of making an investigation concerning the entry, exempt the land from taxation, especially when, at the time of the investigation, the equitable title is in the purchaser, and the patent finally issues upon the original purchase and entry."

In Morris et al. v. Board of Commissioners of Love County, 177 Pac. 900, the syllabus reads:

"Where nontaxable Indian lands become taxable on alienation, a vendee, who takes possession of such lands under an executory contract of sale, has the equitable title thereto and is the owner thereof for the purpose of taxation."

In Wheeler v. Merriman, 30 Minn. 379, 15 N. W. 667, we have the following:

"The facts disclosed by the record are these: One White purchased the land of the United States on the 2d of October, 1857, by locating upon it a military bounty land warrant. The issue of a patent upon this location was suspended on account of a caveat being filed in the General Land Office against the warrant by the owner thereof, on the ground that the assignment was forged, and on that ground the warrant was canceled in November, 1864. * * * The plaintiff, who was the grantee of White, the locator, in July, 1880, paid to the United States $100 in lieu of the canceled warrant, and, the substitution being thus made, a patent issued to White upon his original location of October 2, 1857. Had this location been canceled and the land reverted to the United States and by them been sold to another purchaser, an entirely different question would have arisen. But in this case the location was never canceled, but merely the issue of a patent suspended until the substitution was made, the money being substituted for the warrant and relating back to the original location. * * * It is well settled that land purchased of the United States and paid for, though not patented, is subject for taxation. * * * The entry was finally approved, and the patent when issued, related back to the original location."

In Witherspoon v. Duncan, 21 Ark. 240, appeal to the Supreme Court of the United States, reported in 4 Wall. 210, 18 L. Ed. 339, Mr. Justice Davis said:

"It does not appear from the record why the patent was so long delayed; but the claim was finally approved on the original proofs, and the patent, when issued, related back to the original entry. The lands were therefore under the laws of the state properly chargeable with taxes from the date of the first entry. * * *"

In Bowls v. Oklahoma City et al., 24 Okl. 579, 104 Pac. 902, 24 L. R. A. (N. S.) 1299, by an act of Congress, the United States granted to Oklahoma City a tract of land for the benefit and use of the city's free schools. The act provided for the platting of the land, and that when a sale thereof had been made and purchase money all paid, patents should issue. On December 24, 1894, Bowls and the city entered into a contract of sale for some of the land, and, pursuant to the agreement, Bowls paid $25, and agreed to pay the sum of $32, thereon before one year from said date, and the further sum of $75 on or before December 24, 1912. It was there held that—

"A vendee of realty in possession under an executory contract of sale at the date of the assessment is the real owner for the purpose of taxation, and that too, whether prior to said sale the same was subject to taxation in the hands of his vendor or not."

In Miller v. Corey, 15 Iowa, 166, cited in Bowls v. Oklahoma City et al., supra, the court said:

"By the terms of the contract the vendee had a right to the possession of this land before these taxes were assessed, and this right, according to the finding of the court below, he exercised and enjoyed from and after the time thus fixed. * * * As a rule, the party deriving the sole profit from the use of the land, in the absence of some stipulation, should pay the accruing taxes."

In Boone v. Porter, 45 Okl. 615, 146 Pac. 584, this court, in deciding the question of who was the owner of the land in that case, within the meaning of the tax laws at assessing time, held that the plaintiff was the owner, and, as its reason therefor, said:

"This for the reason that he was a vendee in possession under an executory contract of sale at the time of their assessment."

In Bowls v. Oklahoma City et al., 24 Okl. 579, 104 Pac. 902, 24 L. R. A. (N. S.) 1299, we held such an owner to be the real one for the purpose of taxation.

Digitized by Google

The judgment of the trial court is therefore affirmed.

HARRISON, V. C. J., and KANE, JOHNSON, McNEILL, and RAMSEY, JJ., concur.

TULSA FUEL & MFG. CO. v. GILCHRIST DRILLING CO. (No. 9709.)

(Supreme Court of Oklahoma. May 18, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸1001(1)—Judgment on verdict supported by evidence will not be reversed.

Where the evidence in the case reasonably tends to support the verdict of the jury, and the trial court has entered judgment thereon, such judgment will not be reversed on the ground of the insufficiency of the evidence.

2. Contracts ⟸322(5)—Evidence supporting verdict for partial recovery for drilling oil and gas well.

Evidence examined, and *held* sufficient to support the verdict returned by the jury.

(Additional Syllabus by Editorial Staff.)

3. Contracts ⟸4—"Implied contract" defined.

An "implied contract" is a contract implied in fact, or, in the proper sense, one which arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Implied Contract.]

Error from District Court, Tulsa County; N. E. McNeill, Judge.

Action by the Gilchrist Drilling Company against the Tulsa Fuel & Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Shell S. Bassett, of Tulsa, for plaintiff in error.

Edward P. Marshall, of Tulsa, for defendant in error.

PITCHFORD, J. The plaintiff in error was defendant below; the defendant in error was plaintiff below. Hereafter the parties will be referred to respectively as they appeared in the trial court.

The Lynna Oil Company was the owner of an oil lease, and the defendant was the owner of a gas lease on the west half of the southwest quarter of section 30, township 23 north, range 14 east. These leases had been purchased from the original owners, O. B. Goldrick, Ray Collins, and Donald P. Oak. The defendant's purchase was prior to that of the oil lease by the Lynna Oil Company.

There seems to have been some agreement or understanding between the defendant and the original owners of the oil lease that either party had the right to drill wells upon the leasehold estate, and in case the owners of the oil rights drilled a well producing gas, the owners of the gas rights might take it over, and if the owners of the gas rights drilled a well producing oil, the owners of the oil rights might take the same over, the party so taking the well to pay the expense of drilling.

The Lynna Oil Company purchased the oil lease December 15, 1915. There is no positive evidence showing that the defendant knew of the change in the ownership of the oil lease. The Gilchrist Drilling Company, the plaintiff, was composed of W. O. Goldrick and F. N. Gilchrist. W. O. Goldrick was the father of O. V. Goldrick, one of the original owners of the lease, and had been acting as superintendent for his son, O. B. Goldrick, Collins, and Oak.

On or about January 1, 1916, the plaintiff commenced and prosecuted to completion to the depth of 1,275 feet a test well for gas and oil. The well proved to be dry, and was accordingly plugged. The plaintiff, after completion of the well, sent a bill for the work to the Lynna Oil Company and also to the defendant. The former paid one-half of the bill and refused to pay the balance, claiming that the defendant was liable therefor. The defendant refused to acknowledge its liability, and the plaintiff commenced this action in the district court for Tulsa county against the defendant, demanding judgment for the sum of $541.87. Judgment was returned in favor of the plaintiff for $440.50.

The grounds relied on for reversal of the judgment of the trial court were: First, the verdict of the jury was contrary to the evidence introduced in said cause and wholly unsupported thereby; second, that the verdict of the jury and judgment of the court thereon were contrary to law.

The jury at the time the cause was submitted to them answered certain interrogatories as follows: First. "Was there an express or implied contract between the plaintiff and the defendant, the Tulsa Fuel & Manufacturing Company?" to which the jury unanimously answered, "Yes." Second. "Did the Tulsa Fuel & Manufacturing Company know that the plaintiff was drilling a well for it, or did it have knowledge of facts or circumstances sufficient to apprise it of that fact?" to which question the jury unanimously answered, "Yes."

The facts and circumstances connected

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

with and surrounding the drilling of the well are practically as follows: Sometime prior to January 1, 1916, W. O. Goldrick, one of the plaintiffs, had a conversation with M. D. Arbuckle, field superintendent for the defendant company, in which he told Mr. Arbuckle that something ought to be done with the lease; that the rights thereunder would soon expire. He says that Mr. Arbuckle replied by telling him, "Our contractors are busy; we can't get to it; have you got a string of tools you can put on them?" The witness says that he told him he could. After this conversation over the phone, the witness had a conversation with Mr. Arbuckle in the office of the plaintiff company. They there discussed the best place to locate the well. Mr. Arbuckle stated that he wanted the well in the southeast corner to test the lease south of it. The witness further testified that he reported to the Tulsa Fuel & Manufacturing company as to the progress being made in drilling the well; that he called up the office of Mr. Arbuckle and made reports at different times, and Mr. Arbuckle was asked for gas, and his reply was, "They didn't have any line up there." The witness further stated that, after they got the well to a point where they considered it dry, he called Mr. Arbuckle over the telephone and wanted to know what should be done, whether they ought to go any deeper or not. He says that Mr. Arbuckle answered, "As far as we are concerned, we are through with it." The witness further testified that he sent a bill to the defendant, and they refused to pay it. He spoke to Mr. Arbuckle about it, and Mr. Arbuckle replied, "We won't pay 85 cents a foot; we only pay 75 cents to our contractors."

There was also evidence to the effect that Mr. Arbuckle was frequently in the neighborhood where the well was being drilled, and was present at the well on one occasion at least. It appears that the Lynna Oil Company furnished the casing for the well and also the gas to run the machinery.

The question presented for our consideration is as to whether or not there was evidence sufficient to sustain the verdict of the jury. The province of the jury is to weigh the evidence, consider the conduct and manner of those testifying and to reconcile conflicts in the proof, and, if the verdict is found to be reasonably sustained by any competent evidence, the same should not be disturbed.

There is nothing in the evidence showing an express contract between the parties; consequently the plaintiff must rely for recovery upon what is known as an "implied contract." The intention of the parties in an "implied contract" is to be gathered from their acts in connection with the surrounding circumstances, and what was said between the parties at the time, the nature of the work done, and as to how the interest of the parties sought to be charged is effected thereby.

[3] An "implied contract" is defined in 13 C. J. § 8, p. 241, as follows:

"A contract implied in fact, or an implied contract in the proper sense, arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. It follows that the only distinction between this species of contract and express contracts rests in the mode of proof; the nature of the understanding is the same, and both express contracts and contracts implied in fact are founded on the mutual agreement of the parties. The one class is proved by direct, the other by indirect, evidence; in other words, the one must be proved by an actual agreement, while in the case of the other it will be implied that the party did make such an agreement as, under the circumstances disclosed, he ought in fairness to have made. The implication, of course, must be a reasonable deduction from all the circumstances and relations of the parties, although it need not be evidenced by any precise words, and may result from random statements and uncertain language."

In Rains et al. v. Weiler et al., 101 Kan. 294, 166 Pac. 235, L. R. A. 1917F, 571, it was said:

"Parties may be as firmly bound by implied contracts as by those expressed in words, oral or written; they may arrive at agreements by acts and conduct which evince a mutual intention to contract and from which the law implies a contract."

In section 1363, Elliott on Contracts, vol. 2, it is said:

"Where there is no family relationship between the parties, and one accepts and retains the beneficial results of another's services, which he had no reason to suppose were gratuitous, and which he could accept or not at his option, the law will imply a previous request for the services and a promise to pay what they were reasonably worth."

[1, 2] There was evidence on the part of the plaintiff which tended to show that the gas lease was about to expire for lack of development, and that the defendant, by its field superintendent, Mr. Arbuckle, had authorized the plaintiff to drill the well. When his attention had been called to this, and when he answered, "Our contractors are busy; we can't get to it; have you got a string of tools you can put on them?" this was within itself sufficient to induce the plaintiff to suppose that Mr. Arbuckle understood that the drilling thereafter would be for the benefit of the defendant company, and especially when requested by the plaintiff to suggest where he

Digitized by Google

desired the well drilled, and, when the point to drill was selected, it was located near the line of 30-acre tract immediately to the south, covered by leases owned by the defendant, and there is evidence tending to show that Mr. Arbuckle wanted the well located so that adjoining leased premises owned by the defendant could thereby be tested.

While engaged in drilling, the plaintiff requested gas from Mr. Arbuckle; his reply was that the defendant had no gas line up there. After the well was found to be dry, and the defendant notified of this fact, the answer was, "As far as we are concerned, we are through with it." This remark was rather significant. If the defendant had never had any interest in the well, why a remark of this nature? When called upon for gas, that within itself was significant, and should have been notice to the defendant that the plaintiff considered the defendant was to some extent interested in the drilling. After the well had been completed and plugged, and Mr. Arbuckle was informed of the price which was charged by the plaintiff, there was no denial of liability, but, on the contrary, Mr. Arbuckle seemed to realize that there was a liability against the defendant, for his answer was, "We won't pay 85 cents a foot; we only pay 75 cents to our contractors."

From all the evidence in the case, the jury could infer that the defendant, in effect, requested the plaintiff to drill the well; that it directed the location of the well, knew of the drilling thereof, and received reports of the progress which was being made. There is nothing in the record indicating that the drilling by the plaintiff was intended as a gratuity to the defendant, nor anything to justify the defendant in believing that the former lessees, Goldrick, Collins, and Oak, were having the lease tested under their oil lease. If Mr. Arbuckle was under the impression that the original lessees were interested, and that the well was being drilled for their benefit alone, his acts were very inconsistent with that belief. In our opinion, the evidence is ample to justify the jury in drawing the inference that the defendant had every reason for believing and knowing that the well was being drilled for the benefit and at the instance of the defendant. The plaintiff was not in any manner interested in the lease. If gas had been discovered in paying quantities as a matter of course, the defendant would have been benefited thereby. On the other hand, if oil had been discovered, the owners of the oil lease would have been benefited. The only way in which the plaintiff could have been benefited was in receiving compensation for its work.

In German-American Bank of Blackburn et al. v. Rush et al., 171 Pac. 713, Owen, J., in delivering the opinion, said:

"In an action for damages for breach of contract, where it appears that the evidence reasonably tends to support the allegations of the petition and to sustain the plaintiff's theory, the judgment of the lower court in overruling a demurrer to the evidence will not be reversed; and, there being a conflict in the evidence on the issues properly submitted to the jury, the judgment based upon the verdict will not be set aside by this court."

In Incorporated Town of Sallisaw v. Chappelle, 171 Pac. 22, Mr. Justice Kane, in delivering the opinion of the court said:

"Where there is any evidence reasonably tending to support the verdict of the jury or the judgment of the court in an action of purely legal cognizance, the same will not be set aside on appeal on the ground that it is contrary to the evidence."

In Kline v. Haffner, 175 Pac. 341, it is said:

"There being some evidence to support approved verdict, based on conflicting evidence, the appellate court will not interfere with the judgment and will treat issues of fact as settled thereby."

To the same effect, see Blasdel et al. v. Gower, 173 Pac. 644; Dimmers v. Regan et al., 174 Pac. 742.

In Chicago, R. I. & P. Ry. Co. v. Pruitt, 170 Pac. 1143, Justice Rainey said:

"Where the evidence in the case reasonably tends to support the verdict of the jury, and the trial court has entered judgment thereon, such judgment will not be reversed on the ground of the insufficiency of the evidence."

From a careful examination of the entire evidence, we find the same is sufficient to support the verdict returned by the jury.

The judgment of the trial court is affirmed.

RAINEY, C. J., and KANE, JOHNSON, and HARRISON, JJ., concur.

Digitized by Google

ROBERSON et al. v. HURST. (No. 9652.)

(Supreme Court of Oklahoma. April 13, 1920. Rehearing Denied June 1, 1920.)

(Syllabus by the Court.)

1. **Homestead ⇐110—Unmarried owner may deed or mortgage without consent of family.**

The laws of this state do not prohibit the unmarried owner of land impressed with the homestead character from executing a valid deed therefor or mortgage thereon without the consent of the members of his family.

2. **Wills ⇐616(7)—Construed to give fee to wife with power to mortgage realty, and contingent remainder over to her minor children.**

Record examined, and *held*, that the will herein involved, assuming, as the parties do, the same to be valid, devised the entire estate to Henrietta Roberson subject to the limitations therein set out, with a contingent remainder over to her minor children; that in these circumstances Henrietta Roberson was authorized by the terms of the will to execute the instruments herein involved.

Error from District Court, Carter County; W. F. Freeman, Judge.

Action by Lulu Hurst against Henrietta Roberson and others on notes secured by realty mortgages. From a decree foreclosing the mortgages and ordering a sale, defendants bring error. Affirmed.

Champion & George and Moore & West, all of Ardmore, for plaintiffs in error.

Cruce & Potter, of Ardmore, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below, upon certain promissory notes and to foreclose certain mortgages given to secure their payment. The action also involved the foreclosure of a materialman's lien, but, as the action of the trial court on this branch of the case was not appealed from, no notice need be taken of it.

The petition, after describing these notes and mortgages, further alleged, in substance, that on the 5th day of April, 1916, the said Henrietta Roberson, in consideration of $6,837.70, this being the amount due on said notes, executed to Lulu Hurst a warranty deed to the property hereinbefore referred to, at which time said Lulu Hurst employed the said Henrietta Roberson to act as her agent in renting out said property; that, if the court should hold that said deed should be construed to be a mortgage, the covenants and conditions therein were broken on account of the defendant Henrietta Roberson's failure to turn over to Lulu Hurst the rents and profits accruing therefrom. Wherefore the plaintiff prayed: First, that the deed made by Henrietta Roberson to this plaintiff be declared to be a valid deed and to convey to this plaintiff a good and perfect title to said lot; second, if this cannot be done, then judgment be rendered against Henrietta Roberson for her said debt and costs and attorney's fees and for the foreclosure of said mortgages, and that said property or so much thereof as may be necessary to pay her debt, interest, and costs be sold as the court may direct.

The lot involved was devised to the defendant Henrietta Roberson and her minor children by the last will and testament of John A. Roberson, deceased, the husband and father of these defendants respectively, and the answers to the petition necessary to notice are the answer of the Roberson children and the answer of Henrietta Roberson.

The answer of the minor heirs alleged, in substance, that John A. Roberson, deceased, and the defendant Henrietta Roberson were lawfully married; that they lived together as husband and wife on the property in question until the death of John A. Roberson; that at the time of the death of John A. Roberson the lot in controversy was occupied by him, his wife, and minor children as a homestead, and that since his death it has been occupied by Henrietta Roberson and said minor children as a homestead. They then set up the will and deny that Henrietta Roberson had authority thereunder to convey their interest in said property by deed, mortgage, or otherwise, and that she ever conveyed their homestead right to and in the same, and further alleged that, if the plaintiff had any lien upon said property by virtue of said mortgages, deed, or otherwise, the same was subject to their homestead right, and could not be enforced against said premises until the homestead right of all of them had become extinct.

The answer of Henrietta Roberson was substantially the same as the answer of the minor heirs, except she alleged in addition that she had no title or interest to the property in question up to the time of the death of John A. Roberson other than the right of homestead; that the will of said deceased was duly probated; that by its terms she was named administratrix without bond and guardian of the minor children; that the land in question was set aside as a homestead for the defendant and her minor children; that by the terms of said will she became vested of an undivided one-sixth interest of said real estate, and the children of the remaining five-sixths.

Upon trial the court found that the notes and mortgages were executed as alleged by the plaintiff, that taxes were paid as alleged,

Digitized by Google

and that there was due the plaintiff by the defendant Henrietta Roberson the sum of $7,190.95, with costs and attorney's fees. Whereupon a decree was entered foreclosing the mortgages and ordering the property to be sold and the proceeds realized from the sale to be applied upon the indebtedness due the plaintiff, Lulu Hurst. It is to reverse this judgment and decree that this proceeding in error was commenced.

Counsel for plaintiffs in error in their brief summarize their grounds for reversal under three propositions as follows:

"First Proposition. The mortgages sued upon are void as to the minors, who are plaintiffs in error, both as to their individual interest in the property involved and also their homestead rights.

"Second Proposition. The mortgages executed by Henrietta Roberson to Lulu Hurst could not affect the interest of the minors in the homestead or their interest in fee to the premises in question by virtue of the will of their father, John A. Roberson.

"Third Proposition. The mortgages executed by Henrietta Roberson are void in so far as they attempt to affect her homestead right, or her interest in fee."

[1, 2] As all of the instruments mentioned in the plaintiff's petition were executed by Henrietta Roberson in her individual capacity, and all the parties to the action concede the validity of the will of John A. Roberson, deceased, it is obvious that whether Henrietta Roberson had authority to execute the various instruments affecting the title to this land turns upon the construction of the will of John A. Roberson, deceased.

The fourth paragraph of the will provides that:

"All of my real estate of any kind and every kind shall go to my said wife, Henrietta Roberson, and her three minor children, * * * provided that my said wife, Henrietta, shall have absolute control of said estate during the minority of any and all of said minors with all the authority above mentioned."

This provision, standing alone, probably would have the effect of devising an undivided one-sixth interest of the estate in Henrietta Roberson and the remaining five-sixths in the children, as contended for by counsel for the plaintiffs in error. But upon further examination of the will we find "the authority above mentioned," referred to in the fourth paragraph of the will, to be of the most sweeping nature. After declaring that Henrietta Roberson shall be designated the sole executrix of the will without bond, and without obtaining any appointment or being in any manner subject to the control of any probate court or any court having probate jurisdiction, the will further provides that:

"My said wife, Henrietta Roberson, shall have full control and management of my entire estate after my death and so long as she may live with full power and authority to lease, let and rent any of my real estate and if in her opinion it shall be necessary for the support, education and maintenance of her minor children, or either of them as for the best interest of my said estate, she shall have the full power to sell any part of my estate and if she shall so prefer to reinvest the proceeds of said estate for the benefit of herself and her minor children."

The will further directed that Henrietta Roberson shall be the guardian and custodian of her said minor children as well as of their estate without giving bond as such guardian.

It seems to us that the effect of these provisions of the will is to vest the estate in Mrs. Roberson in fee with a contingent remainder to the heirs. The only limitations imposed upon the authority of Mrs. Roberson to deal with this lot was whether in her opinion such action was necessary for the support, education, and maintenance of her minor children or for the best interest of the estate. If these circumstances existed, and there is no contention that they did not, it seems to us that Mrs. Roberson exercised full control over the lot; lease, let, or sell the same in precisely the same manner as an owner in absolute fee simple. It is true that the power to mortgage is not specifically conferred in the will, but this would be included in the power to exercise full control or in the greater power to sell which were specifically granted.

This construction of the will, it seems to us, makes untenable the three propositions of counsel stated above. In each of these propositions stress is laid upon the homestead character of this lot, and counsel in their brief seem to take the view that the homestead character of the lot in some way militated against the right of Henrietta Roberson to deal therewith. We are unable to perceive how the homestead character of the lot affects any of the transactions involved herein. We know of no statute, and none has been pointed out to us, which prohibits a husband owning land impressed with the homestead character from willing the same to his wife. Indeed, the will involved herein which does this is not attacked upon that ground. The will, as we understand counsel, is conceded to be valid. If it is valid, and if, as we hold, it vests the title to the real estate in the wife subject to the limitations hereinbefore pointed out, we know of no reason why, within these limitations, the wife, while she remained unmarried, was not at liberty to execute the instruments involved herein, notwithstanding the homestead character of the land. It is only the spouse of the owner of land invested with the homestead character who is required by statute to join in the conveyance thereof in

Digitized by Google

order to make the same valid; in other words, although the land thus impressed is the homestead of the family, the family is not required to join in a conveyance thereof by the owner.

For the reasons stated, we think the judgment of the court below is right, and should be affirmed.

OWEN, C. J., RAINEY, V. C. J., and PITCHFORD, JOHNSON, HIGGINS, McNEILL, and BAILEY, JJ., concur.

KATTERHENRY et ux. v. WILLIAMSON. (No. 9712.)

(Supreme Court of Oklahoma. May 11, 1920.)

(Syllabus by the Court.)

1. **Partnership ⇐64—Statute construed not to apply to one person adopting a business or trade name.**

Sections 2700, 4469, 4471, Rev. Laws 1910, relate to partnerships composed of two or more persons, and are not intended to apply to one person who, being the sole person interested in a business, adopts a business or trade name under which the business is conducted.

2. **Trial ⇐143—Conflicting evidence as to issue makes a question for jury.**

Where there is evidence reasonably tending to sustain the issues on the part of plaintiff, and the evidence on the part of the defendant conflicts therewith, a determination thereof is for the jury.

3. **Appeal and error ⇐1001(1)—Verdict supported by evidence not set aside as contrary to evidence.**

Where there is any evidence reasonably tending to support the verdict of the jury or the judgment of the court in an action of purely legal cognizance, the same will not be set aside on appeal on the ground that it is contrary to the evidence.

4. **Appeal and error ⇐1170(6)—In absence of substantial error, judgment will be affirmed.**

From an examination of the entire record we are unable to say that the errors complained of, relating to the improper admission and rejection of evidence and the giving of the instructions complained of, and refusal to give certain instructions, has resulted in a miscarriage of justice or deprived the plaintiff in error of any constitutional or statutory right.

Appeal from District Court, Craig County; Preston S. Davis, Judge.

Action by L. H. Katterhenry and wife against S. S. Williamson. Verdict and judgment for defendant, and plaintiffs appeal. Affirmed.

W. H. Kornegay and W. M. Simms, both of Vinita, for plaintiffs in error.

C. Caldwell, of Vinita, for defendant in error.

McNEILL, J. This action was commenced by Katterhenry and his wife against S. S. Williamson and W. C. A. Gast for damages resulting from a certain land transaction. W. C. A. Gast was not served with summons and the issues were joined between Katterhenry and Williamson. The petition alleged, in substance, that the plaintiff Katterhenry employed Williamson to purchase a farm for him according to a certain verbal agreement, and in carrying out the terms of said agreement Williamson purchased 200 acres of land in Craig county for plaintiff, and in payment of said land plaintiff exchanged 77 acres in Iowa and $1,970, in cash; that for the services rendered by Williamson plaintiff agreed to give Williamson 160 acres in Bailey county, Tex., which Williamson agreed to accept for his services in purchasing said land for the plaintiff.

It is further alleged that Williamson represented the purchase price of the land in Craig county was $75 an acre, or $15,000, and that plaintiff relied upon said statement and believed that the same was true, and acted upon the said representations, but Williamson falsely and fraudulently represented that he was purchasing the land for $75 an acre, when in truth and in fact he was purchasing the same for $35 per acre, or a total of $7,100. It is further alleged that Williamson, while acting as the agent of said plaintiff, made false and fraudulent statements as to the value of said land, in that he represented the land to be worth $75 an acre, when in truth and in fact said land was only worth $35 per acre. By reason of said facts, the plaintiff was damaged in the sum of $7,900, and prayed judgment for said amount.

To this petition the defendant, Williamson, filed his answer, admitting that Katterhenry owned 77 acres of land in Iowa and 160 acres in Texas. He denied that he ever acted as agent for plaintiffs or made any false and fraudulent representations concerning said land, but alleged he had a written contract with the plaintiff involving an exchange of land. A copy of said contract was attached to defendant's answer. The contract provided that the plaintiffs would transfer to defendant 77 acres of land in Iowa and the 160 acres in Texas and pay $1,970 in cash, and in exchange therefor that the defendant would transfer to plaintiff 200 acres of land in Craig county. The Iowa land and the Craig county land were transferred subject to certain incumbrances. The defendant further answered stating that the contract and deeds were deposited in the bank in escrow, that the abstracts were furnished, showing exactly what

Digitized by Google

defendant was paying for the Craig county land, and the abstracts were approved and the deeds delivered, and the trade consummated, and possession of the property was given, and that plaintiff has taken possession of the land, and that the terms of the written contract had been fully carried out. To this answer the plaintiffs replied, denying that Williamson had furnished the abstract showing the price he had paid for the land, and further stated that Williamson had always represented that he was paying $75 per acre for said land, and denied that he had ever received a copy of the contract but by reason of his long friendship with defendant he relied upon the representations made by the defendant. With the issues thus formed the case was submitted to the jury, and the jury returned a verdict for the defendant. From said judgment the plaintiffs have appealed.

For reversal of said judgment the plaintiffs have set out in their brief 24 different assignments of error. The first assignment of error is that the court erred in permitting the defendant to introduce the contract, a copy of which was attached to defendant's answer, being the agreement for the exchange of the property, which contract was signed by plaintiff and Iowa Land Company, by S. S. Williamson, manager.

[1] Plaintiffs in error contend that this contract was not admissible as a legal instrument for the reason that it showed upon its face that the contract was made by a fictitious partnership, and there was no evidence to show that said partnership had complied with section 4471, Revised Laws 1910. We are unable to see how said section can have any application to the question as to whether this contract was admissible in evidence, for the plaintiffs produced Mr. Williamson as a witness, who testified as follows:

"Q. Mr. Williamson, who was the Iowa Land Company? A. Myself, doing business under that name.

"Q. You are the only member? A. Yes, sir."

The plaintiffs below offered evidence that the Iowa Land Company was composed of S. S. Williamson, doing business under that name, and the contract was signed by Iowa Land Company, by S. S. Williamson. If we apply the rule announced by this court in the case of Robinovitz v. Hamill, 44 Okl. 437, 144 Pac. 1024, L. R. A. 1915D, 981, Roberts v. Mosier, 35 Okl. 691, 132 Pac. 678, Ann. Cas. 1914D, 423, and Oklahoma Fire Insurance Co. v. Wagester, 38 Okl. 291, 132 Pac. 1071, to these facts, the section of the statute which plaintiff in error relies upon has no application to the contract in the case at bar.

The plaintiffs in error have set out in their brief 23 additional assignments of error, and, with the exception of one or two of said assignments, they have presented no authorities to support any contention made. Several of the assignments of error admit that they are not sufficient to cause a reversal of the case, but counsel feels that the court should have ruled otherwise, although admitting the rulings made by the court were largely discretionary with the court.

[2-4] The twelfth assignment of error raises the question of the refusal of the court to give an instruction which in effect was an instruction directing the jury to find in favor of the plaintiffs and against the defendant, while counsel for plaintiffs in error suggests in his brief as follows:

"In order for the court to definitely determine the correctness of the court's ruling upon this instruction, it might be necessary for the court to read the entire record, and perhaps there is no judge of the Supreme Court who would want to do so, although occupying the position of a reviewing court."

We desire to say, from an examination of the entire record and a careful reading of all the evidence that was offered by the plaintiffs, we have no hesitancy in saying that the trial court did not commit error in refusing this peremptory instruction for the following reasons: First, plaintiffs alleged that they had employed the defendant to purchase 200 acres of land in Craig county, and in payment of said services rendered by the defendant they paid or gave to the defendant 160 acres of land in the state of Texas as consideration. Plaintiff L. H. Katterhenry states that he made this oral contract with the defendant while going up the stairs to the defendant's office. During the cross-examination the plaintiff admitted that after going up the stairs to defendant's office, or shortly after he alleges the oral contract was made, he executed a written contract with the defendant or the Iowa Land Company wherein it was agreed that he, as party of the first part, and the Iowa Land Company, as party of the second part, should exchange certain lands, and it was provided in said written contract that the plaintiffs should convey to the defendant or any party it desired the 77 acres of land in Iowa, subject to $3,100 incumbrance and interest thereon, for the consideration of $9,625, also 160 acres in Bailey county, Tex., free and clear of incumbrance, for $3,000, and to pay $1,970 cash. It then provided that the party of the second part should convey to the plaintiff 200 acres in Craig county, Okl., consideration being $15,000, subject to a $3,500 mortgage. The defendant testified, denying agency, and that the transfer of land was according to the terms of the written contract.

In view of the fact that the records disclosed that plaintiff's suit was based upon a verbal contract wherein he alleged he had employed the defendant as their agent to purchase certain lands, and the defendant denied this fact and pleaded there was a written contract, and the written contract was introduced in evidence, we certainly cannot agree,

Digitized by Google

when there is such a conflict in the evidence, that it would have been proper for the court to have instructed a verdict for the plaintiffs, nor would the court have been justified in instructing the jury that the verbal contract controlled over the written contract. This court in the case of Taylor v. Insurance Co. of North America, 25 Okl. 97, 105 Pac. 354, 138 Am. St. Rep. 906, and which has been followed by numerous decisions, has stated, in substance, where the evidence is conflicting, it is error for the court to instruct a jury to return the verdict for either party.

The fifth assignment of error is based on the court's refusal to allow an amendment to the petition. Plaintiffs state in their brief as follows:

"Perhaps this allegation is set forth in the petition with sufficient clearness to meet the facts as developed, but when counsel asked for the insertion in positive terms, under ordinary conditions, this courtesy should have been awarded."

An examination of the petition disclosed that the petition contains practically the same allegations which plaintiffs desired to insert by amendment. It therefore was not error to overrule the application to amend the petition.

The fourth and sixth assignments of error are based upon the ruling of the court which limited the cross-examination of the defendant Williamson. It is conceded that the ruling of the court in regard to questions relating to the fourth assignment of error was largely within the discretion of the court. It therefore follows the same would not be reversible error. The sixth assignment of error is based upon the refusal to permit the plaintiffs to examine the defendant, Williamson, in regard to representations made to Carl Klook. Plaintiffs in error do not set out what particular questions the court sustained the objection to which they complain, nor do they set out what they expected to prove by said cross-examination, and, without the record disclosing what particular question they claimed the court committed error in sustaining an objection to, or without alleging what they expected to prove or elicit by said cross-examination. We are unable to say that the ruling of the court was erroneous by applying section 6005, Revised Laws 1910, to the facts as disclosed by the record.

The second, third, seventh, and eighth assignments of error present the question of permitting incompetent evidence to be introduced and the ruling of the court which limited the cross-examination of Mr. Williamson. An examination of the record discloses no error was committed by the trial court in its rulings upon either of these propositions. Nor do plaintiffs in error set out in their brief how or in what way they have been prejudiced by the rulings of the court upon any of these questions.

The eleventh and twelfth assignments of error refer to refusing two instructions. We have referred to assignment 12 heretofore in this opinion, which raised the question of the errors in regard to giving certain instructions, but the brief has designated two assignments as No. 12. An examination of these instructions convinces us that the court did not err in the giving of the same.

The fourteenth, sixteenth and seventeenth instructions raise the question of the refusal of the court to give certain instructions. An examination of these instructions disclosed that the court properly submitted the case to the jury upon the issues raised by the pleadings, and that there was no error in refusing the instructions given.

The fifteenth assignment of error is based on certain instructions, and is stated as follows:

"The fifteenth assignment is based on a refusal to give an instruction on the measure of damages. It will probably be contended that this instruction is covered by other instructions actually given to the jury, but, in the event it is not, the principles of law therein set forth according to the decisions of this court were correct. See Silverwood v. Carpenter, 51 Okl. 745, 152 Pac. 381; Werline v. Aldred, 57 Okl. 391, 157 Pac. 305, 158 Pac. 893."

We think an examination of the instruction discloses that the measure of damages was properly submitted to the jury, and embraced in the instruction given.

We are therefore unable to say from an examination of the entire record that the ruling upon any of the questions presented was prejudicial.

Section 6005, Revised Laws 1910, provides that no case shall be reversed on account of evidence introduced or refused unless it affirmatively appears that the party had been prejudiced thereby or had been deprived of some substantial right. We are unable to find from the record where the plaintiffs were deprived of any of their substantial rights.

The plaintiffs brought their action upon a certain theory for damages, and alleged a certain state of facts to exist, and produced testimony to support his theory of the case. The defendant answered and alleged in his answer that a different state of facts existed, and produced evidence to support his theory of the case. The court submitted the case to the jury under proper instructions, and the jury returned its verdict in favor of the defendant. This court, in the case of Sallisaw v. Chappelle, 171 Pac. 22, states as follows:

"Where there is any evidence reasonably tending to support the verdict of the jury, or the judgment of the court in an action of purely legal cognizance, the same will not be set aside on appeal on the ground that it is contrary to the evidence."

An examination of the evidence and the entire record discloses there is sufficient evi-

Digitized by Google

dence to support the verdict of the jury. Being unable to find any prejudicial error in the record, the judgment of the trial court is therefore affirmed.

RAINEY, C. J., and HARRISON, KANE, JOHNSON, and PITCHFORD, JJ., concur.

PETERS v. BLEDSOE. (No. 10156.)

(Supreme Court of Oklahoma. May 11, 1920. Rehearing Denied June 1, 1920.)

(Syllabus by the Court.)

1. Time not of essence of contract.

Section 968, Rev. Laws 1910, provides: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

2. Contracts ⟸354 — Refusal to determine whether time was impliedly of the essence held not error.

Where a written agreement does not in express terms provide that time shall be considered the essence thereof, and the court so finds, and finds also that under the evidence the failure on the part of one of the parties to comply strictly with the terms as to exact time was excused by the conduct of the other party, and the evidence is sufficient to sustain such latter finding, it is not error in such case for the court to decline to go further and decide whether time was the essence of the contract by necessary implication.

3. Appeal and error ⟸1011(1) — Judgment sustained by weight of evidence not disturbed.

Where the judgment of a trial court on a decisive question of fact is sustained by the clear weight of the evidence, the judgment will not be disturbed.

Error from Superior Court, Okfuskee County; John L. Norman, Judge.

Action by G. G. Bledsoe against W. S. Peters. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Peters, of Boley, and P. T. McVay and Geo. B. Rittenhouse, both of Oklahoma City, for plaintiff in error.

Huddleston & Stephenson, of Okemah, for defendant in error.

HARRISON, J. The judgment herein sought to be reversed was rendered against W. S. Peters, plaintiff in error, requiring him to comply with the terms of a certain contract or escrow agreement, by which he, plaintiff in error, bound himself to convey to defendant in error, G. G. Bledsoe, a certain tract of land situated in Okfuskee county, Okl. W. S. Peters was an attorney of the Okfuskee county bar, and G. G. Bledsoe was a farmer of Okfuskee county.

On November 1, 1916, Peters and Bledsoe entered into a written agreement, which was placed in escrow in the Farmers' & Merchants' Bank of Boley, Okl., by the terms of which agreement said bank was to deliver to Bledsoe the warranty deed attached to said written agreement, by which deed Peters conveyed to Bledsoe a certain 80-acre tract of land situated in Okfuskee county, said deed to be delivered to Bledsoe upon the payment by Bledsoe of certain notes attached to the agreement and the assumption of payment by Bledsoe of a certain mortgage for $1,500, then existing against said tract. One of the notes amounting to $400 fell due on the 1st day of November, 1917. On said day, however, Bledsoe, then living on the land in question, was confined to his bed, sick of typhoid fever, and under the treatment of a doctor. He told his physician on that day of the note being due on that day and of his desire to pay same, but his physician, Dr. J. L. Scott, advised him that he was not able to go to town, that his fever was then 102, whereupon it was agreed between Bledsoe and the doctor that the doctor, who was on intimate and friendly terms with Attorney Peters, should see Peters that day and tell him of Bledsoe's condition, and that he had the money to pay the note, and would in a few days come in with his wife and pay it off, and to ascertain from Peters whether such arrangement would be satisfactory. The doctor testified that he saw Peters on that day, and delivered the message from Bledsoe, and that Peters said, in substance, that such an arrangement was all right; that he had been making some money, and would not need what Bledsoe owed on the note for a few days. The doctor further testified that he returned on that day to Bledsoe's home and told Bledsoe what Peters had said.

Bledsoe testified that, relying upon the message his physician had brought him from Peters, he did not go to town that day to make payment, but that the next day, the 2d of November, he was informed by another party that things did not look just right, meaning the actions of Peters, whereupon he went into the town of Boley on that day, the 2d of November, and offered to pay the note to the bank, but the bank refused to receive the payment, stating that on the day before Peters had advised him not to accept the payment, because the agreement had been breached by Bledsoe's failure to make payment on the 1st day of November. He thereupon employed an attorney, and within a few days the attorney made a further tender of payment to Peters, which was declined. The bank in the meantime had returned the written agreement and deed at-

Digitized by Google

tached over to Peters, and had mailed the unpaid promissory notes to Bledsoe. Thereafter Bledsoe brought suit to require Peters to comply with the terms of the agreement; that is, to accept payment of the promissory notes due, and to deliver the deed to the land.

At the conclusion of the trial the court decreed that Peters should replace the escrow agreement with deed attached in the bank, and that Bledsoe should replace the promissory notes with the bank, and that the parties, Peters and Bledsoe, should comply with the terms of the agreement, and that upon the payment of the amount due under said agreement, which amount due at that time had been tendered into court, and was found to have been tendered by the court, the bank or escrow holder should thereupon deliver the deed to Bledsoe.

Plaintiff in error asks that this judgment be reversed, principally upon the ground that by the terms of the agreement "time was made the essence of the contract," and that the failure on the part of Bledsoe to comply with the terms of the contract by payment of the note on the 1st of November should forfeit his right to a fulfillment of the contract.

On the other hand it is contended by Bledsoe: First, that by the terms of said contract time was not made the essence thereof; and second, that his failure to make payment on the 1st day of November was justified by Peters' message sent by the doctor, even though the agreement be construed to mean that "time was of the essence of the contract."

[1, 2] The court found that under the terms of the agreement time was not expressly made the essence of the contract, and further found that, though Bledsoe did not strictly comply with the terms and conditions thereof with reference to the time of payment, his failure to do so was excused by the conduct of Peters, but did not find whether by necessary implication time should be considered as of the essence of the contract. Both these findings are sustained by the record. The instrument in question did not in words expressly provide that time was to be considered the essence of the contract. This being true, and the finding that Bledsoe's failure to make payment on November 1st was excused by the conduct of Peters being sustained by the evidence, it was therefore unnecessary for the court to go into the field of speculation and decide whether by necessary implication "time was intended to be the essence of the contract." Section 968, Rev. Laws 1910, provides:

"Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

In Drumright v. Brown et al., 76 Okl. 162, 184 Pac. 110, this court in a well-considered opinion by Mr. Justice Rainey, after quoting the above statute said:

"Although no particular form of expression is necessary, it must appear from the plainly expressed provisions contained in a contract, independent of all extraneous matter or circumstances, that it was the intention of the parties thereto that time should be the essence thereof."

The obvious reason for the wording of the above statute, as well as for the foregoing interpretation thereof by this court, is that the terms of the written instrument are more clearly and more safely expressed by explicit wording than by being left to the uncertainties of implication.

Additional light may be thrown upon and a clearer view obtained of the full meaning of the above statute by carefully considering in connection therewith the preceding sections 945 to 967, inclusive, bearing in mind also that said sections are under article 3 of the chapter on Contracts, and that such article devotes itself entirely to defining just how contracts in this state are to be interpreted. Section 945 provides:

"All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by law."

Section 946 provides that effect is to be given to the intent of parties; 947 provides how intention of parties may be ascertained; 948 provides what language governs; 949 provides how intention is to be ascertained from writing; 950 provides that error is to be disregarded; 951 provides for giving effect to every part; 952 provides when several contracts are taken as one; 953 provides what interpretation favors validity; 954 provides for words to be taken in ordinary sense; 955 for technical words; 956 what law governs; 957 what circumstances explain; 958 for restricting the contract to intention of parties; 959 that belief of promisor governs in case of ambiguity; 960 provides that particular clauses are subordinate to general intent; 961 that written and original parts control; 962 how repugnancy must be reconciled; 963 that inconsistent words be rejected; 964 for interpretation against party causing uncertainty; 965 when reasonable stipulation implied; 966, when necessary incidents implied; 967 that reasonable time allowed where not specified.

But when it comes to the question as to when time is the essence of a contract the statute makes a distinct exception, and, emphasizing the importance of the provision of a contract in that regard, it thus provides:

"Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

The Legislature no doubt recognized the injustice that might be done to one of the

Digitized by Google

parties thereto by an erroneous construction, and recognized, further, that if it were the intention of the parties to make time the essence of their contract its terms should expressly so provide. In other words, the Legislature, recognizing the importance of this feature of a contract and the injustice that might be done by an erroneous interpretation, recognized also that if such were the intention of the parties, there could be no easier, plainer, or safer way for providing so than by saying so; hence it expressly provides as above quoted. Therefore the trial court is correct in finding that the contract did not expressly provide that time should be the essence thereof.

[3] As to the finding that Bledsoe's failure to comply strictly with the contract as to payment of the note was justified by the conduct of Peters, the court had these facts to consider, viz.: That the fact of Bledsoe's being sick was not denied; the fact that he told his physician of his desire to pay off the note that day was not denied, but proven by positive testimony; the fact that the doctor forbade him to go to town, and that word was sent to Peters of his intention, desire, and ability to pay the debt on that day, unless Peters was willing to wait until he got able to come in. The fact that the message was delivered to Peters, and that Peters did not signify a desire for payment on that day, and did not inform the doctor that he demanded payment on that day, and the fact that the doctor's message from Peters to Bledsoe influenced Bledsoe in not going to make the payment that day, are all facts which the court had for consideration, and which were undisputed; there is a dispute as to the message which Peters sent to Bledsoe by the doctor. The doctor said Peters told him that it would be all right, that he had made some money, or was making money, and would not need it. Peters denied recollection of making such statement; therefore that fact was in dispute, and the court was authorized to give credence to such testimony as appealed to his senses, but there is no dispute as to the fact that when the doctor went to him with the message from Bledsoe that Peters did not in any way signify that he would demand payment on that day, or that he would consider the contract forfeited if not paid on that day. These undisputed facts sustain the court's finding that Bledsoe's failure to make payment on the 1st was excused by the conduct of Peters.

It is also contended by Peters that Bledsoe did not have enough money in the bank to pay off all that was due; that the tender was therefore insufficient to constitute a tender in law. Peters further contends that the fact that Bledsoe stated to the doctor and sent word by the doctor to Peters that he (Bledsoe) and his wife would come in and make the payment should be taken to prove that Bledsoe did not have sufficient money in the bank to pay same, but that he and his wife would come in and obtain a loan sufficient to cover the amount due. With this contention the trial court evidently did not agree, and we see no reason for questioning its discernment in the premises; for, taking the contention of Peters in its fullest legitimate effect, and conceding that Bledsoe did not have all the money in the bank, it is not disputed that he or his wife, or both, had the money at home, nor that he and his wife could have obtained the money on the 1st, if he did not already have enough, nor that they would have come in on the 1st day of November and obtained it, except for the conduct of Peters, as was found by the court.

Therefore the numerous authorities cited by plaintiff in error as to what constitutes a legal tender are immaterial. Likewise the numerous and well-considered authorities cited in support of his contention as to when time is the essence of a contract, and what is to be done in such cases are not applicable to the facts in this case, governed, as they are, by the statutes and decisions of this state.

The judgment is affirmed.

RAINEY, C. J., and KANE, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

FERRIS et al. v. HOLIMAN. (No. 10783.)

(Supreme Court of Oklahoma. May 25, 1920.)

(Syllabus by the Court.)

1. Trial ⟸178—Question presented on motion for directed verdict stated; on motion to direct verdict only the evidence favorable to the opposing party should be considered.

The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict should the jury find in accordance therewith. Where the evidence is conflicting, and the court is moved to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled.

2. Master and servant ⟸286(13)—Railroad's negligence under federal act held question for jury.

In an action by an administratrix against a railroad company for damages for the death of

Digitized by Google

a deceased employé, where the liability is determined under the terms of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), and the negligence of the railroad company complained of was a failure to properly inspect a certain car and in using said car on which the handholds were loose and defective and the roof loose and broken, and where the evidence disclosed that the deceased, while in the discharge of his duties, was in the act of climbing upon the car and using the handholds and the car was jerked and jolted, and the deceased by reason of the jerk and jolt of the car fell on the track and was run over and killed, and there was evidence that the handholds on top of the car were loose and would raise up from one to two inches and would move back and forth two or three inches, and that a pull or jerk on the loose handholds would raise the roof of the car a distance of two feet, although this evidence was controverted by defendant, *held*, it was not error for the court, in view of such evidence, to overrule a motion to instruct a verdict for the defendant.

Appeal from Superior Court, Muskogee County; Guy F. Nelson, Judge.

Action by Mrs. Maidie Holiman, administratrix of John Holiman, deceased, against H. C. Ferris and Alexander New, receivers of the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Jones & Foster, of Muskogee, and Arthur Miller, of Kansas City, for plaintiffs in error.

Maben & Pitman, of Shawnee, for defendant in error.

McNEILL, J. This action was commenced in the superior court of Muskogee county by Mrs. Maidie Holiman, administratrix of the estate of J. H. Holiman, deceased, against H. C. Ferris and Alexander New, receivers of the Missouri, Oklahoma & Gulf Railway Company, to recover damages for the wrongful death of the deceased. The petition alleged plaintiff was the surviving widow of deceased, and had been appointed administratrix; that deceased was an employé of the defendant, and while in the discharge of his duties in assisting in certain switching of the train he was ordered and directed to go upon a certain box car, which car was a part of the train upon which deceased was working, and while the deceased was climbing upon the box car according to orders given him, and while in the discharge of his duties as brakeman it became necessary for him to take hold of one of the grabirons on the roof of the car to raise himself on the top of the car, being the means used to climb upon said car, and while holding to the same the grabirons and roof gave way and deceased fell. It was alleged that said grabirons were in a defective condition, being loose, and that the roof to which the grabirons were fastened was rotten and broken, and on account of the defective and loose condition of the roof and the grabirons the deceased was thrown to the ground and run over and killed; that the defendant was negligent and careless in using said car when not in proper repair, and in not furnishing proper appliances for the deceased to work with, and was negligent and careless in the inspection of the car; that by reason of said acts of negligence deceased was killed. The defendants answered by general denial and alleged contributory negligence. It was agreed during the trial of the case that at the time of the accident the defendant company, or train, was engaged in interstate commerce, and the case was governed by the law applicable to the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), and was tried upon that theory. From a judgment in favor of the plaintiff, the defendants have appealed.

For reversal plaintiffs in error argue but two propositions: First, the court erred in refusing to sustain a demurrer to the evidence of the plaintiff; second, that the court erred in refusing to peremptorily instruct the jury to find for the defendant.

[1] In determining whether the court committed error in refusing to direct a verdict for the defendant, it will be necessary to examine the evidence and determine whether the evidence is sufficient when viewed in the light of the holding of this court as stated in the case of Shields v. Smith, 50 Okl. 548, 151 Pac. 207, as follows:

"The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict should the jury find in accordance therewith. Where the evidence is conflicting, and the court is moved to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled."

[2] The evidence disclosed that the car did not belong to the defendant company, but was a car in transit and was received by the defendant company at Miami, Okl., to be moved over defendant's line of road. The evidence disclosed that the car was inspected at Miami by the defendant company before receiving or attempting to move the same. When the train of which this car was a part reached Waggoner, it was necessary to do certain switching and to set out one car and transfer the same to the Iron Mountain Railroad. The head brakeman, or the party who had charge of the crew, ordered this to be done by making a flying

Digitized by Google

switch. The evidence as to how this was done is abstracted by plaintiff in error in their brief as follows:

"We had one car, M., O. & G. 168, which we wanted to switch on to the Iron Mountain; it was the rear car, the tenth car from the engine, and the Michigan Central car was next to it. We had to make a flying switch to get the car towards the Iron Mountain connection, which laid off in another direction south of where we were, leading off of the main line. The engine and other nine cars were to be run down on the passing track so they would clear the main line and let this car come on down the main line. I was on M., O. & G. car 168, the tenth car, and told Mr. Holiman to ride the ninth car, Michigan Central 48007, which he did; I gave the engineer the signal to put the train in motion, which he did, and I then told Holiman to stay with the car he was on and I would cut off the one I was on and ride it myself. When the cars were going at a speed I considered sufficient to make the drop of this car I gave the customary slow signal; the engineer slowed up; the cars jammed together and I pulled the pin, glancing up to see where Holiman was. He was then at the top of the car ahead and had hold of the top grabiron. I immediately signalled the engineer to go ahead, and he did so with a jerk; I then looked to see where Holiman was, and as I looked I could see the roof of the car where he was in the act of falling or coming down; it looked as though it had been thrown up a bit on account of his weight; his left hand was loose and he seemed to swing around the corner of the car and fell in the center of the track."

As to the condition of the car, the witness Cheshire testified in regard to the condition of the handholds or grabirons the deceased was using or had hold of at the time of the accident, and in describing the ones that were defective stated as follows:

"A. You could take hold of either of the grabirons and raise them up an inch or inch and a half and move them back and forth (indicating) probably 2½ or 3 inches.

"Q. Now when you take hold of them and raise them up were they stationary or did they move? A. They would move about.

"Q. You think the play or moving about of these grabirons something like 2½ inches? A. Yes, sir."

In describing the roof of the car where the handholds were fastened the same witness testified as follows:

"Q. What did you find when you examined it? A. I found the roof of the car loose on the corner to the side door almost one half length of the car. * * *

"Q. Tell the jury what you did with reference to raising this roof up, if anything. A. I grabbed up and raised this roof up about two feet with my hand.

"Q. Raised it up about two feet? A. Yes, sir."

The duty the railroad company owed to equip its train with safe appliances is defined by section 8608, Comp. St. U. S., being Act March 2, 1893, c. 196, § 4, "Grabirons," etc., which provides as follows:

"From and after the 1st day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railway company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Section 2 of the federal Employers' Liability Act states:

"That every common carrier or railroad * * * shall be liable in damages to any person suffering injury while he is employed * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of said carrier, or by reason of any defect or insufficiency, due to his negligence, in his cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The duty of the railroad company being defined by statute, it then becomes our duty to view the evidence in the light of the former opinions of this court to determine whether the court committed error in failing to instruct a verdict for the defendant or in failing to sustain a demurrer to plaintiff's evidence. In doing so, we must admit the evidence heretofore set out to be true. Admitting the evidence to be true, it could not be said as a matter of law that the handholds were securely fastened, because this evidence does not support such a contention, nor could it be said the roof was in a safe condition. Whether the appliances were in a safe condition was a question of fact for the jury to determine, and not a question to be decided by the court. It was for the jury to say whether this box car was properly equipped and in a safe condition for proper usage, when the roof was in condition that an employé in climbing on top of the car by using the handholds a pull or jerk would raise the roof approximately two feet. It was for the jury to say whether the handholds were securely fastened or in a dangerous condition, when they would pull up from the car an inch and a half or two inches when catching hold of the same, and then they would move one side to the other side a distance of from 2½ to 3 inches.

Upon the question of whether these defects of the car were such that could be noticed by an inspector when examining the handholds on the roof, evidence was given by one of the inspectors of the train, and an employé of the defendant, who was produced by the defendant as a witness, testified as follows:

"A. This board right here called a facia and that is 2⅜ inches (witness indicates on photo).

"Q. Split in this facia of 2⅜ inches? A. Yes.

"Q. I see. And you say that could be seen by

Digitized by Google

persons going up to take hold of these grabirons? A. Yes, sir.

"Q. Then a car inspector who had gone up to examine these grabirons were to see whether they were fastened, what condition they were or could have seen this split in the facia? A. If they went up that place they could not have helped it."

This evidence and the other evidence set out heretofore, when considered from the standpoint of whether the court committed error in refusing to instruct a verdict for the defendant, does not even present a close question, but discloses a condition and state of facts that is very apparent; the top of the car and the handholds were in an unsafe and dangerous condition. While it is true defendant offered evidence that the state of facts as detailed above was exaggerated and untrue, yet this court cannot weigh the evidence, nor consider the evidence most favorable to the defendant, when passing upon the question of instructing a verdict for the defendant.

We therefore conclude that the court did not commit error in either overruling the demurrer offered by the defendant to plaintiff's evidence or in failing to instruct the jury to return a verdict for the defendant; and therefore the case is affirmed.

RAINEY, V. C. J., and HARRISON, JOHNSON, BAILEY, and RAMSEY, JJ.

CRAWFORD et al. v. CASSITY et al.
(No. 9589.)

(Supreme Court of Oklahoma. April 27, 1920. Rehearing Denied June 8, 1920.)

(Syllabus by the Court.)

1. Judgment ⇐248—Judgment outside the issues is erroneous.

The rendition of a judgment, or a part thereof, which is entirely outside of the issues as made by the pleadings and the evidence, is erroneous.

2. Municipal corporations ⇐325—City council's finding of necessity of sewer improvement final in absence of fraud.

Section 468, Revised Laws 1910, grants to the mayor and city council the power to determine the necessity of establishing certain sewer districts within said town or city, and the general rule is the finding by the city council that said improvement is necessary is final, and cannot be reviewed by the courts in the absence of circumstances of fraud and oppression.

3. Municipal corporations ⇐323(3)—Petition alleging unreasonableness of improvement ordinance construed to state a cause of action.

A petition which alleges that an ordinance of the city council in creating a sewer district was unreasonable, unjust, and was passed designedly and capriciously, and was unnecessary and would be of no benefit to the property nor to the public, contains sufficient allegations to state a cause of action.

4. Municipal corporations ⇐484(1)—Proceedings for improvements and in making assessments presumed regular.

Proceedings of a municipal corporation ordering public improvements and making assessments to pay for same are presumed to be regular, and the burden is upon the one attacking the legality of such assessments to show irregularity in such proceedings.

5. Municipal corporations ⇐484(2)—Finding of benefits by improvement to the amount of the assessment conclusive.

Whether lots in a sewer district are benefited to the amount of the assessment levied against such lots is a legislative question, and, having been determined by the legislative power of the city in regular proceedings, is conclusive in an action to enjoin the collection of the assessments on the ground that the cost exceeds the benefits.

6. Municipal corporations ⇐323(1) — Courts cannot prevent intended sewer improvement unless ordinance void for unreasonableness.

The general rule is where the mayor and city council have determined a certain sewer improvement necessary the courts cannot interfere to prevent said improvement, except in cases where it clearly appears that the discretion of the local legislative branch of the government has been abused and said ordinance is so unreasonable and oppressive as to render it void.

7. Municipal corporations ⇐538 — Judgment enjoining collection of sewer assessments held clearly against the evidence.

The evidence examined, and *held*, the judgment of the trial court when the law applicable to such facts is applied to said evidence is clearly against the weight of the evidence.

Appeal from District Court, Kay County; Wm. M. Bowles, Judge.

Action for injunction by G. M. Cassity and others against W. R. Crawford and others, as the City Council of Tonkawa, and F. W. Keeney & Co. Judgment for plaintiffs, motion for new trial denied, and defendants appeal. Reversed and remanded, with directions to dismiss the petition.

W. W. Davis, of Tonkawa, and John S. Burger, of Blackwell, for plaintiffs in error.

Sam K. Sullivan, of Newkirk, and J. H. Hill, of Tulsa, for defendants in error.

McNEILL, J. This action was instituted in the district court of Kay county by G. M. Cassity, Elihu Myers, and G. G. Overstreet against the city council of Tonkawa and F. W. Keeney & Co. to enjoin the city from constructing lateral C in sewer district No. 4, in the alley of block 30. It is alleged that the

Digitized by Google

plaintiffs were the owners of all of the lots in said block and that lateral C, which extended into block 30, was placed in said ordinance by the said city council and officers of the said city designedly and capriciously and unnecessarily, for the reason a sewer placed in the alley of said block would not be beneficial to the citizens of the city of Tonkawa in any manner, would benefit no one, and the act of the city council in including said block in said ordinance was unreasonable, unjust, and not a reasonable and just exercise of the authority conferred upon the said mayor and council. It is further alleged there are sewers running along the sides of said block and that said lateral is unnecessary, and that defendants filed a protest with the city council and thereafter the city council let a contract to Keeney & Co. To this petition is attached the defendants' protest and the ordinance. The plaintiffs asked for a temporary injunction, which was denied by the court. Thereafter plaintiffs filed a supplemental petition, alleging that Keeney & Co. had filed its bond and was attempting to proceed with said work. Thereafter a second supplemental petition was filed, alleging in addition that the work had been completed and that the city council had passed an ordinance assessing the benefits to said lots amounting to $278, and asking that the same be declared illegal and void and the city be enjoined from collecting the same. The defendants answered, admitting a great portion of the allegations of the petition, except the fact that it was unnecessary that the sewer be installed in said block, and denies that said lateral C was included in said sewer district on account of any ill will or for oppression, but that said block is in the center of said city, a portion of the same was low and without sewerage and unsanitary; and further answered that the ordinance had been passed and sewer had been installed as provided in sections 462–471, Revised Laws 1910. With the issues thus formed the case was tried upon its merits to the court, and after hearing the evidence the court granted the injunction, and the court in granting the injunction stated as follows:

"The court finds that the city council and the defendants herein were without jurisdiction to order the sewer complained of in the petition of the plaintiff, for the reason that after the protest was filed by the plaintiffs there was no finding by the city council and no record of any finding made in accordance with the statute (section 468, Revised Laws 1910), making it necessary, where the protest is filed, that the council find it necessary to build said sewer, and that said neglect of the council to make said finding when said protest is filed is jurisdictional.

"The court further finds as a matter of fact that the said sewer in block 30 in said city of Tonkawa, as set out in plaintiffs' petition, was not necessary, in the judgment of the court."

The defendants filed a motion for a new trial, which was overruled by the court. The plaintiffs in error for reversal argue two propositions, or it might be considered as three: First. That the trial court had no jurisdiction to hear and determine the matter presented in the petition of defendants in error, for the reason that the jurisdiction conferred by legislative enactment upon the mayor and council to proceed with the work of providing a sewer when they deemed it necessary is conclusive. Second. That the judgment of the trial court holding plaintiffs in error were without jurisdiction to order the sewer complained of in the petition, for the reason that after the protests were filed by defendants in error there was no finding by the city council, and no record made of any finding made in accordance with section 468 of Revised Laws of 1910, that said finding is not based upon evidence introduced into the trial of the case; and, further, that the judgment of the court is contrary to the weight of the evidence and is contrary to law.

[1-4] We will first consider the finding of the court in regard to the city council having no jurisdiction to enter into the contract, for the reason that after the protest was filed the city council did not make a finding that the sewer was necessary. We have searched the pleadings to find where this question was ever raised or made an issue in the case at bar, and have been unable to find where such question was made an issue in the case either by the pleadings or the evidence.

The opening statement of defendants in error and their statements during the trial disclose that the question as to whether the city council had made an order after the protest was filed finding that the sewer was a necessity was not an issue in the case. Counsel for defendants in error in defining their position stated their contention was this lateral C was unnecessary; that the same was not for the benefit of plaintiffs' property and added no benefit to the property in any amount, no benefit to the citizens of Tonkawa, nor was it beneficial for the welfare of the city; and, further, the city could not take private property to benefit the public unless it gave the private property back sufficient benefit to the amount of the costs or taxes to be assessed against said property. There was no issue raised by the pleadings that the injunction was applied for upon the ground the city council acquired no jurisdiction by failing to make a record after the protest was filed that the city council considered the lateral a necessity. The record of the city council upon this proposition is not in evidence. The evidence does not disclose whether there was such a record or not. The evidence does disclose that the city council gave the protestants a hearing, but

Digitized by Google

there was no evidence offered upon either side as to whether the council had overruled the protest or whether there was a record disclosing that the city council considered it a necessity to complete said lateral. The evidence does disclose that after hearing the protest the city council proceeded to let the contract for constructing the sewer, and all or practically all of the members of the city council testified they considered said sewer necessary.

Defendants in error, who were the plaintiffs below, did not introduce the record of the city council upon this point, and if they attacked the proceedings upon that ground the burden of proof was upon the defendants in error to prove no such a record was made. It was not incumbent upon plaintiff in error, being the defendants below, to introduce such record when no such issue was presented in the pleadings.

This court, in the case of Newman v. Warner-Quinlan Asphalt Co., 177 Pac. 375, stated as follows:

"Proceedings of a municipal corporation ordering street improvements and making assessments to pay for same are presumed to be regular, and the burden is upon the one attacking the legality of such assessments to show irregularity in such proceedings."

See, also, Rawlins v. Warner-Quinlan Asphalt Co., 174 Pac. 526.

This court, in the cases of City of Perry v. Davis et al., 18 Okl. 427, 90 Pac. 865; City of Muskogee v. Rambo, 40 Okl. 672, 138 Pac. 567; Orr v. City of Cushing, 168 Pac. 223—has held that the city acquired jurisdiction when passing the ordinance of necessity. We therefore hold that this finding of the court is not based upon the pleadings nor the evidence in the case, and is erroneous, following the rule laid down by this court in the case of Champion v. Oklahoma City Land & Development Co., 159 Pac. 854.

The next question presented is, Did the court have jurisdiction or did the petition state a cause of action? The petition alleged that it was unnecessary to construct said sewer in block 30, and the constructing of the same in block 30 was unreasonable, unnecessary, and arbitrary exercise of power and an abuse of discretion upon the part of the city council. The general rule on the question is that the finding of the city council that an improvement is necessary is conclusive, unless the finding is based on such circumstances as to amount to fraud or oppression. The rule is stated as follows in Page and Jones on Taxation by Assessment, p. 450:

"By the terms of some statutes, power to determine the necessity and propriety of certain kinds of improvement is sometimes vested in certain public officials. The action of such officials is generally regarded as final, at least in the absence of circumstances of fraud and oppression."

This same rule is supported in the case of Stewart v. Neodesha, 3 Kan. App. 330, 45 Pac. 110:

"And where the mayor and council have determined by ordinance that a new sidewalk is necessary, and by ordinance provide for the removal of the old walk and the building of a new one, designating the material, and providing the dimensions of the walk, their determination is final, and no action will lie by an abutting property owner to enjoin the construction of such walks, when the ordinance is not unreasonable or unjust in its provisions."

We think the petition stated a cause of action and the court had jurisdiction to hear the case and to determine whether the ordinance was unreasonable, unjust, and amounted to an abuse of discretion upon the part of the city council.

[5, 6] The next question presented is, Was the finding of the court that the construction of the sewer in block 30 was not necessary in the judgment of the court a sufficient finding to base an injunction on, or is said finding clearly against the weight of the evidence? It was admitted that block 30 was practically within the center of town, 200 feet from the depot, about 2 blocks from the schoolhouse, and about a block or a block and a half from the post office. The evidence in the case on behalf of plaintiffs below was not that it was unnecessary that sewerage be provided for said block, but their contention was that there was sufficient sewerage surrounding said block, and that the city council by adopting proper ordinance could compel the people to connect with the main sewer and thus obviate the building of this sewer. Several witnesses testified to this state of facts. The county health physician testified to that state of facts. One of plaintiffs' witnesses testified that he did not know whether the sewer was a necessity or would be any benefit at this time, but it might be a benefit in the future. Two other physicians testified that they believed the sewer was necessary for the benefit of the health of the city. One of the city councilmen testified that he did not believe the sewer was essential; the other six testified that they believed it was essential, not only for connecting the house and building which had been used as a garage and connect the outhouses with the sewerage, but also the installing of the manhole close to the elevator would assist in draining the property. It was admitted by all that this property was considerably lower than the other portion of town, and was not a desirable residence portion of the town, for the reason the land was low and high water made it undesirable and unhealthy to live there. While there might be sufficient evidence to find that the people would disagree upon whether it was essential to construct said sewer, yet such a

Digitized by Google

rule is not the test upon which a judgment may be supported. Counsel for defendants in error also contend that the property was not benefited by the improvement. This question has been decided by this court contrary to the contention of defendants in error in the case of Newman v. Warner-Quinlan Asphalt Co., supra, where the court stated as follows:

"Whether lots abutting on a street improvement are benefited to the amount of the assessment levied against such lots is a legislative question, and, having been determined by the legislative power of the city in regular proceedings, is conclusive in an action to enjoin the collection of the assessments on the ground that the cost exceeds the benefits."

This rule was followed in the cases of Okla. Ry. Co. v. Severns Pav. Co., 170 Pac. 216; City of Chickasha v. O'Brien, 58 Okl. 46, 159 Pac. 282; Alley v. City of Muskogee, 53 Okl. 230, 156 Pac. 315; M., K. & T. Ry. Co. v. City of Tulsa, 45 Okl. 382, 145 Pac. 398.

Upon the question of whether the evidence was sufficient to support the finding that the ordinance was unreasonable or unjust, the rule is stated by the Supreme Court of Illinois in the case of City of Chicago v. Kehillath Anshe Mayriv, 284 Ill. 210, on page 212, 119 N. E. 905, on page 906, as follows:

"We have held that the necessity for an improvement of this character is committed to the judgment of the city council, and that judgment is conclusive unless the evidence clearly satisfies the court that the council's action is unreasonable and oppressive. If there is room for a reasonable difference of opinion, the action of the council is final. City of Marengo v. Eichler, 245 Ill. 47, 91 N. E. 758; City of Belleville v. Pfingsten, 225 Ill. 293, 80 N. E. 266. We would not be warranted, under the evidence in this case, in holding the ordinance unreasonable and void."

The Supreme Court of Illinois, in the case of City of Belleville v. Herzler, 225 Ill. 404, 80 N. E. 269, stated as follows:

"On objections to a special assessment to a street improvement, evidence held insufficient to show that the ordinance was void as arbitrary, unjust, and oppressive."

Again, the court in City of Belleville v. Pfingsten, 225 Ill. on page 297, 80 N. E. on page 267, stated the rule as follows:

"The necessity of a local improvement is by law committed to the city council, and courts cannot interfere to prevent such improvement except in cases where it clearly appears that the discretion of the local legislative branch of the government has been abused. This court has held many times that the only ground upon which the court can interfere is that the ordinance is so unreasonable and oppressive as to render it void. The presumption always exists in favor of the validity of an ordinance passed by competent legal authority. The nature, character, locality, and description of the improvement must necessarily, under the law, be left very largely to the discretion of the city councils in cities and boards of trustees of villages. Whether the pavement of a certain city street ought to be macadam or brick must be determined by the city council, and that question ordinarily is not subject to review by the courts. In determining the question of the reasonableness or unreasonableness of an ordinance the court must have regard to all existing circumstances, contemporaneous conditions, objects sought to be obtained, and the necessity or want of necessity for its adoption. To justify the court in interfering on questions of this kind requires a clear and strong case; but it is the duty of the court, when such case is presented, to protect against arbitrary and oppressive ordinances."

In the case of Marengo v. Eichler, 245 Ill. 47, 91 N. E. 758, the fifth syllabus of the case (91 N. E.) is as follows:

"To justify a court in holding an ordinance passed by a city council for a local improvement void because unreasonable, it must clearly appear that there has been an abuse of discretion and an arbitrary exercise of power to impose an unjust burden on property owners; it not being enough that there should be a difference of opinion between the court and council."

[7] The record further disclosed that the cost of said improvement will range from $5 to $12 per lot, or a total cost of some $278. By following the rule laid down by the Supreme Court of Illinois, it was not only necessary for the plaintiffs to prove that the improvement was unnecessary and that the ordinance was oppressive, but the evidence should be so strong and clear that a court could say with reasonable certainty that the ordinance was so oppressive as to amount to the taking of property without due process of law and void. The evidence in the case is not sufficient to support such a finding.

For the reasons stated the judgment of the court is reversed and remanded, with instructions to dismiss the petition.

OWEN, C. J., and KANE, HARRISON, PITCHFORD, JOHNSON, and HIGGINS, JJ., concur.

Digitized by Google

QUAPAW MINING CO. v. COGBURN.
(No. 9625.)

(Supreme Court of Oklahoma. May 11, 1920.)

(Syllabus by the Court.)

1. Release ⟸24(1)—Prior rescission or cancellation of release for a grossly inadequate consideration is not a prerequisite to action for injury.

Where personal injuries have been suffered, for which a liability exists, and a release therefor has been fraudulently procured for a grossly inadequate sum, an action for damages may be maintained without first obtaining a decree to rescind or to cancel the release.

2. Release ⟸17(2)—False statements by defendant's agent as to a physician's opinion of the injury is fraud justifying rescission.

Where the professional opinion relied on is not given directly by the physician to the patient but is communicated to him by a third person it is the duty of the latter to repeat it with entire correctness. And where the person responsible for the injury or the agent falsely represents to the releasor what a physician or surgeon thinks or has said about his injuries it is a fraud which will justify the rescinding of a release executed in reliance on such false statements.

3. Release ⟸17(2)—Release of damages for injury induced by knowingly false statements of defendant's physician is not binding.

Where the plaintiff in a personal injury case is induced to execute a release of damages by the false and fraudulent representations of a physician in the employment of the defendant, or sent to him by the defendant, that his injuries are but slight or temporary, the physician well knowing the contrary, the release will not be binding.

4. Trial ⟸140(1)—Credibility of witnesses is for jury.

The credibility of witnesses is a matter lying peculiarly within the province of the jury.

5. Release ⟸57(2)—Evidence supporting finding avoiding release of damages for personal injury.

Evidence examined and *held* sufficient to support the finding of the jury voiding the release of damages signed by the plaintiff.

6. Master and servant ⟸118(2), 124(2)—Mining regulations applicable to lead and zinc mines.

Sections 3983 and 3984, Revised Laws 1910, prescribing certain duties of mine operators toward employés, including the duty of daily inspection, applies to the operators of lead and zinc as well as coal mines.

7. Master and servant ⟸118(2)—Mine owner's violation of statute is negligence.

The violation of the duty expressly imposed by a statute upon the owner or operator of a mine to his employés or to the public is negligence which prima facie imposes liability for damages resulting therefrom.

8. Master and servant ⟸118(2)—Mine owner's liability for injury by falling rock defined.

Where an employé at work in a mine is injured by the falling of a loose rock, the employer's liability depends, not upon whether it had actual or constructive notice that the rock was loose, but upon whether it had failed to perform its statutory duty to secure loose rock from falling.

9. Master and servant ⟸258(15)—Evidence of negligence held sufficient.

After a careful examination of the entire record it is *held*: (1) That the evidence reasonably supports the verdict and judgment in favor of the plaintiff; (2) that the errors complained of based upon the rejection of evidence and the giving or refusing to give instructions have not resulted in a miscarriage of justice.

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Charles Cogburn against the Quapaw Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. Scott Thompson, of Miami, G. W. Earnshaw, of Joplin, Mo., and Asp, Snyder, Owen & Lybrand, of Oklahoma City, for plaintiff in error.

J. M. Grubbs, of Cushing, for defendant in error.

KANE, J. This was an action for damages for personal injuries, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Hereafter, for convenience, the parties will be called "plaintiff" and "defendant" respectively, as they appeared in the trial court.

The plaintiff was employed by the defendant as a shoveler in its lead and zinc mine, and was severely injured by falling rock from the roof or side of the drift in which he was working. The plaintiff alleged in his petition that the defendant was negligent in failing to properly inspect the mine and in failing to provide timbers in the mine to prevent the rock which caused the injuries from falling, as required by sections 3983, 3984, 3988, and 4014, Revised Laws 1910.

The answer sets up a general denial, contributory negligence, assumption of risk, and a settlement. The reply denied the allegations of new matter in the answer, and alleged that the settlement was procured by fraud.

Upon trial to the jury there was a verdict for the plaintiff in the sum of $9,650 to reverse which this proceeding in error was commenced.

While counsel for the defendant have assigned numerous errors, they have summarized them all in their brief under four subheads, which for convenience we rearrange as follows:

(1) The plaintiff was precluded by his settlement from recovering.

Digitized by Google

(2) The evidence was not sufficient to authorize a verdict and judgment for the plaintiff.

(3) Errors in the rejection of evidence offered by the defendant.

(4) Error in the instructions.

By the settlement set up in the answer, which was procured by the defendant's claim agent some three weeks after the injury, the plaintiff, for the sole consideration of $2,000, released and discharged the defendant from all claims, demands, damages, actions, or causes of action on account of the injuries. The injuries inflicted upon the plaintiff consisted of numerous wounds upon his back, head, breast, and left arm; the injury to his back being of such a nature that it cut off all motor sensibility of his lower limbs, thus causing permanent paralysis from the waist downward. The fraud relied upon to avoid the settlement consisted of alleged false and misleading statements made to the plaintiff concerning his condition by the defendant's claim agent and by the defendant's physicians while the plaintiff was under their care. The plaintiff seems to have been in an unconscious or dazed condition for several days after his injury, and the settlement was consummated after some five or six visits of the claim agent, the negotiations commencing a few days after the plaintiff had regained consciousness, and continuing until the agreement was finally reached.

[1] It is well settled in this jurisdiction that, where personal injuries have been suffered for which a liability exists, and a release therefor has been fraudulently procured for a grossly inadequate sum, an action for damage may be maintained without first obtaining a decree to rescind or to cancel the release. St. L. & S. F. Ry. Co. v. Richards, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032; St. L. & S. F. Ry. Co. v. Nichols, 39 Okl. 522, 136 Pac. 159; St. L. & S. F. Ry. Co. v. Reed, 37 Okl. 350, 132 Pac. 355; Enid Electric & Gas Co. v. Decker, 36 Okl. 367, 128 Pac. 708; C., R. I. & P. Ry. Co. v. Burke, 175 Pac. 547; C., R. I. & P. Ry. Co. v. Johnson, 175 Pac. 494.

[2-5] The plaintiff testified that the claim agent frequently told him that he was not badly injured; that he would be all right and back at work again in a short time; that the claim agent based these assertions upon alleged conversations with the doctors to the effect that the plaintiff was not seriously hurt; and that he would fully recover in due time. The plaintiff also testified that the company doctor at Commerce, the home of the plaintiff, and Dr. Gregg, in the hospital at Joplin, where the plaintiff was sent for treatment by the advice of the local physician, also advised him to the same effect. The plaintiff further testified that he was ignorant of his true condition, and that the settlement was entered into in reliance on these statements. The claim agent and the doctors each flatly denied the statements attributed to him and testified that, on the contrary, he acted in the utmost good faith toward the plaintiff. Both of the doctors admitted that the plaintiff's condition did not warrant the statements ascribed to them. Dr. Wormington, who attended the plaintiff in his home at Commerce, testified that he knew the injuries to the plaintiff's back had caused paralysis, and that, if the injured nerve was not relieved by nature or by an operation, the injury would be permanent, and that it was in hope of relieving this condition by an operation that he sent the plaintiff to the Joplin hospital for an examination by Dr. Gregg.

Dr. Gregg testified in substance as follows:

"I told him he was bruised over the site of the injury; that the cord had probably been severed, or was so restricted that it cut off all motor sensibility of the lower limbs. I did not give him any encouragement, and I did not think from the line of talk that they thought any more of it. I did not think he would survive the anæsthetic. I thought the anæsthetic would probably kill him, and that the injury was so extensive that I did not see any consequence in removing the pressure off the cord, as I thought the cord had been sufficiently injured that it was destroyed."

Both doctors testified that they communicated the result of their investigation and their honest opinion as to his condition to the plaintiff, and that they never advised the claim agent to the contrary.

This evidence, it seems to us, joins a sharp issue of fact upon which the finding of the jury in favor of the plaintiff justifies the judgment entered thereon upon two grounds.

Black, in his Rescission and Cancellation of Contracts, § 390, lays down the following rule:

"Where the professional opinion relied on is not given directly by the physician to the patient, but is communicated to him by a third person, it is the duty of the latter to repeat it with entire correctness. And where the person responsible for the injury or the agent falsely represents to the releasor what a physician or surgeon thinks or has said about his injuries, it is a fraud which will justify the rescinding of a release executed in reliance on such false statement."

The same author in the same section is authority for the following rule:

"Where the plaintiff in a personal injury case is induced to execute a release of damages by the false and fraudulent representations of a physician in the employment of the defendant, or sent to him by the defendant, that his injuries are but slight or temporary, the physician well knowing the contrary, the release will not be binding, especially where the plaintiff was ignorant of such matters or was at the time too weak and ill to form an intelligent judgment for himself."

Digitized by Google

The finding of the jury on this sharply conflicting testimony entitled the plaintiff to recover under either or both of these two rules.

The evidence of the plaintiff was direct and positive to the effect that the claim agent of the defendant falsely represented what the physicians or surgeons thought or said about his injuries, and also that the physicians and surgeons of the defendant falsely advised him as to his condition. At first blush it may appear that the great weight of the evidence is against the plaintiff on this point, but, when we reflect that no one was present except the particular parties engaged therein during any of the conversations held between the plaintiff and the claim agent and between the plaintiff and each of the doctors, the evidence stands pretty well balanced as to the number of witnesses testifying to each conversation. In these circumstances, the verdict turning upon the credibility of the witnesses, a matter lying peculiarly within the province of the jury (11 A. & E. Enc. 498), we do not feel justified in reversing the finding of the jury, who saw the witnesses upon the stand, observed their demeanor, their candor or lack of candor and all the other circumstances which may be determining factors in cases like this where the evidence is so sharply conflicting.

As was said by this court after reviewing the evidence in the case of Enid Electric & Gas Co. v. Decker, supra, the jury had this as well as other testimony and circumstances before it, and under this testimony and the surrounding circumstances we do not feel justified in saying that such evidence did not reasonably tend to support their finding.

There is some discussion in the brief of counsel for the defendant as to the mental capacity of the plaintiff to enter into a contract of settlement, but, in view of the statement of counsel for the plaintiff in his brief that it is not contended that the plaintiff was unconscious or crazy or anything like that at the time he made the settlement, and that it is not because of his mental condition that the plaintiff claims the release should be set aside, we do not deem it necessary to specifically notice this phase of the question.

Preliminary to the next question presented for review, it is conceded by the parties that the measure of responsibility due from the master to his servant is correctly stated in C., R. I. & P. Ry. Co. v. Duran, 38 Okl. 719, 134 Pac. 876, that is, the master must furnish to the servant a reasonably safe place to work and reasonably safe tools with which to work, and that, to constitute actionable negligence where the wrong is not willful and intentional, three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure.

Starting from this agreed premise, we will now examine the sufficiency of the evidence to authorize the verdict and judgment for the plaintiff upon the merits.

The evidence shows that the drift where the plaintiff was working at the time of his injury was 18 or 20 feet wide and 10 or 12 feet high, and had a mixed formation of soapstone and hard rock.

The plaintiff testified as follows:

"Q. Describe this soapstone so the jury will understand what it is? A. It is something like a slate rock, soft and slacks up; when it gets to the air, it slacks to pieces; it slacks up like lime; it is a soft rock.

"Q. Did any pieces ever fall in the mine when you were in there? A. Yes, sir.

"Q. What kind of pieces were they? A. Well, at one time there was a large piece fell just at the turn of this drift and the one on the right, and several different times small pieces of the soapstone fell; most any time during the day there were some falling little slivers.

"Q. Were there any props or timbers in this mine to prevent the falling of stone? A. No, sir; there was not.

"Q. Were there any in this drift where you were working? A. There wasn't any in the mine at all."

Another witness, an experienced miner, after testifying to the same effect as to the formation of the drift, testified as follows:

"Q. Now, assuming that a drift was of soapstone formation and was 20 feet high, 25 to 35 feet wide, state what, if anything, could be done to make it more safe than just to leave it without any timber. A. Well, I don't know that anything could be better than to timber it.

"Q. In what way would the timbers make it more safe? A. Hold up the soapstone, wouldn't it?"

Another witness, who was also an experienced miner, testified as follows:

"Q. Now, where did the rocks fall from that fell on Cogburn? A. Well, fell from the roof and from the side, both. Big slab from the roof, I think, that is the one that hit him.

"Q. How was this slab located at the time you found Cogburn? A. Broke all around him. Big rock as big as this table, I guess (indicating a double office desk in room), lying kind of over him, and a few small pieces broke up and laying right beside and around him.

"Q. What, if anything, held this big rock from crusing him down towards the ground? A. The can, I think, is what held that big rock off of him.

"Q. Did you observe the stone that had fallen there in the mine at that time, as to what it was, what kind of stone? A. Do I know what kind it was?

"Q. Yes. A. There fell soapstone.

"Q. What is the nature of soapstone; what is its characteristics, whether it is strong or otherwise. A. Kind of slick, blue, white-looking rock. It isn't solid.

"Q. Wasn't solid? A. No; slick.

"Q. What about its being strong, as holding in place; will it or will it not hold itself in

Digitized by Google

place? A. When it is arched up it will hold. When it is just a flat place, it will fall.

"Q. What do you mean by being 'arched up'? A. That is where it kind of come up to an arch, like this (indicating).

"Q. Was this arched up or flat? A. Flat.

"Q. Do you know whether or not anything could have been done to protect the falling of rock in this mine? A. Yes, sir; there could have been timbers put up there and protected it.

"Q. In what way would timbers have protected it, Mr. Slayton? A. If there had been big timber up there, the soapstone wouldn't have fell; would have protected it, held it up; kept it from falling down."

There was other evidence to the same effect tending to show that, on account of the soapstone formation, the drift was an unsafe place to work, and that timbering was necessary in order to make the drift safe.

[6, 7] In Big Jack Mining Co. v. Parkinson, 41 Okl. 125, 137 Pac. 678, it was held that sections 3983 and 3984, Revised Laws 1910, prescribing certain duties of mine operators, toward employés, including the duty of daily inspection, applies to the operators of lead and zinc as well as coal mines.

Section 3983 of the chapter on Mines and Mining requires every operator to employ a competent and practical inside overseer for each mine employing ten or more persons inside, who shall have charge of the inside operations of the mine and shall see that the provisions of this chapter are strictly enforced. This section provides that the foreman shall keep a careful watch over timbering, etc., and see that sufficient props, caps, and timbers of suitable size are sent into the mine when required, and that he shall, as far as possible, see that as the miners advance their excavations all dangerous slate and rock overhead are taken down or carefully secured against falling.

Section 3984 provides that the foreman shall see that all miners are supplied at all times with such timbers, props, and cap pieces as are necessary to keep their working places in a safe condition, and that all such timbers, props, and cap pieces shall be delivered at the face of the miners' working place, and, if from any cause the timbers cannot be supplied where required, the said mine foreman shall instruct the persons to vacate all said working places until supplied with the timber needed.

Section 3988 provides that the mine foreman shall direct that each and every working place shall be properly secured by props or timbers, and that no person shall be directed or permitted to work in any unsafe place unless it be for the purpose of making it safe.

Section 4014 declares that any violation of this chapter shall be a misdemeanor.

Counsel for defendant concede that the drift where the plaintiff was injured was not timbered, but they say that the uncontradicted evidence shows that no timbering that could have been placed in the drift would or could have prevented the injury. They contend that in these circumstances, there being nothing to refute this evidence except the bare fact that the plaintiff was injured, the case is governed by the rule laid down in C., R. I. & P. Ry. Co. v. Brazzell, 40 Okl. 460, 138 Pac. 794, wherein it was held that the fact of an accident or injury to the employé as a rule carries with it no presumption of negligence on the part of the employer. And by the rule laid down in St. L. & S. F. Ry. Co. v. Hess, 34 Okl. 615, 126 Pac. 760, to the effect that in a suit for damages for personal injuries, although the defendant may be shown to have been negligent in some manner, yet, unless the negligence so shown was the proximate cause of the injury complained of, no recovery can be had on account of such negligence. We are unable to agree with counsel in this contention. There can be no doubt that the evidence conclusively shows that timbers, props, and cap pieces were not furnished by delivering the same at the face of the miners' working place in the mine as required by the statute.

The foreman conceded that the drift was not timbered, but he said that timbers were available for that purpose, and that he could have procured them whenever timbering was necessary to make the mine safe. Possibly timbers were available on the surface of the ground near the mine, but the evidence does not disclose that timbers were even this near nor just where they were. This, in our opinion does not meet the requirements of the statute, which provides that props, caps, and timbers of suitable size be sent into the mine, cut to suit the places where they are to be used, delivered to the working force by company men, and that there shall be sufficient timbers, props, and cap pieces to keep the miners' working place safe, etc., delivered at the face of the miners' working place. The operator must not only furnish timbers and a timber man to timber the mine, but he must see that the mine is actually timbered. Great Western Coal & Coke Co. v. Coffman, 43 Okl. 404, 143 Pac. 30; Great Western Coal & Coke Co. v. Cunningham, 43 Okl. 417, 143 Pac. 27; Great Western Coal & Coke Co. v. Belcher, 43 Okl. 439, 143 Pac. 36; San Bois Coal Co. v. Resetz, 43 Okl. 384, 143 Pac. 46; McAlester-Edwards Coal Co. v. Hoffar, 166 Pac. 740.

As these statutes require the operator to timber the mine for the purpose of protecting the miners against injuries resulting from falling rock, it seems quite obvious to us that, when failure to timber followed by injury by falling rock is shown, the only question left for consideration is whether the injury was caused by failure to timber, which is purely a question for the jury to determine from the facts and circumstances of each particular case.

Digitized by Google

The sections of the mining laws hereinbefore cited requires the operator to appoint a foreman whose duty it is to keep a careful watch to see that as the miners advance their excavations all loose slate and rock are carefully secured against falling.

In these circumstances the employer is chargeable with knowledge of whatever it is his duty to find out and know. 5 Thom. Com. L. of Neg. § 5404. In Madison v. Clippinger, 74 Kan. 700, 703, 88 Pac. 260, 261, it was said:

"That the violation of a duty expressly imposed by a statute upon an owner or operator of machinery dangerous to employés or to the public is negligence which prima facie imposes liability for damages resulting therefrom is well-settled law."

The defendant therefore cannot escape liability for its failure to perform its statutory duty on the ground that it did not know that the rock was likely to fall. No duty was imposed upon the plaintiff to keep a careful watch to see that loose rock did not fall upon him. He had the right to rely upon the performance by the master of the statutory duty to inspect and keep the roofs of the entries propped to prevent stone from falling. The theory of the defendant that it was only bound by ordinary diligence to furnish a safe place for its employés to work would deprive the statute of all force. It is not be be assumed that the Legislature intended merely to declare that to be the duty which the common law already imposed upon him.

[8] The rule is also well established that, where an employé at work in a mine is injured by the falling of loose rock, the employer's liability depends, not upon whether it had actual or constructive notice that the rock was loose, but upon whether it had failed to perform its statutory duty to secure loose rock from falling; the only matter of inquiry being whether the requirements of the statute have been complied with, and, if not, whether the injuries complained of were caused by such neglect. McAlester-Edwards Coal Co. v. Hoffar, 166 Pac. 740; Schwarzschild & S. Co. v. Weeks, 72 Kan. 190, 83 Pac. 406, 4 L. R. A. (N. S.) 515; Little v. Norton Coal Co., 83 Kan. 232, 109 Pac. 768.

In 26 Cyc. 1117, the rule is stated as follows:

"Where a servant is employed in a mine, quarry, tunnel, pit, trench, or other excavation, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of, and must comply with all statutory requirements which have been enacted for the protection of the servant."

"The only matter of inquiry is whether the requirements of the statute have been complied with, and, if not, whether the injury complained of was caused by such neglect." Spiva v. Osage Coal Co., etc., 88 Mo. 68.

[9] Taking this view of the law, there can be little doubt that the evidence was sufficient to authorize the verdict and judgment in favor of the plaintiff on the merits.

Errors of the class complained of in the remaining grounds for reversal, to wit, errors in the rejection of evidence offered by the defendant and errors in the instructions, do not, under section 6005, R. L. 1910, constitute reversible error, unless in the opinion of the court, after an examination of the entire record, it appears that the errors complained of have probably resulted in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right. Of these grounds for reversal it is sufficient to say that we have carefully examined the entire record, and are convinced that the errors complained of have not so resulted.

The case was unusually well tried by both sides, and the record below seems to us to be unusually free from prejudicial error. In our judgment there is but one close question in the case, and that is the sufficiency of the evidence adduced by the plaintiff for the purpose of avoiding the settlement. Being satisfied on this point, in the view we take of the mining laws, the trial court committed no reversible error in ruling on the admission or rejection of evidence or in its instructions given to the jury. In these circumstances we are not disposed to disturb the verdict of the jury and the judgment entered thereon in favor of the plaintiff.

For the reasons stated, the judgment of the court below is affirmed.

RAINEY, C. J., and HARRISON, V. C. J., and PITCHFORD, JOHNSON, McNEILL, BAILEY, and RAMSEY, JJ., concur.

POLLYKOFF v. STATE. (No. A-3306.)

(Criminal Court of Appeals of Oklahoma. June 22, 1920.)

(Syllabus by Editorial Staff.)

Criminal law ⟸1182—On failure to file brief or appear for argument judgment affirmed under rule.

Where no brief is filed in behalf of defendant appellant, and no appearance is made to orally argue the case when it was submitted, the court, under Supreme Court rule 9 (165 Pac. x), will examine the pleadings, the instructions and the exceptions thereto, and the judgment and sentence, and, if no prejudicial error appears, affirm it.

Appeal from District Court, Creek County; Ernest B. Hughes, Judge.

Ike Pollykoff was convicted of grand larceny, and he appeals. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

C. B. Rockwood, of Sapulpa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal by transcript of the record from a judgment of the district court of Creek county convicting the defendant, Pollykoff, on the 29th day of September, 1917, of the crime of grand larceny and sentencing him to serve a term of two years' imprisonment in the state penitentiary.

The appeal has been pending in this court since the 28th day of March, 1918. No brief has been filed in behalf of the defendant, nor was any appearance made to orally argue the case at the time the same was submitted.

Rule 9 of this court (165 Pac. x) provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court, and the exceptions taken thereto, and the judgment and sentence, and, if no prejudicial error appears, will affirm the judgment."

After an examination of the record, the court finds no error, and the judgment is affirmed.

In re CONLEY et al. (No. A-3657.)

(Criminal Court of Appeals of Oklahoma. Aug. 30, 1920.)

Application of J. M. Conley and Bess Conley for writ of habeas corpus to be let to bail. Bail allowed.

McCombs & McCombs, of Sallisaw, for petitioners.

The Attorney General, Luther Kyle, Co. Atty., and Frye & Frye, all of Sallisaw, for respondent.

PER CURIAM. A petition filed November 17, 1919, on behalf of J. M. Conley and Bess Conley, alleges in substance that they are illegally restrained of their liberty and imprisoned by Ben F. Faulkner, sheriff of Sequoyah county; that they are held in custody by virtue of a certain commitment issued by Joe Brandon, a justice of the peace in and for district 9 of said county upon a preliminary examination had upon a complaint wherein petitioners were jointly charged with the murder of John Horn.

It is averred that the proof is not evident, nor is the presumption that they are guilty of said crime great. Attached to the petition are numerous affidavits and a transcript of the testimony taken upon the preliminary examination. The cause was submitted and on December 1, 1919, it was considered, ordered, and adjudged that bail should be allowed in the sum of $15,000, each bond or bonds to be conditioned as by law required, and the same to be approved by the court clerk of Sequoyah county, and upon the giving and approval of the same petitioner to be released from custody.

JAMES v. STATE. (No. A-3491.)

(Criminal Court of Appeals of Oklahoma. Aug. 14, 1920.)

Appeal from County Court, Oklahoma County; W. R. Taylor, Judge.

Pressy James was convicted of unlawfully selling intoxicating liquor, and he appeals. Affirmed.

Giddings & Giddings, of Oklahoma City, for plaintiff in error.

W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Pressy James, was convicted at the June, 1918, term of the county court of Oklahoma county on a charge of unlawfully selling intoxicating liquor, and his punishment fixed at a fine of $100 and imprisonment in the county jail for a period of 60 days.

No briefs have been filed on behalf of plaintiff in error, and no appearances made for oral argument. The Assistant Attorney General has imposed a motion to affirm the judgment of the trial court on the ground that the appeal has been abandoned.

A careful examination of the record discloses no fundamental error prejudicial to the substantial rights of the plaintiff in error. It also appears that the appeal is without merit and has been abandoned. The motion of the Attorney General to affirm for failure to prosecute is therefore sustained.

The judgment is affirmed.

Digitized by Google

STATE v. CRAWFORD et al. (No. 488.)

(Supreme Court of Arizona. June 18, 1920.)

1. Intoxicating liquors ⟹137—One attempting to manufacture intoxicating liquors guilty of crime.

One may fall short of actually manufacturing intoxicating liquors, and yet take steps or do things in that direction that will render him guilty under Const. art. 23, Laws 1917, c. 63, and Pen. Code 1913, § 736, of attempting to make intoxicating liquor.

2. Intoxicating liquors ⟹209 — Allegation of unlawful manufacture need not set out instruments or processes used.

An information for unlawful manufacture of liquor under Const. art. 23, and Laws 1917, c. 63, need not allege the instruments or the processes used to manufacture the intoxicant; allegation of the ultimate fact being sufficient.

3. Intoxicating liquors ⟹209—Allegation of "attempt" to manufacture need not allege process used.

An information stating that defendant "did then and there unlawfully attempt to manufacture intoxicating liquor" sufficiently stated an offense under Const. art. 23, Laws 1917, c. 63, and Pen. Code 1913, § 736, it not being necessary to allege the instruments or processes used, and the word "attempt" itself importing an intent to commit the crime and a direct ineffectual act done towards its commission.

Cunningham, C. J., dissenting.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Attempt.]

Appeal from Superior Court, Pinal County; O. J. Baughn, Judge.

Prosecution of Joseph M. Crawford and Frank Nelson for unlawfully attempting to manufacture intoxicating liquors. From a judgment sustaining a demurrer to the information, the State appeals. Reversed and remanded.

Wiley E. Jones, Atty. Gen., L. B. Whitney, Asst. Atty. Gen., and H. G. Richardson, Co. Atty., of Florence, for the State.

E. P. Patterson, of Florence, for respondents.

ROSS, J. The charge against respondents was set forth in the information in this language:

"The said Joseph M. Crawford and Frank Nelson, on or about the 30th day of January, 1920, and before the filing of this information, at and in the county of Pinal, state of Arizona, did then and there willfully and unlawfully attempt to manufacture intoxicating liquor in the aforesaid county of Pinal, state of Arizona, contrary," etc.

Respondents' demurrer to the information was: Insufficient facts; that the acts constituting the offense in ordinary and concise language were not stated; and that the information failed to state any act which would constitute an attempt to manufacture intoxicating liquor. The demurrer was sustained, and from the order sustaining it the state appeals, contending that the information was good.

[1-3] Any person who manufactures intoxicating liquor in this state is guilty of a crime. Article 23, State Constitution; chapter 63, p. 93, Laws of 1917. Likewise one who attempts to commit a crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable for such attempt. Section 736, Penal Code. It follows that one may fall short of actually manufacturing intoxicating liquors and yet take steps or do things in that direction that will bring him within the terms of the statute against the attempt to manufacture intoxicants. We apprehend it would not be essential to allege in a charge of the complete offense the instruments or the processes used to manufacture the intoxicant, but that the allegation of the ultimate fact would be sufficient. If that be true of the complete offense, it would seem that an allegation of the ultimate fact constituting the incomplete crime would be a sufficient statement of the facts constituting the attempt. "Attempt" itself as used in the information imports: (1) The intent to commit the crime; and (2) a direct, ineffectual, act done towards its commission. People v. Petros, 25 Cal. App. 236, 143 Pac. 246, 16 C. J. 113. This definition of an attempt has been adopted by the California courts, whose statute is the same as ours. Cal. Penal Code, § 664. The word has a well-understood legal meaning, and that is the meaning that should be assigned it in this pleading.

The establishment of the details of the crime charged is important in the trial, but need not in all cases be set forth in the indictment or information. In illustration of this proposition, in People v. Hoyt, 145 App. Div. 695, 130 N. Y. Supp. 505, it is said:

"Where property rights may be affected, intent to defraud is a necessary element of the crime of forgery, but it is unnecessary to allege the details by which the intent to defraud is to be established. Paige v. People, supra; People v. Stearns, 21 Wend. 409; Noakes v. People, 25 N. Y. 381; West v. State, 22 N. J. Law, 212. Nor is it necessary to plead how one aided and abetted in the commission of a crime (People v. Seldner, 62 App. Div. 357), or in what manner one attempted to commit a crime (People v. Bush, 4 Hill, 133), or by what means one broke and entered in committing a burglary (People v. Farrell, 28 N. Y. St. Rep. 43)."

In the Hoyt Case it was held that the word "forge," having a well-defined meaning in law, sufficiently informed the defendant of

Digitized by Google

what he was charged without setting forth the means or manner of the forgery. People v. Bush, 4 Hill (N. Y.) 133, supra, is a case where an indictment under the New York statute for an attempt to commit a crime was attacked because it failed to set out "the particular manner in which the attempt was made." The New York statute, while using different language than ours, is of the same purport and meaning. Mr. Justice Cowen, in holding the indictment good, said:

"An attempt in any form to commit an offense is within the statute; and the particular manner in which the attempt was made need not be pointed out by the indictment."

In another case wherein defendant was charged with an attempt to commit arson, the court said:

"It was unnecessary for the district attorney to allege in the indictment the particular manner in which the prisoner attempted to burn his insured goods and chattels, with intent to prejudice the insurer." Mackesey v. People, 6 Parker, Cr. R. (N. Y.) 114.

In People v. Murray, 67 Cal. 103, 7 Pac. 178, an information for an attempt to commit burglary was held good even though it did not set forth the particular manner or means used in such attempt. The court used this language:

"The statute of this state (Pen. Code 459) defines the crime of burglary, and section 664 declares that 'every person who attempts to commit any crime,' etc., is punishable but does not declare what acts shall constitute an attempt. It has been frequently held by this court sufficient to state the offense charged in the language of the statute. Applying these rules to the information before us, it is sufficient."

Respondents cite, as their sole authority, the case of Baca v. State, 18 Ariz. 350, 161 Pac. 686, and rely upon it as decisive. In that case the county attorney sought to charge the defendant with violating this constitutional provision, "Every person who * * * attempts to introduce into the state of Arizona * * * intoxicating liquor * * * shall be guilty of a misdemeanor * * *" (article 23, § 1), by alleging that the defendant "did * * * attempt to transport, bring, and carry into the county of Apache * * * a large quantity * * * of alcoholic liquors, to wit, whisky, * * *."

There were three opinions in the Baca Case, two holding the information insufficient, and one holding it good. The reasoning adopted by the two members of the court declaring it bad proceeded along different lines, but it would seem that their ultimate conclusion was the same, to wit, that the information did not use the language of the statute, or equivalent language, in describing the offense sought to be charged. One of the justices said:

"The allegation that the defendant did willfully and unlawfully 'attempt to transport, bring and carry' whisky into the state of Arizona fails to set forth the offense in the language of the law or otherwise, except as a conclusion."

Another said:

"I do not think the allegations 'to transport, bring and carry' import the same meaning as the word 'introduce' contained in the Constitution. Clearly it would be no violation of our Constitution for a public carrier 'to transport, bring and carry' into Apache county, Ariz., intoxicating liquors in a continuous shipment from the state of New Mexico to the state of California. The word 'introduce' as used in our Constitution means that the liquors are brought into the state for the purpose of commingling them with the other property of the state."

Unlike the Baca Case, the information charges the offense in the language of the statute. We are of the opinion that the information states a crime, and that the court committed error in sustaining the demurrer. The judgment is reversed, and the cause remanded, with directions that further proceedings be had not inconsistent with this opinion.

BAKER, J., concurs.

CUNNINGHAM, C. J. (dissenting). Section 1, art. 23, Amendment State Constitution, page 1, Session Laws 1915, "Amendments," defines as guilty of an offense the following:

"Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind to any person in the state of Arizona, or who manufactures, or introduces into, or attempts to introduce into the state of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor and upon conviction shall be imprisoned for not less than ten days nor more than two years and fined not less than twenty-five dollars and costs nor more than three hundred dollars and costs for each offense: Provided, that nothing in this amendment contained shall apply to the manufacture or sale of denatured alcohol."

Of course, denatured alcohol is neither ale, beer, or wine. It is either "ardent spirits" or it is an intoxicating liquor of some kind. Whether or not denatured alcohol is ardent spirits in its nature may be passed without decision, yet, there is no doubt that denatured alcohol is an intoxicating liquor in fact, and as such its manufacture is harmless under the Constitution, no crime is committed by reason of its manufacture or sale in this state. To manufacture any ardent spirits or intoxicating liquor in this state, other than denatured alcohol, is declared a criminal offense.

The information in this case charges that—

Digitized by Google

"Joseph M. Crawford and Frank Nelson, on or about the 30th day of January, and before the filing of this information, at and in the county of Pinal, state of Arizona, did then and there willfully and unlawfully attempt to manufacture intoxicating liquor in the aforesaid county of Pinal * * * contrary to the form, force, and effect of the statute in such cases made and provided," etc.

The charge does not follow the language of the statute defining and describing the offense condemned in the said constitutional provision. Section 735, Penal Code 1913, provides that—

"Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such an attempt. * * *"

The respondents demurred to the above information, and their demurrer was by the court sustained, and the state appeals on a question of the sufficiency of the information to charge a public offense.

The ingredients of the offense of manufacturing intoxicating liquors of every kind, except denatured alcohol, cannot be accurately and definitely stated if the exception is omitted in charging the main offense. 22 Cyc. 344, and cases cited in note 40, and particularly State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754. If the exception is separable from the description, and is not an ingredient of the offense as defined, it should not be noticed. 22 Cyc. 344, note 41. Ex parte Harvey, 154 Cal. 355, 97 Pac. 891, deals with the rule and with the exception. See People v. H. Jevne Co. (Cal.) 178 Pac. 517; State v. Abbey, supra.

It seems, as an exception to the manufacture of intoxicating liquors, that denatured alcohol may be manufactured in the state, and a failure to notice this exception in the accusation of manufacturing intoxicating liquors, the specific offense, is not described with the degree of certainty and definiteness the statute requires. As a consequence, a charge that the defendants did attempt to manufacture intoxicating liquor in this state sets forth no offense unless the pleading describes the liquor attempted to be manufactured, showing that it is ale, beer, wine or some intoxicating liquor other than denatured alcohol.

A further reason is that the information neither gives the legal appellation of any crime, nor states facts necessarily constituting a crime. "Attempting to manufacture intoxicating liquor" is not the generic name of any class of offenses. There is nothing stated in the information that the act of the defendants would have resulted in the production of intoxicating liquor of any kind had not the act been frustrated by extraneous circumstances. Such rule was enforced in People v. Ezra Thomas, 63 Cal. 482, and the indictment held insufficient. I am satisfied that the same rule justly is applicable to the same statutes in this state.

The Baca Case, 18 Ariz. 350, 161 Pac. 686, relied upon by the appellees, is of little value as an authority for any purpose. One of the judges considered the indictment insufficient to charge an offense; another of the judges considered the indictment to be sufficient to charge the offense; and the other judge, at the beginning, waived that question, and, assuming that the indictment did state an offense, said: "I think there is a total lack of evidence to sustain it." Then he stated another reason that the indictment charged that the defendant did "transport, bring and carry" the whisky into this state, and the word of the law is "introduce" the whisky into the state, so the words of the statute defining the offense were not followed. The indictment in the Baca Case was condemned by two members of the court as insufficient to state a public offense, but for reasons both give, which are wholly different. The indictment in that case, however, was more specific in describing the kind of intoxicating liquor the accused was attempting to introduce than the information describes in this case. In the Baca Case the intoxicating liquor mentioned was alleged to be "whisky"; in this case no specific kind of intoxicating liquor is mentioned; simply the defendants are accused of attempting to manufacture intoxicating liquor. Maybe the defendants themselves did not intend that the product sought by them would be intoxicating or adapted to use for any purposes of beverage, but intended to use it for power purposes; then what would become of the offense? Would the state make a case of guilt beyond a reasonable doubt by proving that the defendants attempted to manufacture denatured alcohol?

I do not concur with the determination reached by Judge ROSS. The information fails wholly to charge a public offense, and the demurrer was correctly sustained.

Digitized by Google

PEOPLE ex rel. HILL v. COUNTY COURT OF CITY AND COUNTY OF DENVER et al. (No. 9811.)

(Supreme Court of Colorado. May 10, 1920.)

1. Judgment ⇐948(1)—Res judicata must be pleaded.

Res judicata is a defense that must always be pleaded affirmatively.

2. Pleading ⇐104(1)—Affirmative plea necessary to raise issue of want of jurisdiction depending on question of fact.

Wherever want of jurisdiction depends on a question of fact, and does not appear on the face of the complaint, an affirmative plea is necessary to raise the issue.

3. Judgment ⇐948(1)—That court's attention was called to point of res judicata insufficient, in absence of pleading.

Defendant husband, seeking writ of prohibition against consideration of custody of children in his wife's divorce suit on ground that in previous habeas corpus proceeding on facts alleged by wife their custody had been awarded to him, should have framed an issue on such matter of res judicata in the proper way, and his directing the court's attention to the habeas corpus proceeding is insufficient.

Department 2.

Proceeding for writ of prohibition by the People of the State of Colorado, on the relation of Richard T. Hill, against the County Court of the City and County of Denver, State of Colorado, and the Honorable Ira C. Rothgerber, Judge thereof. Writ denied.

H. R. Kaus, of Denver, for petitioner.

Wayne A. Gunkle, of Denver, for respondents.

DENISON, J. Jessie E. Hill on the 16th of February, 1920, brought suit for divorce against Richard T. Hill in the Denver county court. Among other things she prayed for the custody of their two minor children pending the action. This proceeding is brought to prohibit the consideration of the custody of the children by that court, on the ground that heretofore, in a habeas corpus proceeding in the district court, upon the same facts now alleged by the wife, the custody of the children has been awarded to the father until the further order of that court; and it is claimed that therefore the county court has no jurisdiction over the custody of the children and that their custody and the facts upon which their custody is claimed are res adjudicata.

[1, 2] No answer is shown to have been filed below pleading res adjudicata or want of jurisdiction; indeed no answer has been filed at all. Res adjudicata is a defense that must always be pleaded affirmatively, and wherever want of jurisdiction depends upon a question of fact, and does not appear on the face of the complaint, an affirmative plea is necessary to raise that issue. The cases on this point are numerous. The following are some of them: Ex parte Little Rock, 26 Ark. 52; Ex parte Williams, 4 Ark. 537, 38 Am. Dec. 46; Whipple's Succession, 2 La. Ann. 236; People v. Putnam County Surr., 36 Hun (N. Y.) 218; State v. Breckenridge, 43 Okl. 711, 142 Pac. 407; State v. Voorhies, 34 La. Ann. 1142. See, also, Callbreath v. Dist. Ct., 30 Colo. 486, 71 Pac. 387; Adams County Ct. v. People, 48 Colo. 539, 111 Pac. 86; Miller v. Weston, 189 Pac. 610, decided at the present term.

[3] The petitioner alleges that he "directed the county court's attention" to the proceedings in the district court; but he should have framed an issue there in the proper way. Adams County Ct. v. People, 48 Colo. 539, 111 Pac. 86.

If the county court had no jurisdiction of the subject-matter of divorce or custody of children a different question would be presented.

The writ of prohibition should be denied.

BOWER v. POUND. (No. 9692.)

(Supreme Court of Colorado. June 7, 1920.)

1. Specific performance ⇐105(3)—Cross-complainant barred by laches, though seasonably filed.

Where, although defendant vendee, in action to quiet title, filed in apt time his cross-complaint for specific performance, yet, after the case was retired from the docket, allowed the suit to remain in abeyance and did not move to redocket for a period of over nine years, during which the property greatly increased in value, and the vendor placed improvements thereon, the defendant's laches was fatal to his suit; for laches may consist in a failure to prosecute with diligence a suit seasonably begun.

2. Appeal and error ⇐1175(2)—Suit may be dismissed by appellate court for laches.

It is within the power of a court, on review, to dismiss a suit for specific performance on the ground of laches.

Error to District Court, Sedgwick County; L. C. Stephenson, Judge.

Action by W. T. Bower against W. H. Pound and others, in which the named defendant filed a cross-complaint. Decree for the named defendant on his cross-complaint, and plaintiff brings error. Reversed and remanded, with directions.

Munson & Munson, of Sterling, for plaintiff in error.

Allen & Webster, of Denver, for defendant in error.

Digitized by Google

ALLEN, J. This is an action which, as between the parties in interest upon this review, is a suit for the specific performance of a contract for the sale of certain real estate. The relief is sought by the vendee against the vendor. The contract is in writing, and is dated and reads as follows:

"Julesburg, Colo., Feb. 19, 1908.

"Received of William H. Pound the sum of one hundred dollars ($100.00) as part payment for the purchase of the following described real estate, to wit:

"Lot 5 in Blakesley's subdivision of lots 1 and 2 in block 11 in the original town of Denver Junction, now Julesburg, in Sedgwick county, Colorado, the said lot the said William T. Bower has this day sold to William H. Pound. The entire price to be paid by William H. Pound to William T. Bower for said above-described lot is two thousand dollars, and is to be paid as follows:

"One hundred dollars cash paid at the time of the signing of this agreement or memorandum, and the balance is to be paid at the time the deed is delivered. The title to the said lot to be perfect, and the deed above mentioned is to be a good and sufficient warranty deed, to be signed and acknowledged by William T. Bower and his wife and delivered to William H. Pound, his heirs or assigns, on or before March 19, 1908.

"The said William T. Bower is to furnish abstract of title to said lot, showing the title to said lot to be clear and perfect, and is to be furnished at least ten days before said deed is delivered. If title is not perfect, said Bower shall perfect title within thirty days from this date.

"Witness our hands and seals this 19th day of February, A. D. 1908.

"W. T. Bower.
"William H. Pound.

"In presence of L. H. Eversman."

Shortly after this contract was made, Bower submitted to Pound an abstract of title, and Pound found or regarded the title as being imperfect. Thereafter, and on July 31, 1909, W. T. Bower commenced an action to quiet title to the land in question. The complaint named W. H. Pound as one of the defendants. It appears to be assumed on both sides that on November 12, 1909, the plaintiff obtained a decree quieting his title to the lot as against all of the defendants named in the complaint other than W. H. Pound.

In the above-mentioned action to quiet title the defendant Pound, on September 17, 1909, filed a cross-complaint. In this was set up the contract hereinbefore quoted, and a specific performance of the same was prayed. It was also alleged that plaintiff's title was not perfect, that the plaintiff brought the action for the purpose of making the title perfect, and that the defendant Pound is willing to accept the title when it is made perfect by this action. The answer and cross-complaint further alleged the removal by plaintiff of certain improvements upon the lot, and sought a deduction from the purchase price by reason thereof.

On November 12, 1909, the plaintiff filed a reply to the answer and cross-complaint, admitting the execution of the contract, but denying other allegations.

At the time that the case was disposed of as to other defendants, on November 12, 1909, nothing was done as to the determination of the issues between the plaintiff and the defendant Pound. The cause was retired from the docket. In 1919 the case was redocketed, on motion of the defendant Pound. Thereafter, and on June 5, 1919, the plaintiff filed a further pleading, in which he set up the defense of laches to Pound's cross-complaint for specific performance.

On July 10, 1919, upon trial to the court, a decree was rendered in favor of the defendant Pound, granting specific performance as prayed for in his cross-complaint. The plaintiff brings the cause here for review.

The principal contention of the plaintiff error, plaintiff below, is that the record shows such laches on the part of the defendant Pound as precludes him from the right to the remedy of specific performance, which he seeks in his cross-complaint.

[1] While the defendant Pound filed his cross-complaint in apt time, yet, after the case was retired from the docket, he allowed the suit to remain in abeyance, and did not move to redocket the same for a period of over 9 years, which was over 11 years after the contract was made. Laches may consist in a failure to prosecute with diligence the suit for specific performance, although the suit may have been seasonably begun. 36 Cyc. 724; Grant v. Elder, 170 Pac. 198, 205; Hagerman v. Bates, 5 Colo. App. 391, 38 Pac. 1100; Johnston v. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480.

It was shown at the trial, by a clear preponderance of the evidence, that the property greatly increased in value during the time the defendant Pound, the purchaser, delayed in prosecuting his cross-complaint. There was testimony that the lot more than doubled in value. Such circumstances render the delay prejudicial to the vendor, and fatal to the purchaser's suit for specific performance. 36 Cyc. 726.

It is undisputed that during Pound's delay the vendor, Bower, placed improvements on the lot. Bower testified that he expended $800 upon the premises. It was evidently done, as he testified, in reliance on Pound's supposed abandonment of the contract. These are further circumstances tending to prove Bower's charge of laches against Pound. 36 Cyc. 725.

The record shows no circumstances sufficient to excuse Pound's laches. The vendor, Bower, remained in possession of the proper-

Digitized by Google

ty. He did nothing recognizing the contract as still subsisting.

[2] The record clearly shows such a delay, and such circumstances attending the same, as is fatal to Pound's claim to the right to specific performance. It is within the power of a court, upon review, to dismiss a suit for specific performance upon the ground of laches. Hughes v. Leonard, 181 Pac. 200. For the reasons hereinabove indicated, we are of the opinion that the defendant Pound's cross-complaint should be dismissed.

Other questions are presented in the briefs, but our determination of the same does not or would not affect the result, and no opinion need be expressed thereon. The judgment is reversed, and the cause remanded, with directions to dismiss the cross-complaint.

Reversed and remanded.

GARRIGUES, C. J., and BAILEY, J., concur.

BOLLEN et al. v. WOODHAMS et al. (No. 9615.)

(Supreme Court of Colorado. April 5, 1920. Rehearing Denied June 7, 1920.)

1. Pleading ⟸359—Sham replication is properly stricken.

If the replication was a sham, it was properly stricken out.

2. Pleading ⟸24—"Sham pleading," one good in form, but false in fact.

A "sham pleading" is one good in form, but false in fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sham Pleading.]

3. Appeal and error ⟸907(3)—Evidence not presented by bill of exceptions must be presumed sufficient.

Evidence not in the Supreme Court by bill of exceptions must be presumed sufficient to sustain the trial court's finding that the replication, which was stricken as sham, was false.

4. Pleading ⟸360(4) — Motion to strike as sham proper, where trial by record.

A motion to strike a pleading as sham should be granted only with the most careful consideration; but, if ever proper, it is so in a case where the trial is by record.

5. Judgment ⟸949(2)—Answer of former adjudication held sufficient in suit on injunction bond.

In suit on an injunction bond, answer that the question of damages on the bond had been litigated and determined between the same parties on the cross-bill in the injunction suit stated a defense, as such facts barred the suit.

6. Pleading ⟸360(2)—Motion to strike parts of answer should have preceded demurrer.

Denial of plaintiff's motion, after overruling of his demurrer to the answer, to strike out parts thereof, was proper, as the motion should have preceded demurrer, and was waived by pleading over.

7. Pleading ⟸341—Motion to strike is not to test sufficiency of pleading.

The function of motion to strike parts of a pleading is to clear away rubbish, and so to clarify the issues, not to test its sufficiency.

Error to District Court, City and County of Denver; Henry J. Hersey, Judge.

Suit by Mary D. Bollen and M. J. Walsh, as Public Trustee of Weld County, against Adelbert L. Woodhams and the Ætna Accident & Liability Company. To review a judgment for defendants, plaintiffs bring error. Affirmed.

George F. Dunklee and Edward V. Dunklee, both of Denver, for plaintiffs in error.

John T. Barnett and John Campbell, both of Denver, for defendants in error.

DENISON, J. This was a suit by Bollen, plaintiff below, against Woodhams and the bonding company on an injunction bond. The court sustained defendant's motion to strike the replication as a sham, and for judgment on the pleadings, and plaintiff brings error.

The third defense in the answer was a plea of res adjudicata. It alleged a previous judgment in plaintiff's favor, on the same bond, for damages caused by the same injunction and satisfaction of such judgment. A demurrer to this plea was overruled.

[1] If the replication was a sham it was properly stricken out, and then, if the answer was good (and it had already been held good on demurrer), there was nothing to do but render judgment for defendant, because, under such circumstances, no other judgment was possible.

[2, 3] The first question, then, is whether the replication was a sham. A sham pleading is one good in form, but false in fact. The replication to the third defense consisted of denials. If there was a record of such a judgment as was pleaded, the replication was false. The court found it was false upon evidence that is not here by bill of exceptions, and which we must therefore presume was sufficient.

[4] A motion to strike a pleading as sham should be granted only with the most careful consideration, because it supersedes the trial of the issue; but, if ever proper, such motion is so in a case where the trial is by record.

[5] But plaintiffs insist that the said third defense was bad, and their demurrer thereto

Digitized by Google

should have been sustained. We think not. The plea states that the question of damages on the injunction bond was litigated and determined between these same parties on a cross-bill in the injunction suit. If that is true, it bars this suit.

[6] After demurrer overruled, the plaintiff moved to strike out parts of the answer, and the motion was denied. This was right. The motion to strike should have preceded the demurrer (31 Cyc. 633, 660), and was waived by pleading over (Sweet v. Barnard, 182 Pac. 22).

[7] The motion here seems to be intended as a substitute for a demurrer; i. e., to test the sufficiency of the facts alleged. The function of the motion to strike is to clear away rubbish, and so clarify the issues, not to test the sufficiency of a pleading.

Since what has been said requires an affirmance, we do not notice other points.

The judgment should be affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

SAN LUIS VALLEY BUILDING & LOAN ASS'N v. HOLBERT. (No. 9812.)

(Supreme Court of Colorado. June 7, 1920.)

Vendor and purchaser ⇐172—Installment contract construed to call for interest on "unpaid part of purchase price," not on whole of initial balance.

Contract of sale of land for $15,000, providing for payment of $1,000 cash, and the remaining $14,000 in certain equal monthly installments "in payment of both principal and interest upon the unpaid part of the purchase price," and "that such monthly payments shall continue * * * until the same equals" $14,000, "together with interest upon said sum of money from the date hereof until the payment thereof" at 8 per cent., *held* to require, not the payment each month of interest on $14,000, regardless of what might have been paid on the principal sum, but interest only on the "unpaid part of the purchase price," which would be the initial balance of $14,000, less the total paid thereon.

Error to District Court, Alamosa County; Jesse C. Wiley, Judge.

Action by Frank F. Holbert against the San Luis Valley Building & Loan Association. Judgment for plaintiff, and defendant brings error. Affirmed.

Albert L. Moses, of Alamosa, for plaintiff in error.

J. D. Pilcher and Charles H. Woodard, both of Alamosa, for defendant in error.

TELLER, J. Defendant in error, having purchased property which his vendor held under a contract of sale with the plaintiff in error, on which a part of the purchase price had not been paid, brought suit to compel the acceptance of a balance theretofore tendered to said association, and refused by it. The defendant claimed that the amount tendered was too small. The court found for the plaintiff, and entered judgment accordingly.

The only question which we are asked to consider is that of the amount due on the contract at the time of the tender. Provision for payment of the purchase price of $15,000 was as follows:

"One thousand (1,000) dollars at the time of the signing, ensealing and delivery of this agreement, the receipt of which said sum of one thousand (1,000) dollars is hereby confessed and acknowledged, and the remaining fourteen thousand (14,000) dollars, in equal monthly installments of one hundred and seventy-six dollars and sixty-six and two-thirds cents ($176.66⅔), payable on the 15th day of each and every month during the life hereof, beginning with the current month, it being understood and agreed that the said sum of one hundred seventy-six (176) dollars and sixty-six and two-thirds (66⅔) cents per month is in payment of both principal and interest upon the unpaid part of the purchase price of the premises hereinbefore described, and that such monthly payments shall continue to be made by the party of the second part to the party of the first part until the same equals the sum of fourteen thousand (14,000) dollars together with interest upon said sum of money from the date hereof until the payment thereof at the rate of eight (8) per centum per annum."

Counsel for plaintiff in error contends that this requires the payment each month of interest on $14,000, regardless of what may have been paid upon said principal sum. The judgment allows interest, each month, on the principal sum after deducting all payments made thereon. Counsel's contention is based upon the words "with interest upon said sum of money from the date hereof until payment thereof at the rate of eight per centum per annum." Interest, he says, is to be computed monthly on "said sum," which is $14,000. If the parties had so intended, they would, naturally, have provided that $83.33⅓ be applied on the principal, and $93.33⅓ on interest, each month, there being on counsel's theory no variation from month to month, in the amounts to be applied on principal and interest, respectively.

The contract must be construed as a whole, and no unreasonable intent should be imputed to the parties. It would require very clear and express provisions in such a contract to justify the conclusion that the vendee agreed to pay 8 per cent. interest on the principal sum, regardless of the amount by which it had been reduced. In the paragraph quoted it is agreed that the $176.66⅔

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

per month is, in part, in payment of "interest on the unpaid part of the purchase price." The unpaid part of the price, which is to be the basis for computing the interest, is that price, less the total paid thereon.

This construction is not in conflict with that part of the contract upon which plaintiff in error relies. It makes the agreement reasonable and fair, and is, we think, according to the intent of the parties. The court did not err in its interpretation of the agreement.

Inasmuch as the plaintiff tendered the amount due, before there was any default in payment, there was no forfeiture, and the court rightly denied relief under defendant's counterclaim.

The judgment is affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

BROWN et al. v. HALLETT. (No. 9589.)

(Supreme Court of Colorado. April 5, 1920. Rehearing Denied June 7, 1920.)

1. Landlord and tenant ⟸194(2)—Assignment of lease not surrender, and does not relieve lessee from liability.

The assignment of a lease is not a surrender, and does not relieve the lessee from his covenant to pay rent, even though rent is accepted from the assignee, but question whether there was a surrender and a substitution of tenants and a release of the original lessee is one of fact.

2. Landlord and tenant ⟸231(8)—Finding of surrender of lease and acceptance of new tenant sustained by evidence.

When the whole purpose of a transaction was to get premises for use and benefit of a corporation to be formed, lease being later assigned to it by lessee, who had no individual interest in the lease, and the transfer was accepted by lessor, no one ever having possession except the assignee, and rent was received from assignee and no one else, there was evidence sufficient to justify the court in finding that there was a surrender by lessee and acceptance of a new tenant by lessor.

3. Appeal and error ⟸931(1)—Presumed that question of fact was resolved by court for prevailing party.

Where there were no special findings, it will be assumed on appeal that a certain question of fact was resolved by the court for the prevailing party.

4. Evidence ⟸466—Parol evidence admissible to show surrender of lease.

In an action under a lease for rent, parol evidence was admissible to show that the negotiation in its inception was for the benefit of an assignee of the lease only, and that lessee had no individual interest, and that the lease was assigned, and lessor received rent from the assignee and no one else; the purpose being to show that there was a surrender by the lessee and an acceptance by the lessor.

Department 2.

Error to County Court, City and County of Denver; Ira C. Rothgerber, Judge.

Action by Harry Brown and Maude Brown Plettner, executor and executrix of the estate of Anna Brown, deceased, against Lucius F. Hallett. Judgment for defendant, and plaintiffs bring error. Affirmed.

John F. Tourtellotte, of Denver, for plaintiffs in error.

H. W. Danforth, of Denver, for defendant in error.

DENISON, J. Brown, executor, sued Hallett for rent, upon a lease from Anna Brown, deceased, to Hallett. The trial was to the court. The defendant had judgment.

There were no pleadings, the case being appealed from justice of the peace. The lease in question was in ordinary form with the ordinary covenant to pay rent and not to sublet or assign without the consent of the lessor, but there was a rider as follows:

"It is mutually agreed that the lessee may assign his interest in this lease to a corporation of which he is a member."

There was also an agreement that the covenants should be binding upon the heirs, executors, administrators, and assigns of both parties.

At the trial the defendant was allowed to show that the purpose and intention of the lessee in taking the lease was for the use of a corporation to be formed; that the corporation would not be formed unless the lease could be obtained; that it was the lessee's intention immediately to assign the lease to this corporation; that these purposes and intentions were made known to the lessor. Indeed the purpose to form a corporation for the purpose of taking over the lease was mentioned before anything was said about the name of the lessee, or that there would be an intermediate lessee, and that at the last the lessee stated that he was not interested in the matter individually; that he was only acting for the company, and if the lease could properly be secured the company would be formed—otherwise not. This evidence was objected to by the plaintiff, the objection overruled pro forma, but the ruling was confirmed at the end of the trial and exception taken.

The lease was finally delivered May 27, 1915. On the next day the corporation was formed, accepted an assignment of the lease from Hallett, and went into immediate possession. Hallett, the lessee, was never in possession, but was a member of the corporation.

Digitized by Google

The corporation paid the rent and performed all the duties of a tenant under the lease. In November, 1917, having become embarrassed, it went out of business, and offered to surrender the lease to the lessor. The offer was refused, and suit was brought against Hallett for rent.

The defendant relies upon three defenses, but we need consider only the third, which was that all of the circumstances leading to and attending the execution of the lease, taken with the course of dealings after the assignment, effect and prove a surrender of the lease and term by Hallett and a substitution of the assignee as tenant, so that he is no longer chargeable.

[1] It is very true that the assignment of a lease is not a surrender, and does not relieve the lessee from his covenant to pay rent, even though rent be accepted from the assignee (Jones v. Barnes, 45 Mo. App. 590, 593, 594), but the question whether there was a surrender and a substitution of tenants and a release of the original lessee is one of fact. Golding v. Brennan, 183 Mass. 286, 289, 67 N. E. 239; Colton v. Gorham, 72 Iowa, 324, 33 N. W. 76; Logan v. Anderson, 2 Doug. (Mich.) 101; Gomprecht v. Ludwig, 65 Misc. Rep. 557, 120 N. Y. Supp. 986 (the concurring opinion is the majority opinion).

[2-4] When the whole purpose of the transaction is to get the leased premises for the use and benefit of the assignee, the negotiation being in inception for its benefit and the lease secured for that purpose only, with no individual interest in the lessee; when the transfer is made and accepted by the lessor no one having been in possession except the assignee, and rent is received from it and no one else, it would seem that there was evidence sufficient to justify the court below in finding that there was a surrender by the lessee and an acceptance of a new tenant by the lessor.

Since there were no special findings, we must assume that this question of fact was resolved by the court for defendant. The evidence was admissible for the purpose of showing this fact, and consequently the judgment must be affirmed.

GARRIGUES, C. J., and SCOTT, J., concur.

MILES et al. v. HAMILTON. (No. 22670.)

(Supreme Court of Kansas. June 16, 1920.)

(Syllabus by Editorial Staff.)

Limitation of actions ⇐148(3)—Letter of purchaser assuming a mortgage debt held not an acknowledgment.

A letter to owner of mortgage by the purchaser of the mortgaged realty who had become personally liable by assuming payment of the debt, declaring an intention to pay off the lien and stating that he was going to meet the mortgage without much further delay, was not such an acknowledgment as to toll the statute of limitations, assuming that an acknowledgment of the lien would have that effect.

Appeal from District Court, Butler County.

On motion for a rehearing. Motion overruled.

For former opinion, see 189 Pac. 926.

MASON, J. In the original opinion in this case it was said, in effect, that the court did not regard the letter which the plaintiff relied upon to toll the statute of limitation as sufficient for that purpose, even if the defendant had been the maker of the note, but that the solution of the question was aided by the fact that his liability arose from his assumption of the mortgage debt. In a motion for a rehearing the entire ground is gone over, an argument being included in support of the view that the operation of the statute would be suspended by an acknowledgment of the existence of a lien as well as by an admission of personal liability. The rehearing will be denied, but the order of affirmance will be based explicitly upon the ground that the letter is insufficient to interfere with the running of the statute, assuming, without deciding, that an acknowledgment of the lien would have that effect. We are persuaded that the language of the letter here involved comes no nearer to meeting the requirements of the statute than that passed upon in Corbett v. Hoss, 98 Kan. 290, 157 Pac. 1195, and upon the authority of that decision it is held not to have prevented the cause of action from being barred.

The motion for a rehearing is overruled.

All the Justices concurring.

ATHERTON v. TOPEKA RY. CO. (No. 22283.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

Street railroads ⇐103(3)—Discovered peril doctrine defined.

The trial court correctly charged that after his truck was negligently driven between the street car tracks, and the plaintiff was in a position of peril, and his own negligence had ceased, the defendant would be liable if it saw, or by the exercise of ordinary care could have seen him in such position in time to avoid injuring him, and failed to do so.

Appeal from District Court, Shawnee County.

Digitized by Google

Action by J. T. Atherton against the Topeka Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ferry, Doran & Cosgrove and Clayton E. Kline, all of Topeka, for appellant.

J. J. Schenck and W. E. Atchison, both of Topeka, for appellee.

WEST, J. The defendant appeals from a judgment recovered by the plaintiff for injuries sustained while in a transfer truck which had been driven across the defendant's tracks between two cars going in opposite directions, one of which collided with his truck and shoved it against an iron trolley pole, and the other of which collided with his truck, severely injuring him. It seems quite likely that the cars were both running in violation of the speed ordinance of the city, and the plaintiff was crossing in a manner prohibited by another ordinance providing how a vehicle should cross a street.

The court instructed that under the facts the plaintiff was guilty of negligence by going upon the tracks in the way he did, and that such negligence would prevent his recovery, unless he was allowed to recover under the doctrine of last clear chance; that if his own negligence continued up to, and actually contributed to, the injury, he could not recover; "but, although plaintiff was guilty of negligence in placing himself in a position of danger, * * * yet, if his negligence had ceased, and the defendant, * * * by the exercise of ordinary care, ought to have seen the danger to plaintiff in time to avert the same, and failed to do so, or * * * actually saw plaintiff's danger in time to avert the same by the exercise of ordinary and reasonable care under the circumstances, * * * and failed to do so, * * * then the defendant is responsible for any injury directly resulting to plaintiff from such failure to exercise ordinary care in either case."

Among the answers to special questions returned by the jury were the following:

"Q. 6. Did the plaintiff have time to leave the van after it was struck by the east-bound car, while it was being shoved down the street to the trolley pole, and avoid injury, before it was struck by the west-bound car?

"A. 6. So confused, had no time.

"Q. 7. What, if anything, did the plaintiff do to escape injury, after the van or truck was struck by the east-bound car, while it was being shoved down the track to the trolley pole, and before it was struck by the west-bound car?

"A. 7. Nothing could be done.

"Q. 8. Could not the plaintiff, by looking and listening and taking proper precautions for his own safety, have stopped his truck, or have caused his truck to be stopped, before it went upon the defendant's track, while it was in a position of safety, and thus have avoided being struck by either the east-bound or west-bound car?

"A. 8. Yes; by remaining in the position he was in before starting.

"Q. 9. If you answer the last question in the negative, state what there was to prevent the plaintiff from stopping or causing his truck to be stopped while it was in a position of safety, thus avoiding injury.

"A. 9. Nothing, because he thought he had ample time to cross ahead of the west-bound car."

Counsel for the defendant contend that under the facts and findings the plaintiff should have been held guilty of continuing negligence, that the defendant is not responsible for his being "confused," and that he tried to leave the truck at the wrong place. All these matters are regarded as questions of fact, properly answerable by the jury.

Counsel for the defendant frankly concede that the doctrine of last clear chance, as frequently declared in this state, applies when the defendant actually finds the plaintiff in a condition of peril, or by the exercise of proper care should so find him; his own negligence at that time having ceased. But it is argued with much force, buttressed with numerous authorities, that no duty arises in such cases until the actual discovery of the perilous condition. However, the rule is so firmly fixed in this state and so thoroughly supported by the great weight of authority that it cannot now be changed. In Railway Co. v. Arnold, 67 Kan. 260, 72 Pac. 857, the deceased was riding a bicycle, and on going down an incline on smooth asphalt pavement to a street on which a car was running, and with which he was about to collide, he turned eastward, parallel with the car, and after reaching some rough pavement was thrown from his bicycle in front of the moving car, carried some distance, and killed. It was claimed that contributory negligence barred recovery. It was also argued that, although the negligence of the deceased contributed to the collision, yet if the motorman saw him in a position of danger, or by the exercise of reasonable diligence should have seen him in time to stop the car before killing him, the defendant was liable. This theory was adopted and followed after full consideration. This decision was adhered to after a most thoroughgoing examination in Dyerson v. Railroad Co., 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207, and these two decisions were approved and followed in Springer v. Railroad Co., 95 Kan. 408, 148 Pac. 611. The same rule was announced in the Dyerson Case, and followed in Railway Co. v. Clinkenbeard, 77 Kan. 481, 94 Pac. 1001, and all three were approved and followed in McMahon v. Railway Co., 96 Kan. 271, 150 Pac. 566. In these decisions the doctrine was so carefully gone into and so clearly stated that mere reference thereto is sufficient.

The rule so established was correctly given by the trial court, and the record presenting no error, the judgment is affirmed.

All the Justices concurring.

Digitized by Google

CURRANT v. LENGER. (No. 22692.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. **Appeal and error ⟸1002—Verdict and judgment on controverted evidence conclude the facts.**

Rule followed that a verdict and judgment based on controverted evidence end all dispute touching the facts in a lawsuit.

2. **Assignments ⟸119—Assignee of account for wages may sue thereon.**

A person to whom an account for wages has been assigned may maintain an action on the account, and it is immaterial whether the assignee has paid for the account or not.

3. **Interest ⟸46(1) — Interest is allowable from demand for payment of wages and money expended for defendant.**

In an action for wages and to recover for money paid out at the behest of a defendant and for his benefit, it is not error for the court to instruct the jury that, if they found for the plaintiff, they should allow him interest from the date demand for payment was admittedly made.

4. **Correct instructions.**

Instructions examined, and no error discerned therein.

Appeal from District Court, Stafford County.

Action by John Currant against Fred H. Lenger. Trial before a justice of the peace, and on appeal to the district court there was a verdict and judgment against defendant, and he appeals. Affirmed.

Ray H. Beals and Robert Garvin, both of St. John, for appellant.

Paul R. Nagle and Harry T. Gray, both of St. John, for appellee.

DAWSON, J. The plaintiff sued the defendant for laborer's wages, materials furnished, and for services in caring for defendant's horses. He also sued for wages due two other laborers who had assigned to him their accounts against defendant.

The cause was tried before a justice of peace, and appealed to the district court. The plaintiff's evidence tended to show that in February, 1918, the defendant employed plaintiff to chop trees at an agreed wage of $3 per day, and that pursuant thereto plaintiff worked for defendant some 64 days. It also tended to show that defendant had authorized plaintiff to purchase $6.60 worth of window glass and some wire. It was also shown by plaintiff's evidence that defendant promised "to make it right with" plaintiff if the latter would look after defendant's horses, and that pursuant thereto plaintiff cared for seven head of horses, fed them, and pumped water for them for 114 days, and that such service was worth "a dollar a day." Plaintiff also showed that one John Carey and one B. E. Carey had worked for defendant for a number of days, and that they had assigned their wage accounts to him.

Defendant's evidence tended to show that, while he had offered plaintiff 30 cents per hour to cut wood, and that the two Careys worked for him some days at that price, all three of these laborers had later made a counter proposition to chop the trees for the wood; "they would take the wood for the chopping, so that they could go to work and sell it and get the money." They did so, according to defendant, and he owed them nothing for labor, and had paid them for wood which they had delivered to him. Touching the care of the horses, defendant testified that plaintiff agreed to do that for the use of the horses. Militating somewhat against the force of defendant's evidence was his admission that he gave plaintiff some "credit on the wood chopping."

Other details of the evidence need not be narrated.

Verdict and judgment for $144.38 were rendered against defendant, and he appeals.

[1-3] This is simply another case of disputed facts—a dispute terminated by the jury's verdict and the trial court's approval of that verdict. Bruington v. Wagoner, 100 Kan. 439, 164 Pac. 1057.

It is immaterial that plaintiff may have paid nothing for the Carey's accounts. That they were duly assigned to him is not denied, and he could maintain an action to collect them. Civ. Code, §§ 25, 26 (Gen. St. 1915, §§ 6915, 6916). See, also, Stanley v. Penny, 75 Kan. 179, 182, 88 Pac. 875; Shannon v. Abrams, 98 Kan. 26, 29, 157 Pac. 449, Ann. Cas. 1918E, 502; Lower v. Shorthill, 103 Kan. 534, 538, 176 Pac. 107.

It is contended that the trial court erred in instructing the jury that, if they found for the plaintiff, they should allow him legal interest on the amount found due from October 3, 1918. Defendant admitted that on that date plaintiff had made a demand on him for payment. Since there can be no doubt that the money was then due from defendant, interest was properly computed from that date. Smith Bros. v. Hanson, 106 Kan. 32, 187 Pac. 262.

[4] Complaint is made of some of the other instructions. These have been examined. As a whole they were rather extensive, but not inaccurate, statements of elementary law, formulated with pertinent relation to the issues involved. The instructions stated the law with reference to defendant's theory as to the case as well as to that of the plaintiff; they contain no discernible error, and present nothing justifying discussion.

The judgment is affirmed.

All the Justices concurring.

Digitized by Google

TITLE INS. & TRUST CO. v. MILLER & LUX, Inc., et al. (two cases). (L. A. 4993, 4994.)

(Supreme Court of California. June 1, 1920. Rehearing Denied July 1, 1920.)

1. Waters and water courses ⟸152(8)—Evidence held to sustain conclusion plaintiff entitled to per cent. of waters allotted under settlement agreement.

In action to quiet title to water rights, evidence *held* to sustain court's conclusion that plaintiff was entitled to take 9.94 per cent. of the waters allotted to the first parties therein by a certain water settlement agreement of 1888, including waters accumulated by them in a reservoir, and to use them at any place it should think proper, either on lands riparian to the river or its branches or on other nonriparian lands, but that the use should be limited to lands owned by a party to the water settlement agreement, plaintiff's predecessor, on its date.

2. Waters and water courses ⟸158(1)—Agreement not describing land too uncertain to establish riparian rights.

Agreement between riparian owners, not describing any land, but merely showing the area signed for by the several parties, established no riparian rights of the parties in any land, being too uncertain, as such rights can exist only as part and parcel of specific tracts, and any contract must describe the land sufficiently for identification.

3. Waters and water courses ⟸39 — Only tracts acquired by single conveyance from state and abutting on stream entitled to riparian rights.

Only tracts acquired by single conveyance from the state and abutting on a stream are entitled to riparian rights.

4. Waters and water courses ⟸158(2)—Right to use water confined by agreement to land owned by party within certain townships.

Under provisions of water settlement agreement, right of a party thereto and of plaintiff as his successor to the use of water of a river *held* confined to its use on land owned by the party to the agreement on the date of its making and within certain townships.

5. Waters and water courses ⟸40—Right of riparian proprietor as against appropriators extends to entire stream.

The right of each riparian proprietor as against appropriators of water extends to the entire stream, however small a part of his land actually abuts thereon.

6. Waters and water courses ⟸152(5)—Defendant's claim of lien held proper for amendment in action to quiet title to water right.

In action to quiet title to water rights against claims of defendants, one of whom claimed that such rights as plaintiff had were part and parcel of plaintiff's land, either as a riparian right or as an appurtenance, it was proper for a defendant, if it had a claim, present or prospective, against plaintiff which would constitute a lien on the lands of which the water rights were a part, to assert the same by amending its answers and to have its lien established.

7. Pleading ⟸236(3)—Amendments during trial within discretion of court.

The matter of amending pleadings during trial is largely in the discretion of the trial court.

8. Executors and administrators ⟸315(5)—Decree of distribution established lien on land.

Decree of distribution in a decedent's estate declaring that a burden or charge in favor of the present defendant existed against certain land, and that it should run with and bind such land, established the claim in favor of defendant as a lien on the land described and declared to be subject thereto.

9. Executors and administrators ⟸315(1)—Probate court in distributing estate can declare lien in favor of third person.

The court in probate has power, in distributing the estate of a decedent, to declare a lien thereon in favor of a third person and that the distributee shall hold subject to such lien.

10. Executors and administrators ⟸315(1)—Lien imposed by distribution decree not void for uncertainty.

Decree of distribution of a decedent's estate declaring a lien on certain land in favor of a corporation which had a contingent claim against the estate for expenses to be incurred in certain water litigation *held* not void for uncertainty, in that the claim for which the lien was imposed was for moneys to become due in the future, whose amount could not be learned in advance, or as leaving it to the corporation to be the sole judge of the amount of expenses.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by the Title Insurance & Trust Company against Miller & Lux, Incorporated, and another. From portions of the judgment, both parties appeal. Judgment modified and affirmed.

Edward F. Treadwell and McCutchen, Olney & Willard, all of San Francisco, for appellants.

M. P. Frasier, Hunsaker & Britt and Le Roy M. Edwards, and Joseph L. Lewinsohn, all of Los Angeles, and Houghton & Houghton, of San Francisco, for respondent.

Case No. 4993.

SHAW, J. The defendants, Miller & Lux, Incorporated, and Kern County Land Company, separately appeal from portions of the judgment. They also respectively appeal from the order of the court denying motions to vacate the judgment and enter a different judgment on the findings and from the order

Digitized by Google

of the court denying motions for a new trial. All the appeals are presented in one transcript of the record.

The complaint alleges that the plaintiff is the owner of a certain proportion of the waters of Kern river; that the defendants each claim interests or rights in the waters belonging to plaintiff; that the claims of the defendants are without right and that none of the defendants has any interest therein. The prayer is that the plaintiff be declared to be the owner of said proportion of said waters; that its title thereto be quieted against the claims of the defendants thereto; and that the plaintiff be declared entitled "to use and dispose of its share of said waters as aforesaid in any manner, at any place, and for any purpose it may think proper." The judgment was in accordance with this prayer.

The claim of appellants is that plaintiff's right to use the water is a riparian right appurtenant to certain lands; that it has no right to use it on other lands; and that its use is subject to the reasonable use of other riparian owners along the stream, including the appellants. The question whether the water right of the plaintiff is that of a riparian owner only or is a right arising out of contract or appropriation depends on transactions and conduct during a period extending from 1879 to 1911, and it will be necessary to give as briefly as possible a history of the origin of the right and of the subsequent transactions throwing light upon its nature and character.

Kern river emerges from the foothills into the valley about 4 miles northeast of Bakersfield. From thence it now runs northerly of Bakersfield about 20 miles to the lower part of the valley, and there turns and flows northwest and north some 30 miles or more to Tulare lake. It has in the course of years changed its course from time to time. The water in times of flood will spread out of the regular channel and find its way in part through the sloughs or old channels. Formerly the main channel turned to the south shortly after emerging from the foothills and ran easterly of Bakersfield nearly south to Kern lake, thence westerly to Buena Vista lake and on to Tulare lake. In high floods it now divides near Buena Vista lake, part of the water flowing into that lake and another part running down Buena Vista slough toward Tulare lake. We speak, of course, of conditions as they would have been but for the changes which have been made by the several parties interested to control the course of the water. The interests of the several parties in the land involved in this action were acquired by them prior to the year 1879. Haggin, Tevis, Carr, and others had acquired large tracts of land, apparently, for the most part, not riparian to the stream, but which were irrigable by means of canals from Kern river, and they had made canals and thereby diverted a large part of the water of the river and were applying the same to the irrigation of lands situated in the vicinity of Bakersfield and south, southwest, and northerly thereof. Miller & Lux, Frederick Cox, C. W. Clarke, Reddington, Livermore, Cornwell, Bonestell, and Stebbins had acquired large tracts further down the valley, to which the water of the river, at least in times of flood, naturally would flow, if not intercepted. The diversions by Haggin and the others had the effect of preventing this flow. Thereupon Miller & Lux and others, on May 12, 1879, began the historic action of Lux v. Haggin, the decision of which by the Supreme Court is found in volume 69 of California Reports, extending from page 264 to page 439, 4 Pac. 919, 10 Pac. 674. Its object was to enjoin the diversions above mentioned, and it was based on the claim that the lands of the plaintiffs were riparian to the river or its branches and sloughs and that the diversions of the defendants were invasions of the riparian rights of the plaintiffs in the waters naturally flowing therein. The opinion in the case clearly shows that the principal question for decision was whether the right of a riparian owner or that of an appropriator or mere diverter was the superior right to the waters of the stream, under the law of California. On November 3, 1879, the plaintiffs therein, together with the said Frederick Cox and C. W. Clarke, executed an agreement relating to the prosecution of said action.

This agreement recited that—

the parties thereto, "being owners of land in Kern county, California, on and adjacent to Kern lake, Buena Vista lake, the slough connecting said lakes, and on Buena Vista slough, all of which said lands have a common interest in the assertion, preservation, and maintenance of the 'riparian rights' of the said land derived by the water of Kern river through and by Kern lake, Buena Vista lake, and Buena Vista slough, and whereas the said riparian rights are threatened and in danger by the diversion of the waters of Kern river by sundry adverse claiming parties, who are illegally diverting the said waters and preventing their natural and heretofore continuous flow through the above-described channels and the lands of the parties subscribing hereto; and whereas such damaging, and illegal diversion can best be met by united action in litigation of all the parties in interest for the establishment and maintenance of the riparian rights of the hereinbefore mentioned land:

"Now, therefore, the said parties do hereby associate themselves together for the prosecution of such litigation, and do pledge themselves each to the other that they will share all proper expenses of such litigation in the proportion of the number of acres of land set opposite to their respective signatures hereto, and that the association shall continue to exist until the final termination of all litigation necessary to establish the riparian rights of the said lands,

Digitized by Google

it being expressly stipulated that should any party or parties during the pendency of such litigation sell his or their lands or any portion thereof, he or they shall nevertheless pay his or their pro rata of cost of such litigation to the final end thereof, notwithstanding any such sale during the pendency thereof."

The parties signed this agreement and each wrote the number of acres claimed by him opposite his name, as follows:

Clarke & Cox	14,520	acres
Miller & Lux	36,644	"
John H. Reddington	13,283	"
George N. Cornwell	8,000	"
L. H. Bonestell	1,920	"
Horatio B. Livermore	22,541	"
Horatio Stebbins	1,280	"

The total number of acres was 98,188.

Thereafter the said action was prosecuted in the superior court and judgment was rendered therein in favor of the defendants. The appeal was taken by the plaintiffs and the final decision was made as above stated. The case attracted a great deal of attention throughout the state, and it is a matter of history that it was made an issue in the political campaigns of 1884 and 1886, and was a subject of agitation at the legislative sessions of 1885 and 1887, as a result of which section 1422 of the Civil Code, declaring that "the rights of riparian proprietors are not affected by the provisions of this title," was repealed by the Legislature of 1887 (St. 1887, p. 114). The judgment of the Supreme Court reversed the judgment of the court below and remanded the cause for a new trial. The opinion, however, settled the controversy between the parties as to the superiority of riparian rights in favor of the plaintiffs in the action, and the cause was not tried again. Reddington, Livermore, and Bonestell had in the meantime conveyed their lands to Miller & Lux. Instead of having a new trial, the parties settled their controversy by an elaborate contract executed on July 28, 1888, and known in that region as the "Lux-Haggin Contract," or as the "Water Settlement Agreement." It was signed by a large number of persons who were not parties to the action. The parties to this agreement designated as parties of the first part included all the persons who signed the agreement of November 3, 1879, except those who had sold their interests to some of the other parties thereto as aforesaid, and also the Kern Valley Water Company, a corporation which operated a canal to take water to the lands of said parties, or some of them, and which was apparently a mere agency for the use by them of the riparian rights or waters claimed by them. The parties of the second part were composed of two classes: First, corporations operating canals for the diversion and distribution of the waters of the river to others, under rights by appropriation; second, persons claiming rights to receive such waters from said corporations for use on their respective tracts of land. The agreement recited that the several parties executing it either claimed to own lands along the river and its branches, with riparian rights in the water, or other lands irrigated or susceptible of irrigation from water of said river, or claimed rights to divert water from the river and distribute and sell the same for the irrigation of lands not riparian to the river. One recital is as follows:

"All of the aforesaid owners of and claimants in said lands claim to have in connection with or as appurtenant to, or as a part and parcel of, said lands, certain riparian or other rights to the waters of said river, slough, or lakes, or some thereof."

The parties holding or claiming rights by appropriation took their water from the river at points above the lands claimed by the parties of the first part and above the head of the canal of the Kern Valley Water Company. The agreement provided that the water of the river should be measured at two places; one at a point where the river debouches from the foothills, called "the first point of measurement," a short distance above the headgate of the Kern Island Irrigating Canal Company; the other, designated as "the second point of measurement," located in the river some 20 miles or more further down the stream and below the intakes of all ditches owned by any of the parties of the second part. Of the water found to be at the first point of measurement 300 cubic feet per second was to be delivered to the Kern Island Irrigating Canal Company. Of the balance, one-third was allotted to the so-called parties of the first part, and two-thirds was allotted to the parties of the second part. The one-third to go to the first parties was to be delivered without diminution at the second point of measurement. This division was to continue during the irrigating season, that is, from March 1 to August 31 of each year. During the remaining months the second parties were to have all the water not taken by said Kern Island Irrigating Canal Company to use as they saw fit, but whatever they suffered to flow down through the second point of measurement was to go to the parties of the first part. The instrument declares that the shares of water thus allotted to the parties of the first part were "to be used and disposed of by them in any manner, at any place, and for any purpose they may think proper, or arrange or agree among themselves." The same language was used with reference to the rights of the parties of the second part in the waters allotted to them by the agreement, and the 300 cubic feet of said Kern Island Irrigating Canal Company was also "to be used and disposed of in any manner at any place, and for any purpose it should think proper." The agreement also provided that for the benefit of the

Digitized by Google

parties of the first part levees should be constructed around a large lake known as Buena Vista lake, into which a part of the water of the Kern river naturally ran, so as to make of said lake to some extent an artificial reservoir in which should be confined the waters of the river flowing at the second point, at times when there was more than was then in use by the first parties, to be there stored for use subsequently by the parties of the first part. The expense of constructing the levees and other works necessary for conducting the water in and out of the reservoir and for controlling the flow was to be paid one-half by the first parties and one-half by the second parties. A part of such expenses of maintaining such levees, canals, and other works, after the construction thereof, were, however, to be borne by the parties of the first part.

The agreement (paragraph 17) declared that it should be perpetual and should be construed "as a covenant running with all the land owned or claimed by any of the parties hereto which is situated in the following townships or portions of townships," here describing 30 congressional townships and portions of others, extending from township 25 on the north to township 32 on the south, and from range 22 on the west to range 28 on the east, embracing a large part of the valley land of Kern county. It also declared that the parties of the first part "do hereby grant and convey unto said parties of the second part" all the waters and water rights to which the second parties were declared to be entitled thereby, and that in like manner the parties of the second part "do hereby grant and convey unto the said parties of the first part * * * all and singular the waters, water rights, privileges, and easements to which said parties of the first part are respectively, by paragraph third of this instrument, declared entitled, or which are or are intended to be by said paragraph apportioned to them respectively." The waters to which the first parties were declared to be entitled by said third paragraph of the instrument was the one-third of the water flowing at the first point of measurement and delivered at the second point of measurement, as above stated, together with the surplus waters allowed to run by the second point of measurement during the six months following each irrigating season, as above stated. Paragraph third further declares that the second parties each "hereby acknowledges the right of the parties of the first part as riparian proprietors in Kern river, Buena Vista slough, Kern and Buena Vista lakes, and the slough connecting said lakes, to the proportion of the water flowing in Kern river hereinbefore agreed upon, and that as such riparian proprietors they shall at all times be entitled to receive at the second point of measurement during the months of March, April, May, June, July, and August, of each year, the amount of water they are so entitled to." It also provided that Henry Miller should act as the agent for the first parties in the construction of the reservoir. The evidence shows that by common consent, after the execution of the agreement of 1888, Henry Miller acted as the manager and agent of said first parties in the affairs of common interest connected with their water rights under said agreement, until after the commencement of the present action.

In 1879 Miller & Lux were partners and the property in controversy, so far as Miller & Lux were concerned, was the property of said firm. Lux afterwards died and the affairs of the firm were managed by Henry Miller as surviving partner until the settlement of the estate of Lux. In that settlement a corporation was formed under the name of "Miller & Lux" and the property of the firm was transferred to said corporation, which thereafter operated under the management of Miller. In our further discussion we shall use the name Miller & Lux to designate all that was done either by Miller personally or by Miller & Lux in the management of the common affairs of the first parties to said agreement of 1888.

The record does not show that any express agreement was ever made between said parties of the first part defining their respective shares or proportions of the waters allotted to them by said water settlement agreement of 1888. Nor was there any agreement between them expressly declaring the nature or origin of the water rights claimed by the first parties except as it is to be found in the aforesaid agreements of November 3, 1879, and July 28, 1888. The appellants claim that these agreements, when considered in connection with the matter in controversy in Lux v. Haggin, to which it referred, together with the subsequent conduct of the parties interested in the 98,188 acres of land referred to in the agreement of 1879, and the contents of other instruments of writing to which Cox was a party, conclusively establish the fact that the water rights secured by the parties of the first part in the water settlement agreement of 1888, and now in controversy, were riparian rights possessed by the parties, respectively, solely by virtue of the ownership of portions of the 98,188 acres of land, and pertaining only to those lands. They also claim that, even if the rights are not riparian in character, the evidence conclusively shows that the respective water rights of said parties so obtained are rights appurtenant to said 98,188 acres of land, and none other, and that none of the first parties or their successors in interest can rightfully apply the same to other lands without the consent of the others.

The respondent insists that from the several contracts made by the parties, together

Digitized by Google

with other evidence, there arises a necessary implication, or at least a reasonable inference, that the parties of the first part in said water settlement agreement of 1888 are each entitled to a share in the water allotted to them by that agreement in the same proportion as he was called on to pay the expenses aforesaid, that of Cox being equal to 9.94 per cent. of the whole allotment, and that this interest is not attached to any land as a riparian right, but that the water it represents may be used at any place to which Cox or his successors in interest may wish to take it. The respondent also claims that the water settlement agreement of 1888, if properly construed, constitutes a grant to each of the parties of the first part of his proportionate share of the water, for use at any place he sees fit.

[1] We think the evidence is sufficient to sustain the conclusion of the court below that the plaintiff was entitled to take 9.94 per cent. of the waters allotted to the first parties by the agreement of 1888, including the waters accumulated by them in Buena Vista reservoir, and to use the same at any place it should think proper, either on lands riparian to the river or its branches or on other nonriparian lands, but that the use should be limited to lands owned by Cox on July 28, 1888.

[2] The agreement of 1879 is not sufficient of itself to establish the riparian rights of the parties thereto in any land. It is too uncertain to have that effect. It does not describe any land, but merely shows the area "signed for," as one of the witnesses expressed it, by the several parties. Riparian rights can exist only as part and parcel of specific tracts of land, and any contract relating thereto would be void for uncertainty and of no avail unless it describes or refers to the land in a manner sufficient for identification. The number of acres "signed for" by the parties aggregates 98,188, Clarke & Cox signing for 14,520 acres. The evidence shows that Clarke & Cox at that time owned 24,880 acres of land in common, in Kern county, situated within the congressional townships enumerated in paragraph 17 of the agreement of 1888. The agreement of 1888 declares that it shall be construed as a covenant running with all the land owned or claimed by any of the parties thereto situated in said townships. It appears that Clarke & Cox made a partition of their lands. The court finds that Cox owned 30,940 acres of land in said townships at the time the agreement of 1888 was made. The evidence shows that a large part of it was the land owned by Clarke & Cox in 1879 and that only a comparatively small part of it, much less than 10,000 acres, was actually riparian to the river or its branches. Until the agreement of 1888 was made Cox contributed to the expense of litigation a sum equal to his proportion of the 98,188 acres "signed for" in the agreement of 1879. Thereafter he contributed in the same proportion to the expenses of the parties of the first part in constructing Buena Vista reservoir and to the expenses of its subsequent maintenance and operation. Miller & Lux, as managers for the parties of the first part, made contracts for the sale of water to other persons, receiving therefor several hundred thousand dollars and in some instances receiving monthly rentals of substantial amounts, for all of which it accounted to the first parties and paid to Cox his share thereof in proportion to his share of the lands aforesaid. Miller personally, as agent or trustee, also obtained title to the lands covered by said reservoir and conveyed to Cox and others of the first parties each a share therein, proportioned to his ownership in the acreage signed for in the agreement of 1879. The proportion of the expenses and receipts paid to and by Cox obviously was fixed by reference to his ownership of the part of the land owned by Clarke & Cox in 1879. The evidence identifies only 3,840 acres of this land, and it is impossible to determine therefrom whether the remainder of it is or was at any time riparian to said river or any of its branches. There is evidence as to the identity of the lands "signed for" in the agreement of 1879 by each of the other parties thereto, except Miller & Lux, and it appears therefrom that a large part of that land was not riparian to the stream or any of its branches.

[3] At the time the agreement of 1879 was made, the extent to which riparian rights attached to lands owned by one person, consisting of adjoining parcels, one of which, only, abuts upon the stream, was not well understood in this state. Many persons supposed that such rights extended to all the lands owned by a single person, although obtained by separate conveyances, some of which did not convey any land abutting upon the stream, providing all the parcels were contiguous. The land was for the most part swamp land which the parties had acquired from the state. It is not improbable that the parties to that agreement understood that they would have riparian rights in the stream for all of their lands if it was all contiguous to land which did abut upon the stream. When the contract of 1888 was made, however, the opinion in Lux v. Haggin had definitely declared that only those tracts which were acquired by a single conveyance from the state and which abutted upon the stream were entitled to riparian rights. 69 Cal. 424, 425, 4 Pac. 919, 10 Pac. 674. The parties must be presumed to have known this, since they were interested in that case, and the agreement of 1888 must be understood to have been made with knowledge of this principle. It is now well settled. Boehmer v. Big Rock I. D., 117 Cal. 27, 48 Pac. 908; Alta, etc., Co. v.

Digitized by Google

Hancock, 85 Cal. 227, 24 Pac. 645, 20 Am. St. Rep. 217; Anaheim, etc., Co. v. Fuller, 150 Cal. 331, 88 Pac. 978; Gallatin v. Corning I. Co., 163 Cal. 416, 126 Pac. 864, Ann. Cas. 1914A, 74. It is apparent from that document that the first parties intended to secure the water allotted to them for the benefit of all the lands they owned at that time to which it was feasible to carry the water. But they must have known that the riparian rights did not extend to a large part of those lands, and hence the court below might reasonably have drawn the inference that they intended that each of the first parties should have the right to use his share of the allotted water upon any land he then owned situated in the townships enumerated in paragraph 17 thereof, whether riparian or not. This being the case, it is obvious that the right in the waters so allotted was not exclusively riparian in character.

[4] It does not follow, however, that the plaintiff, as successor of Cox, has the absolute right to the share of water in controversy and is entitled to use it at any place or to sell it to others for use on lands not owned by Cox in 1888, or, if then owned by him, not within the townships enumerated in paragraph 17 of the agreement of 1888. That paragraph not only contains the statement above quoted as to its provisions running with all the land owned by any of the parties situated within said townships, but it also declares that all said land "shall be subject to" all its provisions, into whosoever hands it may come by transfer or otherwise from said parties. And paragraph 23 provides that the personal liability imposed under paragraph 17 should be deemed to be the liability of the person who should own the land at the time the liability should accrue, and the party who conveyed his interest "in said lands" should thereafter be freed from all liability under the agreement "to the extent and in the proportion" that the lands sold by him bear to the "whole amount of such lands * * * theretofore owned" by him. These provisions have the effect, by necessary implication at least, to confine the provisions of the agreement and the application thereof, so far as the first parties are concerned, to the lands then owned by them and situated within said townships. It follows that the right of Cox, and of the plaintiff as his successor, to the use of the water is confined to its use on land owned by Cox on July 28, 1888, and within said townships.

The subsequent conduct of the parties implies an understanding between them that there was an even narrower restriction, that is, a limitation of the use to the 98,188 acres "signed for" in the agreement of 1879. It is apparent that Miller and Cox must have known what lands were there referred to, for whenever by conveyances between them their comparative ownerships of that acreage were changed, the proportion of Cox in the common expense paid out by Miller & Lux in maintaining the reservoir was changed accordingly by Miller & Lux in rendering the account to Cox, always with the number 98,188 as the denominator of the fraction, and Cox acquiesced therein and paid his share so computed. Likewise, the distribution of the large receipts from sales of water or water rights was made in the same proportions, and Cox received his diminished share without objection. If the identity of the 98,188 acres had been shown, there might be good reason for such further restriction of the use, but as the case stands there is no means of ascertaining the lands comprising that acreage and that restriction cannot be declared or enforced, and we are bound by the broader area described in the agreement of 1888; it being the only writing on the subject which contains a description capable of being made certain.

The case is, we think, distinguishable in this respect from Calkins v. Sorosis, etc., Co., 150 Cal. 426, 88 Pac. 1094. In that case the court said that, while by the covenant in the agreement the water right was made an easement appurtenant to the land of the plaintiff, yet:

"We look in vain to the agreement or to this covenant to find anything limiting or restricting the use of the water to the lands of plaintiff. It is not a case where, by the very terms of the conveyance, the right to use the water was expressly limited to lands to which the right was made appurtenant." 150 Cal. 431, 432, 88 Pac. 1096.

And so it was held that the plaintiff might sell the water to others for use on other land. In this case, as we have said, the agreement of 1888 necessarily implies such a limitation upon the use. Furthermore, it is to be remarked on this point that the agreement as a whole, in connection with the circumstances under which it was made and the object sought to be attained, thereby indicates strongly that such a limitation was understood.

We are therefore of the opinion that the court erred in adjudging to the plaintiff the unlimited right to use the water at any place it should think proper. It should have restricted the use to the lands owned by Cox on July 28, 1888, situated within the townships aforesaid.

The point just stated may not be of great importance. It does not appear that the plaintiff intended to make any other use of the water than we have held it has the right to make. But the future might develop other desires or interests on that subject, and it is proper that the judgment should be modified so as to state the rights of the parties accurately. This modification was not the object sought by these appeals, and we do not think it should have the effect of carrying costs in favor of the appellant.

Digitized by Google

[5] The clause in the third paragraph of the agreement of 1888, by which the second parties acknowledge the right of the first parties as riparian proprietors along the river and its branches to the proportion of water allotted to said first parties, is not sufficient to defeat the conclusion we have reached. Since the right of each riparian proprietor as against appropriators extends to the entire stream, the first parties would each have the right as riparian proprietors to all of the waters thereof, although only a small part of the land of each actually abutted upon the stream. The second parties all claim solely by appropriation. An acknowledgment by them of the riparian rights of the first parties would therefore be appropriate if any part of the lands of each of the first parties was contiguous to the stream, and it does not of necessity imply that all of it was so contiguous or was entitled to riparian rights.

There are other circumstances appearing in the evidence which are of some weight as tending to the conclusion that the right secured to the first parties in the agreement of 1888 was not considered by them as exclusively of a riparian character, and that they did not understand that they were not entitled to use it upon lands not in fact riparian to the stream. We do not deem it necessary to state these matters in detail. It is sufficient to say that upon the whole case we think the findings complained of, except as above stated, are sustained by sufficient evidence.

Case No. 4994.

The plaintiff has appealed from certain parts of the judgment entered in the court below declaring that certain lands owned by the plaintiff, as successor to Frederick Cox, are subject to a charge in favor of Miller & Lux for a portion of the expenses that might be incurred in future by that corporation in maintaining and operating the Buena Vista reservoir and in constructing other canals and works for the control of the waters owned in common by the parties of the first part to the agreement of 1888. This appeal is numbered L. A. 4994 and is presented upon the same record as case No. 4993.

The court found that the plaintiff had acquired all or a large part of the land formerly owned by Cox, situated in the townships enumerated in paragraph 17 of said agreement, and that it had afterwards sold a large part of said land to other persons, with reservations excluding from the conveyance whatever rights the plaintiff had in the water allotted to the first parties by the agreement of 1888 aforesaid, and that the plaintiff still owned certain parcels of said land, describing them, situated in township 27 south, range 22 east, aforesaid, containing 3,840 acres. The judgment declared that this 3,840 acres was subject to the charge aforesaid for the future expenses to be incurred and paid by Miller & Lux as aforesaid in the common enterprise of maintaining their water rights and works.

Frederick Cox died in the year 1906. Administration of his estate took place in the superior court of Sacramento county. The decree settling the final account and making distribution thereof was entered in that court on April 18, 1908. During the administration Miller & Lux presented a claim against the estate for the contingent expenses thereafter to be incurred by it in maintaining and operating said reservoir and waterworks. Said corporation also filed a contingent claim for moneys to become due to Miller & Lux under an agreement executed between Miller & Lux on October 6, 1898, providing for the construction of certain canals and the payment of rental therefor in case they were made use of by Cox and for the payment of part of the expense thereof by Cox. Both claims were duly allowed in the course of administration. At the time of the final settlement these claims had not been adjusted or disposed of in any way. As they must of necessity arise in the future and the amounts were not then determinable, they could not be adjusted by a present payment. Upon the hearing, all of the parties entitled to distribution were present in open court together with the attorney for Miller & Lux, and thereupon in pursuance of an agreement between them made in open court a decree of distribution was by consent of all parties made and entered distributing the aforesaid 3,840 acres of land to the residuary devisees and declaring that the same was subject to a charge and burden imposed thereon by the provisions of the agreement of 1888 aforesaid in favor of Miller & Lux, and that said burden and charge was "to run with and bind said lands," and imposing a charge upon the said land for the expense to be incurred and moneys to become due under said agreement of October 6, 1898, which also was "to run with and bind said lands."

During the trial of the present action in the court below the defendant Miller & Lux, by leave of court, filed an amendment to its answer setting up these charges and burdens as a lien against the aforesaid lands asking a judgment declaring the plaintiffs should hold said land subject to said charges and burdens. The court made findings in accordance with the amendment and judgment was rendered accordingly imposing upon said 3,800 acres of land a lien for the charges and burdens mentioned in favor of said Miller & Lux.

[6, 7] The plaintiff claims that the court erred in allowing the defendant to amend its answer in the manner above indicated. The object of plaintiff's action was to quiet its title to certain water rights and to certain

Digitized by Google

lands, including said 3,840 acres, against the alleged unfounded claims of the defendants. Miller & Lux claimed that such water rights as plaintiff had were part and parcel of the said 3,840 acres of land, either as a riparian right or as an appurtenance thereto. It was proper, therefore, for the defendant, if it had a claim, present or prospective, against the plaintiff which would constitute a lien upon said lands of which the water rights were a part, to assert the same and have its lien established in the action to quiet title. The matter of amending pleadings during the trial is largely in the discretion of the trial court, and we see nothing in the record to indicate any abuse of discretion in allowing the answer to be amended as aforesaid.

[8] Appellant also claims that the part of the judgment appealed from is based on the theory that the covenants of the agreement of 1888 were covenants running with the land, and that they are not of that character. We do not think this proposition is of any importance. It is immaterial what the nature of those covenants was. The judgment of the court below was obviously based upon the lien or burden established by the decree of distribution in the estate of Cox. That decree declared that this burden or charge existed against the land and that it should "run with and bind the land." By this language the claim in favor of Miller & Lux was established as a lien upon the 3,840 acres of land described therein and declared to be subject thereto. Fresno C. & I. Co. v. Rowell, 80 Cal. 116, 22 Pac. 53, 13 Am. St. Rep. 112; Fresno C. & I. Co. v. Dunbar, 80 Cal. 535, 22 Pac. 275. It is therefore immaterial whether the covenants of the agreement of 1888 were or were not covenants running with the land. Whatever their character, the effect thereof was adjudicated in the decree of distribution, which was binding upon the distributees to whose title the plaintiff has succeeded.

[9] Appellant insists that part of the decree of distribution imposing upon the land the lien above mentioned was void for two reasons: First, because it was beyond the jurisdiction of the court to make such a decree; second, because its provisions are so uncertain as to render it unenforceable. We think there is no doubt of the jurisdiction of the court to enter the decree. This is not a case where the court was endeavoring to determine a controversy between the distributees and third persons regarding the title to the land distributed, adverse to the title of the decedent or to the title of distributee. Cases holding that the court has no jurisdiction to determine such controversies upon the final settlement of the estate in probate are not in point here. Miller & Lux claimed that it had a contingent claim against the estate for expenses thereafter to be incurred, and that such claim was a charge or lien upon a part of the land about to be distributed. The court was making a final settlement of the estate. In order to do so it was necessary that it should make some provision regarding the payment of said claim. It had jurisdiction of the parties and of the property for all purposes necessary to the settlement of the estate. The residuary devisees, the only persons interested in the land as successors of Cox, were present in court and agreed to the distribution made and to the imposition of the lien. It has often been decided that the court in probate has power, in distributing the estate of a decedent, to declare a lien thereon in favor of a third person, and that the distributee shall hold it subject to such lien. Estate of Moore, 96 Cal. 530, 31 Pac. 584; Finnerty v. Pennie, 100 Cal. 407, 34 Pac. 869; Estate of Boyes, 151 Cal. 151, 90 Pac. 454; Estate of Clanton, 171 Cal. 386, 153 Pac. 459.

[10] The contention that the decree is void for uncertainty is also untenable. The claim for which the lien was imposed was for moneys to become due in the future, the amount of which could not be determined in advance. If the lien existed it could be enforced when the moneys became due to Miller & Lux under the provisions of the agreement of 1888 aforesaid and the agreement of October 6, 1898, aforesaid, both of which were referred to in the decree of distribution. The amount thereof could be established at that time, but not before. The plaintiff argues that the decree leaves it to Miller & Lux to be the sole judges of the amount of expenses to be incurred and therefore delegated to that corporation the functions of the court. This, however, is obviously not the case. The decree of distribution merely imposed the lien for whatever amount should legally become due thereafter to Miller & Lux on account of the agreements referred to. It would, of course, be necessary, if there was any dispute about these amounts, or their validity or legality, that Miller & Lux should resort to a court of competent jurisdiction to establish and enforce its lien. That corporation would not be the sole judge of the legality or extent of the charges to be imposed. If they were not justified under the contracts referred to, if they were improper charges, or if the contracts do not authorize Miller & Lux to charge the expenses claimed against the owner of the land, then, of course, the court to which the matter was submitted would refuse to declare or enforce a lien therefor. We find no merit in the points made in support of this appeal.

It is ordered that the judgment be modified by striking out the words "at any place within its lawful control, and for any lawful purpose it may think proper, whether on lands riparian to said Kern river, Buena Vista slough, Kern and Buena Vista lakes, the slough connecting said lakes, or elsewhere," found at the end of the first paragraph of the

Digitized by Google

part of the judgment declaring the rights of the plaintiff immediately following the words "and to use and dispose of the same in any lawful manner," and inserting instead thereof the following:

"Upon any lands owned by Frederick Cox on July 28, 1888, situated in any of the congressional townships and portions of townships described in paragraph 17 of the agreement of July 28, 1888, attached to the complaint and marked Exhibit A thereto, but not elsewhere."

As so modified, the judgment is affirmed. The court below is directed, upon the going down of the remittitur, to re-enter the judgment as thus modified. The respective respondents are to recover costs of appeal from the respective appellants in each case.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

Mr. Justice OLNEY does not participate herein.

SEAMAN v. SUPERIOR COURT OF MARIN COUNTY et al. (S. F. 9331.)

(Supreme Court of California. May 26, 1920.)

1. Dismissal and nonsuit ⟸60(6) — Court properly refused to dismiss cross-complaint for failure to return summons.

The court was justified in refusing to dismiss a cross-complaint on the ground that summons had not been returned within three years, where the delay was occasioned wholly at the request of the movant and for his benefit.

2. Process ⟸150—Jurisdiction of cross-complaint not lost on failure to return summons within three years.

Code Civ. Proc. § 581a, under which court loses jurisdiction where summons is not returned within three years, does not apply to a cross-complaint, notwithstanding section 442 as amended by St. 1909, p. 966, providing for a summons on a cross-complaint.

3. Dismissal and nonsuit ⟸60(1) — Courts have inherent power to dismiss cross-complaint for lack of diligence in prosecution.

Courts have inherent power to dismiss a cross-complaint for lack of diligence in its prosecution.

In Bank. Petition by Russell G. Seaman, individually and as executor of the last will of George B. Seaman, deceased, for writ of prohibition prayed to be directed to the Superior Court of the County of Marin, and Honorable E. T. Zook, Judge thereof. Transferred from District Court of Appeal on respondent's motion. Application denied.

James H. Boyer, of San Francisco, for petitioner.

George H. Harlan, of San Rafael, for respondents.

WILBUR, J. [1-3] Petitioner applied for a writ of prohibition to the District Court of Appeal, and a peremptory writ was ordered. On respondent's motion the case was subsequently transferred to this court. Petitioner seeks to prohibit the respondent from proceeding with the trial of the issues on a cross-complaint in an action to foreclose a mortgage, in which the Bank of Sausalito, a defendant, had answered and filed a cross-complaint, September 14, 1915, for the foreclosure of a first mortgage; the original action having been begun October 13, 1913, to foreclose a second mortgage. Summons was issued upon the cross-complaint, and served September 23, 1915. The affidavit of service was immediately indorsed thereon. In order to allow the defendant, who had defaulted in the original foreclosure action and on the cross-complaint, an opportunity to try to sell the property and realize something out of his equity, and because of his earnest solicitation, and in accordance with a written stipulation to that effect, the summons was not filed until September 22, 1919; the defendant having agreed to pay the interest upon the mortgage of the Bank of Sausalito and to make efforts to sell the property. The defendant Seamans paid the interest to January 31, 1919, and a small amount ($25) on account of the principal. He died March 27, 1919. His son, having been appointed the executor of his estate, makes this application to prohibit the further prosecution of the cross-complaint on the ground that the summons, though served within time, was not filed within three years after the filing of the cross-complaint, thus depriving the court of jurisdiction to proceed thereon. So far as the trial court has any discretion in the matter, it has been already exercised against the petitioner by a denial of a motion to dismiss the cross-complaint, and the fact that the delay was occasioned wholly at the request of the defendant and for his benefit would amply justify such decision if the court has any discretionary power. The petitioner relies upon section 581a, Code of Civil Procedure, as construed in Vrooman v. Li Po Tai, 113 Cal. 305, 45 Pac. 470; White v. Superior Court, 126 Cal. 247, 58 Pac. 450; holding that the court loses jurisdiction where the summons is not returned within three years, and the question is as to whether the rule is different on a cross-complaint. At the time section 581a was enacted in 1907 the law did not require the issuance or service or return of summons upon a cross-complaint. White v. Patton, 87 Cal. 151, 25 Pac. 270; Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975. Consequently, at the time section 581a, Code of Civil Procedure, was enacted it did not apply to a cross-complaint. In 1909 (St. 1909, p. 966) section 442, Code of Civil Procedure,

Digitized by Google

was amended to provide, for the first time, for a summons upon a cross-complaint. The provision then added by amendment is as follows:

"If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action."

It is contended by petitioner that by reason of this amendment to section 442 the provisions of 581a now apply, to which the respondent replies that section 442 does not now require the summons to be "returned," and that section 442 does not change the previous meaning of section 581a. As 581a, at the time of its enactment, did not apply to an action upon a cross-complaint, it follows that it would apply thereto only because of the amendment to 442. It is true that, for some purposes, a cross-complaint is regarded as the beginning of an entirely new action, but it is nevertheless a part and portion of the original action, and differs from a new action in this essential particular, namely, that the cross-complainant is brought into court by the plaintiff and does not come of his own volition. The reasons for a dismissal in the latter case may be as cogent as in the former, but in the absence of legislation depriving the court of jurisdiction, it has still power to proceed, and the mere amendment of section 442, providing for a summons on a cross-complaint, would not have that effect. No harm can come from such a construction, because of the inherent power of the court to dismiss for lack of diligence in the prosecution of a cross-complaint; while an arbitrary rule requiring a dismissal might work great injustice, and would here, where the statute of limitations has run against a new action, or the period for filing claims against an estate has expired, as in this case.

Writ denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

In re SIMONTON'S ESTATE.

SIMONTON et al. v. LEITER et al.

(L. A. 6259.)

(Supreme Court of California. May 27, 1920. Rehearing Denied June 24, 1920.)

1. Executors and administrators ⟸513(15)—Settlement of widow's account as executrix determined property not inventoried or accounted for was hers.

Presentation of widow's account as deceased husband's executrix and petition for its settlement presented, as between her and her husband's descendants and legatees, the question as to what property in her hands was part of the estate, so that settlement of her account involved a conclusive determination in her favor that certain property in her name at her husband's death, and not inventoried or accounted for by her as a part of his estate, was her own and not his or community property.

2. Executors and administrators ⟸513(9)—Order of settlement conclusive on executrix and persons beneficially interested.

Order of settlement of a widow's accounts as executrix of her deceased husband when it became final as between her and those beneficially interested in the estate was conclusive upon her as to the ownership of any property for which she was held accountable, and was conclusive upon those beneficially interested as to any for which she was not held and which she did not withhold from her accounts fraudulently or by mistake.

3. Executors and administrators ⟸513(9)—Settlement of executrix conclusive as between her successors and persons interested in estate.

Under Code Civ. Proc. § 1960, settlement of account of executrix, conclusive as between herself and persons beneficially interested in the estate, is conclusive as between such persons and the executrix's successors in interest.

4. Husband and wife ⟸274(1)—Code provision as to inheritance by persons not relatives of decedent, but relatives of decedent's spouse, construed.

Civ. Code, § 1386, subd. 8, providing that if deceased is a widow and leaves no issue, and the estate or any portion was common property of decedent and her deceased spouse while he was living, the property goes in equal shares to the children of such deceased spouse, applies only to community property received by will or inheritance or retained by virtue of its character; if the husband is the survivor it applies to the community property which he retains as such without administration, and if the wife is the survivor it applies to such of the community property as she receives by will or as her share of the estate.

5. Husband and wife ⟸274(1)—Property received by widow as allowance and fees properly distributed to her next of kin.

Under Civ. Code, § 1386, subd. 8, property which widow received from deceased husband's estate as family allowance and as fees as executrix on her death was properly distributed to her next of kin, and not to her husband's descendants.

6. Homestead ⟸142(2)—Next of kin of widow entitled to proceeds of homestead set aside to her.

Under Civ. Code, § 1386, subd. 8, next of kin of deceased widow, and not the descendants of her husband, *held* entitled to proceeds of homestead set aside to widow on husband's death; property having vested absolutely in her as survivor, and order setting it aside to her having been unnecessary.

Digitized by Google

7. Husband and wife ⊂=274(1)—Property acquired by widow held not husband's descendants' as presumably community property.

Property acquired by widow after husband's death with funds, source of which was not traced, *held* not to go to husband's descendants on her death, as against her next of kin, on any ground funds must be presumed to be proceeds of community property; all in her hands not having been community property.

8. Husband and wife ⊂=274(4) — Burden on heir whose right depends on fact of relationship, and fact property was formerly community property.

Where the right of a person as heir depends not merely on the fact of a certain relationship, but also on fact property he claims as heir had formerly been community property of decedent and predecedent spouse, or else separate property of latter, burden of proof as to such fact rests upon him.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Jane Simonton, deceased. From final decree of distribution, J. G. Simonton and others appeal. Affirmed.

Stewart & Stewart, of Los Angeles, for appellants.

George W. Prince, Jr., Overton, Lyman & Plumb, and Wm. B. Himrod, all Los Angeles, for respondents.

OLNEY, J. This is an appeal from the final decree of distribution of the estate of Jane Simonton, deceased. The decedent by her will, after making certain specific bequests, left the residue of her estate to her "heirs at law as provided by the laws of succession of the state of California." She was the widow of one George W. Simonton, and left no descendants of her own, but there survived her a son and a daughter of her husband by a former marriage and three children of a deceased son of her husband by that marriage. She also left blood relations of her own.

The statute of successions in this state (section 1386, Civ. Code) provides, in brief (subdivision 8), that when a widow dies intestate and without issue such of her estate as was formerly either the community property of herself and husband or his separate property shall go to the descendants of her husband, if any there be, and the balance of her estate shall go to her next of kin by blood. In the present instance, upon the presentation of the petition for distribution, issue was made between the descendants of Mr. Simonton and the next of kin of Mrs. Simonton as to what portion of her estate had been formerly community property and should therefore go to Mr. Simonton's descendants, and as to what portion was not of this character and should therefore go to Mrs. Simonton's branch of the family. There was no contention that any portion of the estate had been formerly Mr. Simonton's separate estate. The probate court proceeded to determine the issue so made, found that a certain portion of the estate had been formerly community property and that a very considerable portion had not, and decreed distribution accordingly. From this result the descendants of Mr. Simonton, with the exception of his daughter, appeal, claiming that as to certain property found not to have been formerly community property the finding of the court is not sustained by the evidence.

The property as to which the finding of the probate court is attacked by the appellants falls into four classes: First, property which stood in Mrs. Simonton's name at the time of her husband's death and was not inventoried or accounted for as a part of his estate, but which the appellants claim was nevertheless community property; second, property received by Mrs. Simonton from her husband's estate by way of family allowance as his widow and by way of fees as his executrix; third, property which is the proceeds of certain real property, claimed by appellants to have been community property, which had been selected as a homestead by Mrs. Simonton and her husband while both were living and was set aside to her as such in the administration of his estate; and, fourth, certain property purchased by her after her husband's death with funds the source of which is not traced.

[1] As to the first class of property, that in Mrs. Simonton's name at the time of her husband's death and which was not inventoried or accounted for as a part of his estate, a complete answer to the appellant's contention is that the question is now concluded by the settlement of Mrs. Simonton's account as an executrix of her husband's will. As one of his personal representatives it was her duty to inventory and account in the administration of his estate for all of his property, either common or separate, in her possession, or of which she had knowledge. In particular, if the property here in question was common property as is now claimed, it was her duty to inventory and account for it. The appellants, on the other hand, were legatees under his will and the amount of their legacies depended directly upon the amount of the estate, so that they were directly interested in the executrix including in her inventory and account everything forming part of the estate. Under these circumstances the presentation of Mrs. Simonton's account as executrix and the petition for its settlement presented as between her and the appellants the question as to what property in her hands was part of the estate, and the settlement of her account of necessity involv-

Digitized by Google

ed a determination of this question. Estate of Hall, 154 Cal. 527, 98 Pac. 269; Stevens v. Superior Court, 155 Cal. 148, 99 Pac. 512.

[2, 3] The order of settlement, when it became final, was as between her and those beneficially interested in the estate conclusive upon her as to the ownership of any property for which she was held accountable. Estate of Burdick, 112 Cal. 387, 44 Pac. 734. Conversely, it was conclusive upon those beneficially interested as to any property for which she was not held accountable and which she did not withhold from her accounts fraudulently or by mistake. Tobelman v. Hildebrandt, 72 Cal. 313, 14 Pac. 20; Lataillade v. Orena, 91 Cal. 579, 27 Pac. 924, 25 Am. St. Rep. 219; Estate of Grant, 131 Cal. 429, 63 Pac. 731; Silva v. Santos, 138 Cal. 536, 71 Pac. 703. There is no showing of any sort that in the present case Mrs. Simonton failed to account for the property in question through fraud or mistake. The settlement of her account being conclusive under these circumstances as between the appellants and herself, it is likewise conclusive as between the appellants and her successors in interest, the respondents. Section 1960, Code Civ. Proc. It follows that the probate court properly found that the property which stood in Mrs. Simonton's name and of which she had possession at the time of her husband's death and which she did not account for as a part of his estate was not community property.

As to the second class of property in dispute, property acquired by Mrs. Simonton from her husband's estate by way of family allowance as his widow and fees as his executrix, the question is determined by a proper construction of the Code section. The material provision of the Code (section 1386. subd. S) reads:

"If the deceased is a widow * * * and leaves no issue, and the estate or any portion thereof, was common property of such decedent and * * * her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse," etc.

Literally, this would include any property which had once been community property, no matter if it were not such at the time of the husband's death, as, for example, where the husband had in his lifetime given it to his wife for her separate property. But such a meaning is clearly not what was intended, and it has already been held that it is not the true meaning. Estate of McCauley, 138 Cal. 546, 71 Pac. 458.

[4] The only rational construction which can be given the provision is that it applies only to community property received by will or inheritance or retained by virtue of its character as community property. If the husband be the survivor, it applies to the community property which, as such, he retains without administration. If the wife be the survivor it applies to such of the community property as she receives either by will or as her share of the estate. This, and this alone, is undoubtedly what was in the mind of the Legislature when it adopted these provisions whereby those who are not the relatives of a decedent are yet made heirs by reason of their relationship to a predeceased spouse of the decedent.

The correctness of this construction is made doubly evident by the language of the second paragraph of the Code subdivision, that which deals with property which was the separate property of the predeceased spouse. There the language is that such property as "came to the decedent (the surviving spouse) by descent, devise or bequest" from the spouse first dying shall go to the latter's relatives. This language is specific as to how the property must come to the decedent in order that the provision apply. The equivalent provision in the case of community property would be one limited to property received or retained by the survivor of the community either by will or by inheritance or by virtue of its character as community property. There is a fair presumption that upon this point the provisions with regard to community and separate property were intended to be equivalent, for no reason for a difference exists. Furthermore, to place a broader construction upon the provision in regard to community property than the language of the provision in regard to separate property will permit as to it would be to place the relatives of a predeceased spouse in a more favorable position with regard to community property than with regard to such spouse's separate property, when, if any distinction were to be made, it would naturally be just the contrary. In this connection it may perhaps be worthy of note that in another respect, that of the matter of division between the two sets of relatives, a distinction is made between separate and community property, and that the distinction, as is natural, is in favor of the relatives of the predeceased spouse as to property which was his or her separate property. The Code subdivision provides that if neither spouse leave descendants the separate property of the spouse first dying shall go to his or her relatives exclusively, while the community property shall be divided between the relatives of both spouses.

[5] Our conclusion, as stated, is that the Code provision refers only to community property which the surviving spouse received by will or inheritance or retained by virtue of its character as community property. The property which Mrs. Simonton received as family allowance and as fees as executrix was not received by her in any of these ways, and it follows that the probate

Digitized by Google

court properly distributed it to her next of kin exclusively.

[6] What has just been said is likewise determinative of the question as to the third class of property in dispute, that which is the proceeds of the homestead set aside to Mrs. Simonton. Admitting the appellants' contention, which is very doubtful, that the property, when homesteaded, was community property, it was yet impressed with the homestead while both Mrs. Simonton and her husband were alive. It is familiar learning that under these circumstances the property vested upon Mr. Simonton's death absolutely in Mrs. Simonton as the survivor, and this not by way of inheritance or as in any way a part of her husband's estate. The order made in the course of the administration of his estate setting the property aside to her was wholly unnecessary and ineffective. Hart v. Taber, 161 Cal. 20, 118 Pac. 252, and authorities there cited. Practically the identical question here presented was presented in Estate of Beer, 178 Cal. 54, 171 Pac. 1062, where it was decided that the relatives of a predeceased spouse were not the heirs of the surviving spouse as to property which had been homesteaded and which came to the surviving spouse by virtue of the homestead. The only difference between it and the present case is that there the homestead was selected by the predeceased spouse out of her own separate estate, while here it was selected out of community property. But the difference is immaterial, since the right of the surviving spouse in the two cases is identical. Our conclusion, therefore, is that the appellants are not entitled to any portion of the proceeds of the homestead property.

[7, 8] As to the fourth class of property, that acquired by Mrs. Simonton after her husband's death with funds the source of which was not traced, the argument of appellants' counsel would seem to be that such funds must be presumed to be the proceeds of community property, since, according to their contention, practically all the property she had was community property. But since, as we have just held, a very substantial portion of her property was not community property, his argument fails. Furthermore, where the right of a person as heir depends not merely upon the fact of a certain relationship, but upon the fact of such relationship plus the fact that the property he claims as heir had formerly been either the community property of the decedent and his or her predeceased spouse or else the separate property of the latter, the burden of proof of showing such additional fact rests upon him. It is a fact which must appear in order that he be an heir and he is an heir only as to property as to which it does appear. It is an essential element of his claim of heirship and he must affirmatively show it, just as in the ordinary case, where heirship depends entirely upon relationship, the burden rests upon the claimant of proving the relationship which makes him an heir. In the present case the fact that the source of the funds with which Mrs. Simonton purchased certain property after her husband's death is not traced means that as to this property the appellants' claim of heirship was not made out. It follows that the property was properly distributed to the respondents who are heirs by virtue of their relationship alone.

The claim is also made on behalf of the appellants that the income received during administration from the portion of the estate which was determined by the probate court to be theirs was not distributed to them, but included in the cash distributed to the respondents. Of this claim respondents' counsel in their brief make what is apparently a complete refutation, and nothing in rebuttal appears in the appellants' reply brief. Under these circumstances we do not feel compelled to inquire ourselves into the correctness of the refutation, but will assume it.

Decree affirmed.

We concur: SHAW, J.; LAWLOR, J.

BANCROFT et al. v. WOODWARD.

WOODWARD v. BANCROFT et al.

(L. A. 5309.)

(Supreme Court of California. June 4, 1920.)

1. Election of remedies ⟸3(1) — Rescission held not barred.

Notwithstanding a party induced to enter into a transaction by fraud affirms it by an action for damages and loses the right to disaffirm subsequently, may, when sued on the contract, defend by counterclaim, and cross-complaint, filed at the same time, and say that he is entitled either to damages or to rescission, and that if he cannot have the latter he asks the former, without barring his right to disaffirm.

2. Landlord and tenant ⟸34(1) — Lessee's rights to rescission lost by transfer of rentals and subleases to his wife.

If lessee, who was induced to execute a lease by fraud, previous to commencement of an action for rent, in which he sought rescission, actually transferred rentals and subleases to his wife, he alone could not rescind.

3. Landlord and tenant ⟸34(2)—Lessee cannot rescind because false representations as to previous lease prevented building.

Lessee cannot rescind on the ground that false representations as to a previous lease for a part of premises prevented his construction of a building, requiring the execution of a new lease between the parties not made, since such

Digitized by Google

injury could not be predicated on the existing lease.

4. Landlord and tenant ⊜34(4)—Lessee must rescind promptly after discovering facts putting him on inquiry as to his rights.

Though Civ. Code, § 1691, provides that to rescind the party entitled "must rescind promptly upon discovering the facts which entitle him to rescind, if he * * * is aware of his right to rescind," a lessee is not justified in waiting 2½ years after discovering the facts, reasonably putting him on inquiry leading to discovery of ground for rescission, since he is chargeable with knowledge of his rights as of the time when he discovered such facts.

5. Contracts ⊜270(1)—Knowledge of right to rescind is imputed at time person is charged with discovery of facts.

The rule as to the time as of which a person seeking rescission will be charged with knowledge of his right is the same as in regard to the time as of which he will be charged with the discovery of facts which give him the right.

6. Landlord and tenant ⊜34(4)—Failure of lessee to learn of legal right to rescind held due to want of diligence.

In absence of explanation, lessee's failure to learn of his legal right to rescind for 2½ years after discovery of fraud affording ground therefor must be *held* due to his want of diligence.

7. Landlord and tenant ⊜31—Lessee held to have lost his right to rescind for fraud by dealing with property as if contract in effect.

Where lessee, after discovering facts warranting a rescission for fraud, dealt with the property as if the contract was still in effect, and subleased and collected rents even after filing a cross-complaint for rescission in a suit for rent, he must be *held* to have unequivocally affirmed the lease, and cannot rescind.

Department 1.

Appeal from Superior Court, San Diego County; Wm. A. Sloane, Judge.

Action by Paul Bancroft and another against Henry T. Woodward, with cross-complaint against the named plaintiff and others, seeking rescission of lease. Trial upon issues presented by cross-complaint. Judgment for defendant, declaring lease rescinded, and plaintiffs appeal. Reversed.

Haines & Haines, of San Diego, for appellants.

Wright, Winnek & McKee, of San Diego, for respondent.

OLNEY, J. The plaintiffs brought an action to recover certain installments of rent due them from the defendant according to the terms of a lease between the parties. The defendant answered, denying certain of the allegations of the complaint and, in addition, alleging that he had been induced to execute the lease through a certain fraudulent misrepresentation by one of the plaintiffs. He also, in his answer, set up by way of counterclaim the same fraud and his damage thereby in a very considerable amount. He also filed at the same time a cross-complaint in which he sought a rescission of the lease by reason of the same fraud. The plaintiffs answered the cross-complaint and upon the issues presented by it and the answer to it, the cause went to trial, a trial of the issues presented by the original complaint and the defendant's answer being postponed. The trial resulted in a judgment for the defendant declaring the lease rescinded, and the plaintiffs appeal.

[1] It is well, before proceeding with a further statement of the facts, to dispose of a contention of the appellants based on the facts already stated. It is urged on their behalf that a person induced by fraud to enter into a contract has his option upon the discovery of the fraud either to allow the contract to stand and obtain relief in damages for the wrong inflicted upon him or to disaffirm the contract and obtain what relief is necessary to restore him to his original position, but that he cannot both recover damages and be restored to statu quo; that the right of a party defrauded to disaffirm the contract and be restored to his original position is one which must be affirmatively exercised and consistently maintained and which is lost if he takes a position inconsistent with it as where he brings an action for damages. From these propositions as a premise, the conclusion is argued that the defendant here cannot at the same time seek the relief of damages by way of counterclaim and claim rescission by way of his cross-complaint, and that because he does ask for damages he cannot have rescission.

We may grant the premise, but the conclusion does not follow. While it is true that a party induced to enter into a transaction by fraud affirms the transaction when he brings an action for damages, and because of the affirmance loses any right to disaffirm subsequently (Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639), it is not true that if he seeks to disaffirm, but ineffectually, he loses the right thereafter to maintain an action for damages. The right to damages exists unless and until the transaction is effectually disaffirmed. It could hardly be questioned, for example, that under a complaint which, by proper and sufficient averments, set out that the plaintiff had been induced by fraud to enter into a contract and had endeavored to rescind it because of such fraud, and prayed relief upon the basis of a rescission, the plaintiff might be accorded damages in case the fraud were found but under such circumstances that the right of rescission did not exist. To put the matter in another way, it is wholly inconsistent for a party defrauded to ask for damages first

Digitized by Google

and a rescission if he cannot have them. But there is nothing inconsistent in his asking for rescission first and damages if he cannot have it. The defendant here by his counterclaim and cross-complaint, filed at the same time, has gone no further than to say that he is entitled either to damages or to rescission, and that if he cannot have the latter he asks the former. There is nothing in this that constitutes an affirmance so that his right to rescission is gone. Upon this point the case comes directly within the rulings of Glover v. Radford, 120 Mich. 542, 79 N. W. 803, and Richardson v. Lowe, 149 Fed. 625, 79 C. C. A. 317.

[2] Passing now to the further facts, much of what we are about to state is not in dispute. As to some of the facts, however, this is not true, and wherever it is not we have taken either the facts as found by the court or the defendant's own testimony upon which his case almost entirely depends. It appears that the plaintiffs were and are the owners of an entire block in the business district of San Diego, which, on October 7, 1912, they leased as a whole to the defendant for a period of 99 years, commencing the 1st of the following January, 1913. It is this lease for whose rentals the plaintiffs sued and whose rescission is sought by the defendant. The block was occupied by a number of different buildings leased, in whole or in part, to various tenants for various periods. The lease to the defendant, which we may call the ground lease, provided that it was subject to existing leases, and that the lessee should have the rents accruing from them after the commencement of his term, and should himself have the right to make leases. The negotiations for the lease were carried on by the defendant mainly with one of the plaintiffs, and during the negotiations this plaintiff handed the defendant a bundle of papers, and told him that it contained all of the outstanding leases, when, in fact, it did not contain one to a Mrs. Kinney, of which the defendant remained ignorant until after he had taken possession under his lease. The Kinney lease was of the upper floor of a two-story building occupying one-eighth of the block at the northwest corner. The floor leased was used as a rooming house. Mrs. Kinney was in possession at the time, but under another lease, of which the defendant was informed and which expired December 31, 1913. The lease complained of was an extension of this at an increased rental for three years, expiring December 31, 1916. Complaint is not made by the defendant as to the rental called for by the latter lease, but solely as to the length of its term. The lease to the defendant contemplated, and, in fact required, that the defendant erect new buildings on the property, and this was a feature of the negotiations between him and the plaintiffs. His complaint is that because of the length of the term of the Kinney lease negotiations which he had under way for financing the improving of the property failed, and he was unable to improve it as he desired.

The defendant's agent discovered the existence of the second Kinney lease almost immediately on taking charge of the property, and the defendant himself learned of it by the 1st of the following April, three months after the commencement of his term. He immediately complained to the plaintiff who had made the representation as to existing leases, who stated that he had forgotten about the extension, and would do all he could to get Mrs. Kinney out by the end of 1913, when the defendant had expected to be free to take possession. Nothing more occurred concerning the matter until some months later, and still in 1913, the defendant spoke to the plaintiff again about it. The plaintiff then told him that the lease to Mrs. Kinney was good, and he was unable to put her out, and expressed regret, and assured the defendant he would do all he could to rectify the mistake, presumably in the way of making some allowance to the defendant.

In the meantime the defendant had been going ahead with his negotiations for financing the construction of new buildings or rather a new building. The ground lease itself required the erection by the end of 1921 of buildings costing at least $200,000. It also provided that the building on the west half of the block, where the building occupied in part by Mrs. Kinney was located, should be of "Class A" construction, without similar provision as to the east half, and that no buildings should be torn down except those on the north half of the east half until at least $50,000 had been expended in new buildings on the last-mentioned portion. It must be taken that what the parties had in mind when they made the lease conformed with these provisions and the materiality of the misrepresentation must be judged by reference to them. Even these buildings the defendant had at no time the means to construct, although he could have obtained the money for a $50,000 building on the portion of the block to be first improved and which was not affected by the Kinney lease.

But the building whose construction the defendant was endeavoring to finance was of a much more ambitious character. It was to be a hotel known as the Royal Alexandria, which would cost $900,000 or more. It was the negotiations for financing the erection of this building which it is complained failed because of the Kinney lease. These negotiations were along the line of organizing a hotel company, which was to take the ground lease, the issuing by it of $2,000,000 in bonds, which, through the intervention of another company, were to be underwritten by still a third and disposed of by it abroad. The

Digitized by Google

scheme, however, involved the plaintiffs' modifying the terms of the ground lease. As it read, it provided for specified annual rentals for the first 10 years of the lease, and that thereafter the rental was to be 5 per cent. net on the value of the ground, as ascertained by appraisement immediately prior to the commencement of each 10-year period. The persons with whom the defendant was negotiating desired that the lease provide a fixed rental for the first 30 years of the term, and drafts of an agreement and new lease so providing were actually prepared, but were never signed. In other words, the success of the negotiations which it is claimed failed because of the existence of the Kinney lease and because of whose failure it is now sought to rescind the ground lease involved the obtaining by the defendant of the consent of the plaintiffs themselves to a modification of the ground lease, something which they were not obligated to give and did not give. On the other hand, the fact, according to the defendant's testimony, which must be taken to be true, is that the plaintiffs were ready to consent, and that the negotiations did not fail because of any unwillingness on their part in this respect.

The defendant's negotiations to finance the new building came to an end about September, 1913, while Mrs. Kinney was still in possession under her first lease of which the defendant was informed when he made the ground lease and which still had several months to run. The negotiations were never resumed. From time to time thereafter the defendant had conversations with the plaintiff who had made the false representation complained of. The two men saw each other frequently, but there was no suggestion of a rescission or cancellation of the lease, or that the defendant was not obligated thereunder. He informed the plaintiffs that the negotiations had failed because of the Kinney lease, and the plaintiff replied that he would use his best efforts with the other plaintiffs to obtain a reduction of rent on account of it. Matters ran along in this way for practically two years, until August, 1915. In the meantime the salability and rental value of the property had substantially diminished. The defendant failed to pay the rent due that month, and after several conversations with the plaintiff about the matter had an interview with him in company with his lawyer. The defendant stated that he was anxious to carry on the lease, but could not do so at the agreed rental, and asked for a reduction which the plaintiff rejected as unreasonable in amount. The defendant then offered to cancel the lease, and the plaintiff replied that he would do what he could to obtain a reasonable reduction in rent from the other plaintiffs, but they would not take the property back. It was then agreed that the plaintiff would communicate with his fellow lessors about a reduction in rent. Whether he did so or not does not appear, but, in any event, the present action was shortly thereafter commenced against the defendant without further communication with him.

During all this time the defendant was in possession of the property, collecting the rents from the various tenants, himself extending old leases and making new ones and in every way exercising full dominion under the ground lease. It is alleged in the cross-complaint, testified to by the defendant and found by the court, that while he personally discovered the fraud claimed to have been perpetrated upon him by April 1, 1913, and thereafter proceeded under the lease and retained dominion of the property, he did not learn of his right to rescind the lease until September, 1915, shortly after the commencement of the plaintiffs' action against him. Then he consulted a lawyer, and was advised of his supposed right, and thereupon filed his answer and cross-complaint, alleging the fraud, that he was ignorant of his right to rescind until about September 1, 1915, and offering to restore everything of value he had received from the plaintiffs under the lease. Even after this, however, he retained dominion of the property, collected the rents, and actually made a lease of a portion of it.

We say the defendant collected the rents advisedly, although the fact is that just previous to the commencement of the action he had assigned the accruing rentals for 3 years to his wife, and she thereafter collected them. But if the fact be that this assignment was a genuine transfer of interest so that the rents collected by the defendant's wife were not in effect collected for him, it is evident that the defendant had put it out of his power to surrender the lease and its benefits without the concurrence of his wife, which was not shown. If this were the situation, he alone could not rescind. The most favorable view for the defendant is therefore that it was he who was the ultimate collector of the rents.

[3] Upon the foregoing facts we can see but little question but that for several reasons the defendant did not have the right to rescind. In the first place, it is not shown that the defendant was materially injured by the false representation complained of, and it is conceded that in such a case as the present this must appear. As we have said, no complaint is made as to the amount of the rental reserved by the Kinney lease. The sole complaint is that because of the length of its term the negotiations of the defendant for financing the erection of the hotel building failed. But those negotiations involved the plaintiffs' consent to a new and different lease. As a condition of giving it the plaintiffs would have had the right to require an acquiescence by the defendant in the Kinney lease. In fact, the new lease which the

Digitized by Google

plaintiffs were apparently ready to sign did so provide, for it provided that it was subject to existing leases or which the Kinney lease was at that time known to be one. The situation is that the arrangement, the failure to consummate which is relied upon by the defendant as the injury done him by the plaintiffs through their false representation, was an arrangement which he was not entitled to make, and could not make except by the consent of the plaintiffs themselves, which they were not obligated to give. The defendant could complain of the wrong of the plaintiffs in case it worked injury to him in respect to some right which he had, not in respect to something to which he had no right unless the plaintiffs themselves agreed to it. The defendant could perhaps have complained if the false representation had interfered with negotiations, which would otherwise have been successful, for the construction of a building or buildings under his lease as he had it. But he cannot complain of the interference with negotiations for erecting a building under a lease which he did not have, and that is the only complaint made. The fact that the plaintiffs were willing to agree to such a lease is wholly immaterial. If they did agree, the defendant of necessity acquiesced in the Kinney lease. If they did not agree, the negotiations of the defendant were futile. In any case, the object of the negotiations, the failure to achieve which is alone complained of, was something which the defendant could not do under the lease which he had, and his right to rescind must depend upon his suffering loss under that lease.

[4] In the second place, there is no sufficient excuse presented for the defendant waiting 2½ years after discovering the fraud before endeavoring to rescind. It is true that the Code provides (section 1691, Civ. Code) that to accomplish a rescission the party entitled thereto "must rescind promptly upon discovering the facts which entitle him to rescind, if he * * * is aware of his right to rescind." It is true likewise that the complaint alleges and the court finds that the defendant was not aware of his right to rescind until just prior to the filing of his cross-complaint. But no reason whatever is stated in the cross-complaint, and no sufficient reason appears in the evidence or findings why he did not long before become aware of his right, assuming that he had one. It is well settled that where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so. Lady Washington, etc., Co. v. Wood, 113 Cal. 482, 45 Pac. 809; Harrington v. Patterson, 124 Cal. 542, 57 Pac. 476.

[5] The reason for this rule is that diligence throughout is required of one who would rescind. It is a reason which applies with equal, if not greater, force to the time at which such a person, after learning of the facts upon which his right is based, will be held to be aware of their legal consequence, his right to rescind. It is at least intimated in Ruhl v. Mott, 120 Cal. 668, 679, 53 Pac. 304, and Hannah v. Steinman, 159 Cal. 142, 153, 112 Pac. 1094, that the rule is the same in regard to the time as of which a person seeking rescission will be charged with knowledge of his right as it is in regard to the time as of which he will be charged with a discovery of the facts which give him the right, and the reason for this is so plain that we have no hesitation in declaring it to be the case.

[6] Applying this rule to the present case it appears that the defendant admittedly learned of the fraud which he claims was perpetrated upon him by April 1, 1913, and knew of the injury which he claims resulted therefrom by September, 1913. It is claimed, however, that he did not actually become aware of his legal right to rescind because of the fraud until September 1, 1915. In the absence of any explanation the permitting of this lapse of time before learning of his legal rights is wholly unreasonable. Fraud is no slight matter. Where, as here, a party claims to have been defrauded and to have been injured thereby very substantially any reasonable diligence at all would require of him that he proceed promptly to ascertain what his rights were. When he waits 2 years after learning both of the fraud and of his injury before making any attempt to do this there are but two conclusions which can be drawn from his delay in the absence of explanation. Either he was guilty of a complete lack of diligence, or the fraud and injury complained of were not important in his mind and were not in fact substantial.

No explanation whatever of the defendant's delay is attempted in the cross-complaint, and it was demurrable for that reason. Nor does the evidence show any explanation, or at least any sufficient explanation. It may be that upon his first discovery of the fraud in the spring of 1913, the defendant was justified in not seeking to learn what his rights were, because of the statement of the plaintiff with whom he dealt that he would endeavor to get Mrs. Kinney out by the end of the year. But in the fall of 1913 this plaintiff told the defendant that the Kinney lease was good, and that he could not get Mrs. Kinney out. At just about the same time the defendant's negotia-

Digitized by Google

tions for financing failed, so that he then knew both of the fraud and the supposed injury done him by it. Then certainly, if he were to act with reasonable diligence, he should have proceeded to ascertain what his rights were because of the wrong and injury done him. Instead he made from time to time requests for reduction of rent, which the plaintiff with whom he dealt would agree to take up with the other lessors but which were never agreed to. The defendant's own testimony would seem to make it pretty plain that a reduction was asked for not so much as a matter of right as it was as a matter of something which the plaintiffs should allow in fairness. But, however this may be, the only explanation for the delay of 2 years is these requests from time to time for a reduction in rent and the statement of one of the plaintiffs that he would endeavor to obtain one for the defendant. It certainly cannot be said that such conduct for such a length of time evidences the diligence which might reasonably be expected of a man defrauded and substantially injured.

The defendant in this connection relies upon the authority of Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094. There the plaintiff and defendant had made a lease in mutual ignorance of a fact which rendered the lease practically valueless to the plaintiff, the lessee. The plaintiff discovered the mistake shortly afterwards in July, 1906. He at once protested to the agents of the defendant against going on with the lease, but was told the defendant was East and would shortly return, and he permitted the matter to remain in abeyance until the defendant's return. The defendant did not return until January, when the plaintiff immediately took the matter up with him, negotiating for a new lease which would obviate the result of the mistake. The negotiations lasted for about a month, the plaintiff asking that a new lease be given him or he be released. Upon the negotiations coming to an end the plaintiff immediately consulted a lawyer, was advised of his right to rescind, and at once gave notice of rescission. It was held that upon these facts a want of diligence on the part of the plaintiff did not appear.

That these facts, however, differ essentially from those of the case at bar is plain. In both cases the injured party was justified in first endeavoring by negotiation to see if the matter could not be satisfactorily arranged before inquiring as to his legal rights. But in the one case he took up and pushed the negotiations with diligence, insisting upon the matter being arranged. In the other case, the present one, he was satisfied to allow the matter to drift for 2 years upon conversations from time to time with one of the lessors, largely of a casual character, in which he would ask for a reduction of rent, and the lessor would reply that he would endeavor to get the other lessors to grant a reduction, and which never came to anything. Certainly, reasonable diligence required of him, the defendant here, that when after a reasonable time his negotiations with the plaintiffs, if his conversations can be considered as really amounting to negotiations, resulted in nothing, he should have acted if he had been really defrauded and substantially injured. This he did not do. If he had acted, the first step he would naturally have taken would have been to ascertain what his legal rights were and what redress he could obtain. We see no escape from the conclusion that the defendant's failure to learn of his right to rescind long before he did was due to his own want of diligence. This being the case, his right to rescind was lost.

[7] In the third place, the defendant's right to rescind, if he had any, was lost by his dealings with the property. The rule is too familiar to require the citation of authority that if a person entitled to rescind goes on, after he discovers the facts which give him the right and knows that he has the right, to deal with the property involved as if the contract or transaction were still in effect, he affirms the contract or transaction, and his right to rescind it is gone. That is exactly what the defendant here did. We need not go back to the time at which he should have known of his right to rescind but did not. It is necessary to consider only what he did after he filed his cross-complaint, when he was fully aware of his rights and was affirmatively seeking rescission. After this time he continued through the medium of his wife to collect the rents of the property, and in December, 1915 (the cross-complaint was filed in October, 1915), actually made a lease of a portion of the property for the term of 1 year, commencing the 1st of the following January, and granted an extension for the same period of another lease about to expire. He had no right to make either the new lease or the extension of the existing one, except under and by virtue of the ground lease which he was seeking to rescind. His action in doing so was alone an unequivocal affirmance of the latter, and as such destroyed whatever right of rescission he might previously have had.

It is true the trial court finds that all leases and extensions of leases made by the defendant were upon condition that the plaintiffs carry out what is found to be the promise of the plaintiffs that they would secure the removal of Mrs. Kinney or reduce the rent under the defendant's lease. In this connection it should be stated that no such condition was inserted in any of the leases or extensions made by the defendant. What is meant by this finding is that the defendant was acting upon a condition existing in his own mind. But even so, so far as any promise to remove Mrs. Kinney is concerned, the finding is with-

Digitized by Google

out support except as to the first conversation, or conversations, in the spring of 1913 between the defendant and the plaintiff with whom he dealt. In the fall of that year, this plaintiff definitely informed the defendant that he could not get Mrs. Kinney out, and thereafter their conversations were upon that basis, and were confined to a discussion of a reduction of rental. Furthermore, the finding must be confined to the period prior to the filing of the cross-complaint. It can have no application to anything occurring subsequently, since at that time the plaintiffs in the most positive way possible, by the commencement of their action, had already informed the defendant that they would insist on the rental called for by the lease without reduction. The defendant's action thereafter in making the lease and extension mentioned could be nothing but what we have termed it, an unequivocal affirmance of the ground lease.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

THOMPSON et ux. v. MODERN SCHOOL OF BUSINESS AND CORRESPONDENCE. (L. A. 5299.)

(Supreme Court of California. June 5, 1920.)

1. Judgment ⟸735—Former judgment not adjudication of question not in issue.

Former default judgment in favor of correspondence school against salesman for courses or scholarships claimed to have been purchased by him was not adjudication whether or not school had been guilty of deceit on him and his wife, now suing therefor; such question not being in issue.

2. Fraud ⟸31—Right to rescind contract or perform and recover damages.

Where one is induced to contract by deceit, he may, on discovery, repudiate and rescind, or may allow contract to stand and perform his part, and yet recover any damages, except so far as his own performance waives them.

3. Fraud ⟸58(1)—Evidence held to show fraudulent scheme of correspondence school.

In an action for damages for fraud against a school by one induced to contract with it as a salesman of scholarships and by his wife, who became surety for him, evidence *held* sufficient to justify finding school's whole scheme was founded in fraud of which plaintiffs were victims.

4. Fraud ⟸61—Exemplary damages recoverable.

Under Civ. Code, §§ 1709, 3294, a scholarship salesman for a school, induced to enter its employment through fraud, and his wife, who became his surety likewise under fraudulent representations, could recover actual as well as exemplary damages, though compensation of salesman was fixed by contract.

5. Fraud ⟸54—Evidence held admissible to show scienter.

In an action for fraud against a school by a scholarship salesman and his wife, his surety, evidence of other persons who had contracted with the school, tending to show its business of employing salesmen was fraudulently conducted, *held* admissible to show scienter and to lay foundation for exemplary damages.

Department 1.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by William L. Thompson and Laura P. Thompson, his wife, against the Modern School of Business and Correspondence. From a judgment for plaintiffs, defendant appeals. Affirmed.

Patterson Sprigg, of San Diego, for appellant.

Harrison G. Sloane, of San Diego, for respondents.

LAWLOR, J. This is an appeal from a judgment in favor of the plaintiffs, William L. Thompson, and his wife, Laura P. Thompson in an action for damages based on fraud —for actual damages to plaintiff William L. Thompson in the sum of $235, for "community damage" in the amount of $2,500, and for exemplary damages in the same sum for him and his wife. The court made findings of fact and conclusions of law, and entered judgment for actual damages to William L. Thompson in the amount of $230 and for joint damages in the sum of $460.

The defendant, the Modern School of Business and Correspondence, is a corporation organized under the laws of this state and claiming to have its principal place of business in San Francisco. This is the way the organization was held out to the public: It was represented in an "annual catalogue" that headquarters were maintained in a pretentious building in San Francisco, where there was a "faculty," composed of thirteen "heads of departments." Besides this "faculty," there was a "superintendent of organizers," whose business, it appears, was to induce others to enter the school's employ as "field organizers." These "field organizers" were designated to solicit persons to become "students" in the school and to purchase "courses of instruction"; the instruction to be given through the United States mails. It seems that, according to the scheme, the purchaser of a "course of instruction" could pay in cash or in monthly installments, and was entitled to receive from the school "syllabi, summaries, suggestive outlines, and helps in study," and upon the successful completion of the course there would be conferred upon

Digitized by Google

the "student" a "handsome diploma." It was also represented in the catalogue that there was a "regular employment department to assist graduates of the school in securing desirable positions." The prices charged for the "courses of instruction" did not appear in the catalogue.

Thompson, having read in San Diego a newspaper advertisement of the school, addressed a letter to the headquarters, asking for information. The school replied, under date of June 3, 1915, that if Thompson were selected he would be engaged "on a guaranteed salary, based on education and previous business experience." Thompson filled out and forwarded the application blank which had been sent to him. In a letter dated June 8 the school informed Thompson that its "superintendent of organizers," Mr. Joseph H. Hill, would call on him in San Diego, and stating, "We are authorizing him to engage you on a guaranteed salary of $900 for the first year." In the interview that followed between Hill and Thompson on June 20 in San Diego, Hill told Thompson that he would be required to make a deposit of $10, which was, according to the latter's testimony, "returnable on the first sale." Thompson further stated that Hill told him that this deposit was "to cover the possible chance that I might not enter on the duties after he had spent his time educating me." Thompson was also required to furnish security—or, as Hill put it, a "credit blank" or "bonds"—for the faithful accounting of any collections from "students" which he might make on behalf of the school. Thompson paid the $10 deposit and "gave the name of my wife, Laura P. Thompson, as my security." Hill outlined to Thompson the duties of a "field organizer." On June 21 Thompson entered into a written contract of employment with the school, through Hill, under the terms of which Thompson agreed to devote his entire time to the work of "field organizer" for a period of one year. The contract was admitted in evidence and the provision for compensation was as follows:

"(11) If after this contract has been completed by the said party of the first part [Thompson] it be found that his profits on enrollments secured during the period of this contract, as shown by his own daily reports sent to said school, have not amounted to nine hundred dollars ($900.00) then said second party [school] agrees to make up in cash such deficiency."

On the same day Mrs. Thompson executed and delivered the "credit blank" or "bond" binding herself to pay to the school at San Francisco such amount as should be stipulated and agreed to be paid by her husband "for goods, supplies, stationery, scholarships, and certificates of membership as he may have ordered, or may hereafter order from time to time, not exceeding $250 in any one shipment." Thompson explained that he had his wife do this upon the representation of Hill that "it is simply a guaranty that, if you collect moneys for the company and you fail to return them, that Mrs. Thompson, or whoever signs this letter of credit, will make restitution." Thompson further testified:

That on the same date Hill presented to him an "order blank" to be used in ordering courses from the school and "at the time that he produced this * * * he brought up and mentioned the samples, * * * and he then produced this blank with two courses, the Commercial Scholarship and the Civil Service Scholarship, on it. I had, of course, been studying for several days prior to this under Mr. Hill, * * * and I had become very much pleased with their automobile engineering course, * * * and I told Mr. Hill that I thought I ought to have a sample of that course as well, * * * and so he said, 'All right, we will include that.' And that auto engineering course was then added. After that * * * he handed this order over to me, and I also signed this."

According to Thompson, Hill also told him that these scholarships were "to be used for demonstrating the course. * * *" On cross-examination he testified further as to this conversation with Hill:

"I said, '* * * These scholarships are to be paid for, whether sold or not,' and he said, 'No; that is referring to the matter of collecting the money.'"

It is alleged in the complaint, and evidence was admitted in support of the allegation, that the "order blank" was changed after Thompson had signed and delivered it to Hill. As introduced in evidence there appear thereon, opposite the designations "Commercial Scholarships," "Civil Service Scholarships," and "Auto Eng. Scholarships," the amounts "$27.00," "$23.00," and "$31.00," respectively; the sum "$81.00" appears as the total "amount"; opposite the words "Total amount which I am to pay for above order" is the sum "$81"; opposite the words "Total credits due me" the sum "$10.00" (being apparently the deposit made by Thompson); and opposite the words "Balance to be charged to my account" the amount "$71.00." Thompson's testimony in respect to this instrument was: "There were no figures on the paper at the time I signed it."

Hill did not appear at the trial, but in his deposition he testified that the "order blank" was entirely filled out, including the figures for the prices of supplies ordered, before Thompson signed it; that he never told Thompson, or gave him to understand, that the scholarships were for demonstrating, or were not to be paid for; that "the prices inserted in the order blank were written therein with the full knowledge and consent of the said W. L. Thompson"; and that he

Digitized by Google

made no change or alteration in the figures or prices in the "order blank" after Thompson had signed it.

According to the evidence, the "courses" or "scholarships" were all delivered to and accepted by Thompson, who testified that subsequently he worked faithfully for a period of 80 days trying to sell the "scholarships," but that he was unable to make a sale, and he estimated that additional expenditures incurred necessarily in the course of the canvass amounted to $28.50. About September 21, 1915, he returned to the school the three courses which he had received. The school refused to accept them, and demanded that he pay the balance of $71, which, with the deposit of $10, made the total of $81. On September 29 Thompson wrote to the school, declining to pay for the courses and claiming that he was not aware that they were "unreturnable." After some correspondence suit was commenced against the plaintiffs by one A. S. Cohn, assignee of the school, in the justice's court of the city and county of San Francisco, on February 24, 1916, to recover the balance of $71. The plaintiffs herein were defendants in that action, and judgment was entered against them by default. It was after the filing of the suit in the justice's court that the plaintiffs instituted this suit, alleging that the understanding between Thompson and Hill was that the scholarships were not to be paid for by him, but by the "students" who should buy them, and charging fraud in the insertion in the "order blank" of the figures for the price of each course or scholarship after Thompson's signature had been affixed thereto.

[1] 1. The first ground urged for a reversal of the judgment is stated in appellant's brief as follows:

"That plaintiff's amended and supplemental complaint admits the adjudication in the justice's court in San Francisco of all of the subject-matter herein pleaded, and by reason thereof this action is res judicata. * * * The defendants there and plaintiffs here had their remedy by counterclaim or any other defense. * * *"

The allegation of the complaint upon which appellant bases this statement is as follows:

"That thereafter, and on or about the 24th day of February, 1916, defendant transferred and assigned the said instruments and purported right of action thereon * * * to one A. S. Cohn. * * * That thereafter A. S. Cohn did file an action in the justice's court of the city and county of San Francisco, Cal., against these plaintiffs, * * * and that the same was founded upon the instruments in writing secured from these plaintiffs, namely, the letter of credit or credit blank and the order blank above referred to, but that the same did not present for adjudication the contract of employment secured from these plaintiffs. * * * That thereafter A. S. Cohn on the 26th day of May, 1916, secured a judgment valid upon its face."

The answer to this contention is that the former judgment is not an adjudication of the question whether or not the defendant is guilty of deceit. The question was not put in issue in that action.

[2] Where one is induced by deceit to make a contract, he has a choice of remedies: (1) He may, upon discovery of the deceit, repudiate and rescind the contract; or (2) he may allow the contract to stand and perform his part thereof, and may, notwithstanding such performance, recover of the other party any damages he may have suffered by reason of the deceit, except in so far as his own performance may operate as a waiver of damage. Hence it follows that a judgment against him, given upon his default, in an action brought by the other party to enforce the contract, does not preclude him from recovering damages for the deceit.

2. Appellant's second contention is that—

"There was no evidence of a conspiracy or scheme to extort money from plaintiffs by defendant. * * * The theory of plaintiffs' claim of damages seems to be that appellant, together with its agent, Hill, conceived a plot to entice plaintiff * * * into its employment; that the signing of the 'agreement, order blank, and credit blank,' required of respondents, was a part of the conspiracy."

In this connection it is claimed that finding III is not supported by the evidence. That finding reads as follows:

"That between the 30th day of May, 1915, and the 21st day of June, 1915, at San Diego, Cal., Jos. H. Hill as agent of said defendant solicited plaintiff William L. Thompson to enter into its employ as a field organizer in the county of San Diego, state of California. That in order to secure the consent of said plaintiff to such employment defendant made promises of payment to said plaintiff, and made promises for the furnishing of certain supplies and samples and report blanks, which promises were and each of them was made by the said defendant without any intention of performing the same and with the intent to deceive the said plaintiff and to induce him to enter the employ of defendant. That, except for the fraudulent statements and promises of said defendant, plaintiff would not have entered the employ of said defendant and would not have rendered the services or delivered the instruments or paid the moneys hereinafter set out."

The court further characterized in finding XI the actions of the defendant and its agent, Hill:

"That all of the dealings of defendant with said plaintiffs and each of them, and all the promises, representations, and demands made upon them and each of them, were with the premeditated purpose of defrauding each of said plaintiffs and of extorting money from each of them. That in all of such dealings, representations, and demands said defendant

Digitized by Google

was and is guilty of oppression, fraud, and malice, and that each of the said plaintiffs suffered actual damage thereby. That the said dealings were followed by said defendant in a course of conduct generally and usually practiced by said defendant upon such persons as it succeeds in inducing to enter its employ and were in accordance with a premeditated purpose to defraud these plaintiffs. That such of the acts hereinbefore set out as were performed by defendant through its agents were performed within the scope of such agents' actual authority, and were performed with the knowledge and consent of said defendant, and that said defendant thereafter accepted the fruits thereof with full knowledge of all the attending circumstances."

The Civil Code provides.

"Sec. 1709. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

"Sec. 1710. A deceit, within the meaning of the last section, is: * * * 4. A promise made without any intention of performing it."

"Sec. 1574. Actual fraud is always a question of fact."

"Sec. 1572. Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * * 4. A promise made without any intention of performing it."

Does the evidence support the findings? There is the testimony of Thompson to the effect that, according to the representations of Hill, the "students"—and not Thompson—would be responsible for payment of the scholarships, and that no figures appeared in the "order blank" when Thompson signed it; in other words, that the "order blank" had been altered without the knowledge or consent of the plaintiff. It is clear, from the evidence already referred to, that the findings rest on the conclusion that the entire scheme, both in its conception and operation, was fraudulent. It is to be observed that the questions of fact whether the deposit of $10 was "returnable on the first sale," whether the "credit blank" or "bond" was a guaranty of the faithful remittance of collections from the "students" or was merely designed further to delude the prospective victims into the belief that the transaction was bona fide and regular, whether Hill represented to Thompson that the "scholarships" were to be paid for by Thompson or by the "students," whether the "order blank" was filled out when Thompson signed it or afterwards, and whether any "courses" ordered were returnable if they remained unsold, are all involved in conflict.

We must therefore assume that the court resolved the conflict on the side of the plaintiffs. And, in addition to the testimony already described, Paul E. Sloane and V. E. Standard testified that about the same time they had dealings of a similar nature with the school through Hill. There is a striking similarity between their testimony and that of Thompson as to the representations upon which they were induced to enter into a contract, to furnish a "credit blank" or "bond," and to sign an "order blank." Each of them also testified that the "order blank" which he had signed was subsequently filled in without his knowledge or consent, as was claimed in the case of plaintiff. The Sloane "order blank" was admitted in evidence. This showed that the figures opposite the scholarships were written in an ink of a different color from that used in writing the scholarships and in the signature of Sloane. It is significant that, according to the "credit blank," the payments were to be made in San Francisco, instead of San Diego, where Thompson resided.

[3] The court, too, may have inferred fraud from the fact that on the face of the catalogue appears the cut of a prominent business building in San Francisco under which cut is printed, "Home of the Modern School of Business and Correspondence, San Francisco, California, U. S. A.," in order, it would seem, to give the impression that the school occupied the entire structure. Manifestly, from all the evidence, the court could infer—and no doubt it did—that the whole scheme was founded in fraud, of which the plaintiffs were made victims.

[4] 3. Appellant's third point is that "there was no evidence of damages, either actual or exemplary, from which plaintiffs suffered by any acts of defendant," for the reason that the compensation to be paid to Thompson was fixed by contract. This is not an action on contract, but one for damages arising through fraud. We have already quoted section 1709 of the Civil Code. And section 3294 of the same Code provides:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[5] 4. The fourth contention of appellant is that "the court erred in admitting the testimony of Paul E. Sloane and V. E. Standard," already referred to. This testimony of independent acts was clearly responsive to the issue of fraud, first, to show scienter; and, second, to lay a foundation for exemplary damages. Kornblum v. Arthurs, 154 Cal. 246, 97 Pac. 420; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172.

5. This contention is disposed of in the discussion of appellant's second point as to the sufficiency of the evidence.

6. Appellant's sixth claim of error is:

Digitized by Google

"That as to finding No. 5 there was no evidence to support that portion of said finding as follows: 'Said defendant agreed to pay to plaintiff for such services the sum of $900, and to supply him with certain supplies, samples and report blanks.'"

This point does not call for discussion, for the reason that the eleventh clause of the contract, which we have already quoted, and the evidence in reference thereto, would alone support the finding.

Judgment affirmed.

We concur: OLNEY, J.; SHAW, J.

DOWNING v. CUTTING PACKING CO. (S. F. 8767.)

(Supreme Court of California. June 4, 1920. Rehearing Denied July 1, 1920.)

1. Contracts ⟸318—Forfeiture should be restrained to technical limits.

Where the right to a forfeiture is created by contract or by law, it has always been considered it should be restrained to the most technical limits of the terms and conditions on which the right is to be exercised.

2. Landlord and tenant ⟸94(1) — Notice to quit held not to terminate tenancy for years, and guarantor may still be held liable.

Where plaintiff deposited a large sum of money to guarantee payment of rent by a tenant for years, and on default in payment of rent the landlord, pursuant to Code Civ. Proc. § 1161, subd. 2, served notice to quit or pay rent, the mere service of notice did not of itself terminate the tenancy, for, as shown by the following subdivision, the purpose of such notice is a forfeiture of the lease; hence, where the tenant failed to vacate the premises, and the landlord, waiving the notice despite plaintiff's protest, etc., collected the rent out of the deposit, plaintiff cannot recover the amount, on the theory a new tenancy was created by acts of the parties, for which he was not a guarantor.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George Downing against the Cutting Packing Company. From a judgment for plaintiff, defendant appeals. Reversed.

Lloyd Baldwin and John F. Cassell, both of San Francisco, for appellant.

Houghton & Houghton and Edward T. Houghton, all of San Francisco, for respondent.

SHAW, J. The appeal is from the judgment. The material facts are as follows:

On October 31, 1914, Thomas W. Butcher leased to Ibos and Roche certain premises at the corner of Jackson and Drumm streets in San Francisco, for the term of five years, beginning December 1, 1914. The rental, after the first three months, was $500 a month, payable on the 1st day of each month, in advance. Thereafter in August, 1915, Butcher sold the premises to the Cutting Packing Company, subject to the lease. As a part of the consideration of this sale, the plaintiff, Downing, executed an agreement with the defendant in pursuance whereof the plaintiff deposited in the American National Bank the sum of $6,000, to be held by said bank for the purpose of securing the payment of the rents falling due thereafter from Ibos and Roche under said lease. The agreement provided that, if Ibos and Roche should make default in the payment of any monthly installment of rent, then "as often as payment of said installments of rent shall become in default the said American National Bank of San Francisco, upon the written demand of [Cutting Packing Company] shall pay to the said [Cutting Packing Company], out of the said moneys so deposited with it, the amount of the installment or installments of the rent so in default, until the whole of said sum of $6,000 is exhausted," and the said bank was thereby authorized and directed, upon receiving written notice that an installment of rent was due and unpaid, to pay to the Cutting Packing Company, out of said moneys, the installment so in default.

The installments falling due for October, November, and December, 1915, and January, 1916, were not paid by Ibos and Roche, but were paid by the said bank out of the fund deposited by Downing, as provided in said agreement. Because of this failure of Ibos and Roche, Downing became interested in obtaining a new tenant, and began negotiations with the Cutting Packing Company to that end. In pursuance of these negotiations, Downing procured one Webster as a prospective tenant, and an agreement in writing was proposed by the Cutting Packing Company to Webster, under which a lease of the premises was to be given to Webster as soon as the Cutting Packing Company could obtain possession thereof, either by the surrender of Ibos and Roche, or by proceedings to oust them under unlawful detainer proceedings. Webster proposed conditions to which the company would not agree and the negotiations ceased. The proposal, the counter proposal, and the rejection thereof all occurred on February 1, 1916.

Expecting that such agreement would be made, a notice from the company to Ibos and Roche to pay the rent or quit the premises was prepared by the attorney for the company for service. This notice was in the form required by subdivision 2 of section 1161 of the Code of Civil Procedure. It required Ibos and Roche to pay to the Cutting Packing Company, within 3 days after the service of the

Digitized by Google

notice, the sum of $500, due as rent for the month of January, 1916, or to deliver the possession of the premises to said company, and stated that, unless they so paid said rent or delivered the possession, legal proceedings against them would be instituted for the recovery of possession. This notice was delivered by the attorney of the company on February 1 to a clerk in his office for service, and it was served on Ibos and Roche on February 2, 1916. The date for the payment of the rent therein demanded expired on February 5, 1916. The Cutting Packing Company then decided to abandon the proceedings for restitution of the premises, and on February 4 it demanded of the said bank the payment of $500, due for rent for January, and also the $500 which became due on February 1, for the rent of that month, and in pursuance of said agreement, authorizing and directing said bank on such demand to pay said rents, the said sum of $1,000 was paid by it to the Cutting Packing Company on February 4. It does not appear that Ibos and Roche were aware of this payment, or consented thereto; but they continued in possession of the premises. On February 5 Downing demanded of Cutting Packing Company that it immediately proceed to oust Ibos and Roche by unlawful detainer proceedings he made similar demands on February 26, 1916, and March 1, 1916. The company did not comply with these demands, but suffered the tenants to remain in possession, and demanded and received from the bank the rent for the months of March, April, May, and June, amounting to $2,000, out of the fund so deposited by Downing as aforesaid, notwithstanding the continued objections of Downing to its so doing. This action is for the recovery by plaintiff of the said sum of $2,000.

The case presents the question whether or not, after having given the notice of February 2, 1916, to pay rent or quit, the Cutting Packing Company had the lawful right to abandon further proceedings under said notice and collect the rents for subsequent months from the fund deposited by Downing as security therefor, notwithstanding the protest of Downing against its so doing. The respondent contends that the company could not withdraw or waive the notice to pay rent or abandon the proceeding to recover possession, and hold Downing liable as surety, without his consent. He states his position as follows:

"Where a valid notice to quit is given by a landlord to his tenant, the effect of such notice is to terminate the relation of landlord and tenant between the parties as of the date limited in the notice; that a notice to quit is a notice that cannot be withdrawn or done away with, at the option of the party giving it, and without the consent of both landlord and tenant, and, even if so withdrawn, a new tenancy is thereby created; consequently a guarantor of the rent under the original tenancy is not liable for rent which becomes due after the time the notice would have expired or actually did expire."

The appellant calls attention to the fact that there are two classes of notices to quit: First. Where the tenancy is from year to year, from month to month, or at will, or where a clause in the lease provides for a termination by notice. Code Civ. Proc. § 1161, subd. 1. Second. Where the law allows the landlord to terminate the lease, because of some default by the tenant in the performance of its conditions or covenants, by giving a notice to the tenant to perform within a specified time or deliver the possession. Id. subds. 2 and 3. Its claim is that the authorities relied on by the respondent relate exclusively to notices of the first class, that a different rule is applied in those of the second class, that in such cases there is a forfeiture of the remainder of the estate, which forfeiture occurs only when a second condition or act has supervened in connection with the notice, and that such a notice may be withdrawn, and the proceeding for forfeiture abandoned by the party giving the notice, without the act or consent of the party to whom it is given, provided the withdrawal occurs before the expiration of the time therein fixed for the forfeiture. His theory is that, when a notice to pay rent within three days or quit, as provided by section 1161, is served, no change in the legal relations between the parties takes place at that time or during that period, that the tenant may pay the rent within the time, in which case the lease continues in force unchanged, or he may allow the rent to remain unpaid and thus terminate the lease at the end of the 3-day period; but that if, while the time is running, the landlord elects to recall or waive the notice and abandon the proceeding for a forfeiture, he may do so, and the lease will continue in force thereafter.

[1, 2] The language of the section shows that the appellant's theory is correct. Subdivision 1 applies only to cases where the tenant holds over "after the expiration of the term for which it is let to him" and to tenancies at will which have been ended by a 30 days' notice. Civ. Code, § 789. This would, of course, include all tenancies of the first class above described. The provisions governing notices of the second class are set forth in subdivisions 2 and 3. Notices to pay rent or quit are provided for in subdivision 2 and by a part of subdivision 3 referring thereto. They are as follows:

"2. When he continues in possession * * * without the permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such subtenant."

"3. * * * Within three days after the service of such notice, the tenant, or any sub-

Digitized by Google

tenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture."

The language of the last clause of subdivision 3, above quoted, shows that the object to be attained by a notice under subdivisions 2 and 3 is a forfeiture of the lease. If the tenant, or other person interested, shall "pay the stipulated rent," he may "thereby save the lease from forfeiture." The lease in such cases is not terminated by the expiration of the term fixed therein, or by any provision therein for a termination by the parties, but solely because of the default in the payment of rent, the subsequent notice, the lapse of 3 days, and the ensuing forfeiture. The established rule is that, where the right to a forfeiture is created by contract or by law, "it has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised." Jameson v. Chanslor-Canfield, etc., Co., 176 Cal. 11, 167 Pac. 369; Randol v. Scott, 110 Cal. 596, 42 Pac. 976. Under this rule it must be admitted that the forfeiture does not occur until the last of the acts which are to create it has occurred. It therefore does not take place until there has been a failure to pay the rent during the 3 days allowed by the statute. It follows, also, that if the lease is not terminated by such forfeiture it remains in force for the remainder of the term, or until it is ended in some manner by some subsequent act or agreement. The respondent concedes that if Ibos and Roche had paid the rent themselves at any time within the 3 days following the service of the notice the lease would have remained in force to the same extent as if no notice had been given. The landlord could not have accepted the rent during that period and at the same time have claimed that the notice itself forfeited the estate and terminated the lease. Since forfeitures are not favored in law, the consequence of these principles would be that if the rent was paid in any manner or from any security provided therefor by Ibos and Roche, or by any other person for their benefit, during the three days, the forfeiture is thereby waived and the lease will remain in force.

The respondent claims that this result is avoided by reason of the fact that the deposit in the bank was not made by Ibos and Roche, nor at their instance, so far as appears, but was made by Downing at the time of the sale from Butcher to the Cutting Packing Company, and apparently for some purpose in the interest of Butcher or Downing. If it was done for this purpose, the fact is not fully disclosed by the record. But we regard the point as immaterial, for whatever the motive or inducement to Downing or Butcher may have been, the result was that the security inured to the benefit of Ibos and Roche and to their landlord, the Cutting Packing Company. Ibos and Roche remained in possession after the security was deposited, and availed themselves of the benefit thereof by allowing the rent to be paid out of that fund, instead of paying it themselves. After the giving of the notice to quit they still remained in possession, and continued therein until the payments here in controversy were made. It must therefore be presumed that they consented to such payments. The bank stood in the position of their agent with respect to the matter of making the actual payments of the rent, and the payments operated to their benefit. The forfeiture, as we have seen, had not occurred at the time the payment of February 4 was made. If the notice had terminated the lease or created the forfeiture, or if Ibos and Roche desired that it should have that effect, it was their duty to vacate the premises on or before the expiration of the 3-day period, and also to give notice to the bank to withhold further payments of rent accruing after the 1st of February. Since they did not do either of these things, the conclusion must follow that they acquiesced in the payment, and that the lease was not forfeited, but remained in force as completely as if no proceedings for forfeiture had been begun, and that the security deposited for the payment of rent remained available to the Cutting Packing Company for that purpose.

The respondent, in support of the position that the notice terminated the lease, cites 1 Wood on Landlord and Tenant, § 44; Woodfall on Landlord and Tenant, 423; Underhill on Landlord and Tenant, § 127; Alden v. Mayfield, 164 Cal. 11, 127 Pac. 45; Myers v. Herskowitz, 38 Cal. App. 581, 584, 165 Pac. 1031; Western Union Telegraph Co. v. Penn. R. R. Co. (C. C.) 120 Fed. 365; Wisner v. Richards, 62 Wash. 429, 113 Pac. 1090, Ann. Cas. 1912D, 160; Doe v. Calvert, 2 Camp. 388; Cheny v. Batten, 1 Cowp. 245; Fitzpatrick v. Childs, 2 Brewst. (Pa.) 367. An examination of these authorities shows that they all relate to notices to quit which did not involve a forfeiture, but which, either by reason of the law or of some clause in the lease providing therefor operated to terminate the tenancy between the parties. Thus, in Alden v. Mayfield, there was a tenancy from month to month, which had been terminated by a 30-day notice, as the law provides it may be. Civ. Code, §§ 1944, 1946. In Western Union T. Co. v. Penn. R. R. Co. the lease itself provided that it could be terminated by either party on 6 months' notice, and such notice had been given. Even in that case the court recognized the rule for which the defendant here contends by saying:

"It will be observed that withdrawal of a notice to quit is not, like a waiver of forfeiture, the act of one party, but requires the assent of both; and, when such joint assent is given, it creates a new tenancy." 120 Fed. 385.

Digitized by Google

In this way it distinguishes cases where the notice itself terminates the tenancy from cases where the tenancy is only terminated by the occurrence of a forfeiture. The passage quoted also recognizes the law to be that the forfeiture may be waived by the action of the party in whose favor it occurs, without the concurrence or consent of the party upon whom it is to be inflicted. In Wisner v. Richards the lease in question was terminable by its own provisions by a month's notice given by either party. The same is true of all the other cases, except Myers v. Herskowitz. That case is somewhat peculiar, but it is not authority in favor of the plaintiff. The lease there contained a covenant that the tenant should keep a certain passageway clear of obstructions. The notice to quit was given under subdivision 3 of section 1161, requiring the tenant to perform the covenant or quit possession. Suit was begun 10 days after the notice was served; the tenant continued in possession, and thereafter the landlord accepted rent from him during the pendency of the action until near the time of judgment. The court held that the acceptance of rent while the tenant so remained in possession was not a waiver of the forfeiture arising from the notice to perform the covenant or quit, unless it was received in such a manner as to imply that it was so intended by the landlord.

There are authorities in support of the contention of the appellant. In Tuttle v. Bean, 54 Mass. (13 Metc.) 275, it is held that if, after giving the notice to quit, the landlord told the tenant that he need not quit in pursuance of the notice, it constituted a waiver of the notice and prevented a forfeiture of the lease. In Hodgkins v. Price, 137 Mass. 13, it was held that where a notice to quit for nonpayment of rent was given, the forfeiture does not become absolute until the time given in the notice under the statute has run; the court saying:

"Until then the tenant has the right to pay or tender the rent, and reinstate himself in his rights. * * * The forfeiture is at most conditional, and may be purged and saved by the payment or tender of the rent due."

This language, it will be observed, is substantially the same as the above-quoted clause from subdivision 3, § 1161. The following cases are substantially to the same effect and support the appellant's claims: Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228; Norris v. Morrill, 43 N. H. 213.

The appellant also cites cases which declare the rule to be that, even in cases of the first class above described, where the notice operates to fix the end of the tenancy prior to the time it would otherwise expire, the notice can be waived by the landlord, and the tenant restored to his original term. This question, however, we need not consider. It is not involved in the case.

It is apparent, from these considerations, that the court erred in holding that the lease was terminated by the giving of the notice to quit, and that the security deposited was not available to the appellant as a fund for the payment of the subsequent rents.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

McCAHAN v. McCAHAN. (Civ. 3320.)

(District Court of Appeal, First District, Division 1, California. April 20, 1920.)

1. Contracts ⟸111—Agreement of husband to pay fees and costs of divorce action contra bonos mores.

Notwithstanding Civ. Code, § 158, an agreement between husband and wife, in advance and in anticipation of a divorce action being brought, to pay the wife's counsel fees and costs, is void as contra bonos mores.

2. Divorce ⟸182—Court may compel husband to pay wife money to prosecute appeal.

Under Civ. Code, § 137, the court may, during the pendency of a divorce action, compel the husband to pay the wife any money necessary to prosecute or defend the cause; and this power is not exhausted upon the rendition of the judgment in the trial court, but continues during the pendency of an appeal.

3. Divorce ⟸214(4)—Good faith and merit of appeal by wife determined from showing in lower court on application for suit money.

The question of good faith and merit of an appeal by a wife in an action for divorce is a matter to be considered and determined from the showing made in the lower court upon application for allowance of counsel fees and costs, under Civ. Code, § 137.

4. Divorce ⟸214(4)—Agreements as to counsel fees to be subjected to examination of trial court.

Ante-divorce agreements as to costs and counsel fees must be subjected to the examination of the trial court to see that they are fair and equitable, the matter being vested by Civ. Code, § 137, in the exclusive jurisdiction of the trial court.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Daniel F. McCahan against Lillian McCahan for divorce. Judgment for plaintiff, and defendant appeals. From an order directing plaintiff to pay to defendant a certain amount as costs and counsel fees on appeal, plaintiff appeals. Affirmed.

See, also, 190 Pac. 460.

Pierce H. Ryan, of Eureka, for appellant.

J. J. Cairns and H. L. Ford, both of Eureka, for respondent.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

WASTE, P. J. This is an appeal from an order directing the appellant to pay to his wife, the respondent, $343 as costs and counsel fees, on appeal in a divorce action, in which judgment was entered in favor of the plaintiff, and from which judgment the respondent here appealed.

The complaint is on the ground of extreme cruelty. The defendant answered denying the allegations of cruelty, and filed a cross-complaint for permanent support and maintenance, and in which she also alleged that a certain contract of separation, theretofore entered into by the parties, was executed by reason of undue influence. This allegation plaintiff denied. The case was tried by a jury, which answered all of the special interrogatories submitted to it in favor of the plaintiff. These answers were adopted and approved by the court, which made certain additional findings of its own motion. With full knowledge of the facts, it sanctioned the agreement in part, and granted a decree of divorce to the plaintiff. That judgment was affirmed by this court. McCahan v. McCahan, 190 Pac. 460 (No. 3330), this day decided. A complete statement of the facts of the case is contained in that opinion.

After judgment the defendant moved the court, on affidavits showing she was practically destitute and had no means of her own, for an order directing plaintiff to pay her costs and counsel fees on appeal. The plaintiff filed a counter-affidavit in which he alleged the execution of the contract of separation referred to; that it provided for, and he had paid to the defendant, the sum of $100 for her costs and counsel fees in the action. He objected to making any further payments, and interposed the stipulation of the contract as a bar to the granting of the motion. The court overruled the objection, and, refusing to be governed by the provision of the contract relating to counsel fees and costs, made the allowance complained of. The question presented on this appeal is the right of the court to make the order, in view of the provision in the contract, which is as follows:

"(6) In the event that any action for divorce shall ever be instituted between the parties hereto, then and in such event it is agreed that there shall be awarded to the party of the second part the sum of one hundred ($100.00) dollars in full settlement of all her claims for counsel fees and costs herein; and it is further agreed that said sum shall be awarded in one action only."

[1] Under our Code either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried. Civ. Code, sec. 158. Notwithstanding this freedom to so contract, it has been repeatedly held in this state that an agreement between husband and wife to do anything to facilitate procuring a divorce is illegal and void. Newman v. Freitas, 129 Cal. 283, 292, 61 Pac. 907, 50 L. R. A. 548. We think it requires no lengthy discussion to point out the circumstances under which an agreement in advance, and, in anticipation of a divorce action being brought, to pay the counsel fees and costs, may operate to facilitate a dissolution of the marriage tie. Such being its effect, it is void as contra bonos mores. Pereira v. Pereira, 156 Cal. 1, 5, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107.

[2-4] For another reason the trial court was warranted in disregarding the provision in the contract relating to counsel fees and costs. Our statute provides that during the pendency of a divorce action the court may, in its discretion, compel the husband to pay the wife any money necessary to prosecute or defend the cause. Civ. Code, sec. 137. This power is not exhausted upon the rendition of the judgment in the trial court, but continues during the pendency of the appeal. Bruce v. Bruce, 160 Cal. 28, 30, 116 Pac. 66. The question of the good faith and merit of the appeal is a matter to be considered and determined from the showing made in the lower court and upon which the order for the allowance is based. Gay v. Gay, 146 Cal. 237, 240, 79 Pac. 885. The courts of this state have consistently recognized and upheld the broad discretionary power vested in the trial judges by the above section of the Code in these matters. In refusing to sanction an agreement between an attorney and a plaintiff in a divorce action for a contingent fee, the Supreme Court pointed out that in such cases "the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. * * * The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorneys' fees, and where the reason ceases the rule or law also ceases." Newman v. Freitas, supra. In yet another case the same court was called upon to construe a contract similar, in effect, to the provision in the agreement we are here considering. It was there said: "Nor in case of suit could the agreement control the action of the court in the exercise of its discretion in allowing alimony or counsel fees." In re Estate of Sloane, 179 Cal. 393, 177 Pac. 150. Assuming, as claimed by appellant, but not so holding, that it may have been unnecessary for the court, in deciding the case, to have used the language quoted, we consider the statement significant, as being in complete accord with what we conceive to be the consistent policy of the courts of this state in such matters.

Appellant relies upon the case of Lee v. Lee, 55 Mont. 426, 178 Pac. 173, as fully supporting his contention. While the court there takes a view contrary to that which seems to prevail in this state, we are unwilling to accept it as final authority. We are satisfied it is best to leave the matter of costs and counsel fees in divorce actions to the discre-

Digitized by Google

tion of the trial court, in whose exclusive jurisdiction it has been vested by legislative enactment. If it is desirable or expedient to settle these matters out of court, such agreements must be subjected to the examination of the court. Loveren v. Loveren, 106 Cal. 509, 513, 39 Pac. 801. If fair and equitable, the arrangement between the parties will no doubt receive its sanction.

The order is affirmed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

McCAHAN v. McCAHAN. (Civ. 3330.)

(District Court of Appeal, First District, Division 1, California. April 20, 1920.)

1. Appeal and error ⟸110—Order on motion for new trial is not appealable.

An appeal from order denying motion for new trial is not authorized under Code Civ. Proc. § 963, and will be dismissed.

2. Appeal and error ⟸766, 767(1)—Brief not complying with rules may be stricken.

Where the opening brief is not typewritten, not indexed, only four copies are filed, and no attempt seems to have been made in its preparation to conform to the requirements of rule 8 of the appellate court (176 Pac. ix), and instead of calling the attention of the court to certain parts of the record, as directed in Code Civ. Proc. § 953c, contains merely portions of voluminous testimony, without any reference to the transcript, and with but little comment as to the nature and effect of the evidence, the appellate court would be justified in dismissing the appeal or striking brief from the files.

3. Appeal and error ⟸771—Failure of husband to furnish counsel fees and costs no excuse for failing to file brief.

The fact that a wife is penniless, and that the superior court made an order directing the husband to pay appellant wife sufficient money to enable her to print her brief, and that husband appealed from this order and gave a bond staying execution of the order, is no sufficient justification for not filing a proper opening brief.

4. Divorce ⟸93(3)—Not necessary to allege mental suffering was wrongfully inflicted.

In order to state a cause of action for divorce on the ground of extreme cruelty under Civ. Code, § 94, it is not necessary to state that grievous mental suffering was "wrongfully" inflicted, where the only rational inference from the allegations of the complaint is that the "infliction" was "wrongful."

5. Pleading ⟸406(5)—Complaint held sufficient on appeal though subject to special demurrer if made.

Failure of a complaint in a divorce action, on the ground of extreme cruelty, under Civ. Code, § 94, to state that grievous mental suffering was "wrongfully" inflicted, was a defect which could have been reached by special demurrer, and not having been so attacked, must be held sufficient on appeal.

6. Divorce ⟸27(1)—Mental suffering may be "extreme cruelty."

Grievous mental suffering may constitute and be the equivalent of extreme cruelty, under Civ. Code, § 94.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

7. Divorce ⟸184(10)—What constitutes grievous mental suffering a question of fact not ordinarily reviewable.

Whether in any case the course of conduct complained of as a ground for divorce constitutes "grievous mental suffering" is a question of fact on which the trial court's finding will not be disturbed on appeal, unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion.

8. Contracts ⟸111—Entered into to facilitate divorce void.

An agreement entered into between parties with the object of dissolving a marriage contract, or facilitating that result, is void.

9. Husband and wife ⟸278(1)—May agree to immediate separation and provide for support of either.

Under Civ. Code, §§ 158, 159, either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which they might if unmarried, and they may agree in writing to immediate separation, and may make provision for the support of either of them, or their children, during such separation.

10. Contracts ⟸111—Agreement to pay attorney fee to wife in anticipated divorce action void.

A portion of a separation agreement providing for the payment of an attorney fee to the wife in the event that either of the parties should ever institute a divorce action against the other was void.

11. Contracts ⟸137(3)—Provision for payment of attorney fee to wife in event of divorce did not render entire separation agreement void.

A portion of a separation agreement providing for the payment of an attorney fee to the wife in event either of the parties should ever institute a divorce action against the other did not render the entire agreement void, relating to a different subject, and being entirely distinct, disconnected, and separable from the valid provisions of the contract.

12. Divorce ⟸249(2)—Separation agreement considered in regard to disposition of community property.

Trial court in a divorce action has unlimited authority to make disposition of community property of the parties, under Civ. Code, §§ 146, 147; and, where it is made to appear that a division of property has been made in a separation agreement, the court necessarily has jurisdiction to consider the instrument, and to

Digitized by Google

affirm it or disregard it, if it is found to be void.

13. Divorce ⟸249(2)—Trial court held to have ratified agreement as to division of community property.

Where the trial court, in its decree in a divorce case, made no division of the property of the parties, or provision for support of the wife, but recognized and expressly reserved to her the power to assert such rights and benefits as might accrue to her under a previously executed contract of separation, there was a ratification of the separation agreement to that extent.

14. Husband and wife ⟸278(1)—Trial court may not interfere with valid separation contract dividing community property.

The trial court in a divorce action cannot interfere with a separation contract wherein community property was divided, under Civ. Code, §§ 146, 147, unless it was procured in violation of the general rules which control the actions of persons occupying confidential relations with each other, or was not fairly made, or was obtained by coercion, intimidation, or undue influence.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action for divorce by Daniel F. McCahan against Lillian McCahan. From a decree in favor of plaintiff, defendant appeals. Affirmed.

See, also, 190 Pac. 458.

J. J. Cairns and H. L. Ford, both of Eureka, for appellant.

Pierce H. Ryan, of Eureka, for respondent.

WASTE, P. J. [1] Defendant appeals from the judgment granting her husband, the plaintiff, a decree of divorce. She also appeals from the order of the court denying her motion for a new trial. The latter appeal was unauthorized and is dismissed. Code Civ. Proc. § 963.

[2] Were it not for the nature of the action and the situation of the appellant, we would feel justified in dismissing this appeal, or striking the opening brief from the files. It is typewritten, not indexed, only four copies were filed, and no attempt seems to have been made in its preparation to conform to the requirements of rule 8 of this court (176 Pac. ix). Instead of calling the attention of the court to certain parts of the record, as provided in section 953c of the Code of Civil Procedure, the brief appears to contain merely those portions of the voluminous testimony considered by the appellant to be favorable to her contentions, without any reference to the transcript, and with but little comment as to the nature and effect of the evidence.

[3] The failure and neglect of appellant in these particulars has not only obstructed our examination of the record, but has rendered it well-nigh impossible for us to use the brief for that purpose. In justification of her failure to print her brief, appellant makes it appear that she is penniless, depending for the greater part of her livelihood upon the charity of relatives; that on motion, and after taking evidence, the superior court made its order directing the respondent to pay to appellant sufficient money to enable her to print her brief; that from this order respondent appealed, and that appeal is now pending in this court; that the respondent gave a bond staying the execution of the order, thus completely denying appellant the means wherewith to comply with the rule of the court relative to printing her brief. This statement is borne out by the record, and for this reason we have refrained from dismissing the appeal or striking the brief from the files. There is not, however, sufficient justification for the manner in which the appellant's appeal is presented in the brief. Notwithstanding the labor involved, we have made a complete examination of the record in considering the points made by the appellant in seeking a reversal of the judgment and decree.

Defendant denied all the allegations of the complaint, filed a cross-complaint seeking a division of the community property and permanent alimony, and praying that a certain agreement whereby the parties agreed to live separate and apart from each other, providing for disposition of their property, and fixing an attorney fee in the event that an action of divorce should ever be instituted by either of the parties, be declared null and void. The case was tried with a jury, which decided in favor of plaintiff, and against the defendant, on all the special issues submitted to it. These answers were adopted by the court, which made additional findings of its own. The judgment and decree in favor of plaintiff followed, from which defendant appeals.

Appellant first attacks the sufficiency of the complaint. The plaintiff charged that the defendant secretly accepted the attentions of a man other than her husband, entertaining him in her home both in the daytime and in the nighttime, always in the absence of her husband; that she accompanied this man, without the knowledge and consent of her husband, to picnics and dances, and associated with him, in the privacy of her own home and in public places, to such an extent that her relations with said man became a matter of common gossip and scandal in the place where the parties resided, all of which became known to plaintiff; that she secreted stolen property in the house of plaintiff, and applied vile, insulting names and epithets to him; that she endeavored to strike him

Digitized by Google

with an iron; that she impugned the chastity of his female friends; that she laid down in the public streets, screeching and screaming at the top of her voice; that she frequently threw herself on the floor, remaining there screaming for hours at a time; that she repeatedly threatened to kill and murder her husband; that she frequently threatened suicide, and said she would cut her throat; that she endeavored to get hold of weapons for that purpose; that she quarreled with her husband until late hours of the night; that she attempted to tear out her own hair and to bite plaintiff's hands; that she did all these things and many others without cause or provocation, "all of which caused plaintiff great shame and humiliation, and inflicted upon him grievous mental suffering."

[4, 5] Appellant's contention is that, by reason of the failure to state that the grievous mental suffering was "wrongfully" inflicted, the complaint is insufficient to state a cause of action for extreme cruelty, under section 94 of the Civil Code. As was said in Nelson v. Nelson, 18 Cal. App. 602, 605, 123 Pac. 1099, 1101, "if this does not present a case of 'the wrongful infliction of * * * grievous mental suffering' we have totally misconceived the language employed." Furthermore, we do not understand that the pleader is required to adopt the exact language of the statute in pleading the cause of action, under the section mentioned. It is sufficient if, by appropriate averments, the proper qualification appears. As was said in the case last noted, the only rational inference from the allegation of the complaint is that the "infliction" was "wrongful." Furthermore, if there was any defect in the complaint it was one which could have been reached by special demurrer, and, not having been so attacked, it must be held to be sufficient. Mayr v. Mayr, 161 Cal. 134, 136, 118 Pac. 546.

[6] Appellant contends that the acts charged in the complaint, before summarized by us, even if true, did not constitute cruelty. She places her reliance upon the decision of Waldron v. Waldron, 85 Cal. 257, 24 Pac. 649, 858, 9 L. R. A. 487, wherein it was decided by a divided court that grievous mental suffering is not the equivalent of extreme cruelty, in a legal sense. The rule there laid down was criticized and overruled in Barnes v. Barnes, 95 Cal. 171, 175, 30 Pac. 298, 16 L. R. A. 660. The more rational rule laid down in that case has been universally and consistently followed in this state ever since. Fleming v. Fleming, 95 Cal. 430, 434, 30 Pac. 566, 29 Am. St. Rep. 124; Andrews v. Andrews, 120 Cal. 184, 187, 52 Pac. 298; Smith v. Smith, 124 Cal. 651, 652, 57 Pac. 573; Maloof v. Maloof, 175 Cal. 571, 573, 166 Pac. 330.

[7] We deem it unnecessary to here review the voluminous record of the evidence of some 30 witnesses who testified for the opposing side. No good can be effected by doing so, for the most that the appellant can urge in support of her contention that the findings and judgment are not sustained by the evidence is a conflict of testimony arising for the most part in the respective stories told by the plaintiff and the defendant. Whether in any case the course of conduct complained of constitutes "grievous mental suffering" is a question of fact. "The judge who tries the action, and has the parties before him for observation in the light of the evidence, is the one to whom the law commits the determination of this question in the first instance; and, as was said in Andrews v. Andrews, 120 Cal. 187, 52 Pac. 298, this court will not disturb a finding that particular acts constitute grievous mental suffering unless 'the evidence in support of the finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court.'" Avery v. Avery, 148 Cal. 239, 244, 82 Pac. 967, 969; McDonald v. McDonald, 155 Cal. 665, 670, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Dupes v. Dupes, 184 Pac. 425. We are fully satisfied that the conclusions of the trial court as to the weight and sufficiency of the evidence to support the allegations of the complaint, and the decree of divorce entered thereon, are correct.

Appellant sought at the trial to avoid the legal effect of the separation agreement entered into between herself and husband upon the ground that it was procured by undue influence. By this contract the parties agreed to live separate and apart, divided their property, provided for the custody and education of the minor child of the parties, stipulated an amount to be paid monthly for the support and maintenance of the defendant and the child, and relinquished to each other all obligations growing out of their marital relations, except as in the contract provided, including the right to inherit one from the other. The agreement also provided for an attorney fee of $100 "in the event that any action for divorce shall ever be instituted between the parties." This stipulation of the contract imposed no obligation on the wife to sue for a divorce; and the making of the contract was followed by the actual separation of the parties, during which the plaintiff paid the defendant the sum of $22.50 a month as therein provided for the support of herself and child. The agreement awarded what little community property the parties had to the defendant. The plaintiff, a laborer, has no separate property other than an interest in certain land, which is subject to the life estate of his mother, and which was found by the court to be worth $10,000.

Digitized by Google

From the evidence it appears, and the court so found, that prior to the execution of the agreement the plaintiff and defendant had discussed between themselves the subject of the contract which it was proposed by them to enter into, and agreed upon practically all of its terms. On the date of its execution the plaintiff and the defendant went together to the office of the attorney whom the plaintiff had selected, and stated to him, both parties being present, the terms which they had agreed upon. In the afternoon of the same day they returned to the office of the attorney, who in the meantime had drafted the agreement. He read it aloud to the parties, explaining the various provisions and terms and stating their meaning to them. Before the document was signed the defendant was instructed and advised by the attorney that she had the right to consult her own attorney or adviser, but she declined to do so. Prior to signing the agreement, however, she telephoned to a reputable and competent attorney of Eureka, who later appeared for her and represented her in this action. During the conversation with him she stated she did not desire his aid or advice in the matter of the agreement. The evidence fails to disclose that the defendant was in any way coerced or induced by any means against her will to enter into the contract.

[8-11] There is no evidence that the agreement was entered into between the parties with the object of dissolving the marriage contract or facilitating that result. Such contracts are void. Newman v. Freitas, 129 Cal. 283, 289, 61 Pac. 907, 50 L. R. A. 548. Under our Code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which they might if unmarried. Civ. Code, § 158. They may also agree in writing to immediate separation, and may make provision for the support of either of them, and of their children during such separation. Civ. Code, § 159. The agreement in question was apparently drawn pursuant to the authority thus given, and was one which the parties had the right to enter into. Pereira v. Pereira, 156 Cal. 1, 4, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Walker v. Walker, 14 Cal. App. 487, 493, 112 Pac. 479. Although that portion of the agreement, providing for the payment of an attorney fee to the wife, in the event that either of the parties should ever institute a divorce action against the other, is void (McCahan v. McCahan, 190 Pac. 458, No. 3320, this day decided), it relates to a different subject, and is entirely distinct, disconnected, and separable from, and does not invalidate, the valid provisions of the contract. Estate of Sloan, 179 Cal. 393–397, 177 Pac. 150; Mack v. Jastro, 126 Cal. 130, 134, 58 Pac. 372; Beard v. Beard, 65 Cal. 354, 356, 4 Pac. 229.

[12, 13] The trial court, having jurisdiction of the divorce action, had unlimited authority to make disposition of the community property of the parties. Civ. Code, §§ 146, 147. Whenever, therefore, it was made to appear that a division of the property had been made in accordance with the terms of the separation agreement, the court necessarily had jurisdiction to consider the instrument, and to affirm it, or to disregard it if it was found to be void. "Such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts." Loveren v. Loveren, 106 Cal. 509, 513, 39 Pac. 801, 802. The court, in the instant case, in its decree made no division of the property of the parties, or provision for the support of the defendant, but did recognize and expressly reserve to her the power to assert such rights and benefits as might accrue to her under the previously executed articles of separation. This action on its part we construe to be a ratification of the agreement to that extent.

[14] Measured by the standard of the Code provisions, and construed in the light of the circumstances surrounding its execution and subsequent performance, it is manifest that, in so far as it deals with the property rights of the parties, the contract is a valid agreement with which the court could not interfere, unless from the evidence it was authorized to find that it was procured in violation of the general rules which control the actions of persons occupying confidential relations with each other. It did not so find. Being fairly made, and not being obtained by coercion, intimidation, or undue influence, the trial court was correct in refusing to vacate and set it aside. Murray v. Murray, 28 Cal. App. 533, 535, 153 Pac. 248.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

Digitized by Google

ERICKSON v. ERICKSON. (Civ. 3007.)

(District Court of Appeal, Second District, Division 1, California. May 3, 1920.)

Attachment ⊂⊃13—Not authorized in suit upon judgment secured in another state; "contract of record."

A judgment in another state is a "contract of record" not providing that payment shall be made in this state, so that when sued upon here no attachment is authorized under Code Civ. Proc. § 537.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract of Record.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Mary Erickson against O. S. Erickson. From an order dissolving plaintiff's attachment, the plaintiff appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

C. W. Benshoof, of Riverside, for respondent.

JAMES, J. Appeal from an order dissolving an attachment issued at the instance of the plaintiff. The action was brought in the superior court of the county of Los Angeles and the cause of action stated was upon liability created by a judgment which judgment was entered against defendant in the state of Washington. Plaintiff, as a prerequisite to the issuance of the attachment, made her affidavit in which she alleged that—

Her claim was "for money due, owing, and unpaid on account of judgment rendered in favor of the plaintiff and against the defendant, and that such contract was made and is payable in this state. * * *"

Section 537, Code of Civil Procedure, permits attachment to be issued in an action upon a contract, express or implied, for the direct payment of money, "where the contract is made or is payable in this state." As to whether a judgment in any clear sense constitutes a contract is open to debate. English writers on the common law decline to give it that general character because, for one thing, a judgment in contested cases lacks the essential of consent of the party to be bound. However, judgments were sometimes classified as "contracts of record" upon the assumption that a promise would be implied in law on the part of the judgment debtor to pay the amount adjudged to be due from him. A diversity of opinion is to be found in the decisions on the question. However, the Supreme Court of this state has affirmed the position that a suit upon a judgment is an action upon contract. Bean v. Loryea, 81 Cal. 151, 22 Pac. 513, and cases cited therein. Moreover, appellant here necessarily confirmed that view, and respondent concedes that the law is so established. A contract is presumed to be payable where made, in the absence of terms providing otherwise. Tuller v. Arnold, 93 Cal. 168, 28 Pac. 863. The bald question then for determination is as to whether a contract made in another state, and which contains no terms providing that payment shall be made in this state, is such a contract as authorizes an attachment to issue in an action brought here. The answer must be in the negative. It has been directly so held. Dulton v. Shelton, 3 Cal. 206; Eck v. Hoffman, 55 Cal. 502; Tuller v. Arnold, supra. The cause of action, therefore, as shown, was not based upon a contract made or payable in California, and hence no attachment was authorized to be issued therein. The Oregon case cited by appellant (Meyer v. Brooks et ux., 29 Or. 203, 44 Pac. 281, 54 Am. St. Rep. 790) was evidently decided under a statute different in terms from those of our section 537, Code of Civil Procedure.

The order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

SHERMAN v. SHERMAN. (Civ. 3358.)

(District Court of Appeal, First District, Division 2, California. April 23, 1920.)

1. Appeal and error ⊂⊃932(1)—That motion for allowance of counsel fees was made in action for separate maintenance held presumed.

On appeal from default judgment for separate maintenance, where no findings were necessary and no bill of exceptions was presented, it will be presumed, to sustain that portion of the judgment awarding counsel fees, that plaintiff proceeded in the customary manner by moving for counsel fees before trial and the allowance evidenced by the final judgment cannot be attacked on the theory that it was unwarranted under Civ. Code, § 137, allowing counsel fees necessary for the prosecution of the action because not made until the end of the action.

2. Husband and wife ⊂⊃299(1)—Community cannot be divided in suit for separate maintenance, where the complaint did not seek such relief.

While under Civ. Code, § 137, as amended in 1917 (St. 1917, p. 35), the court may, in an action for maintenance alone, make the same disposition of the community as could have been made if the marriage had been dissolved, but such award can be sustained only on the theory that it is necessary and reasonable; hence, where the complaint did not seek such relief, but alleged that the defendant husband was receiving a salary of $200 per month, and

Digitized by Google

that the sum of $75 was a reasonable sum for plaintiff's maintenance, a division of the community was not on default judgment warranted.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Edith Sherman against H. G. Sherman for separate maintenance. From portions of the judgment awarding attorney's fees and assigning the community property, defendant appeals. Modified by striking out the portion awarding plaintiff the community property, and as modified affirmed.

S. V. Wright, of San Luis Obispo, for appellant.

W. C. Carpenter, of Alturas, and M. R. Van Wormer, of San Luis Obispo, for respondent.

NOURSE, J. Plaintiff recovered judgment against defendant by default upon a complaint for separate maintenance, charging him with adultery. The judgment awarded plaintiff the sum of $75 per month for her support and maintenance in accordance with the allegations of the complaint, and in addition thereto allowed her the sum of $100 as attorney's fees in said action, and assigned to her all the community property of the respective parties. The appeal is taken from the portions of the judgment awarding attorney's fees and assigning the community property.

In respect to the matters complained of, the complaint alleges that the parties owned certain community property consisting of money in bank and an automobile, all of which it is alleged the defendant threatened to withdraw and dispose of for the purpose of leaving plaintiff without means of support. It is further alleged that the plaintiff will, "unless she has some maintenance from her said husband, be dependent upon her friends for support. That the sum of $75 per month is a reasonable sum to be allowed this plaintiff for her support and maintenance." The prayer of the complaint asks for a reasonable sum as temporary and permanent alimony for the support of the plaintiff, for counsel fees and costs, and for general relief.

[1] In attacking that portion of the judgment allowing counsel fees, appellant relies upon Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056, which holds that the court is without power to make an allowance for counsel fees in the final judgment, for the reason that, the services of counsel having then been completed, no award is necessary "for the prosecution of the action," as contemplated by section 137, Civil Code. But the rule of that case does not apply here, because, this being a default judgment in which no findings were necessary and no bill of exceptions presented upon the appeal, all presumptions of regularity in the proceedings must be indulged in to support the judgment. Thus, it must be presumed for want of showing to the contrary that, before the commencement of the trial, plaintiff proceeded in the usual and customary way by moving the court for an allowance of counsel fees necessary for the prosecution of the action, and that this motion was granted by the court, as evidenced by its final judgment.

[2] In assigning to plaintiff the entire community property of the parties, the court was bound by the allegations of plaintiff's complaint, which alone were admitted to be true by defendant's default. Clearly the allegations relating to the community property were inserted for the purpose of procuring an injunction to restrain defendant from disposing of this property for the purpose of defeating the monthly award for maintenance for which plaintiff prayed. No notice was given to defendant that any disposition of the community property was sought. Plaintiff expressly alleged that defendant was drawing a salary of $200 per month; that the sum of $75 per month was a reasonable sum for her support and maintenance; and prayed that the court award such reasonable sum for that purpose. Manifestly under such allegations the court would not be justified in awarding a larger sum for the support and maintenance of the plaintiff without amendment or notice to the defendant. Under the prayer for general relief a court cannot give a plaintiff judgment by default which is not supported by the allegations of the complaint. Concededly, under the amendment of 1917 (St. 1917, p. 35) to section 137 of the Civil Code, the court may, in an action for maintenance alone, make the same disposition of the community property as could have been made if the marriage had been dissolved; but where under such section the community property is awarded to the plaintiff without dissolution of the marriage, such award can be sustained only upon the theory that it is necessary and reasonable for the maintenance and support of the wife or for the wife and children where such relief is sought, because it is for that purpose alone that the action can be maintained, section 137 providing that "the court, in granting the wife permanent support and maintenance * * * shall make the same disposition of the community property," etc. The marriage state continues; the community is not dissolved; the parties may continue to live together and acquire and enjoy community property.

Where, therefore, the complaint expressly puts in issue the reasonableness of the sum necessary for support and maintenance by allegations that a specific sum is reasonable for such purposes, and admits, by failure to allege otherwise, that the community property is not necessary for such support and maintenance, the default of the defendant

Digitized by Google

admits the issue as so presented and nothing more.

The judgment is modified by striking therefrom the portion thereof awarding to plaintiff the community property, and as so modified will stand affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

Ex parte JAMES. (Cr. 520.)

(District Court of Appeal, Third District, California. April 23, 1920.)

1. Criminal law ⟸238—Sufficient cause to believe accused guilty authorizes magistrate to hold him.

A committing magistrate may reject the testimony of accused, and believe that of other witnesses, and he is not required to confine himself to the doctrine of reasonable doubt; it being sufficient if sufficient cause exists to believe accused guilty, in view of Penal Code, § 872.

2. Criminal law ⟸238—Probable cause held to exist for holding one accused of obtaining sheep by falsely pretending to have bank deposit.

Where accused was charged with obtaining sheep worth $16,000 on a false pretense that he had $6,000 on deposit in a certain bank, giving the vendors a check for the whole amount under a promise to deposit a sufficient amount to make the check good by a named day, and it appeared that he did not have $6,000 on deposit, the commitment was authorized.

Application for writ of habeas corpus, prayed to be directed against the sheriff of San Joaquin county, to secure release of petitioner. Writ dismissed.

Application for writ of habeas corpus by F. O. James, to be directed against the sheriff of San Joaquin county. Writ dismissed and petitioner remanded.

Walter F. Lynch, of Stockton, for petitioner.

Edward Van Vranken, Dist. Atty., and E. P. Foltz, Asst. Dist. Atty., both of Stockton, for respondent.

PREWETT, Presiding Judge pro tem. Application for a writ of habeas corpus upon the ground that the petitioner is held to answer upon a criminal charge without probable cause. He is charged with obtaining sheep worth about $16,000 upon the false pretense that, at the time of so doing, he had $6,000 on deposit in a certain bank. The petitioner denies making such a pretense, but admits that at the time he did not have said amount, or, in fact, any amount in excess of 80 cents, on deposit. He engaged to purchase the sheep from the owners. The sheep were counted out and loaded on the cars ready for delivery. He thereupon informed the owners that he had $6,000 on deposit, and that by the following Saturday he would deposit such further sums as were necessary to meet the check which he then offered to them, and which they accepted. They testified, and the court necessarily found, that they would not have parted with the title if they had not believed his statement that he had $6,000 on deposit.

1. The petitioner insists that he should be discharged because he informed the sellers that he did not have sufficient funds in the bank to meet the check. It is quite true that he so informed them, but he is not charged with the representation that the check would be paid on presentation. Both he and they knew that it could not be paid before the following Saturday, and his own testimony shows that he knew it could not be paid in full even then. The false representation with which he stands charged is that he then and there had on deposit $6,000. He took the sheep of these men, gave them a worthless check in payment, and within a few hours sold the sheep to other parties. That he may have intended, in fact, to meet the check in the future may be conceded, but this does not modify the fact, as found by the magistrate, that he obtained this considerable amount of property upon the false representation that he had a large sum on deposit.

[1] 2. The petitioner further insists that the false representation, in order to be criminal, must relate to an existing fact, and that it cannot relate to an act to be performed in the future, as a mere promise to pay. This rule, as a mere statement of the law, is sound, and is upheld in People v. Green, 22 Cal. App. 45, 133 Pac. 334, but it has no application to the facts of this case as shown above. The magistrate was clothed with authority to reject the testimony of the petitioner, and to believe that of the other witnesses, nor is he required to confine himself to the doctrine of reasonable doubt. It is sufficient if there existed sufficient cause to believe that the petitioner is guilty. In re Vandiveer, 4 Cal. App. 653, 88 Pac. 993.

[2] The owners of the sheep testify that they relied, in parting with their title, upon the fact that the petitioner had $6,000 of ready money. The essence of the alleged crime arises out of the fact, not that he could not pay the check, but that he was short by $6,000 of his claimed assets.

It may well be, as insisted by the owners, that they were willing, in view of his deposit of $6,000 in cash, to look to the band of sheep and other properties for the remaining ten thousand.

3. Petitioner's claim that the evidence must show an intent to defraud beyond a reasonable doubt is answered by the case last cited, although the specific question as to intent did not arise in that case. However, section 872

Digitized by Google

of the Penal Code provides that a defendant must be held "if it appears from the examination that a public offense has been committed." This language imports a degree of conviction far short of a belief beyond a reasonable doubt. Ex parte Becker, 86 Cal. 402, 25 Pac. 9, is in point. In that case the court discusses the degree of proof required before a committing magistrate and says:

"Whether it is sufficient to convict beyond a reasonable doubt, it is the province of the jury to say, and ought not to be determined in advance on habeas corpus."

The cases cited by petitioner in support of his claim do not deal with the measure of proof, and are not in point. No authority has been brought to our attention, and we feel assured that none exists, holding that a committing magistrate must, in a case of the character under review, be satisfied as to any fact beyond a reasonable doubt.

We discover no adequate reason for disturbing the commitment. Writ dismissed, and petitioner remanded.

We concur: HART, J.; BURNETT, J.

DUNTON et al. v. TANIGOSHI et al.
(Civ. 2820.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Judgment ⟸155—Notice of motion to set aside default sufficient where date was correctly given, though day was improperly named.

Where a notice recited that motion to set aside a default would be made on Wednesday, the 1st day of July, the specification of Wednesday may be disregarded as immaterial, and the notice deemed sufficient, though the 1st of July fell on Monday instead of Wednesday.

2. Judgment ⟸155—Notice that motion to vacate default would be made at 10 o'clock sufficient, though the same was not heard until 11.

Notice of motion to vacate a default, which specified it would be made at 10 o'clock, is sufficient, though the court by an arrangement of its law and motion calendar segregated causes, and under such segregation the clerk placed the motion on the calendar for 11 instead of 10; for the notice was sufficient to bring the opposite party into court, and, if there was any postponement, he was bound to take notice of it.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Cora Dunton and others against Ida May Tanigoshi and another. After default judgment was entered, defendants' motion to set aside the same was granted, and plaintiffs appeal. Order affirmed.

Stewart & Stewart, of Los Angeles, for appellants.

L. B. Stanton, of Los Angeles, for respondents.

JAMES, J. After the plaintiffs herein had caused judgment by default to be entered against the defendants, defendants presented a motion to set aside the same and to be allowed to file an answer. The motion was granted. Plaintiffs appeal from the order.

[1] The main point presented is as to the sufficiency of the notice as given by the defendants of their motion to set aside the default and the judgment entered thereon. The notice specified that the motion would be made on "Wednesday, the 1st day of July, 1918, at ten o'clock in the forenoon of said day." As a matter of fact, Monday was the 1st day of July, and not Wednesday, and the motion was heard on Monday. Plaintiffs made no appearance at the hearing of the motion, and they contend now that the notice of motion was of no effect because it was indefinite as to the time when the motion would be presented. We think that the notice was a good notice bringing on the motion for the 1st day of July, and that the word "Wednesday" should be disregarded. The mention of the particular day of the week was not necessary to the notice, and a misstatement of that day, where the notice definitely designated "the 1st day of July, 1918," was to our minds immaterial.

[2] The further point is presented that because the superior court by an arrangement of its law and motion calendar segregated causes, and that under such manner of segregation the clerk placed the motion on the calendar for 11 a. m., instead of 10 a. m., as designated in the notice, made its action on the motion of no effect. There appears to be no merit in that contention. The segregation referred to was made by the clerk after the notice of motion was given, and the rule did not require attorneys to ascertain in advance the particular hour of the day at which motions noticed to be heard would be called. A notice that a motion would be heard at 10 a. m. would be sufficient notice to bring the opposite party into court at that time, and, if there was any postponement of the hearing under rule of court, he would be bound to ascertain that fact. No question is made at all as to the sufficiency of the showing upon the application to set aside the default and judgment.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

Ex parte DE MARTINI. (Cr. 517.)

(District Court of Appeal, Third District, California. April 27, 1920.)

1. Perjury ⊂⊃6—False statements by juror on voir dire are perjury.

False statements by one being examined as a juror, after having been sworn to make true answers to questions by court or counsel, constitute perjury under Penal Code, § 118.

2. Habeas corpus ⊂⊃92(1)—Difficulty of proving offense charged cannot be considered.

On habeas corpus proceedings by one charged with perjury for falsely stating that he would try the case solely on the law and the evidence, the contention that the crime charged was difficult or impossible of proof does not require consideration.

Original application by George De Martini, for writ of habeas corpus to secure his release from custody under indictment for perjury. Writ denied.

E. R. Vaughn and George E. Foote, of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Asst. Dist. Atty., both of Sacramento, for respondent.

PLUMMER, Presiding Judge pro tem. On the 17th day of March, 1920, an indictment was returned in the superior court of the state of California, in and for the county of Sacramento, charging the petitioner with the crime of perjury, alleged to have been committed by said petitioner in said court on or about the 12th day of January, 1920, upon his examination on voir dire as to his competency to serve as a juror in a certain cause then and there pending. Upon such examination the petitioner was asked the following questions and gave the following answers, to wit:

"Q. And if you are chosen as a juror in this case, you will try this case solely upon the evidence produced in court, and the instructions of the court? A. Yes, sir. Q. Nothing outside of the case—that is, outside of the evidence and the instructions of the court—will enter into your deliberations when you go into the jury-room? A. No, sir."

The indictment then sets forth allegations such as are required in charging the crime of perjury—the falsity of the answers, the knowledge thereof of the petitioner, etc.

[1] The petitioner contends that the indictment charges no public offense and that perjury cannot be predicated upon false statements given by a prospective juror, or upon his voir dire examination. The argument in support of this contention is based upon the cases having to do with promissory oaths. By section 118 of the Penal Code it is provided that—

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

The petitioner in this case had administered to him an oath in substance as follows:

"That you will true answers make to such questions as may be propounded to you by court or counsel touching your competency to act as a trial juror in the cause now pending," etc.

This oath is in substance, if not in form, the same oath that is administered to a witness testifying in either civil or criminal causes pending in any of the courts of the state. The crime charged to have been committed by the petitioner was not after having been "sworn to well and truly try the cause and a true verdict render according to the law and the evidence," etc., but when he was sworn to tell the truth. The misapprehension in this case arises from the failure to draw the distinction between the two oaths. The oath of the juror to well and truly try a cause is admittedly promissory in its nature, but the oath of a prospective juror on his voir dire examination binds him, under the pains and penalties of perjury, to truthfully answer the questions that may be propounded to him by either court or counsel.

The language of section 118 of the Penal Code is certainly broad enough to include the offense of perjury when committed by a prospective juror upon his voir dire examination, and to hold otherwise would certainly be to open the door wide to all forms of collusion in the selection of jurors, if false answers knowingly and corruptly made under such circumstances can be given with impunity. In Hilliard v. State, 82 Tenn. (14 Lea) 648, a prospective juror was held to have committed perjury upon giving a false answer to the following question:

"Have you formed or expressed any opinion as to the guilt or innocence of the defendant?"

In that case the oath administered upon voir dire was practically the same as administered in the case now under consideration. In State v. Howard, 63 Ind. 502, it was held that an indictment for perjury might be predicated upon alleged false swearing given by the defendant while being examined under oath as to his competency to sit as a juror on the trial of a cause. To the same effect is the case of Finch v. United States, 1 Okl. 396, 33 Pac. 638.

It does not appear that this question has heretofore been expressly decided by the Supreme or Appellate Courts of this state. In the case of Ex parte Meyer, 40 Pac. 953[1] the

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 107 Cal. 17.

Digitized by Google

petitioner was held to answer upon a charge of having falsified his oath under similar circumstances but the question of whether perjury could or could not be so committed was not decided. The petitioner was discharged for other reasons.

[2] The contention that the crime charged is difficult or impossible of proof does not seem to require any consideration upon this proceeding. Being of the opinion that the charge of perjury may be based upon false swearing by a prospective juror upon his voir dire examination and that for the purposes of this petition the indictment herein is in all other respects sufficient it follows that the writ prayed for herein should be denied; and it is so ordered and the petitioner remanded.

We concur: BURNETT, J.; HART, J.

DOLAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 3442.)

(District Court of Appeal, First District, Division 2, California. April 28, 1920.)

1. Judgment ⟸337—Motion to vacate for inadvertence must be filed under Code Civ. Proc. § 473.

A motion to vacate a judgment because entered through inadvertence cannot be made under Code Civ. Proc. §§ 663, 663a, allowing motion to vacate because the conclusions of law were not consistent with nor supported by the findings, but such motion must be made under section 473, permitting relief from judgments entered through inadvertence or excusable neglect.

2. Courts ⟸114—Can correct record by entry of order nunc pro tunc.

The court can always correct its minutes so that they shall speak the truth, and therefore can enter nunc pro tunc an order submitting motion for new trial which was inadvertently not entered on the day made.

3. New trial ⟸155—Order held to show granting on date of entry which was too late, and not date nunc pro tunc, which was in time.

On order, reciting that the submission of the motion for new trial was inadvertently not entered, and further ordering that the motion be granted, and that the order granting it be entered as of a prior date, shows that the order granting the motion was made on the date of the order, not on the prior date stated for its entry, so that it was too late, where more than three months had elapsed from notice of judgment, and the motion must be deemed denied under Code Civ. Proc. § 660.

4. Certiorari ⟸58—Affidavits contrary to record cannot be considered.

On certiorari to review an order granting new trial, which showed it was made too late, an affidavit of counsel that the order was in fact made on an earlier date cannot be considered, where the respondent court and judge stand upon the order, especially where another order, made at the same time, shows that the new trial was granted on that date, and not on an earlier date.

5. Judgment ⟸397—Cannot without notice set aside for inadvertence order of vacation previously entered.

A court cannot without notice to the parties, set aside on the ground of inadvertence an order previously made, which granted a motion to vacate a judgment.

6. Judgment ⟸397—Vacating because conclusions are not supported by findings without new judgment is void.

Under Code Civ. Proc. § 663, authorizing the court to vacate a judgment because the conclusions of law are not supported by the findings or are inconsistent with the findings, and requiring entry of a proper judgment, an order granting a motion to vacate a judgment on that ground, but containing no direction for a new judgment, is void.

7. Judgment ⟸340—Void order can be set aside whenever it comes before court.

A void order can be set aside whenever it comes before a court.

Application for certiorari by Margaret Catherine Dolan against the Superior Court of the State of California in and for the City and County of San Francisco and Hon. George A. Sturtevant, Judge thereof, and another, to review orders granting a new trial and vacating a judgment. Orders annulled.

Raine Ewell, of San Francisco, for petitioner.

Jos. L. Taaffe, of San Francisco, for respondents.

BRITTAIN, J. The petitioner, wife of William Lawrence Dolan, joined as one of the respondents here, was granted an interlocutory decree of divorce on the ground of extreme cruelty. By the decree certain provision as made for the maintenance of four minor children, and certain community property was set aside to the wife. The decree also determined that other real property, the title to which it is averred stood of record in the name of the wife, was her separate property. The decree was made and entered on November 14, 1919, and thereafter on November 28, 1919, notice of motion for new trial was served and filed. On the same day a single notice of motion to vacate the judgment was served. Two grounds were specified, the first being that the conclusions of law were not consistent with, nor supported by, the findings; and the second, that the findings were signed inadvertently, in that they were not first presented to the defendant or his counsel.

[1] A motion to vacate the judgment, bas-

Digitized by Google

ed on the first ground, was permissible under sections 663 and 663a of the Code of Civil Procedure. Those sections do not provide for setting aside a judgment on the ground of inadvertence. Relief from judgments entered through inadvertence, surprise, or excusable neglect must be sought by a motion made under section 473 of the Code of Civil Procedure. The record here does not show what the moving papers were, nor what showing was made when the motions were presented.

Both motions, together with a cross-motion for additional attorney's fees, were presented to the court on January 30, 1920, the case having been transferred from the department of the superior court in San Francisco, where it was first tried to another department presided over by a different judge.

The minute order made on January 30, 1920, did not mention the presentation or submission of the defendant's motion for a new trial. It stated that the defendant's motion to vacate the judgment was submitted and taken under consideration, and that the plaintiff's motion for counsel fees was similarly submitted. On February 13, 1920, a minute entry was made. It recited that, the court having considered and being fully advised concerning defendant's motion to vacate the judgment, it is ordered that the motion be granted as to the property rights of the parties. If the court had considered that motion as one made pursuant to section 473 of the Code of Civil Procedure on the ground of inadvertence in the signing of the findings, the order would necessarily have set aside the entire judgment. Since it was limited to that portion of the judgment relating to the property rights, it must have been considered by the trial court as having been made under sections 663 and 663a of the Code of Civil Procedure. It is to be noted that this order did not direct the entry of any other judgment. It was also ordered that plaintiff's motion for counsel fees be denied. There was no reference to the motion for new trial.

On February 25, 1920, two minute orders were made, the first reading:

"It appearing to the satisfaction of the court that the order heretofore made herein on the 30th day of January, 1920, to wit, submitting the defendant's motion for a new trial having been inadvertently not entered, it is by the court ordered that the entry of said order be made this day nunc pro tunc, as of the 30th day of January, 1920. And it is further ordered that said defendant's motion for a new trial be, and the same is hereby, granted as to the property rights of the said parties to the said action, otherwise said defendant's motion stands denied, and it is further ordered that said order be entered this day nunc pro tunc as of February 13, 1920."

[2] The first clause of this order was clearly within the power of the court, which may always correct its minutes so that they shall speak the truth. Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194.

[3] Assuming that there was a mere ministerial inadvertence in omitting the order of submission of the motion for a new trial, it does not appear that the judicial function of determining that motion was exercised in any way until February 25, 1920. This was more than three months after the service of notice of the entry of the judgment on November 19, 1919. The failure of the court to determine the motion for a new trial before the expiration of the statutory period had the effect of a denial of the motion. Code Civ. Proc. § 660; Estate of Waters (Sup.) 185 Pac. 951; San Francisco, etc., Rys. v. Superior Court, 172 Cal. 544, 157 Pac. 604.

[4] It is stated in the affidavit of the attorney for the respondent, Dolan, that on February 13, 1920, the court made and gave its order granting the motion for a new trial as to the property rights of the parties. This statement contradicts the order of February 25. If the trial court in fact made the order granting the new trial on February 13, and by the later order sought only to correct the inadvertence of the clerk, it would no doubt have said so, as it did in regard to the order of submission, and it would not in terms and by the most apt language have made a new order granting a new trial, nor ordered the new order to be entered nunc pro tunc. On certiorari this court is bound by the record, particularly when, as here, the respondent court and judge stand upon it. City of Los Angeles v. Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; Borchard v. Board of Supervisors, 144 Cal. 14, 77 Pac. 708. Upon the record before this court it is concluded that the order of February 25 in so far as it purported to grant a new trial on certain issues was beyond the jurisdiction of the superior court and void. The motion for a new trial was terminated by the expiration of the time limited for its consideration.

What has been said concerning the ineffectiveness of the affidavit to contradict the record certified gains force in considering the effect of another order made on February 25. It is as follows:

"It appearing to the satisfaction of the court that the order heretofore made and entered on the 13th day of February, 1920, to wit, granting the defendant's motion for an order vacating the judgment and decree heretofore entered herein, and based on the findings of fact made by said court as to the property rights having been inadvertently made, it is by the court ordered that said order be, and the same is hereby, vacated and set aside, and it is further ordered that said defendant's motion * * * be and the same is hereby denied, and it is further ordered that said order be entered this day nunc pro tunc as of February 13, 1920."

A reading of this order in connection with the order purporting to grant a new trial

Digitized by Google

can leave no doubt upon the question concerning what orders were made on February 13, nor that when the court reconsidered them on February 25 the judge concluded and quite clearly stated that he made the order vacating the judgment, and did not make the order granting a new trial on February 13, although he may have intended to do just what he attempted to do on February 25.

[5] Because of the action of the trial court in making the order purporting to vacate the order setting aside the judgment in part, it is deemed proper for the information of the trial court and of counsel to state the views of this court in regard thereto, in order that there may be no misconception of the effect of this decision. The second order purporting to set aside the order vacating the judgment was invalid if the first order be considered as having any effect. Assuming the validity of the first order, it was subject only to be set aside on appeal or under proper proceedings under section 473 of the Code of Civil Procedure. After a court has acted judicially it may not seek to correct its own errors by changing its judgments and orders without notice to the parties affected. Such action would very shortly deprive all judgments of their character of finality. Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306, 416; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Holtum v. Grief, 144 Cal. 521, 78 Pac. 11; United Railroads v. Superior Court, 170 Cal. 760, 151 Pac. 129, Ann. Cas. 1916E, 199; Gill v. Peppin, 182 Pac. 815. If the order was improvidently made, upon a proper showing and on notice it may be set aside, but the court cannot without notice and upon no showing justify a review of its own judicial act by a mere recital that it made the first order inadvertently. In this case there does not appear to have been either notice given the petitioner of the contemplated action of the court or any showing of inadvertence other than that the trial court determined on second thought that it was in error when it first acted. If the first order was a valid exercise of the power of the court, under section 663 of the Code of Civil Procedure the second order was beyond the jurisdiction of the court.

[6] The validity of the order vacating the judgment depends upon whether or not it is within the powers defined in sections 663 and 663a of the Code of Civil Procedure. Without the decision it is impossible to determine whether this objection to the judgment was well taken or not, and in support of the action of the trial judge, for the present purpose it must be assumed that it was. It does not follow, however, that the order vacating the judgment was within the jurisdiction of the trial court. Section 663 of the Code of Civil Procedure provides that a judgment may be set aside and another and different judgment entered when the findings do not support the conclusions of law, and, that when the judgment is set aside, the conclusions of law shall be amended and corrected. Code Civ. Proc. § 663. The notice of motion is required to specify the particulars in which the conclusions of law are not consistent with the findings, and an order granting the motion may be reviewed on appeal. Code Civ. Proc. § 663a. These Code provisions are consistent with the rule that litigation must not be piecemeal. If the original judgment is correct, the party in whose favor it was is entitled to have it enforced, and if it is not supported by the findings, the other party is entitled to have another and correct judgment entered. In either case the loser is given the right of appeal. The Code sections do not permit two motions to be made, nor two orders, one setting aside the judgment, and another at a later day directing the entry of a different judgment. If on the motion it appears to the court that the findings require the judgment to be set aside, it must also appear what conclusions of law should be made on the facts, and the only order within the power of the court under these circumstances is one setting aside the judgment and directing as a part of the same order the entry of another judgment. It is from such an order only that an appeal is provided. An order merely setting aside the judgment and leaving the case undetermined is void and not merely erroneous. Any other rule might lead to interminable delays and the loss of important rights by litigants. On such a motion the court has no power to consider or determine any matter except what judgment should be entered upon the facts as found. Swift v. Occidental, etc., Co., 141 Cal. 166, 74 Pac. 700; Dahlberg v. Girsch, 157 Cal. 325, 107 Pac. 616; Hole v. Takekawa, 165 Cal. 372, 142 Pac. 445.

[7] A void order may be swept aside whenever it comes before a court, and the order vacating the judgment without directing what judgment should be entered was such an order. Upon the present state of the record the original judgment stands unaffected by the subsequent proceedings, unless it be modified or set aside on appeal or in some other way permitted by the statutes.

The order granting the new trial and the order vacating the judgment respectively are annulled.

I concur: LANGDON, P. J.

Justice NOURSE, having rendered the judgment attacked in the proceeding herein reviewed, does not participate in the decision.

Digitized by Google

KINDERMAN v. SHIPLEY. (Civ. 2678.)

(District Court of Appeal, Second District, Division 2, California. April 30, 1920.)

1. **Judgment ⟸714(3)—Judgment for landlord in action defended on ground of breach of lease held conclusive.**

Judgment for landlord in action for one month's rent in which tenant defended on ground that landlord had wrongfully closed up entrance, thereby breaching lease and entitling tenant to vacate premises, was conclusive in subsequent action for accrued rentals under such lease, in which tenant pleaded the closing up of such entrance as a defense and by way of counterclaim for damages.

2. **Judgment ⟸714(1)—Judgment conclusive in subsequent action between same parties involving same question.**

A former judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question.

3. **Appeal and error ⟸766—On appeal under alternative method failure to print portions of record held not to warrant dismissal of appeal.**

On appeal under the alternative method, appellant's failure to print in her brief or in a supplement thereto such portions of record as she desired to call to the court's attention did not warrant dismissal of the appeal, under Code Civ. Proc. § 953c, as amended by St. 1919, p. 261, since court finds it preferable to examine the typewritten record rather than require a supplement to be prepared.

Appeal from Superior Court, Los Angeles County; Louis Myers, Judge.

Action by S. Kinderman against Virginia Shipley. Judgment for plaintiff, and defendant appeals. Affirmed.

E. V. Chavez, of Los Angeles, for appellant.

J. J. Wilson, L. A. Lewis, and Haas & Dunnigan, all of Los Angeles, for respondent.

SLOANE, J. The plaintiff brought this action to recover from the defendant $940 accrued rentals under a lease by plaintiff to defendant of a rooming house in the city of Los Angeles. Defendant admitted the execution of the lease, and that the rental was unpaid, but denied liability, and sought to recover damages upon her counterclaim. The defense and cross-action is based upon the alleged fact that after the execution of the lease for a term of years the plaintiff closed up one of the main entrances to the premises from the public street, thus greatly reducing the value of the use of the premises, and destroying the profits of defendant's leasehold.

On the trial before a jury the court instructed the return of a verdict for plaintiff, and against the defendant on her counterclaim, upon the introduction of the judgment roll in a former action between the same parties, upon the same lease, and in which the same facts were pleaded by way of defense, with findings and judgment against the defendant.

The sole question presented on this appeal is as to the correctness of the holding of the trial court that the issue of fact raised by defendant's answer and cross-complaint was res judicata.

The former action was brought in a justice's court to recover one month's rent under the lease for the sum of $90. Judgment was against the defendant, who appealed to the superior court, and a trial de novo was there had. The issue raised by the answer was pleaded as follows:

"(2) Defendant, further answering and for defense herein, alleges that at the time said agreement was entered into and she took possession of said premises from North Main street, which was the main entrance to the same, the same being designated as No. 337 No. Main street, as set out in said agreement, which fact was the reason for defendant entering into said agreement, but that after defendant had so entered into said agreement and had taken possession of said premises, and against the will and protests of said defendant, said entrance was wrongfully closed up and taken out by plaintiff or his lessor, which was a breach of the conditions of said agreement, and said entrance was made into a store on the ground floor and rented to other parties.

"(3) That the defendant depended and relied in entering into said agreement entirely upon the fact that the said premises had said entrance to said Main street; the other entrance to same to New High street being obscure and in the rear of said building.

"(4) That by reason of said Main street entrance having been so abandoned and taken out, the said agreement became forfeited, inoperative, and void, and the defendant became greatly damaged, and the said premises became entirely worthless and ruined and worthless for the purpose for which the same were leased, and that by reason thereof defendant did, and was compelled to vacate and surrender the same to plaintiff."

In its decision against defendant the superior court found that prior to the negotiations of the lease in question there had been an entrance to the premises in question as alleged by defendant, but that during the negotiations leading up to the execution of the lease such entrance to the premises was being closed, and that certain employés of the plaintiff were engaged in closing up this entrance and removing the stairway leading from Main street into the said premises; that prior to the time of the execution of said lease the entrance had been closed and abandoned, and the stairway removed; that in the execution of the lease the parties to the lease, being the plaintiff and defendant, contemplated and understood that there was to

Digitized by Google

be no entrance to said premises from Main street; and that at the time the lease was executed and defendant entered into possession of the premises there was no entrance from Main street. The court, further found that the allegations of paragraphs 2, 3, and 4 of the answer herein set forth were untrue, and that the defendant, with full knowledge that said entrance did not exist, and for the purpose of ratifying the lease, caused the lease to be acknowledged, and thereafter placed it of record in the records of Los Angeles county. The defendant thereafter abandoned the premises and defaulted in all further payments of rent, and this action was brought some two years later by the plaintiff to recover damages in the sum of $940 for breach of the covenant to pay rent. The defendant, by way of defense and counterclaim, set up, in substantially the same language as in the defense to the former action, the facts there alleged as to the existence and subsequent closing of the Main street entrance, and claimed damages in the sum of $17,700.

[1, 2] We think it is clearly apparent that the defendant is estopped by the former decree and judgment from setting up this defense and cause of action on counterclaim. It is true that the relief sought here by defendant is not precisely the same as in the former action, but the right of defendant to relief depends upon precisely the same issue of fact that was tried in the former case and determined adversely to defendant's contention. The question of debarring defendant's right to plead a counterclaim in the present case because of not having presented such claim in the former trial is not involved. It is merely that the issue of fact which she now relies upon for her defense and recovery of damages has heretofore been tested and adjudged untrue in a trial by a competent court between the same parties; and the law declares that as between the parties that question was settled once for all. "A former judgment between the same parties is conclusive not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question." Bingham v. Kearney, 136 Cal. 177, 68 Pac. 597; Southern Pac. Co. v. Edmunds, 168 Cal. 418, 143 Pac. 597; Curtis v. Upton, 175 Cal. 331, 165 Pac. 935; Koehler v. Holt Mfg. Co., 146 Cal. 337, 80 Pac. 73. The last case cited is particularly in point on the issue here.

[3] Respondent calls attention to the fact that this appeal is brought under the alternative method, and that the appellant has failed to print in her brief or in a supplement thereto such portions of the record as she desired to call to the attention of the court. Such omission, under the amendment of 1919 to section 953c of the Code of Civil Procedure, does not permit of a dismissal of the appeal; and we find it preferable to examine the typewritten record rather than require a supplement to be prepared.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

PEOPLE v. COTA. (Cr. 702.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1920.)

1. Criminal law ⟸535(2)—Evidence aside from confession held to show entry in nighttime.

Evidence that the entry was effected between 8 in the evening and 8 the following morning, and that accused at 11 in the evening had property in his possession similar to that taken, *held* sufficient to establish the corpus delicti of burglary in the first degree, so that defendant's admission that he committed the crime between 10 and 11 in the evening was competent.

2. Criminal law ⟸1172(6)—Instruction allowing conviction of burglary on proof of intent not charged in indictment held not prejudicial.

In the prosecution for burglary in the first degree, an instruction defining burglary in the language of Pen. Code, § 459, as entry with intent to commit larceny or any felony was not prejudicial, though the information charged entry to commit larceny only, where there was no evidence to show intent to commit any other felony than larceny.

3. Burglary ⟸46(1)—Instruction as to first degree burglary held correct.

An instruction that the information charged burglary in the first degree, that before jury could convict they must be satisfied beyond reasonable doubt that he was guilty as charged in the information, and that they could not convict of burglary in the second degree was a carefully drawn instruction for the protection of defendant's rights, of which he cannot complain.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Joe E. Cota was convicted of burglary in the first degree, and he appeals. Affirmed.

W. P. Butcher, Jr., of Santa Barbara, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SHAW, J. Defendant appeals from a judgment of conviction had upon an information wherein he was charged specifically with the commission of the crime of burglary in the first degree.

Digitized by Google

The subject of the theft was a quantity of liquor, consisting of wine and whisky contained in bottles and demijohns, taken from the wine cellar, the door of which was locked, which cellar was situated in the basement of a residence owned by Mr. Gould, entry to which was had by the breaking of a window and the lock on the door of the wine cellar.

One of the essential elements of the crime charged is that it was committed in the nighttime, which in this case was the time between the hour of sunset at 4:54 p. m. on December 2d and the hour of sunrise at 6:46 a. m. on December 3d.

[1] Evidence of statements made by the defendant wherein he admitted his participation in the crime, which, he stated, was committed between 10 and 11 o'clock p. m. on the night of December 2d, was received over defendant's objection, and this ruling is assigned as error. His contention is that the reception thereof was not preceded by proof of the corpus delicti, namely, that the crime was committed in the nighttime, and without which the evidence was not admissible. People v. Vertrees, 169 Cal. 404, 146 Pac. 890; People v. Tapia, 131 Cal. 651, 63 Pac. 1001; Gray v. Commonwealth, 101 Pa. 380, 47 Am. Rep. 733. Conceding that it devolved upon the people to show by independent evidence and beyond a reasonable doubt that the specific crime charged was committed (People v. Smith, 136 Cal. 207, 68 Pac. 702), as a condition of admitting the confession in evidence, we think such fact was established. It was made to appear by testimony of the caretaker of the place, who lived in a house about 100 yards from the Gould residence, that the crime was committed between the hours of 8 o'clock p. m., December 2d, and shortly before 8 o'clock a. m., December 3d, at which latter time he discovered the broken window to the basement, together with the fact of the theft, and, following tracks leading from the window, he found in a hedge of trees a number of bottles containing liquor, which bottles were similar to those contained in the cellar. On the night of December 3d the sheriff stationed himself near the cached liquor, and about 10:30 o'clock defendant appeared with a sack under his coat, when he was arrested. It also appeared from the testimony of another witness that between 10 and 11 o'clock on the night of December 2d the defendant, accompanied by another party, came to his house and left some demijohns of whisky, which demijohns were identified as being similar to those which the caretaker had assisted in taking to the basement of the residence, in addition to which the caretaker testified in direct terms that the entry was made and the goods taken between sunset and sunrise; and, conceding that his evidence upon this point was shaken by his testimony on cross-examination to the effect that he was not out of his house, some hundred yards from the residence so entered, between the hours of 8 o'clock p. m. and 8 o'clock a. m., on said days, and there was an interval of an hour and a quarter of daylight, nevertheless we think the evidence and the inferences fairly deducible therefrom were sufficient to establish beyond a reasonable doubt that the offense was committed as charged. People v. Stevens, 68 Cal. 113, 8 Pac. 712; People v. Schafer, 161 Cal. 573, 119 Pac. 920. This being true, it follows that the court did not err in admitting the evidence of defendant's confession, which, if true, shows conclusively that he was guilty of the commission of the crime.

[2] In defining burglary, the court, in its instruction, used the language of section 459, Penal Code, that—

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or pettit larceny or any felony is guilty of burglary."

Appellant argues that by this instruction, notwithstanding the charge in the information was that of entering the house with the intent to commit larceny only, the jury was authorized to convict defendant if they found he had entered the house with intent to commit any felony, and hence it was error. People v. Mulkey, 65 Cal. 501, 4 Pac. 507; People v. Young, 65 Cal. 225, 3 Pac. 813; Williams v. State, 53 Tex. Cr. R. 2, 108 S. W. 371. Conceding this to be true, nevertheless, for the reason that no evidence other than that pertaining to the offense charged was offered, defendant could not have been prejudiced by reason of the error.

[3] The court instructed the jury that—

"The information charges burglary in the first degree, and before you can convict the defendant you must be satisfied from the evidence to a moral certainty and beyond a reasonable doubt that he is guilty as charged in the information, to wit, of burglary in the first degree, committed at the place charged in the information and between sunset on December 2, 1919, and sunrise on December 3, 1919. You cannot in this case render a verdict of burglary in the second degree."

It would be difficult to conceive of an instruction prepared with greater care, and having for its purpose the protection of defendant's rights, than the one quoted; and it is impossible to understand, even in the light of appellant's argument, any ground whatsoever for the attack thereon.

Other alleged errors predicated upon rulings of the court in permitting the district attorney, over defendant's objection, to ask leading questions of one witness, and its rul-

Digitized by Google

ings in admitting hearsay testimony as to ownership of the house where the crime was committed, and also error predicated upon assignments of misconduct of the district attorney in his argument of the case to the jury, are not of sufficient merit to warrant consideration.

As a whole, the character of the evidence presented by the record is such that the jury could not properly have reached a verdict other than that rendered, and no errors are shown which could possibly have resulted in a miscarriage of justice. Section 4½, art. 6, Const.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

UNIVERSAL FILM MFG. CO. v. KERRIGAN. (Civ. 3151.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1920.)

Appeal and error ⇐123—New trial ⇐163(2)—Judgment held essential as basis for appeal; grant of new trial as to damages vacates judgment.

In an action for breach of contract for personal services, where a motion for new trial was granted as to issues presenting the amount of damages and denied as to all other issues, an appeal by defendant from the whole of the judgment, except the portion vacated by the order granting a new trial, will not lie; the order for retrial as to damages necessarily setting aside the judgment, so that there was no basis for appeal.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Universal Film Manufacturing Company against J. Warren Kerrigan. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Ray L. Chesebro and Edward Winterer, both of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

CONREY, P. J. Action to recover damages for breach of contract to render personal services. Defendant denied that he entered into the alleged contract; also denied the alleged breach of contract, and denied that plaintiff was damaged thereby. There were further issues, including those presented by cross-complaint and the answer thereto. After entry of judgment against defendant for a stated amount, the defendant gave notice of intention to move the court "to vacate and set aside the decision and judgment" entered, and to grant a new trial of the action. that motion having been presented in due course, it was ordered that—

"Said motion for a new trial herein is granted, and a new trial is ordered as to issue or issues presenting the question of the amount of damages suffered by the plaintiff; as to all other issues the motion for a new trial is denied."

Thereafter the defendant gave notice of appeal—

"from the whole of the said judgment, except the part and portion thereof vacated by the order of the said court in granting in part defendant's motion for a new trial, to wit," etc.

Although the appeal has been presented by briefs arguing the case on its merits, the court is forced to take notice of the fact that there is no judgment, and therefore there can be no appeal therefrom. The order for retrial of the issue as to amount of damages, necessarily set aside the judgment. This is an action at law, wherein the judgment is single and indivisible, for it consists of only the one order that the plaintiff recover from the defendant so much money. Taking out that recovery, nothing effective as a judgment remains in existence.

In arriving at this conclusion, we have not excluded from consideration those decisions by which it has been determined that an order granting a new trial does not absolutely vacate the judgment until the order has become final. Sherwin v. Southern Pacific Co., 168 Cal. 722, 145 Pac. 92, and cases cited. We also have in mind the amendments enacted in 1915 (St. 1915, pp. 209, 328) to certain sections of the Code of Civil Procedure, whereby the right of appeal from an order granting a new trial, in cases tried as was the case at bar, was taken away, and whereby it was provided that on appeal from the judgment, the court may review any order on a motion for a new trial. Sections 956, 963, Code Civ. Proc.

In this case the defendant has sought to accept the benefit of the order to the extent that it granted him a new trial of the issue as to damages. To that extent the order has become final, for any claim of right to have it reviewed—assuming that any such claim could be asserted by defendant—has been expressly excluded by the terms of the notice of appeal. But it is a necessary incident to the finality of the order, to the extent that it provided for a new trial, that the whole judgment was set aside, because the specified issue could not be tried after judgment and while the judgment remained in force.

It is true that certain findings of fact have been left undisturbed. When the issue selected for retrial has been tried, and findings thereon have been made, and a new judgment entered, the appeal, if any be taken,

Digitized by Google

will come as an appeal from that judgment, and may include a review of the entire record.

The appeal is dismissed.

We concur: SHAW, J.; JAMES, J.

EDGE v. BRYAN et al. (Civ. 3204.)

(District Court of Appeal, Second District, Division 2, California. May 1, 1920.)

1. Fraud ⟸11(1)—Vendor's representation as to improvements held one of fact.

Representation by the seller of land that gas pipes were already upon or under it *held* representation of an existing fact within the law of fraud.

2. Fraud ⟸11(1) — Vendor's representation land was virgin soil one of fact.

For the seller of land to state that it was virgin soil was to make a representation of fact and not opinion, where, on being asked what virgin soil meant, he stated that it had been a sheep pasture and never cultivated.

3. Fraud ⟸11(1)—Seller knowing buyer relies on representation cannot assert it was opinion.

Where the buyer relies on representations of the seller without relying on his own judgment or opinion, which the seller knows, the seller cannot shelter himself under the pretense that his representation was a mere expression of opinion.

4. Fraud ⟸20, 25—Reliance on representations and damage thereby essential.

A buyer of land under false representations cannot recover from the seller on their account unless she believed the representations to be true and relied upon them to her damage.

5. Fraud ⟸49—Evidence held properly excluded as not within issues.

In an action by the buyer of land against the seller for false representations as to the character of the soil, in absence of allegations setting up the defense, evidence offered by the seller to prove that during a certain period the land which was not under cultivation was covered with barley stubble, *held* properly excluded.

6. Appeal and error ⟸1033(3)—Exclusion of evidence favorable to the other party harmless.

Where evidence offered by defendants and excluded would have supported plaintiff, the exclusion was harmless to defendants, and they cannot complain.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Hannah Edge against E. P. Bryan, L. T. Bradford, H. H. Cotton, and others. From judgment for plaintiff, the named defendants appeal. Affirmed.

W. W. Butler, of Los Angeles, for appellants.

William M. Morse, Jr., and Sam B. Dannis, both of Los Angeles, for respondent Hannah Edge.

Wheeler & Sweet, of Los Angeles, for respondent A. C. Harper.

THOMAS, J. Appeal from a judgment of the superior court by the defendants E. P. Bryan, L. T. Bradford, and H. H. Cotton, entered against them and in favor of the plaintiff, for the sum of $2,669.84. The complaint alleged facts which, if true, would support a rescission of the contract referred to therein and a recovery of damages claimed, if proven. Demurrer to the complaint was interposed, general and special, and by the court overruled. The answer of the defendants denied generally and specifically all the material allegations of the complaint.

The complaint for the relief asked was based upon certain alleged fraudulent representations made at the time of an alleged sale of real property, and which said alleged fraudulent representations, as set forth in the complaint, are as follows:

"(1) That gas pipes were already upon or under said land; (2) that said land was virgin, rich, and arable; (3) that before the completion of the contract of purchase water would be piped by the defendants to every acre of said land; and (4) that before the completion of said contract defendants would build in the subdivision, at a point convenient of access to the land purchased by plaintiff, a warehouse for the storing and marketing of the respective products of said land; that said representations, facts, and promises were a part of the consideration which induced the plaintiff to enter into said memorandum or agreement of purchase."

Then follows the usual allegation that said representations were false, and by the defendants known to be false, specifically specifying the facts supporting this statement. The complaint further alleges:

"That said promises of defendants were false and fraudulent, and were made without any intention to perform the same or to carry out any of the terms of said promises, and for the sole purpose of inducing plaintiff herein to enter into said purchase;" that plaintiff believed said statements to be true; and that so believing she entered into said contract, etc.

It is assumed by appellants, for the purpose of their argument on this appeal, and this assumption is supported by the record, that plaintiff's proof sustains her allegations as to both the representations and the promises. They urge passionately, notwithstanding this fact, that—

"As a general rule it is established that representations, to be actionable, must be of an existing fact or present condition, and not as to

Digitized by Google

future intention," and "must have been made without intention to perform."

There is no legal requirement that all such statements must be false. They also urge that—

"It is apparent, therefore, that the time when the alleged promises of defendants were to be performed has not arrived, because the promises were of things to be done before the completion of the contract, and the contract has never been completed;" hence, no cause of action can be maintained under such circumstances.

[1] If this were the question with which we are confronted we could readily concede the correctness of the contention. Among others of the allegations of the complaint we find that it was represented "that gas pipes were already upon or under the land," and that the land was "virgin, rich, and arable." Certainly, the first of these alleged representations is of an existing fact. It is also one which, according to the evidence and the concession of appellants, was at the time it was made untrue. Plaintiff testified that she did not know what was meant by the phrase "virgin soil." We think it immaterial as to what construction the courts have placed upon, or what definition may have been given by any authority of, the phrase "virgin soil."

[2, 3] There can be no question, we think, when that phrase is construed in the light of the evidence here, but that it was an expression of fact, and not one of opinion; for the evidence shows that the defendants not only said that the land was "virgin," but that, on being asked what "virgin soil" meant, said that it "had been a sheep pasture and never cultivated." To convey the impression that the land was "virgin," under the facts alleged, proven, and found by the trial court to be true, was a representation of a fact, and not an expression of an opinion. Moreover, where, as in this case, "the vendee relies on the representations of the vendor, and acts upon the faith thereof, without relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representation was a mere expression of opinion, when it is discovered to be false." 12 R. C. L. 248. Indeed, we think the general modern tendency is to hold the vendor to a fairly strict accountability for his representations made in connection with such sales as that under consideration here. We have no difficulty in arriving at a conclusion on the first point urged by appellants.

[4] The second point presented is that, "assuming that the representations were not true, plaintiff must show that she believed them to be true and relied upon them"; while in the third place it is contended that "she must show that she was damaged by them." We are in full accord with appellants on both propositions, so far as this case is concerned. By a mere cursory perusal of the complaint and the evidence as disclosed by the record before us, it becomes manifest that plaintiff not only has alleged, but has brought herself squarely to the place where she is not vulnerable to, the objections raised.

[5, 6] It is next contended that the court erred in sustaining objections to certain evidence offered by defendants, which evidence tended to prove that during a certain period of time the land which was not under cultivation was covered with barley stubble, and as to whether defendants had themselves farmed this particular piece of land. As we have already seen, the answers of the defendants were general denials of the material allegations of the complaint. There was no such issue presented. The issue here was as to whether the alleged false representations had in fact been made. The objections were properly sustained. In the absence of an allegation setting up that defense, the evidence was properly excluded. In any event, to have overruled the objections, permitting the presentation of the proffered evidence, would not have changed the result of this case. On the contrary, it would have supported the plaintiff in her claim, for the reason that the evidence sought to be introduced would have been in direct conflict with defendants' statement that the land in question had never been cultivated. In such case defendants cannot complain.

We concur with the learned trial judge in his observation, when he said:

"In the mind of the court there is not a single meritorious contention on the part of the defendants. No court, in the discharge of its own duty, could permit transactions of the character involved herein to stand."

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

Digitized by Google

STOTT v. SOUTHERN SIERRAS POWER CO. (Civ. 2789.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Negligence ⟸121(2)—Presumption held overcome.

Where the bare circumstances of an occurrence as to the cause of which negligence is charged are shown if defendant by uncontradicted evidence clearly shows that he used the degree of care required of him under the circumstances, plaintiff must fail of recovery.

2. Electricity ⟸14(1)—Degree of care required in supplying current defined.

Persons engaged in the business of supplying electric current are required to use great care to see that injury to others is not caused thereby, for the agency involved is a dangerous one.

3. Electricity ⟸19(6)—Negligence question for court where facts are settled.

Whether a reasonable degree of care has been used by one furnishing electricity is a question of law for the court, wherever the facts are clearly settled and the course which common prudence dictates can be readily discerned.

4. Electricity ⟸19(5)—Evidence held not to show negligence in maintaining wires causing fire.

In an action against a power company for damages by fire caused by a short circuit when insulators sustaining high voltage electric wires carried on a pole cracked, evidence *held* to show the use of the degree of care required of defendant, and that a finding of negligence was erroneous.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by H. Stott against the Southern Sierras Power Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Isaac B. Potter and Newman Jones, both of Riverside (Henry W. Coil, of Riverside, of counsel), for appellant.

McNabb & Hodge, of San Bernardino, for respondent.

JAMES, J. Appeal by defendant. Plaintiff was awarded judgment in the sum of $500 as damages, which he alleged he had suffered because of the burning of a lot of hay. The burning of the hay was caused by fire, which originated on a pole belonging to the defendant corporation, which pole held wires carrying high voltage of electricity. Fire was communicated from the pole to some dry grass, and spread for a distance of perhaps half a mile, finally igniting the hay of the plaintiff. The fire was caused at the pole by a short circuit. Two insulators, which sustained one of the wires, which wire was carrying 33,000 volts of current, broke down, and the current, in its course to the ground and in overcoming the resistance offered by the pole, ignited the top of the latter. The wire did not fall to the ground, but remained suspended. Sparks from the burning pole were blown to the dry grass, with the result first indicated. The record shows no dispute to have been made as to the facts. Plaintiff on his part opened his case by showing the bare facts as to the causing of the fire and the amount of damage done. He called, as one of his witnesses, the superintendent of the defendant company, who testified on direct examination as to the wire construction at the pole which was burned. On cross-examination the witness was asked many questions relative to the care used in guarding against occurrences of the kind complained of; and at the conclusion of plaintiff's evidence a motion for judgment of nonsuit was made by defendant and denied by the court. One of the complaints here is that the court erred in denying this motion, because, as urged, the plaintiff had failed to establish any negligence on the part of the defendant. As the substance of all the evidence is before us, and the case presented is one where no actual conflict of testimony appeared, the question as to whether the court erred in its ruling on the motion for nonsuit need not be separately considered. The important point on this appeal is as to whether upon the whole evidence such a case was presented as authorized the court to make the findings, and enter the judgment appealed from.

Before entering into a more detailed statement of the particular facts shown in evidence, it may be stated that the position of respondent is that, having shown the circumstances attending the burning of the pole and the igniting of the grass and hay, he established, under the res ipsa loquitur rule, a prima facie case, and that the evidence of the defendant as to the care used in constructing and maintaining the defendant's lines furnished a case which should be considered as one presenting a conflict, and hence one which the trial court had the sole province of determining on the facts. Such is not the law as we understand it. The presumption which in certain cases is available to a plaintiff as showing, prima facie, negligence on the part of a defendant is one which in its practical application results only in shifting the burden of proof. "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the acci-

Digitized by Google

dent arose from a want of care." Shearman & Redfield on Negligence (6th Ed.) § 59.

[1, 2] So in cases where the bare circumstances of an occurrence as to the cause of which negligence is charged are shown, if a defendant by uncontradicted evidence clearly shows that he has used the degree of care required of him in the circumstances, the plaintiff must fail of recovery. In the first place, we think that it is now well established that persons engaged in the business of supplying electric current, the agency involved being a dangerous one, are required to use great care to see that injury to others is not caused thereby. Keasbey on Electric Wires (2d Ed.) § 241. To say that the care required to be used is proportionate to the dangerous agency being handled is to merely state the requirement in different terms. The question we ultimately reach in this case, and the question determinative of this appeal, is as to whether the defendant established by its evidence that it had discharged its obligation by properly constructing, installing and inspecting its power line. The question becomes a matter of law wherever the facts are clearly settled and "the course which common prudence dictates can be readily discerned." Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555. The following cases are also in point: Davis v. California Street Cable Ry. Co., 105 Cal. 131, 38 Pac. 647; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Fernandes v. Sacramento City Ry. Co., 52 Cal. 45. Conversely stated, the rule is that if, upon uncontroverted facts, reasonable deductions are suggested, both in the affirmative and negative of the question, then the decision of the court or jury must be taken as final.

[3] We are of opinion that the evidence in this case was clear and satisfactory to the point that the defendant had used that degree of care required of it in the circumstances, and that the judgment entered was erroneous. It was shown in evidence that the "short" which caused the fire was occasioned by the cracking or puncturing of two insulators mounted in series, one of which was attached to the pole and the other to the end of the current wire. The insulators were called strain insulators, and a loop wire was used to conduct the current over the pole and to the continuing wire on the other side, which was in like manner supported. These two particular insulators had been in use for at least four years. The testimony of the defendant was that they were the best known in the market, "the best that money could buy," and were those commonly and generally used by power companies; that the individual insulator had been tested to carry several times the voltage being conducted in the wires at the time; that a patrolman was employed by the company whose business it was to constantly patrol the power lines, and that he had traversed this line about four days before the "short" occurred; that he had not mounted the poles to inspect the insulators, but observed them from the ground to find whether they had become nicked or the wires loosened; that when any such defects were discovered report was immediately made; that insulators sometimes break down in the manner that the particular insulators here used did, and the current become shorted; that if an insulator cracked, the current would short; that it was impracticable to take down insulators and test them, because the current would have to be shut off from the wires and the business of the company interrupted if such were done; that even though an insulator should be taken off and subjected to a special test, it might crack within 30 seconds after being replaced upon the pole; that the fact that the particular insulators had remained in service four years would be an indication they were originally sound and sufficient in insulating properties; that when the "short" occurred which caused the fire the superintendent had almost immediate notice of it by the cessation of power on the line, and that the defect was found and remedied as soon as possible thereafter. The expert witness of the defendant testified that temperature changes would sometimes crack insulators, and that the day on which this "short" occurred was an unusually warm one, the thermometer registering in that vicinity about 117 degrees. The trial court evidently held the view that the law imposed upon the defendant practically the obligation of an insurer, rather than to use great care. In the opinion of the trial judge, which is printed in the record, the judge said:

"And the court is of the opinion that in the construction of its pole line the defendant has used the latest improved insulators and all other appliances known to the business in which defendant is engaged. In fact, it appears from the testimony that the defendant has exercised, not only due care, but the greatest of care in the construction of its line of poles and wires in the vicinity where the fire occurred."

[4] The conclusion indicated by the trial judge is not in accord with modern authority, as will be seen by an examination of the text in Mr. Keasbey's work, above cited; we have already stated the rule in that regard. The evidence, to our minds, clearly establishes without conflict that the defendant had discharged its obligation and exercised the full degree of care required of it.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

Digitized by Google

JUDNICK v. JUDNICK et al. (Civ. 3293.)

(District Court of Appeal, First District, Division 2, California. May 6, 1920.)

1. **Execution ⇐49—Judgment cannot be sold.**
A judgment cannot be sold under execution.

2. **Appeal and error ⇐115—No appeal lies from order vacating satisfaction entered by purchaser of judgment at execution sale.**
Since a judgment cannot be sold under execution, no appeal will lie from an order vacating the satisfaction of a judgment executed by the purchaser at an execution sale; such fact appearing from the face of the record.

3. **Appeal and error ⇐151(2)—Principals not aggrieved by judgment entered against sureties on stay bond.**
Defendants in an action could not appeal from a judgment against sureties on their stay bond, where they were not parties to the judgment on the bond, not being aggrieved thereby.

4. **Appeal and error ⇐154(4)—Sureties consenting to judgment against them cannot appeal.**
Sureties on a stay bond who consented to a judgment against them cannot appeal therefrom.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mary Judnick against Antone Judnick and others. Judgment in favor of plaintiff, and several appeals were taken. Appeals dismissed.

Walter J. Thompson and J. E. Manning, both of San Francisco, for appellants.

Daniel O'Connell, of San Francisco, for respondent.

BRITTAIN, J. Motions to dismiss two appeals. On December 6, 1918, judgment was entered in the superior court in favor of the plaintiff and against Judnick Bros., a copartnership, and Steve Judnick, for the sum of $900, interest and costs. Thereafter Antone Judnick, one of the firm of Judnick Bros., appealed from the judgment. Upon motion made on behalf of the plaintiff and respondent, the appeal from the judgment was dismissed by an order of this court on August 13, 1919, on which remittitur was filed in the superior court on October 14, 1919.

One of the defendants, Steve Judnick, on February 26, 1919, paid to the plaintiff $346 for release of one-third of the judgment. While the matter was pending in this court on appeal from the judgment, the defendants, or some of them, caused to be entered on the register of actions in the superior court under dates of July 24th and 28th a statement that a certificate of sale had been filed, satisfaction of judgment filed, judgment satisfied, and docket discharged. These entries were based upon the satisfaction of judgment executed by one Meurice Swim, described as "purchaser at sheriff's sale of judgment." The satisfaction recited that it was by "the undersigned purchaser of said judgment in the above-entitled action at an execution sale of said judgment had upon execution issued out of the superior court in the state of California in and for the city and county of San Francisco, in that certain action wherein Antone J. Judnick was plaintiff, and the said Mary Judnick and Frank Judnick were defendants, and which said judgment was rendered and entered on the 21st day of September, 1918, and which said action lastly hereinbefore referred to was and is known as and numbered 67350 in the records of said superior court." It appears that Frank Judnick was also one of the firm of Judnick Bros. The action in which the present appeals were taken was numbered 88965 of the records of the superior court. Judgment in favor of Antone Judnick and against Mary Judnick was for $16, and the sale of the judgment involved in these appeals was made for the sum of $20.

On December 23, 1919, on motion the superior court made an order vacating and setting aside the entries made by the clerk relating to the satisfaction of the judgment, and one of the two appeals is from that order. On January 6, 1920, judgment was entered against Frank O'Shea and Irvine O'Shea, sureties on a stay bond of April 17, 1918, staying execution on the original judgment.

While the record on these motions is not entirely clear, in opposition to the notice of motion an affidavit was filed by one of the attorneys for the defendants and appellants controverting immaterial matters stated in the affidavit in support of the motions, and no suggestion was made either in the affidavit or in any other way that the record on the motion was defective. On the oral argument counsel for both parties and the court proceeded on the statement that the defendants in the original action were the only appellants.

[1, 2] In regard to the appeal from the order vacating the satisfaction of judgment entered by the clerk, since the only right claimed was by a purchaser of the judgment at execution sale thereof, and this fact appears from the face of the record, the conclusion is reached that the order was not appealable for the reason that a judgment in this state cannot be sold under execution. Latham v. Blake, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417; Carpenter v. Lewis, 119 Cal. 18, 50 Pac. 925. The purchaser at the execution sale is not one of those author-

Digitized by Google

ised to satisfy the judgment of record, and this court has no jurisdiction of an appeal from the order vacating the entry of satisfaction.

[3, 4] The motion to dismiss the appeal of the defendants to the original suit from the judgment entered against the sureties on the stay bond must also be granted. They were not parties to that judgment, nor aggrieved thereby, and neither Frank O'Shea nor Irvine O'Shea, against whom alone the judgment was entered, appeal. The judgment against the sureties was in effect a consent judgment, and was therefore unappealable by the sureties. Erlanger v. S. P. Co., 109 Cal. 395, 42 Pac. 31; Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864; La Societe, etc., v. Beardslee, 63 Cal. 160. Since the persons against whom the judgment on the bond runs could not appeal, the original judgment debtors could not appeal from that judgment upon the theory that they were privies of the bondsmen.

Both appeals are dismissed.

We concur: CABANISS, Presiding Judge pro tem.; NOURSE, J.

ESPINOSA v. GOULD et al. (Civ. 3338.)

(District Court of Appeal, First District, Division 1, California. May 3, 1920. Hearing Denied by Supreme Court July 1, 1920.)

1. Appeal and error ⟨⟩616(2)—Affidavits used on motion must be authenticated by judge.

Affidavits used on motion must be identified and authenticated by the trial judge before they can be considered by the appellate court, and the certificate of the clerk cannot take the place of such authentication by the judge.

2. Appeal and error ⟨⟩659(3)—Application could not be made on appeal for order directing preparation of supplementary transcript.

An application by appellant, through a suggestion of diminution of the record, for an order of the appellate court directing the preparation of a supplemental transcript containing matters not brought up by reason of appellant's failure to give the proper notice to the clerk below, must be denied, as such relief, if it can be given at all, must be sought in the lower court.

3. Appeal and error ⟨⟩907(2)—Ruling of lower court assumed to be proper, in absence of evidence on which based.

Where the evidence on which an order refusing to change the place of trial was based does not appear in the record, the appellate court will assume, in the absence of any showing to the contrary, that the ruling of the court was proper.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Salvador Espinosa against George S. Gould, Jr., and others. From an order refusing to change place of trial, plaintiff appeals. Affirmed.

Z. B. Stuart and C. W. Byrer, both of Los Angeles, for appellant.

Claude F. Lacey, of Salinas, for respondents.

WASTE, P. J. This is an appeal by the plaintiff from an order refusing to change the place of trial. Plaintiff, theretofore adjudged to be an incompetent person, brought this action against his guardian and the other defendants, seeking to have the proceedings, whereby he was declared an incompetent, set aside as null and void, and praying for damages in the sum of $20,000 against defendants Manuel Espinosa and R. C. McComish.

The defendants demurred to the complaint, whereupon the plaintiff filed a motion for a change of place of trial, alleging in his affidavit accompanying the motion a belief that he could not have an impartial trial in the county wherein the action was brought, by reason of the alleged bias and prejudice of the people of the community against him, and an alleged personal dislike on the part of the trial judge. The latter filed a counter affidavit, in which he denied any prejudice or bias against the plaintiff, and alleged that he never had entertained and did not feel a personal dislike against him. The motion came on for hearing and was denied; the order of the court reciting, after the introductory portion:

"Documentary evidence is introduced, said motion is submitted to the court for consideration and decision without argument, counsel for respective parties stipulating that the testimony in case No. 6598 be considered as given herein, and the court denies said motion."

[1] The appeal is taken by the alternative method under section 953a of the Code of Civil Procedure. The only record brought here is the clerk's transcript, prepared on notice of the appellant. That notice specified, and the transcript contains, only the pleadings, notices, affidavit, and notice of motion by the plaintiff, notice of hearing, order of continuance, counter affidavit of the trial judge, and the order denying the motion for change of place of trial. It is certified to by the clerk of the court but not by the trial judge. It has long been settled, with regard to the affidavits used on a motion, that they must be identified and authenticated by the trial judge before they can be considered by the appellate court. The certificate of the clerk cannot take the place of the authentication by the judge. There is no other way in which the appellant can present

Digitized by Google

to us the affidavits on the motion in question. Waymire v. California Trona Co., 176 Cal. 395, 398, 168 Pac. 563. There is neither a bill of exceptions nor a transcript of the testimony offered or taken, or of the proceedings as authorized by said section 953a.

[2] The appellant has made application here, through a suggestion of diminution of the record, for an order of this court directing the preparation of a supplemental transcript, containing the matters not brought here by reason of his failure to give the proper notice to the clerk below. Such relief, if it can be given at all, should have been sought in the lower court (Estate of Keating, 158 Cal. 109, 113, 110 Pac. 109), and the motion is denied.

[3] What documentary evidence was introduced and used on the motion, or what the testimony was in case No. 6598, does not appear. Consequently we have a right to and will assume, in the absence of any showing to the contrary, that the ruling of the court was proper. Patterson v. Rutherford, 179 Pac. 704.

The order is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

PEOPLE v. CITY OF SAN BERNARDINO. (Civ. 2802.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Fines ⇐20—State Poison Act conclusive as to disposition of fines, notwithstanding inconsistent provision of charter; "municipal affairs."

Seventy-five per cent. of the fines imposed in the police court of city for violations of the state Poison Act is to be apportioned to the state under an express provision of such statute, notwithstanding charter provision requiring fines collected in the police court to be paid into city treasury, the poison act being conclusive, since it is a general statute defining state offenses and relating to state affairs, and not to municipal affairs, within Const. art. 11, §§ 6, 8, making city charter of conclusive effect as to municipal affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

2. Statutes ⇐114(1)—Title of state Poison Act held sufficient.

State Poison Act entitled "An act to regulate the sale of poisons in the state of California, and providing a penalty for the violation thereof," *held* sufficiently expressive of the contents of the act under the Constitution.

3. Limitation of actions ⇐34(2)—State's action against city for fines collected in police court is an action upon a liability created by statute.

State's action against a city for a portion of the fines collected in the police court for violations of the state Poison Act was not required to be brought within two years after accrual of cause of action under Code Civ. Proc. § 339, since such action is not on an action upon the obligation specified in such statute, but is an action upon a liability created by statute under section 338, prescribing a three-year period for such actions.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Suit by the People of the State of California against the City of San Bernardino. Judgment for plaintiff, and defendant appeals. Affirmed.

William Guthrie, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Schweitzer & Hutton, of Los Angeles, and G. B. Blanckenburg, of San Francisco, for the People.

JAMES, J. Plaintiff sued to recover 75 per cent. of certain fines imposed upon defendants in the police court of the city of San Bernardino after conviction of violations of the state Poison Act. Judgment was entered agreeable to the prayer of the complaint, and defendant appealed therefrom. The appeal is presented on the judgment roll.

[1] The main contention of appellant is that, by reason of provisions of the freeholders' charter under which defendant city is organized, all fines collected in the police court are required to be paid into the city treasury for the benefit of the city; that the provisions of the state Poison Act in conflict therewith are null and void. This argument is based upon the assumption that in the prosecutions mentioned the collection of fines and the disposition thereof is a municipal affair, and that the charter provisions affecting the matter are therefore of conclusive effect. Sections 6 and 8, art. 11, Const. Cal. The Poison Act is a general statute enacted by the Legislature (see Act 2724, Deering's Gen. Laws), and the offenses defined therein may be designated as state offenses; in other words, offenses which, in their commission or punishment, are not limited to the confines of any municipality. The entire subject-matter of the act relates in no manner to "municipal affairs." Upon the general subject of what is included within that term, see Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923. In Robert v. Police Court, 148 Cal. 131, 82 Pac. 838, it was said, in the concurring opinion:

Digitized by Google

"The jurisdiction of offenses defined by state law must be regulated by general state law, and such regulations cannot be altered or qualified by any provision of a freeholders' charter. The trial and punishment of offenses defined by the laws of the state is not a municipal affair. Jurisdiction of such offenses may be conferred upon police courts by act of the Legislature, but cannot be conferred by special freeholders' charter, and certainly not in a manner which will impair the operation of general laws."

In Fleming v. Hance, 153 Cal. 162, 94 Pac. 620, it was held that the matter of the prosecution of state offenses in police courts was not a municipal affair, and in touching upon the question of the disposition of fines collected in such cases, the court said:

"The Legislature was not bound to turn this source of revenue over to the city; but its doing so did not authorise it to compel the city to pay expenses not properly chargeable to it."

If the general statute had been silent upon the subject of the disposition of fines collected under its provisions, then it might, with reason, be held that the charter provision giving general direction as to the disposition of all fines collected in the police court would be operative. The statute, however, designates specifically that the fines shall be apportioned 25 per cent. to the city and 75 per cent. to the state board of pharmacy; and this provision, relating, as it does, to a state affair, one in which the people generally are interested, is of superior effect and must control.

[2] The second proposition made by appellant is that the title of the poison act does not satisfy the requirement of the Constitution, in that it is not sufficiently expressive of the contents of the act. The act is entitled, "An act to regulate the sale of poisons in the state of California, and providing a penalty for the violation thereof," and we think is sufficient, under the decisions made in Ex parte Liddell, 93 Cal. 633, 29 Pac. 251, and Matter of Yun Quong, 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912C, 969.

[3] Appellant's last point is that the demand for recovery of certain fines was barred by the provisions of section 339, Code of Civil Procedure—the two-year statute. Counsel's position as to this defense would be correct if the two-year statute applied. However, we are of the opinion that the three-year statute is the one to be considered (section 338, Code Civ. Proc.), and that the action is one upon a liability created by statute, rather than upon the obligation specified in section 339.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

PATTERSON v. PATTERSON et al.
(Civ. 3352.)

(District Court of Appeal, First District, Division 2. California. May 3, 1920. Hearing Denied by Supreme Court, July 1, 1920.)

1. Pleading ⟸290(3)—Filing of unverified answer to admission of averments of verified complaint.

Where defendant husband filed an unverified answer to his wife's complaint, seeking to establish title to real property, the averments that the wife was the owner of the property, and that she was induced to convey it to her husband through fraudulent practices, were admitted.

2. Appeal and error ⟸422—Appeal will not be dismissed for defect in notice.

Where, in an action to determine title to real property inquiries were submitted to the advisory jury, and the clerk of the court on return of the verdict made a minute entry, proper in an action at law, and later entered judgment thereon, while the court which followed the advisory verdict thereafter formally entered judgment and decree, notice of appeal, which erroneously stated the day of the judgment as that when the clerk entered his ineffectual judgment, is no ground for dismissal, in view of the error in plaintiff's notice of judgment.

3. Deeds ⟸70(6)—Overreaching wife by husband through violation of the confidential relation is fraudulent.

The least overreaching or misrepresentation by a husband through which he gains the property of his wife is a violation of the confidential relationship, which it is the policy of the law, as evidenced by Civ. Code, §§ 2217, 2219, to uphold, and therefore is fraudulent.

4. Appeal and error ⟸762—Ground abandoned in closing brief need not be considered.

A ground abandoned in the closing brief need not be considered.

5. Vendor and purchaser ⟸244—Husband's paramour, to whom he conveyed property, held to have knowledge of his fraud.

In an action by a wife to determine her title to property which she had conveyed to her husband on his misrepresentations, and which he conveyed to his paramour, evidence *held* to show that the paramour had knowledge of the misrepresentations.

6. Deeds ⟸75—Failure of wife to specify property in divorce action not ratification of conveyance.

Where a husband by misrepresentations to his wife that he would abandon his paramour induced her to convey to him property and execute a quitclaim deed, the fact that the wife in her subsequent action for divorce did not describe the property *held* not a ratification of the conveyance as to the paramour, who was a party to the husband's fraud.

Digitized by Google

7. Deeds ⟸75—Wife's quitclaim deed of property not ratification of former conveyance induced by husband's fraud.

Where a wife on her husband's importunities and promises that he would give up his paramour conveyed to him certain property, and later, on further representations by the husband, executed a quitclaim deed to the property so that he could mortgage it for improvements, *held* that the quitclaim deed was not a ratification of the first conveyance, which would entitle the paramour to whom the husband had conveyed the property to claim it as against the wife.

8. Equity ⟸66—Requirement that plaintiff do equity held not to require defrauded wife to adjust monetary arrangements between husband and paramour.

Where a wife conveyed property to her husband on his representations that he would abandon his paramour, and instead the husband began living openly with the paramour, so that he was arrested, and conveyed to her the property while he was incarcerated, the wife, on asserting her rights, is not bound to adjust money arrangements between the husband and his paramour, by repaying to the paramour the moneys which she had advanced the husband.

9. Appeal and error ⟸1170(1)—Judgment will not be reversed for nonprejudicial error.

Where there was sufficient evidence to support the judgment, it will not, under Const. art. 6, § 4½, be disturbed where from an examination of the entire record there appeared no reversible error.

Appeal from Superior Court, Los Angeles County; F. W. Houser, Judge.

Action by Ethel Keepers Patterson against Clarence Hyatt Patterson and Monnie Blackburn. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

A. L. Abrahams, P. B. D'Orr, Claude B. Morton, and Frank G. Tyrrell, all of Los Angeles, for appellant.

R. P. Jennings, of Los Angeles, for respondent.

BRITTAIN, J. One of the defendants only appeals from the judgment, by which it was decreed that the plaintiff owned two pieces of property in Los Angeles, with a direction that conveyance should be executed by each of the two defendants of the properties to the plaintiff. Judgment followed the trial in which an advisory jury was impaneled to try the principal issues presented by the pleadings.

[1, 2] The plaintiff sued her husband and the appellant, alleging that she was the owner of the properties designated, respectively, "the apartment house" and "the bungalow" properties, which, by the fraudulent practices of her husband, she had been induced to convey to him, and which he in turn conveyed to the appellant, who, it was alleged, was not a bona fide purchaser without notice. The complaint was verified. The husband's answer was not verified, and therefore under the law it constituted an admission on his part of the fraud practiced by him upon his wife. His codefendant, the appellant, answered, setting up ownership of the properties in herself, and denying substantially all the facts upon which the plaintiff relied for recovery. As to each of the properties specific interrogatories were submitted to the advisory jury, which returned a verdict in favor of the plaintiff and determined in the first instance as a matter of fact, that the appellant was not a bona fide purchaser for value. On return of the verdict, on March 26, 1918, the clerk made a minute entry of what purported to be a judgment, such as would have been entered had the case been one at common law. This purported judgment was formally entered March 30, 1918. On March 28, 1918, judgment and decree was signed by the judge who presided at the trial, reciting that he adopted the findings of the jury. It was formally entered April 4, 1918. On April 5, 1918, the attorney for the plaintiff served upon the attorneys for the appellant a notice that—

"On March 30, 1918, the verdict of the jury and judgment thereon and judgment and decree in favor of the plaintiff was entered by the clerk of the court."

Motion for new trial on the part of Monnie Blackburn was denied, and notice of appeal was filed. The notice of appeal, entitled in the cause stated that Monnie Blackburn appealed "from the judgment heretofore entered herein on the 30th day of March, 1918, and the whole thereof."

On behalf of the respondent it is urged that because the first entry by the clerk was premature and without authority, the notice of appeal was ineffectual. Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238. The clerk's minute entry of March 26, entered on March 30, was not a judgment. The only judgment was that rendered on March 28 and entered on April 4, 1918. The addition of the date in the notice of appeal in describing the only judgment in the case must be disregarded, in view of the notice of entry of judgment served by the attorney for the respondent. A highly technical contention, based on an erroneous statement made in the first instance by counsel making the technical contention, should not be made the basis of a refusal to consider an appeal otherwise properly presented on the merits.

[3] The plaintiff and her husband, at the the time of the trial, had been married 18 years. There was one child, a daughter aged 4. They came to California from their former home in 1915. The plaintiff was a woman of considerable means, with which she

Digitized by Google

purchased property in Southern California, including the two properties in suit, and, confiding in the rectitude of her husband, she caused the deeds to be taken in his name. Some time in 1916 they became acquainted with the appellant, and shortly thereafter a meretricious relationship arose between the husband and Monnie Blackburn. In the latter part of January, 1917, because of this condition of affairs, the plaintiff sued her husband to recover her separate property. Upon the promise that he would sever his relationship with the appellant and comport himself as he should as the husband of the plaintiff and the father of their child, he induced his wife to dismiss the suit, and to evidence his good faith he deeded to her all her property. Shortly thereafter he represented to her that he had severed his connection with the appellant, and, promising her that he would have no more to do with the appellant, he importuned the plaintiff to place in his name some of her property, stating that he thought he was entitled to something, and did not want to feel like a beggar. Relying upon his representations, which the plaintiff alleged were made without any intention on his part to fulfill them, she reconveyed to him the two parcels involved in this suit. The meretricious relationship between himself and Monnie Blackburn was either continued or immediately resumed. Regardless of the admission of the husband of the allegations of fraud made by his wife, the least overreaching or misrepresentation by a husband through which he gains the property of his wife is a violation of the highly confidential relationship which it is the policy of the law to uphold, and is therefore fraudulent. Civ. Code, §§ 2217, 2219; White v. Warren, 120 Cal. 327, 49 Pac. 129, 52 Pac. 723; Jones v. Jones, 140 Cal. 587, 74 Pac. 143.

[4-6] In April, 1917, the plaintiff again sued her husband for the recovery of the two properties, the complaint being based on a charge of his fraudulent misrepresentations. Again he represented that he had entirely given up Monnie Blackburn, and promised that if his wife would let the two properties remain in his name, he would have nothing more to do with the appellant, but would conduct himself as a husband and father should. Although she was advised by her attorney not to dismiss the action, because, as she said, she then "loved him and still loved him," she caused the suit to be dismissed, and a few days later at his request she executed a quitclaim deed, covering the same two parcels of land, to him. Prior to this time they had discussed the improvement of these two properties. It was understood between them that the property should be mortgaged for that purpose. He represented that he could not secure the mortgage without her joining, and, no doubt, for the same reason that operated upon her to convey the two properties to her husband, she executed to him a quitclaim deed. He was thereupon enabled to mortgage the two properties for the purpose they had agreed upon, and the improvements were made. There is no question presented as to the rights of the mortgagees. As between husband and wife the same confidential relationship existed, and his admission of all the facts alleged by the plaintiff carries with it the admission that every act done by him pursuant to the scheme of fraud was tainted by the original fraud. On behalf of the appellant, it is claimed that the quitclaim constituted a ratification on the part of the wife because it was made by her after her knowledge that the husband had not in fact performed his promise made at the time of the original deeds to sever his immoral and unlawful relationship with the appellant. If there is evidence to support the finding of the jury adopted by the court that the appellant was fully informed in regard to all the facts she is bound by the same rule of law which binds the husband.

About November 1, 1917, the plaintiff sued her husband for divorce. In her complaint she described the properties standing in her own name, and did not describe the properties involved in this action. It is claimed that this also amounted to a ratification of the deed fraudulently procured from her by her husband. As against a party to the fraud, this was not a ratification, and while an argument is made in the appellant's opening brief on the ground of estoppel, counsel for the appellant abandoned that ground in their closing brief, and it need not be considered. During Christmas week of 1917, the plaintiff and her husband had a conversation, in which she told him that if she thought he was going to lose the properties, she would step in and save them, presumably by buying the incumbrances, because he had promised that their child should have the property, and that he would make a will in favor of the child. He then told her he would do everything he could to make the property a success, and that their child was to get it. Almost coincidentally with this conversation the two defendants went to Venice, near Los Angeles, and took up their residence in an apartment house, where the husband adopted an assumed name and the appellant passed as his wife. On January 4, 1918, they were arrested, and the husband was confined in the city jail in Venice. On January 7, 1918, while he was still in jail, the husband executed a deed of the apartment house property to the appellant. The present suit was commenced on January 9, 1918, and lis pendens was filed. On January 10, 1918, the husband conveyed to the appellant the bungalow property. At the time of the transfer of the properties the apartment house was incumbered by a first mortgage of over $17,000, a second deed of

Digitized by Google

trust of nearly $4,000, with interest and lienable claims for materials of about $1,100, and the bungalow property was incumbered by a first mortgage for $2,400 and other indebtedness of $240. The appellant claims that she had advanced the husband certain small sums of money, that she had actually paid to him $10 at the time of the transfer of the apartment house property, and as a further consideration she undertook to procure bail to have him released from the jail. It is practically conceded that she had actual, as well as constructive, notice of the claims of the plaintiff before the execution of the deed of the bungalow property, and the evidence is conflicting as to her knowledge of the various transactions which have been recited. It is claimed by the appellant that there is no evidence of her knowledge, but there is sufficient evidence of facts to warrant the deduction drawn by the jury and adopted by the trial court that the appellant was very fully informed in regard to the dealings between the plaintiff and her husband.

[7] From the frank, if not bold, statement of facts contained in the appellant's brief, which for the most part furnishes the basis for the recitals made above, it clearly appears that the fraud of the husband was the cause of the original deeds being made to him. When he repeatedly importuned his wife to forego her legal remedies and made renewed promises, which he as repeatedly violated, it would amount to a judicial sanction of gross fraud on the part of the husband to hold that, because his wife loved and trusted him more than he deserved to be trusted, she should be held to have ratified his wrong when in his final disregard of every rule of honorable living he so publicly comported himself with the beneficiary of his fraud as to bring about the arrest of himself and his paramour and his own incarceration.

[8] It is contended on behalf of the appellant that the plaintiff did not offer to do equity in her complaint, and the court should at least have required the plaintiff to pay to the appellant the moneys which the appellant advanced to the plaintiff's husband. In other words, that a court of equity, determining on the admission of an unfaithful husband that he had defrauded his wife of her property and had transferred it to his partner in the entire wrong, should, as a condition for the return of her own property to the wife, compel her to adjust the money arrangements between those who had wronged her. This court knows of no rule of equity which requires any such adjudication.

[9] Upon an examination of the entire record, this court is of the opinion that there was no reversible error committed by the trial court, and that there was sufficient evidence to support the judgment. There was no miscarriage of justice within the meaning of section 4½ of article 6 of the Constitution.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

PEOPLE v. NUNES. (Cr. 496.)

(District Court of Appeal, Third District, California. May 3, 1920.)

1. Mayhem ⟸5—Proof of premeditation not necessary.

Under Pen. Code, § 203, declaring that every person who unlawfully and maliciously deprives a human being of a member of his body, or puts out an eye, etc., is guilty of mayhem, it is not necessary affirmatively to show a deliberate or premeditated intent to commit the crime of mayhem, notwithstanding the word "maliciously" might imply otherwise; hence as malice aforethought is not an essential element in the crime of mayhem, proof of premeditation or deliberation is not required, and it is sufficient to prove only the commission of an act from which the law will presume that it was done unlawfully and maliciously, unless the evidence tends to show it was done under circumstances constituting self-defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mayhem.]

2. Mayhem ⟸1—One who unlawfully strikes another, destroying a member, etc., is guilty of mayhem.

If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party or in putting out his eye, the crime is nevertheless mayhem.

3. Mayhem ⟸1—Mere disfigurement of eye not offense unless eye rendered useless; "puts out an eye."

Under Pen. Code, § 203, declaring that every person who unlawfully and maliciously "puts out an eye" is guilty of mayhem, the mere disfigurement of an eye will not amount to mayhem unless such disfigurement results in rendering the eye useless; but an injury of an eye to such an extent that it cannot be used for the ordinary and practical purposes of life amounts to the putting out of an eye, although the injured party can distinguish light.

4. Mayhem ⟸5—Evidence held to show that defendant put out his victim's eye.

In a prosecution for mayhem, under Pen. Code, § 203, evidence *held* to warrant a finding that defendant put out his victim's eye, notwithstanding the oculist testified that it was barely possible a future operation might be beneficial.

5. Criminal law ⟸829(1)—Refusal of request covered not error.

The refusal of a request covered by the charge given is not error.

Digitized by Google

6. Criminal law ⟸829(3)—Requested instruction on mayhem held not error being covered by charge as given.

In a prosecution for mayhem, where the court stated contents of information and read Penal Code, § 203, declaring every person who unlawfully and maliciously deprives a human being of a member of his body or puts out an eye, is guilty of mayhem, and further instructed that prosecution must prove beyond all reasonable doubt that defendant was guilty of the crime charged in the information which specifically charged defendant with unlawfully and maliciously putting out the eye of the complaining witness, the refusal of a requested charge that the jury must find that defendant put out the eye of the witness, or acquit, was not error, being covered by the charges given.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Dan Nunes was convicted of mayhem. From the judgment of conviction and an order denying a motion for new trial, he appeals. Affirmed.

J. M. Inman, of Sacramento, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant was informed against by the district attorney of the county of Sacramento for the crime of mayhem. Upon a trial he was found guilty, and he prosecutes this appeal from the judgment of conviction and from an order denying his motion for a new trial.

Louis Dulmaine, the prosecuting witness, was engaged as a bartender in a building at the corner of Seventh and L streets in the city of Sacramento; his hours of duty being from 5 o'clock p. m. until closing time the next morning. He was so engaged on the night of June 29, 1919, closed his saloon at 2 o'clock on the morning of June 30th and, about half an hour later, he and two other men started walking up Seventh street toward K. Before reaching K street they met the defendant, accompanied by a woman, approaching them. According to the testimony of the prosecution, at about that time one of Dulmaine's companions was inviting the other members of the party to his house to partake of a chicken dinner. Defendant said, "What's that; what the hell's that about chicken?" and used some vulgar language. Dulmaine turned around and wanted to know "what was the matter with that guy," and asked, "What's it to you?" or words to that effect, upon which defendant struck Dulmaine in his right eye. He was wearing glasses at the time, and the result of the blow was that they were broken and a piece of glass entered the eyeball; the prosecution claiming that thereby the eyesight of his right eye was destroyed.

[1, 2] Section 203 of the Penal Code defines mayhem as follows:

"Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

It has been held that it is not necessary affirmatively to show a deliberate or premeditated intent to commit the crime of mayhem in order to sustain that charge, notwithstanding that the word "maliciously" as used in section 203 might imply otherwise. In People v. Wright, 93 Cal. 564, 29 Pac. 240, it is said:

"* * * It therefore follows that, as malice aforethought is not an essential element in the crime of mayhem, proof of premeditation or deliberation is not required. But the requirements of the statute in such cases will be fully met by proof of the commission of the act, from which the law will presume, though it be done in pursuance of an intent formed during the conflict, that it was done unlawfully and maliciously—that is, 'with a wish to * * * injure another person, or an intent to do a wrongful act'—unless the evidence tends to show to the contrary."

In other words, it is held in that case that it is sufficient to prove only the commission of the act, from which the law will presume that it was done unlawfully and maliciously, unless the evidence tends to show that it was done under circumstances constituting self-defense.

If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party or in putting out his eye, the crime is nevertheless mayhem. See Terrell v. State, 86 Tenn. 523, 8 S. W. 212; Worley v. State, 11 Humph. (Tenn.) 172, 175.

The appellant, however, does not seem to question the law as it is above stated, but his main contention is that the evidence fails to show that the defendant did "put out the eye" of the prosecuting witness within the meaning of section 203 in that particular. It is further contended that the court erred to the prejudice of the defendant by refusing to give one of his requested instructions.

[3, 4] We agree with counsel for the defendant that under the statute the mere disfigurement of an eye would not amount to mayhem unless such disfigurement resulted in rendering the eye useless; but we think the jury were warranted in finding, as their verdict implies that they did find, that the defendant by the blow he delivered in and upon the face of the prosecuting witness "put out" the eye of the latter.

Dr. Briggs, a noted oculist, examined and treated the eye of the complaining witness after the injury was inflicted upon the lat-

Digitized by Google

ter's eye by the defendant. He testified on direct examination as follows:

"Mr. Russell: Q. Do you know Mr. Louis Dulmaine, the gentleman back here? A. I do. Q. You have had occasion to treat him? A. I have. Q. For what sort of trouble was that, doctor? A. He came in on the 2d day of July, last, with an injured eye, that had been injured, he said, I think, two or three days previously. There was a penetrating wound of the cornea, penetrating the iris, and a punctured lense; the lense of the eye was punctured, causing cataract; causing the lense to become opaque, which we call cataract. Q. Did you treat the eye? A. I did. Q. What is the condition of the eye in reference to sight? A. The eye is practically blind. He sees light; that is all. He doesn't see objects. Q. The sight, then, is what we call destroyed? A. He is practically blind. Q. He is practically blind in that eye? A. Yes, sir. Q. All that he can distinguish is just light? A. Yes, sir; I think he can—he sees motions that are made past the eye. Q. Is that a permanent injury, doctor? A. Yes. Q. That is an injury such as cannot be cured? A. Well, yes; I can say that his chances of ever seeing any more are almost nil. Q. Now, you say there was a sort of a wound in that eye? A. A puncturing wound, yes; about, I think, a sixth of an inch long, that went through the clear part of the eye. Q. Could you tell from the nature of the wound what that might be caused by, doctor? A. Well, it might be caused by any sharp thing projected against the eye. It might have been a knife wound, a glass wound, or anything else that struck the eye with force enough to cause that kind of injury. It was more like a cut than a bruise. It was a clean-cut wound. Q. That would indicate that force had been used on it? A. Oh, yes."

There can be no manner of doubt that the foregoing testimony, taken alone, unmistakably shows that the complaining witness' eye was put out. If all that the injured party could do with the eye was, as the doctor testified, merely to distinguish lightness from darkness or perceive a motion or movement of some sort made immediately before the eye, the eye was certainly rendered perfectly useless to its possessor. If both eyes were so afflicted, it is very clear that the complaining witness would practically be blind. What the statute obviously means by the expression or phrase, "put out the eye" is that the eye has been injured to such an extent that its possessor cannot use it for the ordinary and usual practical purposes of life.

But counsel for the defendant, in his contention that the eye of the complaining witness was not shown to have been "put out," relies mainly upon the following testimony brought out on the cross-examination of Dr. Briggs:

"Hardly a likelihood of his ever having any use of that eye for visual purposes. * * * I wouldn't say it is impossible for him to get some vision in it. Possibly in a year or two years it may improve; but I think the chances of doing so are so slight that I don't know that it would be worth attempting. Q. But, in your judgment and experience, you wouldn't say that there isn't any chance? A. Oh, no. Q. In other words, there is a chance? A. There is a chance of getting some sight, but so little chance of getting any useful sight that I wouldn't consider it in human events at all possible—I wouldn't say possible—at all probable. * * * I should say he might have a chance in a hundred of getting some useful sight, and I would say that was hardly a probability either; and in the effort to get it, it might do a lot of harm. So it would be a question in my mind whether I would ever advise him to have an operation done with a view to improving the sight; I don't know; I wouldn't say; I wouldn't know, because I would have to see the eye at some other time, in some other condition. I might feel that in a year or two years' time it might be advisable to do an operation upon it. I wouldn't say it wasn't possible, now, in the course of human events, but I think it is improbable."

There is nothing in the foregoing testimony of Dr. Briggs which would justify us in holding that the verdict is not sufficiently supported. The full purport or the effect of the doctor's testimony upon cross-examination is that, while it is not impossible that "in the course of human events" and at the end of about two years an operation could be performed upon the eye which might have the effect of restoring to it some power of sight, still it was not probable that thus such a result could be brought about. Indeed, it would seem to be very clear from the doctor's testimony as a whole that he was at the time of the trial of the opinion that the injury to the eye could not be so amended or corrected as to enable the complaining witness to use it at any time in the future for any useful or practical purpose whatever. At all events, the direct testimony of the doctor amply sustains the verdict, and if there were any statements brought out on his cross-examination which were calculated to weaken his direct testimony in its tendency to show that the eye was put out, it was for the jury to consider and determine what weight they should give his direct testimony when considered by the light of statements made on his cross-examination.

Our conclusion is, as above stated, that the verdict derives sufficient support from the evidence to uphold it.

[5, 6] The instruction referred to above as having been proposed by the defendant and disallowed by the court is this:

"You are instructed that you must find from the evidence that the defendant, Dan Nunes, put out the eye of the complaining witness or you must acquit him."

One of the grounds upon which the court refused to read the instruction to the jury was that the proposition therein stated was covered by the general charge of the court, and this we find to be substantially true. In its initial instruction the court stated to the jury in detail the contents of the information,

Digitized by Google

thus telling them, as the statute describes it, the nature of the charge upon which the defendant was being tried, and then stated that the issue had been made by a plea of not guilty by the defendant to the information. The court also read to the jury section 203 of the Penal Code, upon which the information is based, and told the jury that, to justify a verdict of guilty, it rested upon the prosecution to prove beyond all reasonable doubt that "said defendant is guilty of the crime charged against him in the information." The accusatory pleading specifically charged the defendant with unlawfully and maliciously putting out the eye of the complaining witness. It would seem that the jury would certainly be minus that degree of intelligence which it must be assumed the average person usually summoned to jury duty possesses if it could be said, as a matter of law, that they did or could not understand from the initial instruction of the court that the defendant would be entitled to an acquittal unless it were shown beyond all reasonable doubt that he had put out the eye of the complaining witness. Indeed, the only question submitted to the jury was whether the defendant did put out the eye of the prosecuting witness; that was the single specific charge in the information; and, when told in general language that the charge in the information was required to be established beyond all reasonable doubt to justify a conviction, that was tantamount to telling the jury that, if the people failed to prove by the degree of proof mentioned that defendant put out the eye of the complaining witness, the former would be entitled to an acquittal.

There are no other points submitted here for consideration.

The judgment and the order appealed from are affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

HUMPHRY v. FARMERS' UNION & MILLING CO. (Civ. 2035.)

(District Court of Appeal, Third District, California. April 26, 1920.)

1. Sales ⟸22(4)—Acceptance subject to inspection was not a variation of offer.

Where an interchange of telegrams between the parties had established an agreement as to all other terms of sale, the fact that the last telegram from the buyer stated the sale was subject to inspection on delivery, which had not been mentioned before, does not defeat the contract, since it merely stated a condition which would have been otherwise implied under Civ. Code, §§ 1771, 1785.

2. Sales ⟸22(3)—Withdrawal of offer after telegram of acceptance was filed is too late.

Under Civ. Code, §§ 1582, 1583, a telegram accepting an offer of sale took effect on its deposit for transmission, and a telegram thereafter sent by the buyer, canceling the transaction, was too late.

3. Sales ⟸80—Contract held to require payment at place of delivery.

Where the seller had required the buyer to furnish bank guaranty of payment of draft attached to bill of lading, payment was to be made at place of delivery, even though, in the absence of such agreement, the sale f. o. b. place of sale required payment at place of sale.

4. Sales ⟸417—Evidence of value at place of shipment held to sustain judgment for damages.

Though the measure of damages for refusal to deliver goods sold is, under Civ. Code, § 3354, the difference between the sale price and the price in the market nearest the place of delivery, evidence of market price at the place of sale is sufficient, in the absence of proof of a different market price nearer the place of delivery to sustain a judgment for the buyer.

5. Appeal and error ⟸1033(8)—Evidence ⟸84—Error as to damages held favorable to appellant; presumptive evidence of value.

The fact that a buyer in Indiana was buying beans in California for shipment to Indiana is presumptive evidence that the value of the beans in Indiana was higher than that in California, so that error in basing damages on the market value in California was favorable to the seller, and he cannot complain.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Charles A. Humphry, doing business under the name and style of the Evansville Commerce Company, against the Farmers' Union & Milling Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Nutter, Hancock & Rutherford, of Stockton, for appellant.

A. H. Ashley, of Stockton, for respondent.

ELLISON, Presiding Judge pro tem. Plaintiff brought this action to recover damages for the alleged breach of contract in and by which it was claimed that defendant agreed to sell to it 80,000 pounds of recleaned pink beans at the price of $6.35 per hundred pounds f. o. b. Stockton, Cal. After trial the court found that the contract was executed as alleged in the complaint, and that the defendant neglected and refused to deliver the beans as therein contracted to be delivered, to the damage of the plaintiff in the sum of $550, and entered judgment against the defendant for that amount. The defendant appeals from the judgment.

The contract, if one was made, resulted from certain telegrams passing between the

Digitized by Google

plaintiff and defendant. For a reversal the defendant and appellant relies upon three propositions: First, that the telegrams did not constitute an agreement; second, that the seller was entitled to be paid at Stockton; and, third, that if the place of delivery was Evansville, Ind., damages should have been based upon the price at which respondent could have bought equivalent beans in markets nearest Evansville, Ind., and not at Stockton.

[1] I. We are of opinion that a fair construction of the telegrams leads to the conclusion that the parties met upon a definite proposition and agreement. In the telegram of November 14, 1916, the defendant said:

"Cannot sell at price you name. Can sell eighty thousand pounds pink $6.35 f. o. b. Stockton. Railroad says cannot furnish empty cars promptly. The prospect of shipment getting through unfavorable. Order subject delay and confirmation."

To this telegram the plaintiff on November 15th, replied as follows:

"Answering telegram accept pink $6.35. Must ship during November. Do the best you can."

This was not an unconditional acceptance of the proposition made in the telegram of November 14th, above quoted. The defendant had stated in his telegram of November 14th that the railroad could not furnish empty cars promptly, and that the prospect of shipments getting through promptly was unfavorable, and that the plaintiff must order subject to delay and confirmation. The answer to this telegram was that the goods must be shipped during November, which was not agreeing to accept the beans subject to delay. On November 17th, the defendant, however, telegraphed as follows:

"Eighty thousand pounds recleaned pink beans ready. Car obtainable. Have your bank wire guarantee payment draft with bill of lading."

This was a statement by the defendant in effect that it could ship as requested by the plaintiff during the month of November, because it stated therein, "car obtainable." It was a statement that there would be no delay, and that if the beans were bought they could be loaded at once; but it contained a new proposition, which had not been suggested before, namely, "Have your bank wire guarantee payment draft with bill of lading." On November 18, 1916, the plaintiff's bank, the Citizens' National Bank of Evansville, Ind., wired the defendant as follows:

"We guarantee payment your draft bill of lading attached, Evansville, commercial pink beans at $6.35, subject permission inspection on arrival."

This was a meeting of the minds of the parties upon the same terms and conditions, save and except that the last telegram referred to had in it these words, "subject permission inspection on arrival." The matter of delay in shipment had been eliminated, the request that the bank guarantee payment had been accepted, and all conditions imposed by defendant had been met, qualified by the added suggestion that the beans would be subject to inspection on arrival. It is the claim of counsel for appellant that it never assented to the plaintiff's request that the beans should be shipped subject to inspection; but, as the learned judge of the trial court observed, the law would have added these words to the contract, even if they had not been inserted in the telegram. Section 1771 of the Civil Code reads:

"One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable."

Section 1785 of the Civil Code reads:

"On an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it, and may rescind the contract if the seller refuses to permit him to do so."

In the case of Newmark & Co. v. Smith, 26 Cal. App. 339, 149 Pac. 1064, it is said:

"The purchaser under a contract of sale of a certain quantity of beans is entitled, in the absence of a waiver of the right, to inspect the property sold as a condition precedent to the making of payment, and the seller is not entitled upon the tender of delivery to refuse such inspection and demand payment, and for failure to make payment to declare the contract annulled."

[2] We are of opinion that the telegrams passing between the parties resulted in a contract between them. The defendant's telegram of November 18th, wherein it says, "wire received too late, entire matter is canceled," was sent after the Citizens' National Bank had telegraphed its guarantee of payment of the draft, and after all the terms and conditions imposed by defendant had been accepted, and was too late to prevent the consummation of the contract. The wire accepting defendant's offer took effect on its deposit at Evansville for transmission. Civ. Code, §§ 1582, 1583. It was deposited at Evansville, Ind., before the defendant's telegram of November 18th was sent.

[3] II. Some discussion is indulged in upon the meaning of the expression "f. o. b. Stockton"; it being the claim of appellant that this expression not only meant that the goods were to be placed on the car by the seller without any expense to the buyer, but also that it meant that upon their being loaded ready for shipment the purchase price was then due and payable and at the place of shipment. We deem it unnecessary to examine critically whether the expression "f. o. b." includes, not only loading, but the right to have payment at the place of load-

Digitized by Google

ing because, even if the expression in general does mean both loading and payment, the parties can contract differently. The telegrams in this case conclusively show that, if a sale were made, it was the understanding of the parties that the goods were not to be paid for in Stockton, but were to be paid for in Evansville, Ind. The telegram of November 17, 1916, sent by the defendant, "Have your bank wire guarantee payment draft with bill of lading," was a clear expression by the defendant that payment was not expected until the goods were received in Indiana, together with the bill of lading, and the guaranty of the Citizens' National Bank in response to the demand for the guaranty, "We guarantee payment of your draft, bill of lading attached," could mean nothing else than that the bank guaranteed that when the bill of lading reached Evansville, together with the draft, the same would be paid at that place, and not at Stockton.

[4] III. Lastly, it is claimed by appellant that if the place of delivery was to be Evansville, Ind., damages should have been based upon the price at which respondent could have bought equivalent beans in the market nearest Evansville and not at Stockton, and this contention is predicated upon the provisions of section 3354 of the Civil Code, wherein, in substance, it is provided that in estimating damages the value of the property to a buyer deprived of its possession is deemed to be the price at which he might have bought the equivalent thing in the market nearest the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.

[5] Respondent introduced evidence tending to show the price at which equivalent beans could have been bought at Stockton, and no evidence of the price at which they could have been bought at any other place was introduced by either party. There is nothing in the record to show that the beans could have been bought at any less price at any place nearer Evansville. The price at which the beans could have been bought at Stockton was the only evidence the court had before it as to the amount the plaintiff would have had to pay for equivalent beans. There is no evidence in the record, either on behalf of plaintiff or defendant, and none offered by the defendant, tending to show what the market price of such beans was at any place nearer Evansville than the city of Stockton. We think, under the circumstances, that the court was justified in accepting the proved price at the city of Stockton as the price at which respondent could have bought equivalent beans. If there was any place nearer Evansville at which they could have been bought, then the matter was entirely open for the defendant to make such proof. It made no attempt to do so. It sufficiently appears from the record that permitting the evidence of the market price of beans at Stockton, instead of confining the proof to some unnamed place east of the Rocky Mountains, was a benefit to the appellant, instead of an injury. The fact that plaintiff was buying beans at Stockton to be shipped to Indiana, and paying the transportation charges thereon, is presumptive evidence that the market price of beans was less in California than in Indiana; otherwise, the plaintiff was unbusinesslike in buying them. The appellant is not entitled to complain of a ruling that resulted in a benefit to it and a smaller judgment than otherwise might have been obtained.

We think the judgment is right, and should be affirmed; and it is so ordered.

We concur: HART, J.; BURNETT, J.

BUSCHMAN et al. v. TURLOCK IRR. DIST. et al. (Civ. 2199.)

(District Court of Appeal, Third District, California. May 3, 1920.)

1. Waters and water courses ⟸227—New construction under Wright Irrigation Act rests on adoption of plans by owners.

The whole purpose and scope of the Wright Irrigation Act, so far as it relates to new construction work, rests on the adoption of plans and the approval of landowners of the district, and does not rest primarily with the directors, who are not empowered to carry on any new work without authorization, so that under section 39 funds can be used by the directors in the prosecution of new work only when previously authorized by voters.

2. Mandamus ⟸154(4)—Complaint for writ of mandate to compel construction of irrigation ditches defective.

Complaint in action for writ of mandate to compel construction of ditches and delivery of water for irrigation purposes under the Wright Irrigation Act *held* defective as containing nothing from which it could be inferred that the landowners of the district had adopted plans calling for the construction of other than main and lateral canals or any canals or ditches which plaintiffs seek to have constructed.

3. Mandamus ⟸154(4)—Complaint must show fund will not be exhausted for various purposes for which raised before application to one particular purpose may be ordered.

The board of directors of an irrigation district being given discretion by the Wright Irrigation Act to raise by a 2 per cent. assessment such sum as the board shall deem necessary for any of the purposes of the act, the different purposes are placed on an equal footing, and it

Digitized by Google

must appear by the complaint that they will not exhaust the fund raised before its application may properly be ordered by the appellate court to any particular project.

Appeal from Superior Court, Stanislaus County; G. W. Nicol, Judge.

Action for writ of mandate by C. H. Buschman and others against the Turlock Irrigation District and S. A. Hultman and others, constituting its board of directors. From an order sustaining defendants' demurrer, and from judgment denying the writ, plaintiffs appeal. Affirmed.

W. C. LeHane, of Los Angeles (Fred C. Peterson, of San Francisco, of counsel), for appellants.

Griffin, Boone & Boone and P. H. Griffin, all of Modesto, for respondents.

PLUMMER, Presiding Judge pro tem. By this action plaintiffs sought a writ of mandate from the superior court of Stanislaus county, directing the defendants to construct certain ditches and deliver water for irrigation purposes to lands and premises described in the complaint, belonging to the plaintiffs, and situate within the Turlock irrigation district. The matter is in this court upon appeal from the order and judgment of the trial court sustaining defendants' demurrer to the plaintiffs' complaint.

It appears from the pleadings that the defendant Turlock irrigation district is a quasi public corporation, organized under the provisions of what is popularly known as the Wright Irrigation Act (St. 1887, p. 29, as amended); that for some time past water has been delivered to the lands belonging to the plaintiffs through a private ditch, called the Delmas ditch, the intake of which is at a point on what is called the Ceres main ditch, constructed by and belonging to the defendant Turlock irrigation district; that the water thus furnished through the Delmas ditch is lost, in large measure, by means of seepage, and the natural porous condition of the soil traversed by said Delmas ditch before being distributed over the lands of the appellants. To remedy this defect and avoid the loss of water, a writ of mandate was prayed for, directing the Turlock irrigation district and the other defendants herein to take such action as might be necessary to furnish plaintiffs with sufficient water for the irrigation of their lands; that said water be delivered directly to, or close by, the lands belonging to the plaintiffs.

Though not stated in precise form, the relief sought is, in fact, as follows: That the Turlock irrigation district be required to build a new branch or service ditch from its main canal; that the directors of the district be required to construct said ditch and provide the money for paying the expenses of such construction without any adoption of plans or previous approval by the votes of the landowners of the district. Appellants argue that authority for such an order from the court is found in the last clause of section 39 of the Wright Act relating to the power of the board of directors of irrigation districts, which clause reads as follows:

"Also sufficient to raise such amount not exceeding two per centum of the aggregate value of the lands within the district according to the latest * * * equalized assessment roll thereof, as the board of directors shall determine may be needed to be raised by assessment for any of the purposes of this act."

A correct interpretation of this clause requires an examination or analysis of the various provisions which set forth the power and purposes of the act, and how the machinery thereof is to operate.

Section 15 gives the board of directors power to construct canals, waterways, reservoirs, etc., and to acquire land necessary for such purposes.

Section 30 sets forth that "for the purposes of constructing or purchasing the necessary irrigation canals and works and acquiring the necessary property and rights therefor," etc., as soon as the district is organized, and also whenever thereafter a construction fund is necessary, etc., for the purpose of ascertaining the amount of money necessary to be raised, said board shall cause such surveys, examinations, drawings, and plans to be made as shall furnish the proper basis for the amount of money to be raised, which plans, it is provided in section 30a, must be submitted to the commission authorized to approve bonds of irrigation districts. And finally, after the plans, surveys, and engineer's report have been approved, the proposition of raising money by a bond issue to carry on construction work according to the plans, surveys, etc., adopted must be submitted to the voters of the district, as provided by section 30c of said act. In the event that the money raised by bond issues proves insufficient to complete the work undertaken by the district according to its adopted plans, section 34 provides that a special assessment may be levied after the question of so doing has been submitted to, and received a majority vote of, the qualified voters of the district.

Section 67 provides for the creation of certain funds, to wit, a bond fund, a construction fund, and a general fund.

Section 55 specifies that the cost and expense of purchasing and acquiring the property and constructing the works and improvements provided for shall be paid wholly out of the construction fund. (This section includes other items not pertinent to this case.)

Section 61 specifies that—

"The board of directors or other officers of the district shall have no power to incur any

Digitized by Google

debt or liability whatever, either by issuing bonds or otherwise, in excess of the * * * provisions of this act," etc.

[1] It thus appears that the whole purpose and scope of the act, so far as it relates to new construction work, rests upon the adoption of plans and the approval of the landowners of the district, that it does not rest primarily with the directors, and that the directors are not, specifically or otherwise, empowered to carry on any new work without such previous authorization. Hence, if that portion of section 39 relied upon by appellants should be construed to authorize the use by the board of directors of funds so raised in any new work, such funds could only be employed in that manner if such new work had been previously authorized by the voters of the district.

[2] There is nothing in the appellants' complaint from which it can be inferred that the landowners of Turlock irrigation district have adopted any plans calling for the construction of other than main and lateral canals, or of any canal or ditch which the plaintiffs seek to have constructed by order of this court. It does not appear that anything more than a general system has been provided for. It does appear, by way of argument in the briefs and the general history of irrigation districts, that different plans have been adopted by the voters of different districts. In some main canals and laterals only have been provided for in the plans, and in others a much more comprehensive system of ditches, calling for the construction at the expense of the district not only of main and lateral canals, but of ditches conveying water to every 40 acres of land susceptible of irrigation, has met the approval of the voters of the district.

The complaint is also lacking in other particulars. It does not appear therefrom what the proposed work would cost, nor whether, if authorized by the district, the 2 per cent. assessment provided for in section 39, if otherwise applicable, would prove adequate to defray the expenses of the undertaking.

[3] There is no means by which this court can determine whether any sum raised by the 2 per cent. assessment might properly be applied to the construction of service ditches, and so order its application, without it being specifically shown that such sum is available. The board of directors of the district are given discretion to raise by a 2 per cent. assessment such sum as the board shall determine may be necessary to be raised for any of the purposes of the act. The different purposes are placed upon an equal footing, and it must appear that the different purposes will not exhaust the fund for which it has been raised before the application of such fund may properly be ordered by this court applied to any particular project.

Considerable stress is laid upon section 18, wherein it is "expressly provided that all waters distributed for irrigation purposes shall be opportioned ratably to each landowner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district." We do not, however, agree with the contention that this section either authorizes or commands the construction of either main, branch, or lateral canals or service ditches which have not been otherwise provided for. Its plain import would seem to be that, when the landowners have their lands prepared for irrigation, have their service ditches connected with the system built by the district, then and in that case distribution of the water available for irrigation purposes is to be apportioned ratably, as therein set forth.

Being of the opinion that plaintiffs' complaint does not set forth a cause of action, it follows that the order and judgment of the trial court should be, and the same are hereby, affirmed.

We concur: BURNETT, J.; HART, J.

HOGUE-KELLOGG CO. v. BAKER.
(Civ. 2847.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Crops ⟸3—Contract for sale of crops to be grown in future valid, where seller has land.

A valid contract may be made for the sale of a crop to be grown in the future by the vendor, where such vendor possesses the land on which the crop is to be grown, for in such case the needful thing out of which the crop is to be produced is in existence, and hence the crop has potentiality.

2. Crops ⟸3—Contract for sale of future crops held valid.

Contract for sale of crop to be grown in the future on seller's land, providing that "this contract is understood by both parties to pass title and constitute absolute sale," *held* not void as against objection that it contemplated a completed sale of property not in existence; the contract being executory, notwithstanding quoted provision, which merely means that title should be deemed to pass whenever the produce became a growing crop.

3. Crops ⟸3—Invalidity of provision as to title on sale of future crops has no effect on main contractual obligation.

Under Civ. Code, § 1141, declaring when title passes by an executory agreement for sale of personal property, the invalidity of provi-

Digitized by Google

sion, in agreement for sale of future crops, that execution of the contract passed title, would not affect the main contractual obligation to grow and deliver the crops.

4. Contracts ⟸10(4)—Contract of sale of future crops held not void for lack of mutuality.

Agreement to sell future crops, for which buyer agreed to pay specified price if delivered on or before certain date, *held* not void for lack of mutuality, notwithstanding provision giving buyer option, on delivery after such date, to either cancel contract or continue it in force; such provision being a mere statement of legal right of buyer in case of seller's default.

5. Sales ⟸411—Buyer, suing seller for refusal to deliver, not required to plead particulars as to general damages.

Buyer, suing seller for breach of contract to grow and deliver crop of beans, was not required, as respects general damakes, to specially plead the particulars as to how and why he had been damaged.

6. Sales ⟸411—Allegation as to price for which goods could have been bought not equivalent to allegation as to value thereof to buyer.

In buyer's action for nondelivery, allegation as to price for which goods could have been purchased at date of delivery *held* insufficient as an allegation of value of property to buyer, under Civ. Code, § 3308, providing that the measure of damages in such case is the excess, if any, of value of goods to buyer over amount due seller under the contract, if it had been fulfilled.

7. Sales ⟸411—Complaint held to state cause of action for failure to deliver.

In buyer's action for seller's breach of contract to grow and deliver crop of beans, complaint, *held* sufficient, as against a general demurrer, to support a judgment for nominal damages, even if it should be held that matters relating to damages omitted therefrom should have been specially pleaded.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Hogue-Kellogg Company against J. S. Baker. Judgment for plaintiff, and defendant appeals. Affirmed.

J. H. Ardis and W. S. Knott, both of Los Angeles, for appellant.

Fred N. Arnoldy, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff upon an alleged cause of action for damages arising because of defendant's failure to perform the obligations imposed by written contract. The case went to judgment after answer and trial. The only contention made by appellant, however, is that the court erred in overruling his demurrer, which was interposed to the complaint of plaintiff. It is insisted that the complaint failed to state facts sufficient to constitute a cause of action. The contract for the breach of which plaintiff sought damages is set out in the complaint and is as follows:

"J. S. Baker, of Norwalk, Cal., does hereby agree to grow for the Hogue-Kellogg Company, of Ventura, Cal., 20 acres of Henderson bush beans, to be grown during the farming season of 1917 on land situated near Norwalk, Cal., known as Baker ranch, and to deliver the entire crop product thereof. The beans are to be delivered as soon as possible after threshing, properly recleaned, free from damage of any kind, in first-class shipping condition, sacked in new bean bags, to be even weighted and so stenciled; f. o. b. cars at Buena Park, Cal.

"The Hogue-Kellogg Company agrees to pay for said beans on net weight at $4.25 per hundred pounds, delivered f. o. b. cars at Buena Park, Cal., on or before December 1, 1917; and in case delivery is not made within the final time limit, it is optional with the Hogue-Kellogg Company to consider this contract in force or to cancel same.

"In case it rains, damaging the beans, said beans shall be handpicked and put in the condition as above stated.

"It is mutually agreed that the Hogue-Kellogg Company will sell seed beans for planting the above acreage at the rate of $4.25 per hundred pounds, f. o. b. Ventura, Cal., payment to be made when the crop is delivered.

"This contract is understood by both parties to pass title and constitute absolute sale, but until delivery has been completed grower agrees to and does assume all risk of loss or damage. Time is the essence of this contract, and any controversy arising under this contract is to be settled by arbitration; each party hereto to select one arbitrator and the two jointly to select a third, the decision of a majority of said arbitrators to be final and binding on both parties."

[1, 2] Appellant insists that the contract was invalid because it contemplated a completed sale of property not in existence, and that it is void for want of mutuality. The third point made has to do with the sufficiency of the allegations in the complaint affecting plaintiff's alleged damages. It is well-settled law that a valid contract may be made for the sale of a crop to be grown in the future by the vendor, where such vendor possesses the land upon which the crop is to be grown, for in such case it appears that the needful thing out of which the crop is to be produced is in existence, and hence the crop has legal potentiallty. Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Benjamin on Sales (7th Ed.) § 311. It was alleged in the complaint that at the time of the making of the contract and subsequent thereto defendant was the owner and in possession of the 20 acres of land referred to in the written contract. We construe the contract to be executory. The mere fact that

Digitized by Google

the writing provided that the contract should pass title and constitute an absolute sale, with a risk on the grower for loss or damage until delivery, should be held to mean only that title should be deemed to pass whenever the produce became a growing crop. It was competent for the parties to so contract. Farmer v. Leaf, 189 Pac. 735.

[3, 4] But, were we to assume that that particular term of the contract was void, it would not vitiate the main contractual obligation imposed upon the defendant, which was to grow and deliver the crop. In that case section 1141 of the Civil Code would apply, which declares that title is transferred by an executory agreement for the sale of personal property, when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer title thereto. There was no lack of mutuality in the obligations imposed by the contract. Plainly its terms were sufficient to have enabled the defendant, had he produced a crop and offered it to the plaintiff, and had the latter refused to accept it, to enforce that term which provides for the payment of the price agreed upon. That term is definitely stated, to wit:

"The Hogue-Kellogg Company agrees to pay for said beans on net weight at $4.25 per hundred pounds, delivered f. o. b. cars at Buena Park, Cal., on or before December 1, 1917."

The condition immediately following, that in the event there was a failure to deliver it would be optional with the vendee to cancel the contract or continue it in force was a mere statement of the legal right of the vendee upon default being made by the vendor.

[5, 6] As to the allegation of damage, plaintiff particularly alleged the making of the contract, the terms thereof, and the breach committed by the defendant; it alleged that by reason of the failure and refusal of the defendant to grow and deliver the beans plaintiff had been damaged in the sum of $775, and that the damages had not been paid. It is the position of appellant that the particulars as to why and how the plaintiff had been damaged should have been specially alleged, and in this regard it is claimed that an additional allegation contained in the complaint, which was that at the time when performance was due the price at which the plaintiff "might have bought" the equivalent of the beans agreed to be grown and delivered, and which the land was capable of producing, was the sum of $42 per hundred pounds, is insufficient. This allegation, of course, if that matter was required to be specially pleaded, as contended for by appellant, was insufficient, for section 3308 of the Civil Code declares that the detriment caused by the breach of a seller's agreement to deliver personal property is "the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled." The statement in the complaint of the price at which the plaintiff "might have bought" beans in the market at the time delivery from defendant was due is not an allegation of the value of the beans to the plaintiff or the market price thereof. But we think the plaintiff was not required to particularly plead the facts as to how the damage arose.

"At the common law, general damages, such as the law presumes to arise, as being the natural and necessary result of the wrong complained of, were not required to be pleaded. Damages for breach of contract to buy or sell goods were within this rule." Riverside Coal Co. v. Holmes, 36 Neb. 858, 55 N. W. 255.

"Under a general allegation of damages a plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of. These damages the law implies will proceed from the act, although the amount may often be in the reasonable discretion of the jury. They are called 'general,' as contradistinguished from 'special' damages, which are required to be specially stated in the declaration." Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; Barber v. Cazalis et al., 30 Cal. 92.

[7] A still further answer to the contention of appellant is that, as against the general demurrer, the complaint was sufficient to support a judgment for nominal damages, even though matters required to be specially pleaded were omitted therefrom. McCarty v. Beach, 10 Cal. 461; Moody v. Peirano, 4 Cal. App. 411, 88 Pac. 380.

For the reasons stated, the judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Digitized by Google

quarter of section 28, which, according to the description immediately following in the homestead, consists of three distinct parcels of land, two of which the declarant does not own. He fails to specify, however, on which of those three parcels he was then residing. In other words, it cannot be determined from the declaration whether the declarant was then residing on the 32-foot strip on the east side of said quarter section, or on the 31-rod strip on the west side of said quarter section, or on the mid parcel which he afterwards attempts to select as a homestead. We are of the opinion that such omission is fatal.

Section 1263 of the Civil Code, as it read at the time of the filing of this declaration, required that a declaration of homestead must contain a statement "that the person making it is residing on the premises, and claims them as a homestead." If the statement of residence, or any of the other statements required to be made by said section, is omitted, the homestead is void. It was said in Jones v. Gunn, 149 Cal. 687, 87 Pac. 577:

"While it is true that homestead and exemption laws are remedial and generally, must be liberally construed in order to effect the purposes intended thereby, yet it is equally true that homesteads and homestead exemptions are the creatures of statute, and that the failure to comply with any statutory requirement essential to a valid declaration of homestead cannot be supplied by liberal construction. Indeed, the Supreme Court of this state has generally held that homestead claimants must quite strictly comply with the statutory requirements as (formerly) to wife's acknowledgment (Beck v. Soward, 76 Cal. 530, 18 Pac. 650) as to head of family (Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 77 Am. St. Rep. 206, 58 Pac. 1063); as to residence on premises (Boreham v. Byrne, 83 Cal. 27, 23 Pac. 213); as to statement of husband's failure to make declaration (Cunha v. Hughes, 122 Cal. 113, 68 Am. St. Rep. 27, 54 Pac. 535); and as to estimate of the actual cash value of the premises, etc. (Tappendorff v. Moranda, 134 Cal. 421, 66 Pac. 491)."

And in Tappendorff v. Moranda, 134 Cal. 419, 66 Pac. 491.

"The right to a homestead, and to enjoy the privileges and immunities incident thereto, is purely of statutory creation, and exists only upon a compliance with the requirements of the statute. What the statute has specifically prescribed as a requisite for impressing the incidents of a homestead upon a tract of land is mandatory, and cannot be dispensed with."

In Boreham v. Byrne, 83 Cal. 23, 23 Pac. 212, it was held that where the declarant stated that he was "in possession" of certain described premises which he claimed as a homestead it was not the equivalent of the required statement of residence. It was there said:

"Nothing could make the premises a valid protected homestead without such a declaration as the statute required. Actual residence on the land would not so make it, in the absence of a sufficient declaration. A declaration sufficient in form without residence, and residence without a sufficient declaration are alike ineffectual to constitute a homestead."

The case of Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58, was one in which it was shown that a parcel of land on which the declarant resided was not the one described in the declaration, and the court held the error to be fatal, saying:

"A declaration of homestead must contain a description of the premises claimed, and a statement that the person making it is residing on the premises described."

Respondent endeavors to sustain the homestead by invoking the doctrine of liberal construction, as stated in Southwick v. Davis, 78 Cal. 504, 21 Pac. 121, and in Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436. But the facts of those cases are quite dissimilar to the facts of the case at bar. In both of those cases the question of the statement of value was involved. In the former case it was stated in the declaration that the value "does not exceed $5,000," and in the latter case the statement was, "We do place the value of said land at a sum not to exceed sixteen hundred dollars." In both cases it was held that the words used were sufficiently definite to convey an expression of an opinion of value.

[3] Respondent further contends for the application of the rule that ambiguity or obscurity in a written instrument may be removed by extrinsic evidence, from which he argues that, since the evidence shows that the dwelling was located on the mid parcel, the defect in the declaration is cured. The established rule is, however, that the right of a claimant to select a homestead and impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence. Reid v. Englehart-Davidson Co., supra, 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206; Boreham v. Byrne, supra.

In the light of the authorities above cited, the homestead in question must be held to be void, upon the ground that said declaration contained no statement that the declarant resided on the premises which he claimed as a homestead. That being so, the deed from David Olds to Thorington became an operative conveyance, and vested title in Thorington, and the determination of the question of the defendants' prescriptive title becomes unnecessary.

Judgment reversed.

We concur: WASTE, P. J.; RICHARDS, J.

Digitized by Google

OAKLAND STREET IMPROVEMENT BOND CO. v. FITZMAURICE, City Treasurer. (Civ. 3440.)

(District Court of Appeal, First District, Division 2, California. April 29, 1920.)

Constitutional law ⟹121(2) — Street assessment is a contract and statutes in force at time thereof as to its enforcement are part thereof.

A "street assessment" is a contract, and the statutes in force at the time prescribing the manner of its enforcement are a part thereof, and the holder of a bond securing an assessment issued prior to the amendment of Improvement Act 1911, § 68, in 1919 (St. 1919, p. 554) could require the city treasurer to advertise for sale and sell the property subject to the lien without depositing the cost of having a search of the records made for the purpose of ascertaining the name of all lien holders of record.

Application by the Oakland Street Improvement Bond Company for a writ of mandate prayed to be directed to W. M. Fitzmaurice, as City Treasurer of the city of Oakland, to require sale of property under lien of assessment for street work. Writ granted.

E. S. Page, of Oakland, for petitioner.

H. L. Hagan, City Atty., and Leon E. Gray, Deputy City Atty., both of Oakland, for respondent.

BRITTAIN, J. The respondent demurs generally to the petition on which an alternative writ of mandate was issued. The facts are not subject to controversy. A single question of law is involved.

Under the Improvement Act of 1911 (St. 1911, p. 730), the assignors of the petitioner under public contract performed certain street work in the city of Oakland. In due course assessment was made on the property subject thereto, and upon one of the lots the amount of the assessment was secured to be paid by a lien for a statutory bond issued by the city treasurer on October 29, 1914. After default in payment of certain installments which became due under the bond, demand was made on the respondent by the holder of the bond for the advertisement for sale and the sale of the property subject to the lien. He refused to advertise unless the bondholder should first deposit with him the cost of having a search of the records made for the purpose of ascertaining the names of all lienholders of record, or unless the bondholder should have such a search made, justifying his refusal upon the provisions contained in section 68 of the Improvement Act, as that section was amended in 1919 (St. 1919, p. 554).

At the time of the issuance of the bond the section in question required the treasurer, after default and demand, to publish a notice of the proposed sale in a newspaper, and that a similar notice should be "served upon any such owner if known, either personally or by depositing the same in the post office at such city, addressed to such owner at his address, if known, with the postage prepaid thereon." By the amendment of 1919 the quoted clause was made to read that a notice similar to that published should "be deposited by the city treasurer in the post office at such city, addressed to the person to whom said property is assessed upon the last assessment roll of such city, * * * if known, and to all record lienholders, with the postage thereon prepaid. When the addresses of such persons are unknown the notice shall be mailed to them at the city in which said property is located." The act makes no provision for the original cost of ascertaining the names of the lienholders of record, nor for the collection thereof from the proceeds of the sale of the property or as a part of the amount secured by the bond in the event of tender of the amount due prior to the date of sale.

The case is not to be distinguished in principle from the recent decision of the Supreme Court on rehearing in bank affirming a decision of Department 2 of the Supreme Court, which affirmed the judgment of the superior court in Los Angeles county. Chapman v. Jocelyn, February 19, 1920, 187 Pac. 962. It was there held that the case must be determined upon the act as it existed when the bond was issued. A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of the contract. In effect, the bond creates a power of sale, whereby its holder may enforce the lien of the assessment against the property described in the bond. The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond was issued. The Constitution forbids the passage of a law impairing the obligations of a contract. "Not only is the bond and the statute a contract, but it is a contract forced upon the parties by the compulsion of law." Chapman v. Jocelyn, supra.

It was well said upon oral argument that to put upon the bondholder the burden of having expert searchers of records determine the names of record lienholders, when no provision is made for the repayment of the expense of such search, would in many instances deprive such bonds of all value; because the cost would amount to more than the amount secured by the bonds.

Let the peremptory writ issue, directing the respondent to make advertisement in accordance with the provisions of the act as it stood at the date of the issuance of the bond.

We concur: LANGDON, P. J.; NOURSE, J.

Digitized by Google

STONER et al. v. SECURITY TRUST CO. et al. (Civ. 3175.)

(District Court of Appeal, First District, Division 1, California. April 26, 1920.)

1. **Appeal and error ⟸882(21) — Failure to request reporter's transcript cannot be complained of where respondents failed to give notice of termination of proceedings for new trial.**

Where notice of intent to move for a new trial has been given, but the motion has not been brought on for hearing nor any action taken within three months after service of entry of judgment, the proceedings on the motion were terminated without further order in view of Code Civ. Proc. § 660, and where respondents have failed to give notice of the denial of the motion "or of other termination thereof" as required by section 953a, they cannot, in the absence of anything showing a waiver of such notification, object on appeal to a consideration of the evidence on the ground that appellants did not file their notice with the clerk below requesting the reporter's transcript of the record within 10 days as required by the last-mentioned section; the trial court having discretion to approve the transcript when presented.

2. **Quieting title ⟸19—Suit to cancel assignments of mortgage and for recovery of money collected will lie as one to determine adverse claim.**

A suit to cancel purported assignment of note and mortgage and for the recovery of money collected by the assignees thereunder may be regarded as a suit under Code Civ. Proc. § 1050, to determine an adverse claim for money or property upon an alleged obligation, and is not objectionable as being an attempt to quiet title to personal property.

3. **Descent and distribution ⟸91(1) — Heirs held entitled to sue to cancel assignment of mortgage by decedent and for amounts collected.**

Where a decree of final distribution had been duly entered, the distributees were vested with the absolute right and title to a note and mortgage claimed to belong to decedent, and could bring an action to cancel an assignment thereof and to recover money collected by the assignees thereunder.

4. **Pledges ⟸16(3)—Evidence held to sustain finding that assignment of mortgage was for security.**

In a suit by heirs to cancel a purported assignment of a note and mortgage and to recover money collected by the assignees, evidence *held* to support a finding that the note and mortgage were assigned merely as security for money advanced.

5. **Cancellation of instruments ⟸47—Evidence in suit to cancel assignment held to support finding that note and mortgage assigned were worth their face value.**

In a suit by heirs to cancel an assignment of a note and mortgage and to recover amounts collected thereunder, a finding that the note and mortgage for $3,500 were worth their face value *held* supported by evidence that the land covered was worth $8,000 incumbered only by a first mortgage for $1,500, and by testimony that the makers of the note were considered financially good for the amount.

6. **Bills and notes ⟸167—Note and mortgage with default and option clause held not negotiable.**

A note and mortgage on land containing a default and option clause and executed as part of the same transaction *held* not negotiable.

7. **Pledges ⟸40 — Pledgee cannot transfer greater interest in pledge than that he himself has.**

A holder of a note and mortgage as security for a loan cannot by pledge or sale transfer to another a greater interest in the property than that he has himself.

8. **Estoppel ⟸75—One clothing another with apparent ownership cannot assert title against transferee.**

Where an owner of a nonnegotiable note and mortgage by assignment for security merely clothes his assignee with apparent title to the paper, and an innocent third party is thereby induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title.

9. **Estoppel ⟸116—Purchaser relying on negligence of true owner has burden of proof.**

If the purchaser from one who has not title to a note and mortgage pledged with him as security merely relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit.

10. **Estoppel ⟸110—Facts constituting estoppel must be pleaded.**

In an action to cancel an assignment of a note and mortgage, transferred for security merely, a purchaser from the assignee cannot maintain that the true owner was estopped because he clothed his pledgee with apparent ownership, unless he pleads the facts constituting such estoppel.

11. **Trial ⟸393(1)—Findings need not be in any particular form.**

Findings are not required to be in any particular form so long as they properly dispose of the material matters at issue.

Appeal from Superior Court, Kern County; K. S. Mahon, Judge.

Action by Vining B. Stoner and others against the Security Trust Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Emmons & Johnstone, of Bakersfield, for appellants.

Chas. H. Mattingly, of Los Angeles, for respondents.

WASTE, P. J. The plaintiffs, children and only heirs at law of Vandoren Stoner, claim-

Digitized by Google

ing to be the owners of a certain note and mortgage executed to the decedent during his lifetime, brought this action to recover the same from the defendants, and for certain sums of money alleged to have been collected thereon. Defendants answered, alleging ownership of the note and mortgage in defendant Katze, by an absolute and bona fide assignment, and that the defendant Security Trust Company held the same as collateral security for certain loans made to defendants Katze and Coyne. The lower court gave judgment for plaintiffs, from which the defendants appeal, seeking a review of the proceedings upon their motion for a new trial.

During the life of Vandoren Stoner, L. P. Keester and M. P. Smith executed and delivered to him their promissory note for $3,500, payable in seven annual installments of $500 each, and secured by a second mortgage upon real property. The note provided that, should default be made in payment of any installment of interest or principal when due, the whole sum of principal and interest should immediately become due at the option of the holder. By an instrument in writing Stoner assigned and transferred the note and mortgage to defendant Katze; the assignment being absolute in form, and purporting to be "in consideration of the sum of ten dollars." This transfer, the trial court found, was made without any consideration, except the sum of $710 loaned by Katze to Stoner, and that the assignment was made as collateral security for the repayment of that amount, and for no other purpose. Stoner gave no authority or direction in reference to the hypothecation or other disposition of the note or mortgage.

Shortly after taking the assignment, Katze borrowed and received of the defendant Security Trust Company the sum of $750, giving his note for the amount. As collateral security for the payment of that note he transferred the Keester and Smith note and mortgage for $3,500 to the trust company; the assignment, by apt reference, being made to secure the particular note. At that time the bank had no knowledge, so the trial court found, that Katze held the assignment from Stoner merely as collateral security. Some time later Katze and Coyne, two of the defendants, borrowed from the bank an additional $500, giving their joint note therefor. Three days later, on May 20, 1913, Vandoren Stoner died. On July 28th following Katze, by an instrument in writing, executed a general assignment of the $3,500 note and mortgage to the bank. The reason for this transaction, as explained by the bank's clerk while on the stand, was that, having only a specific assignment to secure the $750 note executed by Katze, and having advanced an additional amount to Katze and Coyne on their joint note, the bank, on July 28, demanded the new assignment be "given for the money that had been previously advanced."

On the 8th day of December following Katze and Coyne executed a new note to the bank for $2,600. The previously executed notes for $750 and $500, respectively, were thereupon treated as "paid by renewal," and the difference between their total and $2,600, the amount of the renewal note, or $1,350, was credited upon the books of the trust company to the account of defendant Coyne. No new or further assignment was taken by the bank, but on that day it caused the general assignment of July 28th to be recorded, and continued to hold it "as security that they (Katze and Coyne) would pay that $2,600." The limited assignment of March 12th was not recorded.

There is some evidence that the bank had knowledge of the limited interest Katze had in the $3,500 note and mortgage before he hypothecated them for his $750 loan. Katze so stated in his letter to the attorney for the Stoner estate. However, the court found to the contrary. Aside from this bit of evidence, it does not clearly appear that the bank knew of the claim of the estate before the renewal transaction in December. The testimony on the question is conflicting, and the court made no finding in that regard. There is nothing in the record, however, to indicate that the bank made inquiry at any time, during the entire transaction, to inform itself on the point. It took the special and general assignments without any investigation as to the real interest of defendant Katze, in each case for money about to be or already advanced, and apparently by tacit consent, continued to hold the note and mortgage as collateral security for the repayment by Katze and Coyne of the $2,600, to which sum their indebtedness was enlarged by the renewal transaction.

Due administration of the estate of Vandoren Stoner was had, of which the bank had notice. As has been made to appear by diminution of the record, by the final decree of distribution, the note and mortgage for $3,500 executed by Smith and Keester were distributed to these plaintiffs.

The defendant Security Trust Company in its answer admits having collected and appropriated to its own use the first two installments of $500 each upon the $3,500 note and mortgage, together with the interest.

The lower court decided that plaintiffs are the owners of the note and mortgage and entitled to recover the installments of principal and interest collected by the Security Trust Company, less the sum of $710 and interest, representing the amount loaned by defendant Katze to Vandoren Stoner as consideration for the original assignment by Stoner to him. By the judgment this sum was directed to be deducted from the amount collected by the bank, and to be applied by it as a credit on the amount of its claim against defendant Katze. The assignment by defendant Katze to the Security Trust Company was set

Digitized by Google

aside, and it was ordered to assign and deliver the note and mortgage to plaintiffs.

[1] Respondents make a preliminary objection to a consideration of the evidence in the case, upon the ground that the appellants did not file their notice with the clerk below, requesting a reporter's transcript of the record, within time. That notice must be filed within ten days after notice of entry of the judgment, order, or decree, or if a proceeding on motion for a new trial be pending, within ten days after notice of decision denying said motion, *or of other termination thereof*. Code Civ. Proc. § 953a. The italics are ours. The defendants gave notice of their intention to move for a new trial. The motion was not brought on for hearing, nor was any action taken by the trial court in the matter, within three months after the service of the entry of the judgment, the effect of all of which was a denial of the motion without further order, and amounted to a termination of the proceedings on the motion for a new trial. Code Civ. Proc. § 660. No notice of this "other termination thereof" was given, and there is nothing in the record which indicates that appellants either waived such notification or acted in the proceedings of the cause as if they had received formal and binding notice. They caused no undue delay, and the trial court acted well within its discretion in approving the transcript when it was presented.

[2, 3] Appellants contend that the complaint fails to state a cause of action in that it is based upon an attempt to quiet title to personal property, not provided for by sections 738 or 1050 of the Code of Civil Procedure, and for the further reason that the heirs of the decedent may not maintain the action. The specific object of the suit was to cancel the two purported assignments of the note and mortgage, and for the recovery of the money collected by the assignees under them. It may be regarded as a suit under section 1050 of the Code of Civil Procedure to determine "an adverse claim * * * for money or property upon an alleged obligation." Hoffman v. Kirby, 136 Cal. 26, 29, 68 Pac. 321. As to the other objection, a decree of final distribution in the estate of Vandoren Stoner was duly entered before the action was brought, the effect of which was to vest the absolute right and title to the note and mortgage in the distributees, who, as plaintiffs, brought this action. Garraud's Estate, 36 Cal. 277, 279–280.

[4, 5] The appellants urge as other grounds for reversal the alleged insufficiency of the evidence to support certain findings, and that the findings themselves do not warrant the judgment. That the note and mortgage were assigned by Stoner to Katze, as security for money advanced, is amply supported by the testimony of a number of witnesses as to the admissions made to them by Katze that such was the fact, by his acknowledgment that such was the case contained in his letter to the attorney for the estate of Stoner, and by his own testimony concerning the transaction. His acts and relations with Stoner after the purported assignment, as related by himself, particularly under cross-examination by plaintiffs' counsel, and by the court, were inconsistent with his theory of an absolute assignment. His own denials only raised a conflict in the evidence, which the trial court has determined against him. The claim of the defendant Coyne was also shown by the evidence to be based upon money alleged to be owed to him by the decedent, Stoner. His attitude in the matter has much the appearance of being suggested by an effort to collect the amount out of the proceeds of the $3,500 note and mortgage, without the necessity of presenting a claim against Stoner's estate. The finding that the note and second mortgage for $3,500 were worth their face value is supported by the evidence that the land covered by the mortgage was worth $8,000, incumbered only by a first mortgage for $1,500, and by testimony that the makers of the note were considered financially good for the amount.

[6-8] The assignment by Stoner to Katze was for collateral security only. The note for $3,500, secured as it was by a mortgage on land, both being executed as parts of the same transaction, and containing the default and option clause, was not negotiable. Meyer v. Weber, 138 Cal. 681, 685, 65 Pac. 1110; National Hardware Co. v. Sherwood, 165 Cal. 1, 5, 6, 130 Pac. 881. What, then, is the position of the defendant Security Trust Company under these circumstances? If the bank has any right which it can assert, other than the right to offset its claim against defendant Katze to the extent of $710, owed by the decedent Stoner to Katze, and which the court allowed and provided for in its judgment, it must be because it obtained the note and mortgage under such circumstances as would estop Stoner, and those claiming under or through him, from asserting their claim to its prejudice; for it is the general rule that one in possession of personal property can transfer to another, by pledge or sale, no greater interest in the property than he has himself. There is an exception to this rule, where the owner of the property clothes another with the apparent title to, or power of disposition over, it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto; the true owner being in such case held estopped from afterward asserting his title. Chase v. Whitmore, 68 Cal. 545, 547, 9 Pac. 942; Shafer v. Lacy, 121 Cal. 574, 578, 54 Pac. 72; Shirey v. All Night and Day Bank, 166 Cal. 50, 55, 134 Pac. 1001; Fowles v. National Bank of California, 167 Cal. 653, 659, 140 Pac. 271. Under this principle, a bona fide purchaser of a nonnegotiable

Digitized by Google

chose in action, from one to whom the owner assigned apparent absolute ownership, may obtain a valid title as against such owner, although the assignee may not be the true owner. This conclusion is reached by the application of the doctrine of estoppel, and the modification of the general rule relating to the transfer of personal property is placed upon that ground. Moore v. Metropolitan National Bank, 55 N. Y. 41, 14 Am. Rep. 173; 2 R. C. L. p. 632; Fairbanks v. Sargent, 104 N. Y. 108, 117, 9 N. E. 870, 6 L. R. A. 475, 58 Am. Rep. 490. But if the purchaser from one who has not the title, and has no real authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit. Barstow v. Savage Mining Co., 64 Cal. 388, 393, 1 Pac. 349, 49 Am. Rep. 705. The burden is upon the one seeking to invoke the exception to the general rule. Woodsum v. Cole, 69 Cal. 142, 145, 10 Pac. 331; Kenniff v. Caulfield, 140 Cal. 34, 45, 73 Pac. 803.

[10] In the instant case the defendant bank appears to have relied solely upon a legal defense to the action. It contented itself with making common cause with the other defendants in asserting that the assignment by the decedent Stoner to Katze was absolute and for adequate consideration. If it intended to interpose the equitable grounds of estoppel, it was incumbent upon it to specially plead the facts constituting such defense. Clarke v. Huber, 25 Cal. 593; Chapman v. Hughes, 134 Cal. 641, 646, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. Not having so pleaded, it could not be now considered (Burk v. City of Santa Cruz, 163 Cal. 807, 811, 127 Pac. 154), even though the appellant was now attempting to avail itself of it, which it is not. By neither averment or proof has it brought itself within the exception to the general rule. Such action on its part seems to be entirely consonant with its chosen line of defense. We feel that it was satisfied to abide by the fate of its codefendants. We are therefore constrained to hold that its interest in the hypothecated note and mortgage was measured by the extent of the advances made to Stoner by Katze, which the trial court has found, on evidence which we must admit is somewhat confusing, to be the sum of $710.

[11] In view of our conclusion in the matter, the point made that certain findings may appear to be immaterial need not be further considered. A large part of this objection arises, no doubt because the lower court's conclusions do not harmonize, with the theory of the appellants. Findings are not required to be in any particular form so long as they properly dispose of the material matters at issue. Millard v. Supreme Council, 81 Cal. 340, 342, 22 Pac. 864; Mott v. Ewing, 90 Cal. 231, 235, 27 Pac. 194.

We find nothing in the record which would have justified the trial court in granting a new trial.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

PALVUTZIAN v. TERKANIAN et al.
(Civ. 3257, S. F. 9093.)

(District Court of Appeal, First District, Division 2. California. April 9, 1920. Opinion of Supreme Court in Bank Denying Hearing June 7, 1920.)

1. Courts ⟸107—Decisions limited to matters before court.

It is elementary that every decision is limited in its application to the matters before the court.

2. Appeal and error ⟸1078(1)—Matters not argued deemed waived.

On appeal matters not argued by the appellant are deemed to have been waived.

3. Waters and water courses ⟸156(4)—Obvious easement impliedly retained by grantor of portion of land.

Where owner of land sold a part after the establishment of an irrigation ditch across the part conveyed, an implied understanding arose that the lands sold were to continue subject to the right to have the water flow through such ditch, the easement being obviously apparent and the parties having knowledge thereof at the time of the grant.

4. Estoppel ⟸107—Not necessary to plead estoppel in technical words if facts appear on face of complaint.

If the facts from which an estoppel arises appear on the face of the complaint, it is not necessary that estoppel be pleaded in technical words.

5. Estoppel ⟸78(3) — Contract regarding rights in irrigation ditch estopped landowner from denying existence of easement.

In an action for damages and to enjoin interference with irrigation ditches over defendant's land, defendant *held* estopped to deny the existence of an easement by reason of having entered into a contract with plaintiff and another adjoining landowner recognizing the existence of the easement.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by T. G. Palvutzian against John Terkanian and others. Judgment for defendants, and plaintiff appealed. Reversed.

Astor Elmassian, G. L. Aynesworth, and H. M. Johnston, all of Fresno, for appellant.

C. K. Bonestell and J. A. Steele, both of Fresno, for respondents.

BRITTAIN, J. From a judgment in favor of the defendants the plaintiff appeals. The

Digitized by Google

suit was for damages and for injunction to prevent interference with certain irrigating ditches and the flow of water over the defendants' land for which the plaintiff claimed an easement.

The court found that prior to 1885 the predecessors of both the plaintiff and defendants owned in one body the lands now owned by them severally. While the lands were held in single ownership two irrigation ditches or canals were constructed across the tract. These ditches were connected with the main ditch or canal of the Fresno Canal & Land Corporation's system of irrigating ditches. Since their construction they have been the only source from which water can be obtained for the irrigation of plaintiff's land, except by the installation of a pumping plant or the acquisition of a right of way for ditches over other property. The ditches were at all times since 1885 the visible and obvious means of transporting water to the lands now owned by the plaintiff. For two or three years between 1885 and 1908 they were not used, but they were used continuously for five years commencing in 1909. In 1908 the owner of the entire tract conveyed to the defendant Terkanian one portion of the tract. Thereafter the grantor and his successors used the ditches on the portion theretofore conveyed. The plaintiff acquired his portion of the original tract in 1915. In October, 1916, "at the special instance and request of the defendant, John K. Terkanian and one Kienitz," who was the owner of an adjoining tract over which the ditches in controversy ran, Kienitz, the plaintiff, and Terkanian entered into an agreement which is summarized in the findings, but to which it is proper to make some further reference. Kienitz was named as the party of the first part, and the plaintiff, Palvutzian, and the defendant Terkanian were joined under the designation of the "second party." It recited the ownership of Kienitz of his land, "and that a certain ditch or canal is now located upon the premises of the first party, and that said ditch or canal is now used for the purpose of furnishing water for irrigation purposes to second party." It was agreed that "in consideration that first party furnish to second party through and by means of a pipe line [which was to be and was constructed in lieu of the old ditch on the Kienitz land] an amount of water equal to the quantity which has been furnished by said ditch or canal to second party, second party hereby agrees to waive any and all rights that they may or might have in said ditch, and further agree that said first party shall be allowed to obliterate said ditch and substitute therefor the said proposed pipe line, it being understood that first party shall in no manner lessen the quantity of water heretofore furnished to second party by and through said ditch or canal." Taking this contract by its four corners, it appears to have been made as much for the benefit of the plaintiff as for the defendant Terkanian, that the latter by joining in it recognized Palvutzian's right to the water as equal to his own, and that all three of the adjoining landowners recognized the right of the lower owners on the ditch to the flow of water over the lands of the upper owners, merely agreeing that on one of the upper tracts the pipe line might be substituted for the existing ditch, thus changing the easement from the right to have the ditch maintained to one to have the same flow of water through the pipes.

Pursuant to this contract the court further found that Kienitz constructed the pipe line and plowed up the ditches on his land; that Terkanian made a ditch connecting the Kienitz pipe line with the westerly of the two ditches over the defendants' land leading to that of the plaintiff, but refused in April, 1918, to allow the plaintiff to connect the pipe line with that ditch. In May, 1918, Terkanian plowed up and filled the easterly ditch and the westerly ditch so that the plaintiff could not thereafter obtain water for irrigation thereby. Sixty acres of the plaintiff's land was then planted in Thompson seedless grape vines, and 60 acres were in pasture. Neither the grape vines nor the pasture will grow or produce without irrigation during the irrigating seasons. It was then found that by reason of the acts of the defendants in plowing and filling up the ditches the plaintiff has been prevented from irrigating any portion of his premises from the old source of supply; that his grape vines and pasture have been dying out and will die out entirely unless they are irrigated; that there was water in the main canals of the irrigation system which would have flowed to and upon plaintiff's premises for irrigation if the ditches had not been plowed and filled up; that the plaintiff's land has depreciated in value in the sum of $300; that the defendants threaten and intend to and will keep the ditches plowed and filled up so that the plaintiff cannot obtain water through them for the purpose of irrigating his land; the plaintiff's damages unless water be obtained for irrigation will be irreparable, the premises materially reduced in value, and the pasture and seedless grape vines on the plaintiff's land will be rendered valueless; and that the plaintiff has no plain, speedy or adequate remedy at law. The court further found that neither the plaintiff nor Terkanian had acquired as against the other any adverse interest in the ditches since the date of the deed to Terkanian.

Upon these findings the court concluded that by the conveyance to Terkanian the plaintiff's predecessor conveyed to him all his right, title, and interest in and to the ditches, and there was no express or implied right of way reserved over the land for ditches to irrigate the land he afterwards convey-

Digitized by Google

ed to the plaintiff, that in the use of the irrigation ditches after the deed to Terkanian plaintiff's grantor or successors in interest was without right, and that Terkanian had the right to plow and fill up the ditches and is not liable for damages which the plaintiff suffered thereby. The plaintiff and appellant maintains that upon the findings of fact these conclusions of law cannot be sustained, and that in the determination of this appeal on the findings judgment should be entered for the plaintiff for the damages found to have been sustained by him and for injunction in accordance with the prayer of his complaint.

[1, 2] The respondent contends that under the facts the case is not to be differentiated from Taylor v. Avila, 175 Cal. 203, 165 Pac. 533 (Sac. No. 2276). The appellant relies upon a number of cases which unquestionably sustain his position, unless the decision in Taylor v. Avila, supra, is determinative. Cave v. Crafts, 53 Cal. 135; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091; Jones v. Sanders, 138 Cal. 405–412, 71 Pac. 506; Jersey Farm Co. v. Atlanta R. Co., 164 Cal. 412, 129 Pac. 593; Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025. Except Cave v. Crafts, cited upon another proposition than the one chiefly involved in this case, none of these cases was referred to in the opinion of Taylor v. Avila. An examination of the record and briefs in Taylor v. Avila shows that the rule of law announced in the cases relied on by the appellant was not presented to nor considered by the court. It had before it solely the question of the construction and effect of a particular deed. Upon this question the only matters argued in the briefs or decided by the court were that the language used in the deed purported to transfer to the grantee all water rights, ditch rights, etc., and that it did not purport to reserve any then existing water rights for the benefit of the tract of land from which that conveyed by the deed was severed. It is elementary that every decision is limited in its application to the matters then before the court. Grant v. Murphy, 116 Cal. 432, 48 Pac. 481, 58 Am. St. Rep. 188; Chapman v. State, 104 Cal. 690–697, 38 Pac. 457, 43 Am. St. Rep. 158. The decision under consideration was a department decision, and it does not appear that rehearing by the court in bank was sought. It is significant that in the opinion it was suggested there was a probability that the parties intended to include in the deed a reservation in favor of the grantor of the existing easement she then possessed and that by mutual mistake it was omitted therefrom. It was stated the complaint contained no allegation of such mistake, and the plaintiff did not seek reformation of the deed. The opinion closes with the statement that, "as the record stands, we have no choice but to reverse the judgment and order, and it is so ordered." It is also elementary that on appeal matters not argued by the appellant are deemed to have been waived. Churchill v. Lauer, 84 Cal. 233, 234, 24 Pac. 107; Rogers v. Schlotterback, 167 Cal. 35, 52, 53, 138 Pac. 728.

[3] If the appellant in Taylor v. Avila had presented to the court argument under the rule announced in Cheda v. Bodkin, supra, and Jersey Farm Co. v. Atlanta R. Co., supra, and the decision in Taylor v. Avila had been rendered in its present form, this court might have been warranted in concluding the effect of Taylor v. Avila was to overrule the earlier cases. That they are not overruled appears from the fact that in a later case the rule declared in Cheda v. Bodkin, supra, was reannounced by the Supreme Court, and that case cited as authority, the statement being:

"The mere fact that appellant's predecessor was the grantee of one of the respondents under a warranty deed does not prevent an assertion by plaintiff of a right to use the track. Where the owner of one tract of land sells part of it, and that part is burdened by an obvious easement in favor of other persons, or other parts of the larger tract, an implied understanding arises that the burdens and correlative advantages shall continue as they existed before the separation of the title." Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 402, 170 Pac. 832.

This latter decision was one of the other department of the Supreme Court. It is not only the later opinion of the court, but it appears that there was an application for hearing which was denied. This court is bound by the later decision, supported as it is by a long line of decisions not considered in Taylor v. Avila.

The rule of law which was reannounced in Southern Pac. Co. v. Los Angeles Mill Co., supra, received lengthy and careful consideration by this court in Kallenberg v. Long, 179 Pac. 730, and in Nay v. Bernard, 180 Pac. 827, and in both cases it was applied in the manner in which the appellant maintains it should be applied in this case. The matter has received further careful consideration, and no reason appears why this court should overturn a rule of property which has been recognized in this state since the decision in Cave v. Crafts, 53 Cal. 135, decided by the Supreme Court in 1878. Upon the facts found by the trial court, it appears that when the Terkanian deed was made the land conveyed was burdened with an obvious easement for the maintenance of the ditches and flow of water to the property retained by Terkanian's grantor and subsequently conveyed to the plaintiff, and that under the rule to which reference has been made the defendants had no right to destroy the ditches and thus to irreparably injure the plaintiff and his lands.

[4, 5] This case may be further differentiated from Taylor v. Avila, in that it appears

Digitized by Google

in that case there was no allegation to support a reformation of the deed to express the true intent of the parties. In this case the plaintiff sets up the agreement by which Kienitz and Terkanian both recognized the right of the lower owners to the maintenance of the ditches and the flow of water, and the court found that the plaintiff entered into that agreement at the special instance and request, not alone of Kienitz, but of Terkanian. The contract on its face showed that it was made for the benefit both of the plaintiff and Terkanian. If the facts from which an estoppel arises appear on the face of the complaint, it is not necessary that estoppel shall be pleaded in technical words. Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695; Beardsley v. Clem, 137 cal. 328, 332, 70 Pac. 175. The effect of pleading this contract, connected with the finding in regard to it, creates an estoppel as against the defendants to assert that an easement, the existence of which was so recognized, does not exist.

The judgment is reversed, with instructions to the trial court to take such further proceedings as are consistent with the views herein expressed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

SHAW, J. Upon the denial of the petition for a rehearing in this case I deem it advisable to state one feature of the decision in Taylor v. Avila, 175 Cal. 203, 165 Pac. 533, which is not noticed in the opinion of the District Court of Appeal, and which clearly distinguishes it from the present case. The facts in that case were that originally Taylor owned 80 acres, being a west half of a northwest quarter, and Avila or his predecessors owned 40 acres adjoining the north end of the 80 acres. Through these tracts a ditch was made leading from the canal to the north, and it was in use for the purpose of irrigating both tracts. Afterwards Taylor conveyed the north 25 acres of her 80-acre tract to one Gularte. Thereafter she continued to use the ditch as before, although no reservation of the right to do so had been made in her deed to Gularte for her 25 acres. Afterwards Gularte sold the 25 acres to Avila and she joined with Gularte in the deed conveying said 25 acres to Avila.

The significant fact in the case is that she had no right or interest whatever in the 25 acres at the time she joined in the deed of Gularte to Avila, except her implied easement, consisting of her right to maintain the ditch through said 25 acres for the benefit of her remaining 55 acres of the 80-acre tract, and that her deed to Avila expressly purported to convey all ditch rights or interests in ditches for irrigating. The only effect the deed could have, so far as she was concerned, was to convey her right to the ditch. There was, therefore, no room for the operation of any implication that she reserved the ditch right, since, from the circumstances, it was obvious that the only possible intention on her part in joining in the deed was to convey to the defendant her right in the said ditch over the 25-acre tract. The case of Taylor v. Avila is in all respects parallel to that of Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091, in which the same conclusion was reached, and it is not contrary to the decisions in Cave v. Crafts, 53 Cal. 139, Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69, Jones v. Sanders, 138 Cal. 405, 71 Pac. 506, Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593, and Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025.

ZALL JEWELRY CO. et al. v. STODDARD et al. (No. 9619.)

(Supreme Court of Colorado. May 3, 1920. Rehearing Denied May 25, 1920.)

1. **Appeal and error ⇐671(7) — Assignment based on document not in abstract will not be considered.**

An assignment of error based upon a document not appearing in the abstract will not be considered.

2. **Appeal and error ⇐679(2), 719(4)—Alleged defective pleading will not be considered where not set out and error not assigned.**

Where the portion of a pleading said to be defective is not set out in the abstract, and error is not assigned to the ruling of the court thereon, the point will not be considered.

3. **Appeal and error ⇐581(2) — Objections and exceptions to evidence must appear in abstract.**

Objections and exceptions to the admission or exclusion of testimony must appear in the abstract; a statement thereof in the assignment of errors and reference to the bill of exceptions being insufficient.

4. **Appeal and error ⇐586(1)—Court may decline to consider case which it cannot grasp from abstract.**

When it is impossible to obtain from the abstract of record a comprehensive idea of the case, the court may decline to consider it.

Department 1.

Error to District Court, City and County of Denver; W. S. Johnson, Judge.

Action by V. C. Stoddard and Edward McLean, trustee in bankruptcy, against the Zall Jewelry Company and others. To review judgment for plaintiffs, defendants bring error. Writ dismissed and judgment affirmed.

Herman and Jennie Zalinsky are husband and wife, and William Zall is their son.

Digitized by Google

In 1907 defendant in error Stoddard obtained a judgment in the county court against Herman Zalinsky. In 1917 execution was issued on this judgment and returned unsatisfied and such further proceedings had that the other plaintiffs in error were brought into this action as parties, under the contention that certain stock of the company standing in the name of the wife and son was in fact the property of the husband. Herman Zalinsky meanwhile, on his voluntary petition, was declared a bankrupt; the Stoddard judgment being scheduled as his sole debt. Defendant in error McLean was appointed trustee. On the trial a verdict was directed for plaintiffs in error. An appeal was taken to the district court, and the trial there resulted in a verdict for defendants in error. Thereupon judgment was entered decreeing 9,997 shares of said stock standing in the name of Jennie Zalinsky and William Zall to be the property of Herman Zalinsky, and subjecting the same to the lien of the Stoddard judgment. Such further proceedings were thereafter had that the cause is now before us for review on error.

Among the numerous questions argued in the briefs of counsel are: The regularity of the proceedings by which Jennie Zalinsky, William Zall, and the Zall Jewelry Company were brought into the cause, and those by which McLean appeared as a plaintiff in the county court and an intervener in the district court; the amendment of an appeal bond; the correctness of the instructions; and the sufficiency of the evidence. Further details concerning these matters are, however, unnecessary by reason of the condition of this record as hereinafter set forth.

Edwin N. Burdick, John Dewesse, Nathaniel Halpern, and John McPhail, all of Denver, for plaintiffs in error.

Tolles & Cobbey, of Denver, for defendants in error.

BURKE, J. (after stating the facts as above). The bill of exceptions contains 450 pages and is not indexed, and the number of folios, including numerous exhibits thereto attached, is 1,210. It is apparent that, as originally prepared and certified, no instructions were contained therein and none are mentioned in the certificate. Thereafter duplicate folios 1055 to 1114 and 28 additional pages without folio numbers, all relating to instructions, were inserted just preceding the certificate. No discoverable order is followed in making up the record proper.

The original abstract of record, so called, contains 72 pages. It is in no proper sense of the term such an abstract, but rather a collection of desultory comments on the proceedings in the district court, such as:

"Counsel were then permitted to inquire as to the age of the boy and inquiries along that line to some considerable extent."

The folios of this document are so badly mixed as to be worse than useless. The same may be said of its purported index.

The assignment contains 22 paragraphs calling our attention to that number of alleged errors of the trial court. Nos. 1, 2, 3, 19, and 20 are incomprehensible. No. 3, which is a fair example of these, reads:

"The court erred in overruling the motion to quash the summons issued to make any person a party to a summons in garnishment that had already been served and answered."

Each of the remaining assignments refers to certain folios of the abstract, examination of which is indispensable to an understanding of them. In each case either the abstract is too meager to inform us of the cause of complaint, or is altogether silent upon the subject mentioned in the assignment, or fails to disclose any objection to the ruling or any exception saved thereto.

The sufficiency of the evidence to support the verdict is not covered by any assignment of error; hence a supplemental abstract of 147 pages filed by defendants in error was entirely unnecessary.

"Plaintiff in error shall * * * file with the clerk * * * an abstract of the record. Such abstract shall contain a brief statement of the contents of the pleadings, the judgment, the assignments of error relied on, and such other parts of the record as may be essential. * * * The abstract shall be indexed and the folio numbers of the record shown on the margin thereof." Rule 34 of the rules of this court (161 Pac. x).

"Plaintiff in error shall assign errors in writing at the time of filing the record and each error shall be separately alleged and particularly specified." Rule 30 of the rules of this court.

"If the plaintiff in error shall fail to assign error, the writ of error shall be dismissed." Rule 31 of the rules of this court.

"An exception in the lower court to an instruction is essential to a consideration of alleged error therein; such exception should appear in the abstract." Auckland et al. v. Lawrence, 19 Colo. App. 291, 292, 74 Pac. 794, 795.

[1] An assignment of error based upon a document not appearing in the abstract will not be considered. Merriner v. Jeppson et al., 19 Colo. App. 218, 220, 74 Pac. 341.

"Plaintiff in error shall prepare and file a printed abstract of the record which must set forth fully the points relied upon for the reversal of the judgment, and if in this respect the abstract is defective, the * * * writ of error may be dismissed." Brennan Merc. Co. et al. v. Vickers et al., 31 Colo. 324, 325, 73 Pac. 46.

"If counsel desire to question the sufficiency of any pleading, such pleading should be in the abstract and other portions of the pleadings sufficient to understand the question urged." Gerspach v. Barhyte, 17 Colo. App. 490, 68 Pac. 1057.

"Parties who desire to urge error on the re-

Digitized by Google

fusal to admit documents must put them in the abstract. * * * References to the transcript of record are not in compliance with the rules." Mich. F. & M. Ins. Co. v. Wich, 8 Colo. App. 409, 417, 46 Pac. 687, 690.

[2] Where the portion of a pleading said to be defective is not set out in the abstract, and error is not assigned to the ruling of the court thereon, the point will not be considered. Michael v. Mills, 22 Colo. 439, 441, 45 Pac. 429.

"We are unable to gain any understanding of this case from the abstract of record. * * * For aught we know, the ruling complained of was grevious error, but the abstract contains nothing to indicate that it was not entirely proper. * * * It is apparent upon the face of the abstract that it contains fragments only of the instructions. * * * The abstract does not show that they were met by any objection, and if they were acquiesced in their contents are unimportant. This abstract fails wholly of the purpose for which an abstract is required." (Judgment affirmed.) Kelly v. Doyle, 12 Colo. App. 38, 39, 54 Pac. 394.

[3] Objections and exceptions to the admission or exclusion of testimony must appear in the abstract. A statement thereof in the assignment of errors and reference to the bill of exceptions are insufficient. Mc. & Mc. v. Fowler, 36 Colo. 202, 206, 85 Pac. 421.

The abstract "is nothing more than an index to the transcript." It "is so fatally defective that it cannot properly be called an abstract. * * * The abstract in this case is so radically deficient that this court, consistent with good practice, must enforce the rule and make the only order appropriate in the premises dismissal of the writ of error, which is accordingly done." Purdy v. Geary, 45 Colo. 129, 100 Pac. 426.

"Where the court is unable to determine from an inspection of the abstract whether any error was committed by the trial court, the practice does not require it to look elsewhere for the information." Denver M. Co. v. M. Pub. Co., 4 Colo. App. 146, 35 Pac. 192.

The same rule applies where the abstract does not disclose an objection made and exception saved to the alleged erroneous ruling.

"We are not obliged to search through the record to find that which it is clearly the duty of counsel to point out and print in his abstract." Thompson v. D. D. & R. Co., 25 Colo. 243, 248, 53 Pac. 507, 508.

[4] When it is impossible to obtain from the abstract of record a comprehensive idea of the case, the court may decline to consider it. McFaddin v. Bice, 58 Colo. 173, 146 Pac. 244.

"As neither the instructions given nor those refused appear in the abstract, they will not be considered." Knowlton v. K.-C. M. Co., 59 Colo. 51, 147 Pac. 330.

"Numerous errors are assigned, most of which cannot be considered because the abstract shows no objection made to the ruling on which the assignments are based." Colo. G. D. Co. v. S. R. M. Co. et al., 60 Colo. 412, 413, 153 Pac. 765.

It will thus be observed that, as to each of the alleged errors of the trial court, discussed in the briefs of counsel, either the bill of exceptions, the abstract of record, or the assignment of errors is so defective as to preclude the consideration thereof by this court. This conclusion we announce with less reluctance because our examination of the bill of exceptions convinces us that substantial justice was done by the judgment below.

The writ is accordingly dismissed, and the judgment affirmed.

GARRIGUES, C. J., and SCOTT, J., concur.

INTERSTATE BUSINESS EXCHANGE CORPORATION v. CITY AND COUNTY OF DENVER. (No. 9601.)

(Supreme Court of Colorado. April 5, 1920. Rehearing Denied June 7, 1920.)

1. **Municipal corporations ⟸611—Employment agency furnishing technically trained persons not subject to police regulation.**

Employment agencies engaged in furnishing technically trained persons to employers are not subject to police regulation, as are those engaged in furnishing common labor.

2. **Municipal corporations ⟸592(1)—May impose tax upon occupation licensed by state.**

That an occupation is licensed by the state does not prevent a city from imposing a tax upon such occupation for the purpose of revenue.

3. **Licenses ⟸5½—City of Denver may impose occupation tax.**

Under Denver City Charter 1904, § 137, the city of Denver may impose an occupation tax.

4. **Commerce ⟸69—City may impose occupation tax on local business of concern engaged in interstate commerce.**

If a corporation engaged in furnishing technically trained persons to employers carries on a local business, together with its interstate business, it is subject to an occupation tax by a city so far as its local business is concerned.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Action by the Interstate Business Exchange Corporation against the City and County of Denver. Judgment for defendant, and plaintiff brings error. Affirmed.

John Hipp and George H. Marrs, both of Denver, for plaintiff in error.

James A. Marsh and Jacob J. Lieberman, both of Denver, for defendant in error.

Digitized by Google

BAILEY, J. This action was brought to recover $750.00 claimed to have been illegally exacted from the plaintiff by the City and County of Denver, under the guise of a license fee demanded for the privilege of conducting its business therein. Defendant moved to strike out certain portions of the complaint, which motion was in part granted. An amended complaint was then filed, to which defendant interposed a demurrer on the ground that it did not state a cause of action. The demurrer was sustained and plaintiff elected to stand upon its complaint, and judgment of dismissal was entered. That judgment is now here for review.

The question involved is the right of the city to collect a license fee from defendant company for the privilege of conducting its business, which is that of an employment agent, engaged in furnishing technically trained persons to employers throughout the city, state and country. It is contended that the city has no such power, for the reason that the sum fixed was excessive as a police power license, and also because of the peculiar character of the business itself, which it is claimed removed it from the class of employment agencies furnishing common labor.

[1] In view of the decision of this court in Wilson v. City and County of Denver, reported in 178 Pac. 17, it is clear that employment agencies of the class here involved are not subject to police regulations as are those engaged in furnishing common labor. That case, however, does not determine that the City may not impose a license tax upon such employment agencies for the purpose of revenue. This is the only question in the case.

[2] It is contended that the agency is licensed by the state and therefore the City is without power to compel payment of another tax. That the City may impose such tax, in spite of the payment of a state license, is definitely held in Provident Loan Society v. City and County of Denver, 172 Pac. 10.

The City bases its right to provide for the licensing of trades, callings and occupations upon section 137 of the Charter of 1904, which is as follows:

"What callings shall be licensed, the license fee to be exacted in respect thereof in each case, and the conditions upon which the license shall be issued, shall, except as otherwise provided by the charter, be prescribed by general ordinance."

[3] That the city may impose such an occupation tax as is provided for by the above section is clear from the decision in Denver City Railway Co. v. Denver, 21 Colo. 350, where this court, at page 356, 41 Pac. 826, 829 (29 L. R. A. 608, 52 Am. St. Rep. 239), said:

"Our conclusion is that the legislature, having in express terms conferred upon the city the power to tax, as well as to license and regulate, that the enactment of the ordinance under consideration was a legitimate exercise of that power, and the charge for license therein provided may be enforced as a valid tax."

In discussing the rule as to the right of a municipality to impose license taxes, it is said in 17 R. C. L. 536:

"As it is elementary that every license tax is imposed for raising revenue, or as a police regulation, or for both purposes, it is a matter of indifference whether a license fee is exacted under the power to regulate or the power to tax, if the power to do either exists."

[4] It is also contended that the business of the employment agency is interstate in character, and that a tax upon it is in effect an interference with interstate commerce. It is admitted, however, that some of the business done by it is intrastate and, moreover, that it has a state license. Without passing upon the question whether the business of furnishing employés to persons and corporations outside the state, which it is claimed is the main purpose of the agency in question, it is apparent that such fact does not necessarily bring the business within the purview of the laws relating to interstate commerce, especially since that is not the exclusive business and purpose of the agency. In support of this proposition we quote the following from 17 R. C. L. 498:

"A state statute imposing a general tax on certain kinds of business or occupations, and requiring a license to be taken out before such business or occupation shall be engaged in, must be construed as not applying to such business as may constitute interstate or foreign commerce, but only to such business of the kinds specified as constitutes local or state commerce, and to persons engaged or intending to engage therein. This is in accordance with the principle that when a statute is open to two possible interpretations, the court will adopt the one which will uphold the statute. Accordingly if a corporation combines and carries on a local and state business, together with its interstate business, it is subject to state taxation and regulation so far as its local and state business is involved; and a statute is valid when applied to the local or state business of a corporation engaged in both state and interstate business or commerce, so long as it has a uniform operation throughout the state as to such business, and is not shown to be prohibitory or destructive thereof."

Applying this rule to the question before us, it appears that the City has the right at least to license the local business of the agency, regardless of the fact that the company does interstate business also.

Both upon principle and authority the license in question should be upheld as an exercise of the power to tax for the purpose of revenue. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

GARRIGUES, C. J., and ALLEN, J., concur.

Digitized by Google

DARIUS v. APOSTOLOS. (No. 9437.)

(Supreme Court of Colorado. Dec. 1, 1919. On Rehearing, June 7, 1920.)

1. **Civil rights ⇐2—Statute for equal enjoyment of places of public accommodation strictly construed.**

Rev. St. 1908, §§ 609, 610, providing that all persons shall be entitled to the equal enjoyment of places of public accommodation, is a penal statute, and must be strictly construed.

2. **Statutes ⇐194—Ejusdem generis not applicable where specific words signify subjects greatly different.**

The doctrine of ejusdem generis does not apply where specific words signify subjects greatly different from one another, and is not applicable to a statute relating to different kinds of business where the kinds of business enumerated bear no common analogy to one another, except that they are all for pecuniary profit.

3. **Civil rights ⇐8 — Bootblacking stand "a place of public accommodation" under statute providing for equal enjoyment.**

A bootblacking stand is a "place of public accommodation" within the meaning of Rev. St. 1908, § 609, providing that all persons shall be entitled to the equal enjoyment of places of public accommodation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Place of Public Accommodation.]

4. **Civil rights ⇐8—No distinction between barber shops and bootblacking stands by reason of statutory regulation of latter.**

No such a distinction exists between barber shops and bootblacking stands as to clearly imply the exclusion of the latter from the operation of Rev. St. 1908, §§ 609, 610, providing that all persons shall be entitled to equal enjoyment of places of public accommodation, etc., from the fact that barber shops are impressed with a public character by reason of their statutory regulation (Laws 1909, p. 294); the latter statute not being enacted until 14 years after the former.

5. **Civil rights ⇐8 — Bootblacking establishment is "place of public accommodation" notwithstanding later statute.**

There is no such relation between Laws 1917, p. 164, § 3, prohibiting advertisement of discrimination, and Rev. St. 1908, §§ 609, 610, providing that all persons shall be entitled to equal enjoyment of places of public accommodation, as would give to the definition in the former of "all other places of public accommodation" even the doubtful force of later legislative interpretation, and such definition does not exclude a bootblacking establishment from operation of the act of 1895.

6. **Statutes ⇐188—Words and phrases presumed to be used in usual sense.**

The legal presumption is that words and phrases in statutes are used in their usual sense, unless the intent clearly appears to use them in a more restricted or different sense.

On Rehearing.

7. **Civil rights ⇐2 — Statute providing for equal enjoyment of public places constitutional.**

Rev. St. 1908, § 609, providing that all persons shall be entitled to the equal enjoyment of places of public accommodation, is not unconstitutional as applied to the business of bootblacking.

Teller, Scott, and Bailey, JJ., dissenting.

En Banc.

Error to El Paso County Court; W. P. Kinney, Judge.

Action by W. L. Darius against Peter Apostolos. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

E. P. Blakemore, of Denver, for plaintiff in error.

G. W. Musser, of Denver, and W. D. Lombard and C. B. Horn, both of Colorado Springs, for defendant in error.

BURKE, J. Section 1, c. 61, Laws of 1895, p. 139 (section 609, Revised Statutes 1908), provides that "all persons" shall be entitled to the equal enjoyment—

"of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters, and all other places of public accommodation and amusement," etc.

Section 2 of the same act (Rev. St. 1908, § 610) that any person violating the provisions of the foregoing—

"shall for every such offense forfeit and pay a sum of not less than fifty (50) dollars nor more than five hundred (500) dollars to the person aggrieved thereby, to be recovered in any court of competent jurisdiction, * * * and shall also for every such offense be deemed guilty of a misdemeanor."

Plaintiff in error brought this action against defendant in error under the foregoing act. The complaint alleges that the defendant conducted a bootblacking establishment in the city of Colorado Springs, service in which was refused plaintiff because he was a colored man. The prayer is for damages in the sum of $500. A general demurrer to this complaint was sustained by the trial court, on the ground that defendant's business was not covered by the language of section 1, supra. The cause is now before us on error, and this is the sole question for our consideration.

[1] Considering the penal character of this statute, the rule of strict construction must be applied. Brown v. J. H. Bell Co., 146 Iowa, 89, 123 N. W. 231, 124 N. W. 901, 27 L. R. A. (N. S.) 407, Ann. Cas. 1912B, 852.

Finding, as we do, that the judgment of the trial court must be reversed, each of the three principal contentions made by counsel for de-

Digitized by Google

fendant will be discussed. They are as follows:

First. That the doctrine of ejusdem generis is applicable, and hence the phrase "all other places of public accommodation" should be read "all other similar places of public accommodation"; that defendant's place of business does not fall within the same general class as those enumerated; and that the identical question has been so decided in Burks v. Bosso, 180 N. Y. 341, 73 N. E. 58, 105 Am. St. Rep. 762.

We have heretofore stated the general application and limitation of this rule of construction as follows:

"The familiar general rule, which is enforced in this jurisdiction, is that where words of general import follow specific designations the application of the general language is controlled by the specific. This is but a rule of construction, and is not allowed to defeat the plain legislative will; yet, where the legislative intent is doubtful, resort to rules of construction is proper." Gibson v. People, 44 Colo. 600–605, 99 Pac. 333, 335.

The decision in the New York case was as asserted by defendant, but we are of the opinion that it is based upon false reasoning. That court says (180 N. Y. 344, 73 N. E. 59, 105 Am. St. Rep. 762):

"A bootblacking stand may be said to be a place of public accommodation, like the store of a dry goods merchant, a grocer, or the proverbial 'butcher, baker and candlestick maker.'"

This, we think, is incorrect. The principal business of such establishments is the sale of merchandise, whereas the principal business of barber shops and bootblacking stands is the furnishing of personal service. They do not, therefore, belong in the same general class. Furthermore, while the New York court points out that "bathhouses and barber shops are not in the same class with hotels and public conveyances," the bearing of this distinction on the question at issue, and the rule of law therefore necessarily applicable seems to have been overlooked by it. This determination of the diversity of character in the kinds of business specifically enumerated, removes the case from the application of the doctrine of ejusdem generis.

[2, 3] Where the kinds of business enumerated bear no common analogy to each other except that they are all for pecuniary profit, the rule is not applicable. Brown v. Corbin, 40 Minn. 508, 42 N. W. 481. The rule does not apply where the specific words signify subjects greatly different from one another. McReynolds v. People, 230 Ill. 623, 82 N. E. 945–948. A bootblacking stand is a "place of public accommodation." It is of the same general class as "barber shops," in that the business of each consists principally in furnishing personal service and the two are quite generally operated in conjunction, but it is not of the same general class as "public conveyances on land or water," or "theaters"; hence in the instant case the doctrine of ejusdem generis is not applicable.

[4] Second. That such a distinction exists between barber shops and bootblacking stands as to clearly imply the exclusion of the latter from the operation of the act of 1895, which distinction, it is said, arises from the fact that barber shops are impressed with a public character by reason of their statutory regulation. Laws of 1909, p. 294. In view of the fact that such statutes were not enacted until 14 years after the section in question here, the contention is without merit.

[5] Third. That defendant's business must be excluded from the phrase "all other places of public accommodation" because it is omitted from the definition of that phrase as contained in section 3, c. 55, Laws of 1917, p. 163.

There is no such relation between the two acts as would give to the definition even the doubtful force of later legislative interpretation. The former prohibits certain discrimination. The later prohibits only the advertisement of certain discrimination. The former provides that "all persons" shall be entitled to the privileges of the establishments mentioned; the latter that no person shall be publicly proclaimed as excluded because of "race, sect, creed, denomination or nationality." Moreover, the definition of the phrase in the act of 1917 is by its express terms limited to that act. The later act neither repeals, amends, nor refers to the former; and there is nothing to suggest that the Legislature had the one in mind when the other was passed. The same process of reasoning which would exclude bootblacking stands from the definition "all other places of public accommodation," as used in the act of 1895, would also exclude bathhouses; but, if the definition of "places of public accommodation" found in the act of 1917 is to be applied to the phrase as used in the act of 1895, then "bathhouses," which are specifically mentioned in the later act, must be read into the former. Hence this contention is without merit.

[6] Moreover, the legal presumption is that words and phrases in the statute are used in their usual sense unless the intent clearly appears to use them in a more restricted or different sense. Westerlund v. Black Bear Mining Co., 203 Fed. 599–605, 121 C. C. A. 627. No such intent can here be made to appear, except by the application of that rule of construction which we have above eliminated. The phrase here in question "all other places of public accommodation," given its commonly accepted meaning, includes bootblacking stands. To hold otherwise would be to construe that phrase out of the statute; it being impossible to interpret it as meaning "all other similar places of public accommodation" for the reason that "barber shops" and "public conveyances on land and water" are so

Digitized by Google

dissimilar that no place of public accommodation can be similar to both.

The judgment is accordingly reversed, and the cause remanded for further proceedings in conformity with the views herein expressed.

BAILEY, TELLER, and SCOTT, JJ., dissent.

TELLER, J. (dissenting). The majority opinion declines to follow Burks v. Bosso, 180 N. Y. 341, 73 N. E. 58, 105 Am. St. Rep. 762, because of an alleged defect in the reasoning, in that the court applied the rule of ejusdem generis to an enumeration of places of business of diverse character. That rule of construction is said to be eliminated, but it seems to me that it is the basis of the conclusion announced. It is pointed out that barber shops and bootblacking stands have a common feature, in that both are devoted to the rendering of personal service. Hence it is concluded that the specifying of barber shops justified the court in construing bootblacking stands as coming within the meaning of the general words "places of public accommodation."

I submit that this is an application of the supposedly eliminated rule of ejusdem generis. But the rule is in fact applicable, and was properly applied in the New York case.

Classification of places of business does not depend upon their being similar in all respects. A single characteristic in each one may be sufficient to put them in one class. This is recognized in the opinion; the characteristic being the rendering of personal services. In this case the places of business mentioned are, in their nature or by long usage, subject to regulation and supervision in the interest of the public health, safety, or general welfare. This common characteristic—i. e., subjection to public control—makes them all of one class. As this is the only classification of which the places of business are apparently capable, it follows that the general words should be held to apply only to places of that class. This is strictly in accord with sound reason.

No reason is advanced to show that the public has any concern in the management of a business which in no way affects the public health, safety, or morals. Why should a bootblacking stand, any more than a news stand, be subject to this regulation?

The rule that a penal act is to be strictly construed is admitted, but not applied. The defendant's place of business is brought within the statute, and his act made a misdemeanor, when the intent of the Legislature to include such business is by no means clear.

Although the members of the New York Court of Appeals, after careful consideration, were of the opinion that their statute, practically identical with ours, did not include bootblacking stands, this defendant is presumed to know that our statute includes his business, and he is to pay the plaintiff not less than $50 and possibly $500, and be subject also to a possible term in the penitentiary. Why? Because he did not draw the proper inference from general words following special terms. Otherwise stated, a penitentiary offense is imputed to him by implication, a thing which has many times been denounced.

"Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms. * * * It is a principle in the construction of statutes that the Legislature does not intend the infliction of punishment, or to interfere with the liberty or rights of the citizen, * * * by doubtful language, but will in such cases express itself clearly, and intends no more than it so expresses." Sutherland on Statutory Construction, § 350.

The text is supported by numerous authorities.

This is a case eminently fitted for the application of the rule, said to be coeval with municipal law:

That "purely statutory offenses shall not be established by implication, and that acts otherwise innocent and lawful, do not become crimes, unless there is a clear and positive expression of the legislative intent to make them criminal." People v. Phyfe, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141.

In Rex v. Bond, 1 B. & Ald. 390, it is said:

"It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the act of parliament do not authorize it."

The rule is also that, "if the words are equally capable of a construction that would, and one that would not, inflict a penalty," the latter construction should be adopted. Sutherland on Statutory Construction, § 352.

Here by a process of reasoning the defendant in error is held to have committed an offense. No intent to include bootblacking stands is expressed in the law, nor is it even fairly implied. The decision violates rules of law which have been developed through centuries for the protection of the rights and liberty of the people. The judgment of the trial court was right and ought to be affirmed.

I am authorized to state that Mr. Justice SCOTT concurs in the views above expressed.

On Rehearing.

BURKE, J. [7] It is now strenuously contended that section 609, R. S. 1908, as we have herein construed it, is unconstitutional. If such construction makes the act unconstitutional as applied to the business of defendant in error, it is, for the same reason, unconstitutional as to barber shops. The contrary has been held, and we think correctly. Messenger v. State, 25 Neb. 674, 41 N. W. 638.

Digitized by Google

The subject is one for the exercise of legislative, not judicial, discretion. The former opinion is adhered to.

SCOTT, TELLER, and BAILEY, JJ., dissent.

MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. v. PEOPLE ex rel. WILSON. (No. 8328.)

(Supreme Court of Colorado. March 2, 1920. On Motion for Rehearing, June 7, 1920.)

1. Pleading ⟸214(2)—Demurrer admits facts material and well pleaded.

Material facts in the answer well pleaded were admitted by demurrer.

2. Telegraphs and telephones ⟸10(16)—Ouster suit held premature.

Where a telephone company is in the streets of a city by permission of the city authorities, and the city is accepting benefits from it through the gratuitous rendition of service, etc., the company is not a trespasser, and an action in quo warranto against it by a private citizen and taxpayer of the city to oust it from its use of the streets is premature, and should be dismissed without prejudice.

3. Courts ⟸102(1) — Concurrence of three judges of Supreme Court necessary for department decision.

Under Const. art. 6, §§ 5, 8, whatever the number of departments of the Supreme Court, or the number of judges constituting a department, there must be a concurrence of at least three judges for department decision.

4. Courts ⟸101—Majority of members of Supreme Court constitute "court en banc," and majority may decide; "quorum."

Under Const. art. 6, §§ 5, 8, Rev. St. 1908, § 1412, a majority of the members of the Supreme Court constitute the court en banc, and a majority of the court as thus constituted may decide a case, three judges at least concurring; a "quorum," as used in the statute, meaning a majority of the entire body.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Quorum.]

Scott and Teller, JJ., dissenting in part.

En Banc.

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action of quo warranto by the People of the State of Colorado, by and on the relation of O. Clinton Wilson, a resident, freeholder, and elector of the city and county of Denver, against the Mountain States Telephone & Telegraph Company. To review judgment for plaintiff, defendant brings error. Judgment reversed, and cause remanded, with directions to dismiss the proceeding.

Milton Smith, Charles R. Brock, and W. H. Ferguson, all of Denver (Elmer L. Brock, Joseph Sampson, and Flowd F. Walpole, all of Denver, of counsel), for plaintiff in error.

John A. Rush and William E. Foley, Dist. Attys., and Wayne C. Williams, all of Denver (Omar E. Garwood, of Denver, of counsel), for defendant in error.

BAILEY, J. The action is in quo warranto, brought by the People on relation of O. Clinton Wilson acting in a purely private capacity, having admittedly no interest other than such as is common to all taxpayers in the community, to oust the defendant from an alleged exclusive franchise right or privilege to occupy the streets and alleys of the City and County of Denver for the purpose of giving telephone service. The complaint was amended by striking out the word "exclusive" before the words "public franchise right or privilege."

A demurrer to the amended complaint was interposed upon two grounds:

(1) That the relator shows no right whatever to maintain the action; and

(2) That the complaint as amended does not state facts sufficient to constitute a cause of action.

This demurrer was overruled, and the defendant answered.

To the answer the relator filed replication, the first paragraph of which contained a general demurrer. The case was heard upon such demurrer. The defendant sought to have the demurrer carried back to the complaint as amended, but the court denied that request, and sustained the demurrer to the answer. Thereupon the defendant elected to stand by its pleadings and cause as made, and final judgment, not of ouster from the exercise of an exclusive privilege, but an absolute and unconditional ouster from the streets of the City was entered. On this record the defendant brings the case here for review. It will be observed, therefore, that the issues involved, to which the assignments of error are directed, are of law only.

The answer sets forth in addition to many other claims and defenses, certain specific matters, which tend to establish that the complaint fails to state facts sufficient to constitute a cause of action, that question having been raised, in the first instance, by demurrer to the complaint. Upon such demurrer it was argued that the right to maintain this action in any event, did not and could not exist until the duly constituted City authorities had taken appropriate action to terminate and revoke the license to the defendant to be in its streets and alleys the existence of which license the complaint admits.

[1] The facts thus stated in the answer,

Digitized by Google

the truth of those which are material and well pleaded being admitted by the demurrer, are in substance: That since 1879 the defendant, and its predecessors in interest, have occupied the streets and alleys of the City of Denver, with its telephone lines and equipment, under the formal written permission, and by and with the consent of the duly constituted official authorities thereof, subject always to reasonable police control and proper general regulation. That under such license the defendant company, and its predecessors in interest, constructed its plant within the city limits, at a cost of approximately four millions of dollars, that such plant is a vital and integral part and parcel of an interstate system, extending into and throughout the States of Colorado, New Mexico, Idaho, Utah, Texas, Wyoming and Arizona, constructed at a cost of approximately thirty-six millions of dollars, and of that value, which, if this company is compelled to abandon its Denver connections, would not only be greatly damaged and impaired, but practically destroyed. That just presently before the commencement of this action the defendant had expended over a million dollars in placing underground within the city certain of its lines, under the supervision, upon the authority and by order of the city officials. That as a consideration for such license to so use its streets and alleys, the city had demanded, and at all times had received, for its public business and for the use of certain of its officers, partially free telephone service. That the city had permission, at all times and without charge, to string and operate its fire alarm and police wires upon the poles of the defendant, so erected in the City, has done so and still continues to do so. That there never has been an attempt in any way, or at all, by the duly constituted authorities, or by any one whomsoever, to annul, terminate, set aside, alter, withdraw or revoke such license, and that the same is now and at the time of the commencement of this suit was, and still continues to be in full force and effect, and is so recognized, acknowledged, acquiesced in and acted upon by the municipality, which is now receiving and accepting from the defendant telephonic service. That from time to time improvements upon, additions to and extensions of the plant of the defendant have been made with the consent and approval of the city, under its general regulation and police inspection. That the major portion of such improvements, additions and extensions, so as aforesaid made, have been so made within the twelve years next preceding the commencement of this action.

It is thus shown that the defendant had a license from the city to construct a telephone plant, which has been constructed, is being operated and public service being given. In view of the fact that there has been expended, in the construction, additions and extensions of the plant a vast sum of money, that the City has consented to such construction, additions and extensions, has permitted the operation of such plant, has accepted and still is accepting valuable considerations for extending such privileges, is still receiving service therefrom, and has taken no step to revoke the license under which the company operates, it would be illogical and unreasonable to hold that a private individual, with no interest other than such as is common to every taxpayer in the municipality, could, under such circumstances, maintain an action of absolute ouster against it. This becomes the more apparent when it is considered that the municipality, through its legislative authorities, has power to revoke licenses, and that a like power is vested in the people, as a whole, through the initiative to bring before the electorate ordinances revoking licenses, with full authority in the voters to give expression through the ballot to their will on the subject.

By these acts of regulation, supervision and control through its proper officials the City and County of Denver has and does recognize the right of defendant to continue in its streets and in effect requires and demands such continuance.

[2] Under the allegations of the answer, and there is no dispute as to the facts, it seems clear that the telephone company, being in the streets by permission of those having power to extend such privilege, is not a trespasser, and that no action in quo warranto could, under such conditions, be maintained. Without regard to the duration or extent of the right of the telephone company to occupy the streets and alleys of Denver, which we neither consider nor determine, upon authority it is plain that it has such right, so long as the City, in the exercise of jurisdiction, accepts service from it, fails to revoke or attempt to revoke its right to be in its streets, and assumes generally to regulate and control its course of conduct.

In support of this proposition we direct attention to Section 1315 of Volume 3, 5th edition of Dillon on Municipal Corporations, where that learned author said:

"If the City continues to accept a service of water or light from the company, and regulates the rates therefor, this gives implied consent to the continued possession of the streets and operation of the works until such time as the City shall, by reasonable notice, see fit to determine the corporation's tenure of the privileges."

East Tennessee Telephone Co. v. Board of Councilmen, 141 Ky. 588, 133 S. W. 564, is a case in which the Kentucky Court of Appeals expressly ruled that, although the company's right to be in the streets could be terminated, that the right, nevertheless, continues until duly withdrawn. At page 591 of

Digitized by Google

that opinion, in 141 Ky. (133 S. W. 565), the Court said:

"The council has not as yet revoked the permission and until it is revoked, the grantee is rightfully in possession."

The principle of these authorities was recognized by this Court in Denver Tramway Co. v. Londoner, 20 Colo. 150, 37 Pac. 723, and also in Board of Public Works v. Denver Telephone Company, 28 Colo. 401, 65 Pac. 35. The answer discloses that the City has accepted and continues to accept service from the company, and has regulated its affairs in such a way as to bring the case definitely within the rule laid down by Dillon, supra, particularly since its right to be in the streets, as appears from such answer, has never been revoked. It is clear, therefore, that when this suit was brought no cause of action for ouster had accrued in behalf of any one, and that a judgment of dismissal, without prejudice, should have been rendered by the trial court.

If there has ever been any doubt as to the propriety and soundness of this proposition, it has been finally set at rest by two late decisions of the United States Supreme Court, one City and County of Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, and the other Detroit United Railway Co. v. City of Detroit, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 341. In both cases it was conceded that all street rights had terminated, and that the municipalities in question were free to proceed with ouster suits against the respective utilities. Instead of doing this the municipalities undertook to still regulate the conduct of the business of these companies within their borders and by so doing, the United States Supreme Court declared, made it lawful for the utilities to continue in the use and occupation of such streets and alleys. These decisions definitely support the contention that this action is premature.

In the Denver Union Water Co. Case, although the franchise term had expired, and although that fact had been judicially declared, thereafter the City and County of Denver enacted an ordinance regulatory of the rights and privileges of that company; at page 188 of the opinion in 246 U. S. (38 Sup. Ct. 282 [62 L. Ed. 649]), the effect of such an ordinance is discussed, in the following terms:

"The practical situation existing at the time of its enactment [referring to the enactment of the regulatory ordinance] is sufficiently clear from what has been said. The answer admits the averment of the bill that complainant has been and is compelled to continue to serve the city and its inhabitants with water, because there is no other supply of water available, and a cessation of its service would result in great suffering, damage, and loss of life. The city is located in a semi-arid region, and is and for nearly a half century has been absolutely dependent upon the continued operation of complainant's system. The termination of the legal franchise in 1910 did not absolve the city from its duty to the inhabitants. At the time of the enactment of the Ordinance of 1914 the company's plant had been in use for four years since the expiration of the former franchise. * * *

"It is in the light of all these circumstances that the provisions of the Ordinance of 1914 must be read. There is a preamble reciting that since 1910 the company had been without franchise and a mere tenant by sufferance of the streets, and that, while it had been supplying the city and its inhabitants with water, it had done so 'at rates that are excessive and that should be reduced and regulated accordingly.' And there is a declaration that the enactment is made without recognizing the company's right to occupy the streets or to continue its service, but for the purpose of regulating and reducing its charges 'during the time it shall further act as a water carrier and tenant by sufferance of said streets.' But the enacting provisions, in the terms employed and by necessary intendment, are inconsistent with these declarations, and must be taken to override them. The first section establishes, as the maximum charges permitted to be made by the company, a detailed schedule of 'semi-annual water rates payable in advance on the first day of May and November of each year.' The various uses are specified, and many of these are of kinds that cannot be discontinued on brief notice. There is a special rate for irrigation by the season, May 1 to November 1. There is a provision for meter rates, payable monthly, with a clause requiring the company to install a meter for any person desirous of using water by meter. Section 2 provides that for hydrants, including 'those which may thereafter be ordered by council to be set upon existing mains or upon extensions thereof,' the city shall pay annual rentals. And section 4 imposes fines upon the company and its agents for any violation of the ordinances.

"Of course, these provisions are of themselves inexplicit; but in attributing a meaning to them the choice is between a liberal construction that preserves the substantial rights of both parties and a strict construction highly penal and destructive in its effect upon both. The subject-matter was a prime necessity of life, for which there was no substitute available. The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual. Without attributing to the initiators and to the city council a purpose to subject the inhabitants to grave danger of disease or worse, we cannot read the enacting provisions as leaving the company actually without the right to maintain its plant in the city thereafter, for necessarily this would leave it at liberty to discontinue the service at will. The alternative, which we adopt, is to construe the ordinance as the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circum-

Digitized by Google

stances as may be consistent with the duty that both owe to the inhabitants of Denver. It recognizes the dependence of the city upon this plant, by necessary implication confers upon the company whatever privileges may be necessary to enable it to continue serving the public, in effect requires it to furnish water, and in terms prohibits it from exceeding the specified rates. * * *"

The doctrine of the Denver Union Water Co. Case was again announced in the Detroit Case. In that case the franchise right in certain streets had expired. There was no dispute upon this point. Still the municipality sought to regulate the conduct of the business of the railroad company within the city limits, including the business of the company over and through streets upon which it had no franchise, and upon such facts the United States Supreme Court said:

"A principal ground upon which the bill was dismissed by the district court was the view of the learned judge that the power to compel the company to remove its tracks from the streets involving the non-franchise roads included the right to fix terms of continued operation upon such lines, whether remunerative or not. We cannot agree with this view. In our opinion the case in this respect is ruled in principle by Denver Union Water Company, 246 U. S. 178. In that case the franchise of a water company had expired, and the city might have refused the further use of the streets to the company. Instead of doing this it passed an ordinance fixing rates and requiring certain duties of the company. We held that in that situation the company was entitled to make a reasonable return upon its investment. So here, the city might have required the company to cease its service and remove its tracks from the non-franchise lines within the city. Instead of taking this course the city enacted an ordinance for the continued operation of the company's system, with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not. This action contemplated the further operation of the system, and fixed penalties for violations of the ordinance. By its terms the ordinance is to continue in force for the period of one year, unless sooner amended or repealed. This was a clear recognition that until the city repealed the ordinance the public service should continue, with the use of the streets essential to carry on further service. Within the principles of the Denver case this service could not be required without giving to the company, thus affording it, a reasonable return upon its investment. In the Denver case we said: 'The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual.'

"In the present case the service upon the terms fixed in the ordinance is continued for a year, the city reserving the right to repeal the ordinance at any time.

"It is clear that the city might have taken a different course by requiring the company to remove its tracks from the non-franchise lines; it elected to require continued maintenance of the public service, doubtless because it was believed that it was necessary in the existing conditions in the city to continue for a time at least the right of the railway company to operate its lines. This amounted to a grant to the company for further operation of the system, during the life of the ordinance."

The foregoing authorities hold, in effect, that before ouster proceedings against the telephone company can be maintained, the city must abandon its powers of regulation over it, or at least decline to exercise them, and revoke or attempt to revoke, by proper legislative action, the right of the company longer to continue in its streets, and decline to accept service from it.

The judgment is reversed, and the cause remanded, with directions to dismiss the proceeding, without prejudice to the rights of all concerned.

Mr. Chief Justice GARRIGUES and Mr. Justice BURKE concur. Mr. Justice SCOTT and Mr. Justice TELLER dissent. Mr. Justice ALLEN and Mr. Justice DENISON not participating.

Mr. Justice ALLEN and Mr. Justice DENISON decline to participate in the decision, each having decided questions involved at nisi prius, Mr. Justice DENISON having tried the cause finally. It therefore becomes necessary to determine what number of judges constitute the Supreme Court en banc, and how many must participate to decide a case.

Section 5 of Article 6 of the Colorado Constitution reads:

"The Supreme Court shall consist of seven judges, who may sit en banc or in two or more departments as the court may, from time to time, determine. In case said court shall sit in departments each of said departments shall have the full power and authority of said court in the determination of causes, the issuing of writs and the exercise of all powers authorized by this Constitution, or provided by law, subject to the general control of the court sitting en banc, * * * but no decision of any department shall become the judgment of the court unless concurred in by at least three judges, and no case involving a construction of the Constitution of this State or of the United States, shall be decided except by the Court en banc."

Section 8 of Article 6 provides:

"The Chief Justice shall preside at all sessions of the Court en banc, and, in case of his absence, then the judge present who would next be entitled to become Chief Justice shall preside."

This section also provides that the judge having the shortest time to serve, not holding office by appointment or election to fill vacancy, shall be the Chief Justice and of

Digitized by Google

the two judges whose terms of office expire upon the same day, the younger in years of the two judges shall be the Chief Justice during the next to the last year of his term of office.

From these sections of the Constitution it will be noted that provision is made for the court to sit in either of two ways: In departments, or en banc. The number of departments may be two or more, but no decision of a department shall become the judgment of the court unless concurred in by at least three judges.

[3] It is unnecessary to enter into a mathematical determination of the different combinations that would be possible for the creation of departments. Whatever the number of departments, or the number of judges constituting a department, there must be a concurrence of at least three judges for a department decision. There may be two departments, each composed of the Chief Justice and three other justices, or, according to the present arrangement, there may be three departments, each composed of the Chief Justice and two other justices. In either case, as already stated, three judges must concur in order to render a decision. In the one case three of four judges may render a court judgment, and in the other all three of the judges constituting the department must concur. Speculation might be indulged as to why the concurrence of three judges is required, and it might be urged that the number fixed is that number which would be the minimum majority of a minimum quorum of all the judges when sitting en banc.

Under this view it would follow that, when the court sits en banc, the least number of judges which could constitute a quorum is four, and a majority of the four—that is, three judges—must concur in order to render a judgment of the court en banc. However, unless inference be drawn from what is said of the power of the department of the court and the number of judges necessary to a decision, the Constitution is silent upon the subject as to the number of judges required to constitute the court en banc. We say it is silent. This is true in so far as any express statement of the minimum number of judges constituting the court en banc is concerned. It is perfectly clear, however, that the court en banc may be composed of less than all the judges, since it expressly declares that the Chief Justice shall preside at all sessions of the court en banc, and in case of his absence, then the judge present who would be next entitled to become the Chief Justice shall preside. Now, if the Chief Justice is absent because, for example, personally interested in the case or because he feels himself disqualified, then the judge present who would next be entitled to become Chief Justice shall preside. If that judge is also absent, the inference is irresistible that the next judge present who would be entitled to become Chief Justice shall preside and there is no limit fixed by the Constitution as to how many judges might thus be absent.

[4] Under a constitutional provision such as ours, a majority of the members of the court constitute the court en banc, and a majority of the court as thus constituted, of course may decide. Cases which directly sustain this principle are: Oakley v. Aspinwall, 3 N. Y. 547; State v. Lane, 26 N. C. 434; Commonwealth v. Mathues, 210 Pa. 372, 59 Atl. 961.

There is an old statute in this State, carried forward and found as Section 1412 of the Revised Statutes of 1908, which provides:

"If there shall not be a quorum of the justices of the Supreme Court present on the first day of any term, the court shall be and stand adjourned from day to day until the quorum shall attend. * * *"

This statute clearly determines, that which is necessarily implied in the constitutional provision, that a quorum of the justices may transact business and decide cases. The statute does not define a quorum. The word, therefore, must be held to be used in its ordinary meaning, and that meaning is a majority of the entire body. Decker v. School District No. 2, 101 Mo. App. 115, 74 S. W. 390; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 409, 17 Am. Dec. 525; Zeller v. Central R. Co., 84 Md. 304, 35 Atl. 934, 34 L. R. A. 469; Snider v. Rinehart, 18 Colo. 18, 31 Pac. 716.

The necessary and inevitable inference from the constitutional provision as to who shall preside over the court en banc, when the Chief Justice is absent, is that the court en banc may consist of a less number than all the judges. If not equally divided, the inference is also irresistible that a decision may be made according to the views of the majority of the members of the court sitting.

The fact that in "the Famous Telephone Cases" decided by the Supreme Court of the United States in 1888, the report of which fills the entire volume of 126 U. S. Reports [8 Sup. Ct. 778, 31 L. Ed. 863] is illustrative of the power of a majority of a quorum to decide. These great cases were argued before the Supreme Court of the United States on January 24, 25, 26, 27, 28, 31, and February 1, 2, 3, 4, 7, 8 in the year 1887. At the time of the oral argument the Supreme Court was composed of Chief Justice Waite and Justices Miller, Field, Bradley, Harlan Woods, Matthews, Gray and Blatchford. Mr. Justice Gray, however, was not present at the argument, and for that reason took no part in the decision, and Mr. Justice Woods, by reason of illness, did not sit at the argument, and died April 14, 1887, before the cases were decided. Mr. Justice Lamar

Digitized by Google

was appointed to fill a vacancy caused by the death of Mr. Justice Woods, and was sworn in on January 18, 1888, but, not having been a member of the court when the cases were argued, took no part in the decisions. Only seven members of the court, therefore, participated. These were Chief Justice Waite, and Justices Miller, Field, Bradley, Harlan, Matthews and Blatchford. The opinion of the court was delivered by Chief Justice Waite, and was concurred in by Justices Miller, Matthews and Blatchford, with Justices Field, Bradley and Harlan dissenting. The decision was rendered by a majority of a quorum only, which number was not a majority of all the members of the court.

Upon the theory that a majority of the court constitutes a quorum, and this seems to be incontrovertible, we are of opinion that a majority of such quorum has full power to hear and determine any cause. Even upon this assumption three judges at least must concur in order to reach a final determination, just as that number is required in a department to finally decide. Any other rule might often completely paralyze and render impotent one branch of the State Government, a situation which is simply unthinkable.

Upon the question of how many judges constitute the court en banc and how many may decide a case, in which all the members of the court take part, the CHIEF JUSTICE, Justices ALLEN, BURKE and DENISON concur. Justices SCOTT and TELLER dissent.

SCOTT, J. (dissenting). This case was submitted and argued en banc.

The Constitution provides that the court shall consist of seven judges. By the term "court en banc" is meant the whole court as constituted. The decision purporting to reverse the judgment is but by three members of the court in agreement with it. It is therefore by a minority of the court as constituted.

The proposition is so unexampled, so shocking, and to my mind so wholly opposed to the letter and spirit of the Constitution and statutes that I am compelled to regard it as a repudiation of the organic law and the statutes enacted under it, and fraught with the gravest dangers to constitutional government.

1. It may be stated as a universal rule of law that the question as to the number of judges required to be present and necessary to authorize the legal transaction of business by a court is to be determined from the constitutional or statutory provisions creating and regulating the courts, and, further, that in the absence of a quorum of the number of judges required by law to hold court, a judgment rendered by the remaining judges would be regarded as a nullity, because in such case there would be no authority to render the judgment. 7 R. C. L. 998.

In the absence of constitutional or statutory provision on the subject, a majority of the court would constitute a quorum. Our Constitution and statutes are silent upon the subject as to what number of judges shall constitute a quorum.

2. Section 1523, Mills' Ann. St. 1912, provides:

"If there shall not be a quorum of the justices of the Supreme Court present on the first day of any term, court shall be and stand adjourned from day to day until a quorum shall attend; the said court may, there being a quorum present, adjourn to any day specified, as may be deemed advisable."

It will be seen that by this statute less than four judges are prohibited from holding court. They are even prohibited from adjourning the court without a quorum. And yet it is held in this case that three of the judges may pronounce a judgment of the court en banc reversing a nisi prius decision.

3. There are further limitations placed upon the number of judges to agree to the pronouncement of judgments by the Supreme Court. By section 2127, Mills' Statutes, it is provided:

"No punishment shall be inflicted in any case brought before the Supreme Court under the provision of this chapter, unless a majority of the justices of said court concur in respect to such punishment."

4. Article 6, § 5, of the Constitution of Colorado provides:

"The Supreme Court shall consist of seven judges, who may sit en banc or in two or more departments as the court may, from time to time determine. In case said court shall sit in departments each of said departments shall have the full power and authority of said court in the determination of causes, the issuing of writs and the exercise of all powers authorized by this constitution, or provided by law, subject to the general control of the court sitting en banc, and such rules and regulations as the court may make, but no decision of any department shall become the judgment of the court unless concurred in by at least three judges, and no case involving a construction of the Constitution of the state or of the United States, shall be decided except by the court en banc."

It will be here seen that a department of the court is expressly prohibited from rendering any decision involving a construction of the Constitution of the state or the United States.

It will not be contended that a decision of the case at bar does not involve a construction of the state Constitution.

By this provision a department may consist of two, or, because of the limited number of judges, not more than three, departments. If of two departments, then of four judges each. Still a department is expressly prohibited from considering, to say nothing of determining, any case involving a construc-

Digitized by Google

tion of the Constitution. If a department consisting of four judges may not even consider such a question, by what process of reasoning can we say that, if three judges are sitting en banc, they may determine such a cause? Can it be said that in the enactment of their organic law the people even intended such an absurdity?

Under the present organization of the court three members constitute a department with power to determine all questions of less importance than a construction of the Constitution; yet this may not be done in any case without the concurrence of all the judges constituting the department.

If it was the intent and purpose of the makers of the Constitution to permit three judges of the court to determine a constitutional question while sitting en banc, why is there such express prohibition of three judges sitting in department considering the question at all?

The conclusion of the majority would be precisely the same if our court consisted of nine judges instead of seven. Five would constitute a quorum and three would be a majority of the quorum, and therefore the three of the nine judges would have the power to determine a constitutional question, while if the same three were sitting in department they are expressly denied the right to consider the question at all. Not only this, but the three who have assumed to construe the organic law in this case are at the same time denied the power to even open or adjourn court en banc. To my mind this not only trifles with the Constitution, but defies the plain import and purpose of that charter of the people's rights.

It is said that a majority of the court constitutes a quorum, and therefore that a majority of this quorum may determine a cause. There is no suggestion in either the Constitution or statutes that supports such a conclusion.

But the very spirit of the contention is negatived by the provision of our Constitution as relates to legislative acts. A majority or a quorum of either house of the Legislature may sit and transact business, but it is provided by section 22 of article 5 of the Constitution that "no bill shall become a law except by a vote of a majority of all the members elected to each house." Not only a majority present are necessary, but a majority of those elected.

Can it be assumed that the makers of the Constitution ever contemplated that less than a majority of their highest court should construe the provisions of that instrument? The people of this state have shown great concern in the matter of court construction of their Constitution. They have not only denied this power to a department of this court, but by another constitutional amendment they have likewise denied such power to the district court, a constitutional court of original and general jurisdiction, even in the first instance, a power which had theretofore been universally exercised.

5. Section 438 of the Civil Code also provides:

"Whenever the Supreme Court shall be equally divided in opinion, on hearing an appeal or writ of error, the judgment of the court below shall stand affirmed."

Here is an express provision of the law which may not be overlooked. This provides that, when the court shall be equally divided, the judgment of the lower court must be affirmed. This provision was applicable and enacted when the court consisted of three judges. It is equally applicable now when the court consists of seven judges. Both then and now the court consisted of an odd number of judges, and hence the court could not then and cannot now be equally divided in opinion if all judges participate.

It can have no other meaning than that one-half of the largest even number of judges which may sit, one-half of six, to wit, three, cannot reverse a decision of the lower court, and that in such case, and where six judges sit, the judgment of the lower court is affirmed by operation of the statute alone.

Hence, if there were six judges sitting in the present case, three have not the power to affirm or reverse the judgment. The judgment is affirmed by operation of law alone. It cannot be reversed by the votes of three judges. This for the reason that the constituted court nor a majority thereof has not voted for a decision, and therefore it has failed of a court decision, and there can be no decision in such a case except the decision of the law as provided by the statute.

So in this case, if one additional judge had participated, and had joined the two others in dissent from the proposed majority opinion, then and in that case the decision of the lower court must have been affirmed.

Thus by one additional dissent, and with no more than the three voting in the affirmative, the decision would have been changed from reversal to affirmance. The logic of the majority, then, is that, with the two judges only dissenting, the judgment may be reversed, whereas, if three had dissented, the judgment must be affirmed. This presents a strange anomaly in judicial logic. When we reflect that not less than three judges in agreement can pronounce a decision, and then only in department, and this by the express mandate of the Constitution, the unsoundness of the proposition that three judges sitting en banc may pronounce a decision, without any authority under the Constitution or statutes, becomes apparent.

6. Our first constitutional convention submitted as a part of the proposed Constitution the following, being adopted as section 5 of article 6:

Digitized by Google

"The Supreme Court shall consist of three judges a majority of whom shall be necessary to form a quorum, or pronounce a decision."

Thus by express constitutional mandate a majority of the court was required to pronounce a decision.

This remained a part of the fundamental law until the amendment of 1903 increasing the number of judges; it being omitted from the draft. It cannot be assumed that it was the purpose of the omission to change this fundamental policy, and to intend that a minority of the judges should pronounce a judgment of the court sitting en banc, else the amendment would have been so declared. The only reasonable assumption is that this question was deemed to be otherwise sufficiently covered in the draft. To hold that it was the purpose to so revolutionize the law upon this grave subject, without even a suggestion concerning it, is to insult the intelligence of the General Assembly submitting the amendment.

But the majority, finding no authority under the Constitution or statutes of this state in support of their astounding conclusion, cite authorities from other states upon which they seek to rely.

7. The case of Commonwealth v. Mathues, 210 Pa. 372, 59 Atl. 961. This case was in review of an action in mandamus to compel the state treasurer to pay salaries of judges fixed by the Legislature, including judges of the Supreme Court.

The court consisted of seven judges. All but one was financially interested in the result. The one judge assumed to and did pronounce the decision of the court. He cites no authority for his unprecedented and arbitrary act. He does not even refer to the Constitution or statutes of his state, from which he must have derived his authority if he had any. It is a fitting case to cite in support of the remarkable action of this court in this case. It finds no support in the Constitution or statutes of Pennsylvania, nor in common sense. The action of the single judge in assuming to render a decision for a court composed of seven judges is so unreasonable as to make it stand out in our jurisprudence as a monstrosity. Indeed, it must be said that in the history of judicial decisions it partakes of the characteristics of the Irishman's mule, in that it can have no pride of ancestry, nor hope of posterity.

8. In the case of State v. Lane, 26 N. C. 434, cited in the majority opinion, the Supreme Court of that state consisted of three judges. One of these had died, and the remaining two determined the cause. It was contended that a majority of the judges were without power to so hear and determine. This contention was denied, and it was held that a majority of the court could pronounce a decision. It was there said:

"Therefore, when the statute is silent as to what number of the judges shall unite in the judgment, a majority may give it; and, in like manner, when it is silent as to the number of judges who shall unite in consultation, a majority must suffice."

This is precisely my view in this case; that is to say, when the Supreme Court sits en banc, it requires a majority of the judges of the court in agreement to pronounce a decision.

9. The majority cite Oakley v. Aspinwall, 3 N. Y. 547, as in support of their position. The Court of Appeals of New York, by constitutional provision, consisted of eight judges. In the case considered seven of such judges participated. Five of these, or a majority of the entire court, voted for reversal of a cause pending, while two of the seven judges dissented. At the commencement of the hearing one of the five judges so afterward voting for reversal suggested that he was related in a remote degree to one of the parties, and offered to leave the bench. All parties to the action objected to this and urged him to participate in the decision, which he did. Subsequently the defendant in error filed a motion to set aside the judgment of reversal upon the ground that the one judge was disqualified to sit because of his kinship to one of the parties; such judge having voted as one of the five judges. That motion was heard by the remaining six judges.

The majority opinion upon this motion severely criticizes counsel for their conduct in consenting and urging the judge to sit, and afterward presenting the motion to set aside the judgment, because of his participation in the judgment adverse to them. This motion to grant a rehearing, however, was sustained; the court holding that the disqualification could not be waived by a vote of four to two of the judges of the six judges participating.

It is plain that the motion for a rehearing was based solely upon the disqualification of the judge who was one of the five constituting the majority of the court who voted for a reversal of the case in the first instance, and the inference is clear that the motion is based upon the fact that, with the elimination of the disqualified judge, there were but four judges remaining who had voted for a decision, or less than a majority of the court as constituted.

It is true that but four of the judges voted to sustain the motion for a rehearing, but this was a matter of procedure, and not a final judgment or decree of the court. And it is plain also that this was done under a statute of the state declaring that six members of the court should constitute a quorum. Our Constitution and statutes are silent upon the question of the number of judges that shall constitute a quorum of the Supreme Court.

Nowhere in any of the several opinions written in that case is it even hinted that

Digitized by Google

less than a majority of the judges of that court may pronounce a judgment of the court in any cause pending.

10. The other case cited by the majority is what is known as the Telephone Cases, occupying volume 126, U. S. Supreme Court Reports (S Sup. Ct. 778, 31 L. Ed. 863). Nowhere in these cases is the question we are considering suggested or determined. We have before us the simple facts only that the Supreme Court of the United States consists of nine judges. Two did not participate, four joined in the majority opinion, and three joined in the dissenting opinion, so that the prevailing opinion had the support of but four judges of the court, which is not a majority of the nine justices. Why this opinion was permitted to become the opinion of the court must remain to us purely a matter of conjecture, for the matter was not discussed in that case, and, so far as I know, in any other. But, as said in the beginning, the question of how many judges of a court may transact business or pronounce a judgment is controlled by the particular Constitution and statutes.

The Constitution and statutes of the United States are very different from those of the state of Colorado in this respect.

The number of judges which shall constitute the Supreme Court of the United States is not controlled by the federal Constitution. It is a matter wholly with Congress, as are all other matters of organization and control, not left to the court itself. At the time the Telephone Cases were decided there was a federal statute which provided that six of the nine members should constitute a quorum. Section 673, Rev. Stats. 1878 (Comp. St. § 1191). It may have been that either by act of Congress directly, or by permitted rule of the Supreme Court at that time, a majority of the statutory quorum was authorized to pronounce a judgment. In any event, it was a question of statutory power. The decision throws no light one way or another upon the question here.

It is plain that no respectable authority cited supports or tends to support the conclusion of the majority.

11. But that conclusion is based upon the mistaken assumption that the two nonparticipating judges are disqualified to participate in the case.

It is true that Mr. Justice DENISON heard and determined the case in the lower court, but this is not a disqualification under our law. It must be assumed that he would not have heard the case below if he had in any sense been disqualified.

Why Mr. Justice ALLEN declines to participate I am not advised, but I know of no disqualification. It is natural and proper that a judge who has presided at a nisi prius trial should be reluctant to participate in the hearing on review, and does not do so as a rule where there is a sufficient number of judges otherwise to pronounce an opinion and justice may be done.

In the case of D. C. I. & W. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234, it was said by Mr. Justice Elliott:

"Having presided at the trial of this case in the district court, it has been with great reluctance that I have consented to participate in the review of it in this court. But the circumstances attending the case in this court have been peculiar. The honorable commissioners first considered the case and reported a unanimous opinion affirming the judgment, though upon grounds somewhat different than those announced in this opinion. Upon my accession to the bench, finding the judges divided in opinion in respect to the case, I waited for my Brother Hayt to qualify, hoping he and Chief Justice Helm would be able to decide the case without my intervention. But after patient consideration, they, being unable to agree, have insisted that it is my duty to sit in the case, else the decision might be deferred to the close of my term."

It will be noticed that it was the view of the entire court that he should participate in that case.

See, also, Edwards et al. v. D. & R. G. R. Co., 13 Colo. 59, 21 Pac. 1011; Bank v. Hummel, 14 Colo. 276, 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257; McClure v. Smith, 14 Colo. 297, 23 Pac. 786; Boettcher v. Colo. Nat. Bank, 15 Colo. 23, 24 Pac. 582.

13. In the case of O'Connor v. Smithers, 45 Colo. 23, 99 Pac. 46, the facts as stated by the court were:

"When these cases were presented to this court they were heard by four of the justices. Justices Helm, Goddard, and Maxwell did not participate in the first instance, because they are candidates to be voted for at the next election. The four justices were unable to agree and no order was then made. Later application was made by the petitioner to have the cases heard before the full court, and orders were at that time entered, the purpose of which was to preserve the status quo until the cases could be finally disposed of. On the hearing before the full court, respondents objected to Justices Helm, Goddard, and Maxwell participating because of the fact that they were candidates on the tickets in question."

It will be noted that a majority of the court sat in the first instance, just as in this case; that they were divided in opinion as in this case. The four judges sitting could have been divided in but one of two ways, either one to three or equally. If they were divided in the proportion of one to three, then there was presented the identical situation as here; that is to say, three judges of the same mind, and therefore, if the position of the majority here is sound, the three judges could and should have rendered judgment. If they were equally divided in opinion, and if, as the majority here say, a majority of a quorum have the power of decision, then the court must

Digitized by Google

have followed the statute in case of equal division and have declared the case to be affirmed under the statute.

Nothing is plainer than that the entire membership of the court repudiated such a doctrine, and the three judges who declined to participate in the first instance were called in and participated over the objection of counsel.

It is plain that it was a case wherein much adverse comment would and naturally did arise by reason of the three judges being candidates and at least publicly believed to be interested.

Such participation was necessarily very embarrassing to the three distinguished jurists, even if it was strictly within the law, and we must assume that they would not have joined in the pronouncement of a decision if they could have believed and held with the majority in this case that a majority of a quorum, and not a majority of the court, could pronounce a judgment of reversal.

It is apparent that in effect and in fact, though not in language declarative, the acts and proceedings in that case are an authority and should be controlling in this case upon the question I am considering.

14. But I am unable to see the consistency of action of the nonparticipating judges in declining to participate in the cause here pending before the court, and at the same time participating to the extent of adopting a rule in the same case, whereby the opinion of a minority of the court should have the same force and effect as if concurred in by a majority of the court.

Admittedly the opinion of the three must have been inoperative and void except as it may be said to be validated by the votes of these two judges, or at least one of them, to hand it down as an opinion of the court. If it was a binding decision of the court, why did it require the votes of these two judges to pronounce it? If they had not so participated and voted, it could not have emerged as a judicial decision and would not now be entered as such.

Therefore, in my opinion, their participation in adopting the rule to make it effective was as vital and necessary as if they had joined in the opinion of the three judges. It appears to me that this attitude creates a distinction without a difference, a distinction to my mind as reasonable as if A., charged with the murder of B. by pushing him over a cliff, whereupon he fell to the bottom of the abyss and was killed, then sought to defend on the ground that he simply pushed B. over the cliff, but that his fall and consequent death were caused by the natural law of gravitation.

With due deference to the judgment of my learned Colleagues, I am forced to the irresistible conclusion that the action of the majority in this particular constitutes, in effect, a judicial usurpation of constitutional and legislative power, creating within the range of its possibilities grave danger to constituted government.

TELLER, J. (dissenting). According to the majority opinion, the defendant is lawfully in the streets of Denver, not because it has a perpetual franchise to use them, as defendant claims, but because from the city's dealings with it a license is implied to use said streets. From the facts of this license, it is concluded that, until it is revoked by the city, a proceeding in the nature of quo warranto to question the defendant's rights to occupy the streets may not be prosecuted. With so much of the opinion as appears to hold that the defendant has no franchise from the city, I heartily concur; but I cannot agree that the action was prematurely brought, or that it was not properly begun by the district attorney on the relation of a citizen taxpayer.

The conclusion that the writ will not lie until the city orders the defendant from the streets results, in my opinion, with due deference to my Associates thus concluding, from a misapprehension of the ground of the proceeding.

The statute makes it the duty of the district attorney to bring the action "whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held." Code Civ. Proc. § 320. If, then, the district attorney is of the opinion that a franchise is being unlawfully held, either by reason of the fact that the party has no franchise at all, or an alleged franchise which he deems invalid, his duty is to begin proceedings to determine such right. He is not required to wait until some one else acts. If the defendant had a license, that fact would not militate against the right of the state to determine whether or not the company is now lawfully in the streets of the city. Beyond doubt the state has the right to have determined the question of the authority of any person or corporation to occupy streets under a claim of right, whether based upon an alleged franchise or a supposed license. If there be a franchise or license the proof thereof is a matter of defense. Were the inquiry by the city, a different question might be presented; it not being at liberty to deny the validity of the license which it had assumed to grant.

It must not be forgotten that this is an action by the state in its sovereign capacity, acting through the district attorney, who is specifically authorized by statute to act for the state in these matters. The state is the principal and the city the agent, and, if the agent—the agency being special and limited—exceeds its powers, the principal is not bound by such acts. The defendant having obtained, as it claims, through the city rights which

Digitized by Google

only the state can grant, either mediately or immediately, clearly the state need not wait for the city to take action to test the question whether or not there has been a valid grant of those rights. If the state must thus wait for action by the city, the latter might exercise any powers it chose to assert, and its subsequent refusal to question its own action would leave the state powerless in the premises. That would effectually nullify all limitations on the powers of the city, and render unnecessary any consideration of what powers had been granted to it. This view is in accord with both reason and authority.

In State v. Railway Co., 135 Iowa, 694, 109 N. W. 867, the court said:

"It is a thoroughly well-established proposition that rights granted to a corporation, either directly or by the state indirectly through the act of a minor municipality authorized by the state, are to be regarded as franchises no less than is the right to be a corporation. Both classes of rights are derived mediately or immediately from the state, and both are subject to the inherent power of the state to guard against their abuse by the grantee or usurpation by a wrongdoer."

Again, speaking of the privilege of using city streets, the court said:

"The municipality to which is given authority to grant such a privilege exercises a delegated power only, and it cannot grant to any person or corporation a privilege which is confessedly in derogation of the common right, in a manner which shall exclude the power of the state to inquire into its abuse, or to prevent the subversion of the public interests which the legislative grant was intended to promote."

And again:

"To say that the state has surrendered to the city all its power and authority to protect public interests against usurpation, neglect, or abuse by a corporation of its own making, and that so long as the city authorities are content to remain quiescent the state is powerless in the premises, is to say that the state may surrender its sovereignty and the Legislature estop itself by an abdication of its legislative power. Even the state itself cannot constitutionally authorize the occupation of the street for anything but a public purpose, and if a city government by its indifference to public interests or by a mistaken estimate of its own power in the premises permits a corporation to occupy its streets without legal right to such franchise or to assume without authority other rights which are not common to the people generally. the state has the inherent and reserved right to call upon such corporation to show by what warrant it assumes to hold or exercise such franchise. The right and power of the state over its highways, roads, and streets and its duty to preserve and protect these avenues of public travel against unlawful encroachment and obstruction are as wide as its territorial jurisdiction."

Counsel for plaintiff in error say that it should ever be borne in mind that the right to use the streets is derived from the state; yet they deny that the power that grants the right may inquire whether or not the use of a street is under a grant, or in accordance with one admitted to have been made. I confess my liability to follow counsel's reasoning.

Since, then, the state can inquire as to the acts of its agent, whenever it appears that the public interest requires such inquiry, it can never be said that such inquiry, as to acts fully performed, is premature.

It would seem, that after it was ruled that the proceeding was prematurely begun, no consideration of other questions argued was necessary.

The opinion, however, determines that under the circumstances recited a private citizen, with no special interest involved, may not maintain an action of ouster; this especially, it is said, because the city may at any time revoke licenses.

This overlooks the statute which specifically authorizes the district attorney to bring such a proceeding in the name of the state, on the relation of a private party. It is in no sense a private action. The relator, as in many other proceedings, merely acts, under statutory authority, or by established practice, to set the machinery of the law in motion. This proceeding is no more the private suit of the relator than would be a prosecution under an information, as a basis for which he made the necessary affidavit. As well might it be said that a proceeding for constructive contempt is private because it is initiated by the affidavit of a private party.

In State ex rel. v. Railway Co., supra, objection was made that the relator, a private citizen, could not institute the proceeding, as is here contended. The court there points out that the purpose of the proceeding is to protect the public interest, and that the relator acts, not for his private interest, but to set the machinery of the law in motion to vindicate the interests of the public.

The majority opinion refers to statements in the answer which, it is said, "tend to establish that the complaint fails to state facts sufficient to constitute a cause of action."

Then follows a recital of the allegations which are, presumably, the ones which discredit the complaint. This criticism of the complaint ignores our recent ruling, by the full bench in Lockhard et al. v. People, 178 Pac. 565. We there held that the complaint in quo warranto may be general in its terms, "alleging facts showing capacity to institute the action, and directly charging acts which show an intrusion into or the usurpation of an office, or franchise." We said:

"The rule is that the state has no burden to assume in the first instance. The complaint or information is a challenge to the defendant to show by what right he is exercising a franchise or holding office."

Digitized by Google

The ultimate fact to be alleged in this case was that the defendant was exercising a franchise without right. People v. Reclamation Dist., 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085. The attack on the complaint is therefore without basis.

The reversal of the judgment on the ground that the defendant has an implied, revocable license is without any support whatever in the record. The answer sets up, not that the city has done things from which a license to the defendant is implied, but that the defendant has from the Constitution and the statutes a perpetual franchise, which neither the city nor the state can revoke; i. e., a contract with the state, which is protected from abrogation by the federal Constitution. This claim to a perpetual franchise is repeated again and again, and nowhere in the record is there a suggestion that a right is claimed under an implied license. The argument for plaintiff in error follows the same line.

It is true, of course, that a plaintiff may recover upon any right of action fairly stated in his complaint, and possibly, by a liberal construction of the allegations of the answer, the matter of an implied license might have been considered; but it is equally true that a party cannot try his cause on one interpretation of his allegations in the trial court, and change the theory of his case and obtain relief in a reviewing court on a new interpretation.

Counsel claim a franchise under section 13 of article 15 of the Constitution of Colorado; under the law of 1877 (Gen. Laws 1877, p. 177); under the law of 1885 (Laws 1885, p. 358), the city having given the required consent; and under the general incorporation laws of the state.

In view of the length of their brief, counsel kindly furnished the court an "outline of the briefs." In it I find this in capital letters:

"Whether self-executing or not, the Constitution, supplemented by the statutes and consent of the city, conferred upon all persons obtaining such consent the right to construct telephone poles and wires upon all of the public highways of the state, including streets and alleys of the consenting city; and, when the right thus conferred was accepted by the actual construction of a plant, the Constitution and statutes operated to grant a perpetual and irrevocable right to maintain and operate the telephone plant thus constructed."

And again:

"The construction at some time in the past, with the consent of the municipality, having been thus admitted by the complaint, it follows that the act of 1885 and the act of 1907 have constituted and still constitute a continuing grant to the person in possession of said constructed telephone plant within the municipality of the right to operate and maintain it."

The only claim of right to use the streets which the plaintiff in error made at the trial or in the briefs on file here is that arising from a perpetual franchise.

No attempt was made to show any other right until, on the second oral argument, counsel suggested that certain ordinances of the city passed since the transcript was filed in this court should be treated as a recognition of defendant's right to use the streets. The various acts of the city which the majority opinion holds to have given the defendant a revocable license were pleaded, and treated in the briefs as evidence of the city's recognition of an existing franchise, a right perpetually to occupy the streets.

To reverse the judgment on this record, and under such circumstances, is to violate the settled rules of practice, and establish a precedent which is likely to be productive of evil. I therefore feel impelled to record my dissent.

I am unable to agree with the conclusion announced that a majority of the five judges of the Supreme Court—that is to say, three of them—may determine a case required to be presented to the court en banc. The question is not, in my opinion, to be determined by precedents of other courts, because of the peculiar provisions of our Constitution.

This court is authorized to sit in departments consisting of three members, all of whom must agree upon a decision rendered by a department. The Constitution requires that certain cases be determined by the court en banc. According to the rule laid down in the majority opinion, three judges may, if sitting en banc as a part of a quorum, which might be only four members, determine a constitutional question, the very authority which has been denied to them by the constitutional provision creating the departments. If the members of a quorum consisting of four judges be equally divided in opinion, the judgment under review is affirmed under section 403 of the Code. These two judges may determine a constitutional question, which three judges may not constitutionally consider, if sitting in department.

I do not think that this court may, by its ruling, make nugatory a constitutional provision by a mere making of the tribunal a court en banc, instead of a court in department.

On Motion for Rehearing.

GARRIGUES, C. J. 1. It is assumed in the argument on rehearing that the opinion gives the company a perpetual franchise; also that, as a condition precedent to terminating the license, the city would have to relinquish its right to regulate rates. Neither assumption is correct, and the opinion does not so hold. The opinion does not give the company a franchise, perpetual or otherwise.

2. Regarding the power of the majority of a quorum of the court handing down an opinion, the Supreme Court of the United States,

Digitized by Google

in United States of America v. United States Steel Co., 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. ——, on the same day exercised like power by handing down an opinion only concurred in by a majority of a quorum of the court. The full bench consisted of nine judges. Two were absent. Seven were present, constituting a quorum. Of the seven, three dissented and four concurred in the opinion.

Rehearing denied.

As to the first proposition Mr. Justice ALLEN and Mr. Justice DENISON do not participate.

DURHAM v. WILSON. (No. 9610.)

(Supreme Court of Colorado. June 7, 1920.)

1. Continuance ⇐46(5)—Affidavit as to expected testimony of absent witness setting up mere conclusions and showing no diligence insufficient.

Where the affidavit for continuance on ground of the absence of a witness set up mere conclusions and failed to comply with Rev. St. 1908, § 194, and no subpœna had been issued for the witness, and no diligence was shown, denial of the continuance was proper.

2. Replevin ⇐103(2)—Judgment for return erroneous where no taking was shown.

Where the abstract of the record contained no reference to the writ of replevin, and the writ set up in bill of exceptions showed no return, so that it did not appear that the truck replevied had ever been taken from defendant's possession, judgment for its return was void.

3. Replevin ⇐103(1)—No damages can be awarded in favor of defendant where not claimed in the answer.

Where defendant in replevin did not by answer demand either return of the property or damages for retention, no damages can be awarded defendant, though judgment was rendered in his favor.

Error to District Court, Jefferson County; S. W. Johnson, Judge.

Action by M. F. Durham against R. L. Wilson to recover possession of a truck and damages. Judgment for defendant awarding him possession and damages, and plaintiff brings error. Reversed, with directions.

Plaintiff in error brought an action in the district court against defendant in error to recover the possession of a certain truck and for damages. The answer denied plaintiff's ownership and right of possession and alleged ownership in defendant. It set up no claim either for possession or damages.

On the day of trial plaintiff moved for a continuance on the ground of an absent witness. This motion being overruled, plaintiff declined to offer any evidence. Defendant testified in his own behalf that he was the owner of the truck; that it was taken from his possession the day after this suit; that he had not had it since; that so far as he knew "it remained in possession of the plaintiff"; that its value was $1,000, and his damages $828. Thereupon the court entered judgment for defendant, awarding him possession of the truck, damages in the sum of $828, and costs. To view this judgment plaintiff brings error.

Charles McCall, of Denver, for plaintiff in error.

L. J. Stark, of Denver, for defendant in error.

BURKE, J. (after stating the facts as above). [1] Plaintiff's motion for a continuance is supported by an affidavit purporting to set up what the absent witness would testify to. These statements are mere conclusions, and the affidavit is no compliance with section 194 of the Code, R. S. 1908. No subpœna had been issued for the witness, and no attempt was made to show due diligence, or any diligence, in procuring his attendance. The motion was therefore properly overruled.

[2] The abstract of record contains no reference to the writ of replevin. It is, however, set out in the bill of exceptions, and shows no return. It therefore does not appear that the truck was ever taken from defendant's possession under the writ, and a judgment for its return was void. Gallup v. Wortmann et al., 11 Colo. App. 308–312, 53 Pac. 247.

[3] The defendant, by answer, having demanded neither the return of the property nor damages for its retention, a judgment granting such relief must be treated as a nullity.

"The statute providing for a judgment of return and damages in favor of the defendant expressly limits the power of the court, in the matter of the rendition of such judgment, to cases in which the defendant by his answer claims the return and damages." Gallup v. Wortmann, supra, 11 Colo. App. 315, 53 Pac. 250.

The judgment is reversed, with directions to the trial court to enter judgment of dismissal against the plaintiff and in favor of defendant for his costs.

GARRIGUES, C. J., and TELLER, J., concur.

Digitized by Google

GERARD v. COSTEN. (No. 9704.)

(Supreme Court of Colorado. June 7, 1920.)

1. **Deeds ⟸72(3)—Not set aside for undue influence merely because of confidential relation between parties.**

Where there was evidence sufficient to warrant finding that deeds were supported by a valuable and sufficient consideration and were not the result of undue influence, a verdict, denying relief on the ground of undue influence, will not be set aside because the relations between the parties were confidential.

2. **Appeal and error ⟸931(1)—Evidence viewed in light most favorable to party prevailing.**

The appellate court should view the evidence in the light most favorable to the party prevailing below.

3. **Appeal and error ⟸1008(3) — Appellate court may draw its own conclusion as to documentary evidence.**

If there is documentary evidence, the appellate court is at liberty to draw its own conclusion from original examination of the same.

Department 3.

Error to District Court, Kiowa County; C. S. Essex, Judge.

Action by Claude Gerard against Vadna M. Costen. Judgment for defendant, and plaintiff brings error. Affirmed.

S. S. Packard, of Pueblo, for plaintiff in error.

Charles B. Hughes and L. E. Langdon, both of Pueblo, for defendant in error.

ALLEN, J. This is a suit to set aside two deeds which had been executed and delivered by the plaintiff to the defendant. Relief is sought upon the ground of undue influence. The complaint alleges "that about the year 1909 the said defendant falsely and fraudulently promised to marry the plaintiff, without any intention of carrying out or performing said promise;" that she has ever since refused to fulfill the promise; that by reason of the promise the relations between plaintiff and defendant became confidential, and that "defendant acquired thereby an undue influence over the mind of the plaintiff;" that she exercised such undue influence, and thereby induced the plaintiff to execute and deliver the deeds in question. The answer denied the foregoing allegations, and for a further defense alleged facts showing that the deeds were made for a valuable consideration. The trial court found the issues for the defendant, and dismissed the case. The plaintiff brings the cause here for review, and contends that the court should have found the issues for the plaintiff instead of for the defendant.

One of the deeds in question was executed and delivered on January 5, 1914, and the other on January 16, 1915. The plaintiff testified that each deed was executed without any consideration, and that the conveyance was made because the defendant had promised to marry him. On the other hand, there was evidence adduced by the defendant which is amply sufficient to sustain a finding that for each deed there was a consideration in money, and that the consideration was adequate.

[1] There is sufficient evidence to support the trial court's finding, if the same may be implied from its general finding, that the defendant never promised to marry the plaintiff. Assuming, however, that such promise was made, and assuming, further, without conceding or deciding, that the relations between the parties were of such a confidential nature as to raise the presumption of undue influence, such circumstances would not, in this case, affect the result. The evidence in the case still remains sufficient to justify a finding that no undue influence was exercised by the defendant over the plaintiff in connection with the execution of the deeds in question.

[2, 3] The evidence in the case is both oral and documentary. The former should be viewed in the light most favorable to the party prevailing below, in this case the defendant. As to the documentary evidence, we are at liberty to draw our own deductions from an original examination of the same. On reviewing the record, under the foregoing rules, we conclude that the evidence warrants the judgment.

The judgment is affirmed.

Affirmed.

GARRIGUES, C. J., and BAILEY, J., concur.

KNOFF et al. v. GRACE. (No. 9841.)

(Supreme Court of Colorado. July 7, 1920.)

1. **Specific performance ⟸41—Provision that statute of frauds shall not abridge power to compel specific performance in case of part performance not to be enlarged.**

While Rev. St. 1908, § 2664, providing that nothing in the chapter relating to statute of frauds shall abridge the power of a court of equity to compel specific performance of agreements in a case of part performance, the exception should not be enlarged, for otherwise the purpose of the statute will be destroyed.

2. **Specific performance ⟸42—Part performance must be of something required by contract.**

Specific performance of an oral contract for lease for three years, void under Rev. St. 1908, § 2662, will not be granted on the ground of part performance, unless the performance is of something required by the contract, and the doing of something because of the contract or in reliance of it is not enough.

Digitized by Google

3. Specific performance ⟸43 — Payment of rent and taking possession under a parol lease is not sufficient part performance.

Payment of rent for several months and the taking of possession under an oral lease for three years, void under Rev. St. 1908, § 2662, is not sufficient part performance to warrant specific performance of the agreement.

4. Specific performance ⟸42—Part performance, taking parol lease out of the statute, must be consistent with no other theory.

Where part performance of a parol lease for three years was relied on to take the same out of statute of frauds, such performance must be consistent with no other theory than that of the alleged oral lease, and what is fairly inferable from some other cause will not be regarded as sufficient.

5. Specific performance ⟸43—Installation of trade fixtures, coupled with taking of possession and payment of rent, not part performance.

Taking of possession and payment of rent coupled with installation of trade fixtures is not sufficient part performance to take out of the statute of frauds a parol lease for three years, void under Rev. St. 1908, § 2662, so as to warrant specific performance.

Department 2.

Error to District Court, Morgan County; L. C. Stephenson, Judge.

Action by O. M. Knoff and Ray White, copartners doing business under the firm name and style of Knoff & White Grocery against T. F. Grace. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Arlington Taylor, of Ft. Morgan, for plaintiffs in error.

Johnson & Robison and Walter S. Coen, all of Ft. Morgan, for defendant in error.

DENISON, J. A demurrer to the complaint was sustained, the plaintiffs stood by the complaint, and now ask for a supersedeas. Both sides ask us to determine the case now.

The action was by tenants to compel specific performance of an oral lease for three years, beginning February 1, 1919. The defendant, after rent had been paid for several months, refused to accept more, and gave notice to quit. The plaintiffs rely on the doctrine of part performance of an oral contract to support their case.

The statutes in point are as follows:

"Every contract for the leasing for a longer period than one year * * * of any lands * * * shall be void" unless in writing. R. S. 1908, § 2662.

"Nothing in this chapter contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreement." R. S. 1908, § 2664.

The question before us, then, is whether, under the above sections, the part performance shown in the complaint is sufficient to justify a decree for specific performance of an oral lease for more than one year.

The contract alleged is:

"That plaintiffs did * * * enter into an oral lease with said defendant for said storeroom, the said lease to date from February 1, 1919, and to continue for three years, with the option to plaintiffs to extend the said lease two years thereafter at a rental of $75.00 per month payable monthly in advance; that said storeroom was to be used for a general retail grocery and merchandise store."

The facts relied on as constituting part performance are: (1) That, relying on said agreement, plaintiffs resigned their positions; (2) formed a partnership; (3) bought and installed furniture, fixtures, and other equipment; (4) bought a stock of goods; (5) took complete possession; (6) established a paying business; (7) paid six months' rent; (8) it was the only available room; (9) no other now available; (10) business will be destroyed if relief is denied; (11) defendant will be unharmed if relief is granted; (12) that defendant is not in court with clean hands; (13) that defendant seeks to perpetrate a fraud by renting to another for a higher rent.

Section 2664 is a continuation of the equity rule in England and most of the United States. The principle which supports the rule is estoppel by conduct which fundamentally is fraud. It is therefore always necessary to show that the acts constituting part performance were done with the knowledge and consent of the other party to the contract. There is some question whether this is sufficiently alleged here, but we do not determine the case upon that point.

[1, 2] The statute in question was passed for the reason that it was not safe to let proof, upon the questions therein referred to, rest in parol; it follows that to serve the purpose of the statute we must take care never so to extend the exceptions thereto, which are pressed upon us so constantly, as to let those questions become issues to be tried on oral testimony alone.

While it has often been truly said that equity ought not to allow the statute of frauds to be used as an instrument of fraud or wrong, yet the statute can never be enforced without some hardship and wrong. Wherever there is an oral contract on which a party has relied, it is, in some degree, a wrong and hardship upon him to hold it invalid, and if there is no oral contract there is no room for the statute to act. Therefore the enforcement of the statute must always be, in a sense (though, of course, not in legal contemplation) a fraud or wrong upon him against whom it is enforced.

It is necessary, then, to keep carefully within the principles which bound the rights

Digitized by Google

to claim exemption from the terms of the statute. One of those rights is expressed in section 2664, above quoted.

Briefly expressed, the rule is that specific performance of an oral contract will be enforced, according to the rules of equity, in favor of one who has partly performed it.

What are these rules of equity? One of them is that part performance must be part performance; i. e., it must be the performance of something required by the contract. Von Trotha v. Bamberger, 15 Colo. 1, 12, 24 Pac. 883.

Doing something because of the contract or in reliance on it is not enough. Jenning v. Miller, 48 Or. 201, 85 Pac. 517.

[3-5] There is nothing in the plaintiffs' 13 points that is required by the contract except payment of rent, and nothing else in them that is contemplated by the contract except taking possession. There are authorities which hold that taking possession and payment of rent constitute sufficient part performance, but this leaves all proof of the term of the lease to oral testimony, and in a great majority of cases abrogates the statute. Practically all claims by tenants that there is on oral lease for more than a year are made after the tenant has taken possession and paid rent. We must say, therefore, that mere possession and payment of rent will not amount to part performance, for the purposes now under consideration.

The case of Adcock v. Lieber, 51 Colo. 373, 117 Pac. 993, is not inconsistent with these conclusions, because in that case the contract provided that the tenant should leave his ranch and come to Hugo to live and take charge of the leased hotel and he did so.

It is also the rule that what is done as part performance must, to escape the statute, be consistent with no theory other than that of the alleged oral lease. What is fairly referable to some other cause than the contract as alleged will not be regarded as sufficient part performance to justify a decree of specific performance. Von Trotha v. Bamberger, 15 Colo. 1, 12, 24 Pac. 883; Jenning v. Miller, 48 Or. 201, 85 Pac. 517; Morrison v. Herrick, 130 Ill. 631, 642, 22 N. E. 537; Wood v. Thornly, 58 Ill. 468; Koch v. Natl. Bldg. Ass'n, 137 Ill. 497, 27 N. E. 530.

The reason for this rule is that an act which is consistent with some contract other than that alleged does not tend to prove the latter.

For example, in the present case possession and payment of rent are as consistent with a tenancy from month to month as with one of a year or more. So the installation of trade fixtures is consistent with a monthly tenancy, because the tenant would be obliged to install them whatever his tenancy. This distinguishes the present case from those where the alterations have been so great and permanent as to convince one that a long and definite tenancy was expected. The whole proof, therefore, is left to oral testimony, which is what the statute seeks to prevent.

The judgment should be affirmed.

MADSEN v. CARPENTER. (No. 9642.)

(Supreme Court of Colorado. June 7, 1920.)

Vendor and purchaser ⟸37(4)—Representations as to water supply held not ground for rescission, where purchaser personally investigated.

In a purchaser's suit to rescind a land contract on the ground that defendant's agent had falsely represented that a water district wherein the land was situated would be able to supply water, a judgment for plaintiff could not be sustained, where it appeared that the statements of the agent were mere expressions of opinion and that the purchaser had himself personally investigated the situation before entering into the contract.

Error to District Court, Saguache County; Jesse C. Wiley, Judge.

Suit by Miles G. Carpenter against Andrew Hansen, with Cris Madsen, administrator, substituted upon defendant's death, to rescind a land contract. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

In August, 1913, defendant in error, Miles G. Carpenter, a farmer from Sarpy county, Neb., came to Moffat, Saguache county, in the San Luis Valley, for the purpose of examining and buying land, if it suited him, and moving to Colorado. After spending some 10 days looking at land, he entered into a contract with Andrew Hansen, through the latter's agents, to buy a tract near the town of Moffat, at $35 per acre, amounting to $5,600, which contract, as far as material, is as follows:

"Moffat, Colo., Sept. 1, 1913.

"Received of M. G. Carpenter, of Sarpy county, Neb., the sum of $600, as forfeit and part payment on purchase of the following described real estate. * * * The total price to be paid for said above-described real estate is $5,600, and is to be paid as follows: $600 receipted for hereby; $1,800, March 1, 1914; $1,600 March 1, 1915; $1,600 March 1, 1916; interest payable annually at 6 per cent. Title to be good, and a good and sufficient warranty deed to be executed and delivered by Andrew Hansen, his heirs or assigns, on or before March 1, 1914, together with a complete abstract of title. If the title is good, and M. G. Carpenter does not make the payment of said balance of $1,800 on or before March 1, 1914, then the payment of $600 is to be forfeited as partial liquidated damages. If this title is not good, and cannot be corrected within a reason-

Digitized by Google

able time, then the payment of $600 is to be returned to said Carpenter. Possession to be given March 1, 1914."

Carpenter took possession of the premises, and, March 1, 1914, made the cash payment of $1,800, and executed two promissory notes, for $1,600 each, one payable March 1, 1915, and the other March 1, 1916, secured by trust deed and Hansen deeded him the land. April 2, 1915, Carpenter brought this suit to rescind the contract, and to recover the $2,400 paid thereon, and to cancel the notes representing the deferred payments, and tendered a deed conveying the land back to Hansen. Pending the trial, defendant died, and his administrator was substituted.

The complaint alleges that plaintiff was a resident of Nebraska, not familiar with irrigation, and ignorant of the value and productiveness of lands in the San Luis Valley, which matters were all known to defendant; that, to induce him to purchase the tract, defendant falsely, fraudulently, and knowingly represented to plaintiff that it was a No. 1 farm, worth $35 per acre, and as good land as any in that vicinity, and that no land of that quality in the locality could be purchased for a less amount; that on account of its being situated within the boundary of the Moffat irrigation district the land would be entitled to receive sufficient water from the district for irrigation; that the district had developed sufficient water to properly irrigate all the land, and had purchased machinery with which it would develop additional water, and that the alkali on the land was a good fertilizer; that these statements were false, and known by defendant to be untrue when he made them, and were made to deceive plaintiff; that the value of the land did not exceed $15 per acre, and that plaintiff relied upon the false statements, and would not have contracted to purchase the land, had he not believed them to be true.

The court found the issues for plaintiff, and entered a judgment and decree ordering that the contract be canceled and rescinded, and the sale held for naught, and that plaintiff recover from defendant the $2,400 paid thereon, with interest, less $500 as rental, and that the two notes of $1,600 each be canceled and delivered to plaintiff.

J. Elzia Johnston, of Saguache, and James P. Veerkamp, of Monte Vista, for plaintiff in error.

John I. Palmer and S. M. True, both of Saguache, for defendant in error.

GARRIGUES, C. J. (after stating the facts as above). Plaintiff's cause of action is predicated upon alleged fraudulent representations regarding the water rights and the status of the Moffat irrigation district, which it was supposed would furnish the land with water for irrigation, and the quality, character, and value of the land. The second point might be ignored as immaterial, because plaintiff testified that, while the soil was not as represented, still the failure to get the water was the only thing about which he complained; that, if the district had furnished the water as represented, he would have been satisfied and gone ahead with the deal. The tract was pasture and hay land, and had never been farmed or irrigated, and no water was bargained for, promised, conveyed, or went with it. Plaintiff was told and understood that no water went with the land, and that he was purchasing no water right, and that the water would have to come from the irrigation district, which had just been formed and was installing a pumping proposition. Plaintiff testified in substance that the agent represented to him in August, 1913, that the following year—that is, 1914—the irrigation district would have its system so developed that he would be able to get water for the land, and that he would not have executed the contract and bought the land if he had not thought so; that he intended to farm the land when he bought it, but soon saw he could not get any water, and never plowed any of it up; that the agent said that the plan was feasible, and that the district would be able to furnish water for the land; that it had a pumping plant 6 miles north of town, and a water proposition on Crooked creek that it was going to use as soon as they could get hold of it; that the pumping plant would develop sufficient water; that the most of the talk was as to the source of the water; that the agent represented that the irrigation district had water for the land from the pumping plant, and took him out to the plant to examine it before he signed the contract; that he never made any demand for the water, and did not think he had to, because he understood the land in the district was taxed, and they were bound to furnish the water without its being demanded; that the agent showed him the pumping plant as a proposition that was going to be installed; that he saw where they had been pumping water, but did not measure it; that no one showed him any water that was for, or that went with, the land, or that could be used upon it; that there was no ditch conveying water to the land; that the irrigation district was to make a ditch, and put it through to the land; that the agent brought a local newspaper along, and read an article as to when they were going to install the machinery for the pumping plant, and in August, 1913, took him to interview the board about it, and the board told him they had a contract with the Austin people for two dredges, and would start operations in the spring of 1914, as soon as the frost was out; that they showed him some ditches already made from the pumping plant to other land in south of Moffat; that the agent represented that the water they had already developed

Digitized by Google

would "hold us fellows that were coming in there up" until they had the other water going; that he went to see the board personally, because he wanted to find out from them about the water source, and that he found out about it by inquiring at Moffat; that he never plowed up any of the ground, or attempted to put it in crops, because after he had the land a little while he found out he was not going to get the water; that he would have gone ahead, if the district had furnished the water for the land the following spring, and would have been satisfied with the deal; that the failure to get the water was the only thing about which he complained, although the soil was not as good as represented; that the agent induced him to interview the board about the water, and went with him, but that nobody represented to him that there were any ditches built from which he could irrigate the land, but that the district was supposed to put them in, and represented that it would be done.

From reading the whole evidence given on the trial it is plain that defendant's agent only expressed an opinion that the proposition was feasible, that the district would be able to supply water for the lands lying thereunder, and that defendant would be able to get water for the land from the district, which was not a false statement as to a past, present, or existing fact. As a matter of fact the water system was not feasible, but was a failure, and plaintiff, as soon as he found this out, had the land withdrawn from the district and never paid any district taxes, and the district subsequently was dissolved.

As to whether it was a valuable piece of land, or would grow anything that the climate would grow, or as good crops as could be grown in that locality or climate, or grow any crops at all, or whether it was good soil or poor soil, or was worth $35 an acre, were mere expressions of opinion. Plaintiff had been a farmer all his life, and came to Colorado and spent a week or 10 days personally visiting the locality, and conversed freely with the farmers and people about Moffat, and stayed all night there with an old farmer friend from Nebraska, for the purpose of finding out about the lands, and went all over and around the land, and dug holes in it with a spade, and investigated personally the character of the soil, and conversed fully with the officers of the irrigation district, learned their plans, and visited their plant before he signed the contract. He came back again to Colorado on the 15th of February, 1914, and made another thorough investigation, both of the land and water system, before completing the deal.

Under such circumstances the finding, judgment, and decree cannot stand. Muir v. Pratt, 18 Colo. App. 363, 369, 71 Pac. 896; Everist v. Drake, 26 Colo. App. 273, 283, 143 Pac. 811.

Judgment reversed, and cause remanded, with directions to dismiss the action.

TELLER and BURKE, JJ., concur.

KEITH v. SCHUCK. (No. 9792.)

(Supreme Court of Colorado. June 7, 1920.)

1. Appeal and error ⟸1040(16)—Overruling demurrer for a misjoinder harmless where only one cause of action submitted.

The overruling of demurrer to complaint for misjoinder of causes of action and the denial of motion to compel plaintiff to elect upon which cause of action he would proceed, if error, was harmless, where court in its instructions to jury limited plaintiff's recovery, if any, to that sought only in one cause of action.

2. Sales ⟸124—Returned goods upon rescission held sufficient.

The existence of a chattel mortgage on the property at the time buyer returned it to seller and seller refused to accept it did not prevent the buyer's rescission, where refusal to receive property was not based upon the ground of the existence of such lien, and where the buyer did not thereafter treat the property as his own and eventually released the mortgage.

3. Sales ⟸124—On rescission buyer could make good his tender of goods, refused by seller by delivering release of mortgage thereon.

Where seller, on buyer's rescission, refuses buyer's tender of goods on the ground that he is not being put in statu quo because of existence of chattel mortgage placed on the property by buyer, buyer could make his tender good by procuring and delivering to seller a release of the mortgage.

4. Appeal and error ⟸1033(8)—Seller held not entitled to complain of decree of rescission entered after judgment for purchase money in law action.

In buyer's action for return of purchase money on theory that he had rescinded contract of sale on ground of fraud, that court after rendering judgment for buyer entered a decree rescinding the contract and reinvested seller with title is no reason for remanding the case on the ground that such decree was improper or void in action at law based on a rescission by act of buyer, since seller benefited more than buyer by such decree and could not complain thereof.

Department 3.

Error to District Court, Jefferson County; S. W. Johnson, Judge.

Action by Charles F. Schuck against C. W. Keith. Judgment for plaintiff, and defendant brings error and applies for supersedeas. Application for supersedeas denied. Judgment affirmed.

Digitized by Google

Dana, Blount & Silverstein, of Denver, for plaintiff in error.

Quaintance, King & Quaintance and George J. Humbert, all of Denver, for defendant in error.

ALLEN, J. This is an action by the buyer against the seller of certain personal property. The plaintiff seeks to recover back the purchase money, on the theory that he had rescinded the contract of sale on the ground of fraud. The complaint also contains a cause of action for damages. The plaintiff was successful in the court below as to the recovery of the purchase money, and makes no complaint here of the failure to recover upon his claim for damages. The defendant brings the cause here for review, and has applied for a supersedeas. The plaintiff in error, defendant below, contends that there is a misjoinder of causes of action in the complaint.

The complaint, as amended, for a first cause of action alleges, in substance, that on or about October 8, 1918, Charles F. Schuck, the plaintiff, purchased from the defendant, C. W. Keith, "one B. F. Avery tractor, or motor, together with two disc and two moldboard plows and the fixtures and equipment going with the same, for the prchase price of $1,410"; that the purchase of the property was induced by certain false representations made by the defendant; that upon the discovery of the falsity of the representations the plaintiff immediately elected to rescind the sale, notified the defendant to that effect, and tendered and delivered the property back to the defendant. It is conceded, or at least we find, that the first cause of action is one for the recovery back of the purchase money on the theory that the plaintiff had rescinded the contract on the ground of fraud.

The second cause of action sets up the fraud alleged in the first cause of action and alleges, in substance, that because of such fraud the plaintiff was unable to plow certain lands which, in reliance upon defendant's alleged representations, he had contracted to plow. Damages are claimed on this account.

The defendant's contention, above mentioned, that there is a misjoinder of causes of action, is based upon the theory that the second cause of action is one which affirms the contract, and therefore inconsistent with the first cause of action. The plaintiff, on the other hand, contends that the second cause of action disaffirms the contract, and that the damages sought to be recovered are merely incident to the first cause of action.

To raise the question of misjoinder of causes of action, the defendant filed a demurrer to plaintiff's replication, on the theory that the demurrer would be carried back to the complaint. The demurrer was overruled. The question of misjoinder was again presented by a motion to compel the plaintiff to elect upon which cause of action he would proceed. The motion was denied.

[1] Error is assigned to the overruling of the demurrer and the motion. Assuming, without conceding or deciding, that the defendant's contention as to misjoinder of causes of action is well founded, and that the court erred in overruling the demurrer, and again erred in denying the motion to compel election, the record shows that such errors were harmless. The conclusion just stated results from the fact that the trial court in its instructions to the jury limited plaintiff's recovery, if any there should be, to that sought only in the first cause of action. Where a court limits recovery to one cause of action, a misjoinder of causes of action is not a ground for reversal. 4 C. J. 928, § 2902. The overruling of a demurrer for misjoinder of causes of action is harmless error where only one cause of action is submitted to the jury. 4 C. J. 935, § 2909. Where the court, after hearing the evidence, eliminates one of the causes of action, rulings refusing to compel an election do not constitute prejudicial error. 4 C. J. 943, § 2918.

The plaintiff in error further contends that the plaintiff below "was unable to put the defendant in statu quo," and therefore could not rescind the contract and his only remedy, if any, was damages for breach of contract. This contention involves the facts relating to plaintiff's return of the property, and his compliance with the rule that a buyer must, as a condition precedent to rescission, restore, or offer to restore the property to the seller.

It is admitted in the pleadings that "the plaintiff offered to deliver" to the defendant the property purchased which is generally referred to in the briefs as the "tractor." The plaintiff in error, however, claims that the plaintiff could not, and did not, restore or offer to restore the consideration, because of the fact that he had placed a chattel mortgage upon the tractor, which mortgage was a valid and subsisting lien on the property at the time it was returned or offered to the defendant.

[2, 3] Whatever may ordinarily be the effect of placing a chattel mortgage upon property which is afterwards returned to the seller in an attempt by the buyer to rescind the sale, it does not warrant a reversal of the judgment in the instant case. It is not disputed that at the time the tractor was returned to the defendant he refused to accept it. He did not refuse to receive the property upon the ground that a lien existed thereon. Had the refusal been made upon such ground, the plaintiff might have made his tender good by procuring and delivering to the defendant a release of the mortgage. 2 Black on Rescission, etc., § 620. The plaintiff did not, after the return of the tractor, treat it as his

Digitized by Google

own. The defendant did, or at least could have, possession of the property. The mortgage was eventually released. At the time of the trial the plaintiff introduced in evidence a release of the mortgage. If the rescission was faulty, which we do not concede, the defendant was not prejudiced thereby. We are of the opinion that under the admitted facts, above mentioned, the defendant's substantial rights were not affected by any rulings at the trial with reference to the effect of the chattel mortgage.

[4] The plaintiff in error complains of a decree which was entered by the court after a judgment in favor of the plaintiff upon the verdict was ordered entered. The decree appears to be one appropriate in a suit in equity to rescind. It purports to reinvest defendant with title to the property and rescinds the contract of sale. If such a decree is improper, or even if it is void, merely because the action was one at law based on a rescission by the act of the plaintiff, it affords no reason for remanding the case, and plaintiff is still entitled to the judgment on the verdict for the sum of $1,410, the purchase price of the tractor. The entry of the subsequent decree benefited defendant more than plaintiff, and if such entry was error it is not an error of which defendant can complain.

Other questions are discussed in the briefs, upon which no opinion will be expressed other than to say that there is sufficient evidence to support the judgment and that there is no reversible error in the record.

The application for a supersedeas is denied. The judgment is affirmed.

Affirmed.

GARRIGUES, C. J., and BAILEY, J., concur.

PERINI v. CONTINENTAL OIL CO.
(No. 9813.)

(Supreme Court of Colorado. June 7, 1920.)

1. Corporations ⟸339—Statement of indebtedness on January 1st in report filed February 28th held insufficient.

Statement of indebtedness of corporation on January 1st, in report not filed until February 28th, *held* insufficient, under statute requiring statement of the financial condition of corporation "at the date of filing of said report"; it being necessary, under such statute, that the report state the indebtedness on the day that the report is made, and that it be filed within a reasonable time under the circumstances of the case.

2. Limitation of actions ⟸58(4)—Failure to file annual report of financial condition did not bar suit on directors' liability for similar subsequent default.

Failure to file proper annual report of financial condition of corporation, making directors personally liable for the corporation's debts, did not start the statute of limitations running so as to bar an action for liability incurred by failure to file proper report for a subsequent year.

3. Corporations ⟸341—Suit against directors because of default in making annual report maintainable by creditor's assignee.

Where corporation failed to file proper annual report of its financial condition, as required by the statute, an action against the directors for corporation's indebtedness incurred during the year could be maintained by the creditor's assignee.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Action by the Continental Oil Company against H. Perini. Judgment for plaintiff, and defendant brings error. Affirmed.

Lilyard & Simpson, of Denver, for plaintiff in error.

John Horne Chiles, of Denver, for defendant in error.

TELLER, J. Defendant in error brought an action against plaintiff in error to recover the amount of certain debts contracted by the Capital Hill Garage Company, of which plaintiff in error was one of the directors, during the year 1916 and prior to the 6th day of October of that year.

Plaintiff in the action sought to have the defendant made personally liable for said debts because of an alleged failure of the corporation to file its annual report within 60 days after January 1, 1917. This report is dated February 27, 1917, and was filed February 28, 1917. Under the sixth head in a blank provided by the secretary of state, which reads:

"Amount of indebtedness at date of filing of this report $——"

—no statement whatever was made. Under the eighth heading, which reads:

"Eighth. Such other information as will show with reasonable fullness and certainty the condition of real and personal property, and the financial condition of your company at the date of filing this report"

—a trial balance was set out showing accounts payable $3,163.63. The trial court found for the plaintiff, and the defendant brings error.

[1] Whether or not the report filed is sufficient in form need not be determined, since we are of the opinion that a statement of the indebtedness on January 1st, though unobjectionable as to form, not filed until February 28th, does not meet the statutory requirement. We agree with counsel for plaintiff in error that it would be unreasonable to construe the words "at the date of filing

Digitized by Google

said report" as requiring a statement of indebtedness on the very day of filing. That would be impracticable, if not impossible, for corporations at any considerable distance from the capital.

The report should state the indebtedness on the day the report is made, and the filing should follow immediately; that is, the report should be filed within a reasonable time, such time depending upon the circumstances of each case.

Plaintiff in error, however, contends that, if the report for the year 1916, filed in 1917, is defective, so also was the report for the preceding year; it having been dated February 14, 1916, and filed February 26th of that year. Assuming that the report filed in 1916 was defective because of the unreasonable delay in filing it after it was made and verified, it is counsel's contention that under the decisions of this court in Dart v. Hughes, 49 Colo. 465, 109 Pac. 952, and Thatcher v. Salomon, 16 Colo. App. 150, 64 Pac. 368, the offense of the directors was complete on March 2, 1916; that the statutory limitation of one year then began to run, and at the end of a year thereafter the bar was complete. Counsel's position is that, when once directors, by failing to file a report, have become subject to the statutory penalty, and the period of one year has elapsed after the right to a penalty accrued, the resulting bar applies to all contracts made thereafter, even in subsequent years.

[2] This cannot be a proper interpretation of the decisions cited. No such question was involved in either of them, and, if counsel is correct, when once the directors had defaulted in their statutory duty in the respect noted, and suit had not been brought against them for a year, they would thereafter be immune from attack under the statute, though the corporation never filed another annual report.

In C. F. & I. Co. v. Lenhart, 6 Colo. App. 511, 41 Pac. 834, it was held that a creditor cannot waive a default of a corporation in not filing a report in a previous year, and thus postpone the beginning of the statutory period of limitation. That being so, it would be unfair to permit defendants to take advantage of their default in one year to protect themselves from the penalty for subsequent defaults.

The evident purpose of the law is to require and enforce the filing of these reports annually, for the benefit of parties dealing with the corporations. The interpretation suggested by counsel would defeat the plain intent of the law.

[3] It is further urged that, as this is an action for a penalty, there is no right of recovery upon an assigned claim. In Credit Men's Adjustment Co. v. Vickery, 62 Colo. 214, 161 Pac. 297, Ann. Cas. 1918E, 1074, that question was decided adversely to said contention.

We find no error in the record, and the judgment is accordingly affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

SMILLIE v. DE MENDOZA. (No. 9721.)

(Supreme Court of Colorado. June 7, 1920.)

1. Appeal and error ⟸1002—Verdict on conflicting evidence not disturbed.

A verdict on conflicting evidence will not be disturbed on writ of error.

2. Breach of marriage promise ⟸22—Acts of parties are admissible.

As marriage contracts are generally oral and made without witnesses, evidence of the acts of the parties, from which an inference may be drawn as to their relations, is admissible in an action for breach.

3. Breach of marriage promise ⟸21—Letters between parties admissible.

Correspondence between the parties about the time of the alleged engagement *held* admissible in breach of promise suit.

4. Appeal and error ⟸1015(5)—Court will defer to trial court's finding as to quotient verdict on motion for new trial.

Where the trial court heard evidence on the motion for new trial, sought on the ground that the verdict was a quotient verdict, the appellate tribunal will defer to the trial court's finding.

5. Breach of marriage promise ⟸28—Jury might consider attack on plaintiff's character in assessing damages.

In an action for breach of marriage promise, where defendant set up that plaintiff was unchaste, lewd, and immodest, the jury might consider such attack on her character in assessing damages.

6. Breach of marriage promise ⟸31—Amount of damages rests peculiarly with jury.

The amount of damages to be awarded in an action for breach of marriage promise rests peculiarly within the discretion of the jury, and courts are very unwilling to set aside an award as excessive.

7. Appeal and error ⟸232(2)—Defendant's objections held not to show any objection to direct proof of his financial status.

In an action for breach of marriage promise, where defendant's counsel objected to questions as to his financial condition on the ground of immateriality, and, after defendant had testified specifically as to certain property, objected to the details, *held*, that all of the objections, taken together, did not present the contention that defendant's financial condition could not be shown by direct evidence, but only by evidence as to his reputation for financial worth.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

8. Breach of marriage promise ⟸27—Defendant's financial condition may be shown by direct evidence.

In an action for breach of marriage promise, defendant's financial condition, which is a matter to be considered by the jury, may be shown by direct and specific evidence, and the plaintiff is not limited to evidence of defendant's reputation.

9. Breach of marriage promise ⟸27—Jury warranted in considering financial condition of defendant.

In an action for breach of marriage promise, the jury, in assessing damages, are warranted in considering the financial condition of the defendant, in determining the damage suffered by plaintiff for loss of the marriage.

10. Breach of marriage promise ⟸22—Where defendant attacked plaintiff's character, evidence of her reputation was admissible.

In an action for breach of marriage promise, where defendant asserted plaintiff was lewd, unchaste, and immodest, and testified to matters tending to show want of chastity, and that she kept an assignation house, evidence of plaintiff's reputation for morality, etc., was admissible.

11. Trial ⟸244(3)—Instruction that jury, in determining whether marriage promise had been made, might consider letters between parties, was not objectionable as emphasizing the letters.

In an action for breach of marriage promise, an instruction that the jury, in determining whether promise had been made, might consider letters passing between the parties, was not erroneous, as emphasizing the importance of the letters, which should be considered for that purpose.

Error to District Court, Weld County; George H. Bradfield, Judge.

Action by Carrie H. De Mendoza against Andrew J. Smillie. Judgment for plaintiff, and defendant brings error. Affirmed.

James W. Gault, of Greeley, for plaintiff in error.

Walter E. Bliss, of Greeley, for defendant in error.

TELLER, J. Defendant in error had judgment against plaintiff in error in an action for breach of promise to marry, and the latter brings error.

[1] The first assigned error which is argued is that the verdict is not supported by the evidence. Plaintiff testified that she and defendant agreed to marry; he says they discussed it, but never entered into a contract to marry. There are many letters in evidence, written by the parties, from which the jury might well conclude that plaintiff's testimony was more credible than that of defendant. The verdict was rendered on a conflict of evidence, and will not be disturbed.

[2, 3] It is urged, also, that the letters above mentioned were not admissible, and that doubtless they influenced the findings of the jury in favor of the plaintiff. The fact that marriage contracts are generally oral, and made without witnesses, has long been recognized by the courts, and the rule is well settled that evidence of the acts of the parties from which an inference may be fairly drawn as to their relations is admissible in suits of this kind. Leckey v. Bloser, 24 Pa. 401; Rime v. Rater, 108 Iowa, 61, 78 N. W. 835; Crosier v. Craig, 47 Hun, 83; Vaughan v. Smith, 177 Ind. 111, 96 N. E. 594, Ann. Cas. 1914C, 1092; Elliott on Evidence, § 1869. Certainly correspondence between the parties about the time of the alleged engagement may contain matters from which an inference might be drawn as to the alleged contract. Such letters have been held admissible in several cases. Geiger v. Payne, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; Richmond v. Roberts, 98 Ill. 472; Tefft v. Marsh, 1 W. Va. 38. The letters in this case came clearly within the rule, as tending to throw light upon the issue of promise or no promise, and there was no error in their admission.

[4] The judgment is attacked on the ground that it is based upon what is known as a "quotient verdict." On the hearing of the motion for a new trial, the court had before it affidavits of five of the six jurors on the question of how they reached their verdict, and denied a new trial. That was a finding against the defendant's contention, which we cannot say was not justified by the evidence presented on that point. We are therefore bound by such finding. Florence & C. C. R. R. Co. v. Kerr, 59 Colo. 539, 151 Pac. 439. The same may be said of the charge that the jury was influenced by remarks of persons attending the trial.

[5, 6] It is urged that the verdict, $7,500, is the result of passion and prejudice on the part of the jury, for which reason the judgment ought not to stand. The defense was a denial of the promise, and a charge that the plaintiff was "unchaste, lewd, and immodest" at the time of the alleged making of the promise. The court instructed the jury that, if they found said charge was not made in good faith and had not been proved, they might consider such attack on plaintiff's character in assessing her damages. The instruction was correct. Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293. We are not at liberty, therefore, to consider the verdict with reference only to what might be considered fair compensatory damages on the evidence. The amount of damages to be allowed in an action of this kind is a question peculiarly within the power of the jury, and courts are very unwilling to set aside a verdict on the ground that it is excessive. Richmond v. Roberts, supra; 9 C. J. 382. In Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132, the court said:

Digitized by Google

"The translation into terms of money of those peculiarly indefinite damages which result from a breach of such a contract is so a matter of estimate that courts of appeal are extremely reluctant to interfere with the conclusion of the jury thereon."

We find nothing to indicate that the verdict was due to passion or prejudice on the part of the jury.

[7] Error is alleged, also, in the admission of testimony as to the details of defendant's property holdings. The objection is that, in admitting evidence as to defendant's property, the court violated the rule which prohibits, as counsel says, "specific evidence as to the value of particular pieces of property." The record does not show that such rule, if it exists, was violated, nor does it appear that counsel who tried the case for defendant made the objection now made by counsel. The question propounded to defendant was, "How much property did you own on June 1 or 2, 1917?" Counsel for defendant objected "as incompetent and immaterial in this case." Plaintiff's attorney then stated to the court that the evidence was offered—

"for the purpose of enlightening the jury as to the standing this plaintiff would have had in the community where she would have resided if the marriage had taken place, and also to inform the jury of the financial advantage to her the marriage would have caused and for the general information of the jury."

In answer to the above question, defendant stated that he sold a piece of property, describing it, and was then asked for how much he sold it. His counsel then stated that he wanted his objection to go to all these questions and said:

"He is going into specific questions now; he is specifying certain pieces of property and going into detail."

That objection applied in fact to the answers made by defendant, and not to the questions. It was made after the former objection had been overruled, and when there was, as the court stated, nothing before the court.

In objecting to the next question, counsel said that he wanted it noted that his objections went to all the questions and answers on the ground that they are incompetent, irrelevant, and immaterial, and for the further reasons that they are hearsay, "and the other reasons I have heretofore stated." The abstract then gives in narrative form the testimony of defendant as to property holdings, his disposition of the same, the amount received, and the debts he paid. At the close of that testimony upon that point, defendant's counsel again stated that he objected to all questions and answers in regard to real property and to the entire line of cross-examination. Nowhere did he call to the court's attention the rule, for which present counsel contend, that the evidence must be confined to general reputation as to material wealth. The objection was clearly not to the mode of proof, but to the admissibility of evidence as to plaintiff's wealth.

[8] However that may be, we do not agree with counsel that the rule which he invokes is sustained by the weight of authority. In Birum v. Johnson, 87 Minn. 362, 92 N. W. 1, the court affirmed a judgment, where evidence as to actual wealth as well as reputation as to it was received over objections. The court seems to regard the admission of evidence of reputation as to wealth as permitted, because of the difficulty of showing actual wealth. The rule is that a fact should be proved by the best obtainable evidence; why, then, is it not competent to prove one's wealth by his own testimony as to his holdings, rather than on reputation which may be wide of the mark? Upon that reasoning the court in Crosier v. Craig, supra, affirmed a judgment in a case where it was assigned as error that two witnesses had been allowed to testify as to the actual value of defendant's lands. The court said that, inasmuch as the defendant might show the actual value of his property as against evidence of his reputed worth, it was competent to show such value in the first instance. It is there pointed out that in Kniffen v. McConnell, 30 N. Y. 285, a case relied upon by plaintiff in error, the objection was to any evidence as to defendant's wealth, and not to the mode of proof. The statement by the court that evidence should be confined to general reputation was mere dictum. That it was so regarded by the Court of Appeals is shown by the fact that it affirmed Crosier v. Craig, in 130 N. Y. 661, 29 N. E. 1034. In Rime v. Rater, supra, evidence as to the earnings of defendant was held admissible.

In Vierling v. Binder, 113 Iowa, 337, 85 N. W. 621, the court says it is common practice to allow specific evidence as to defendant's pecuniary circumstances. See, to the same effect, Vaughan v. Smith, supra; Hanson v. Johnson, 141 Wis. 550, 124 N. W. 506; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726; Elliott on Evidence, § 1888; 2 Encyc. of Evidence, p. 749. It is well settled that, in this class of cases, the financial condition of the defendant may be shown; for obviously his pecuniary circumstances, as well as his social position, would influence any one's estimate of the damages suffered. That being true, there is no apparent reason why any competent evidence to show what his pecuniary circumstances are would not be admissible.

[9] Counsel urge that the jury might measure the damages by the proved financial worth of the defendant. Inasmuch, however, as it is everywhere held that the evidence as to defendant's pecuniary circumstances is admitted, as bearing upon the question of damages, the objection seems to be not well founded.

Digitized by Google

[10] It is further urged that the court erred in admitting evidence of plaintiff's good character. The authorities cited hold only that a charge of specific acts of unchastity may not be met by evidence of good character. Here, however, the answer contained an attack upon the plaintiff's character, as has already been stated, and defendant, in support of that allegation, testified to a situation from which unchastity would be inferred. Moreover, defendant testified to other matters tending to show that plaintiff was keeping a house of assignation. To meet that testimony evidence of plaintiff's good reputation was certainly competent. In McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, Ann. Cas. 1912D, 960, a breach of promise case, the complaint alleged specific acts from which the conclusion of bad character inevitably followed. The defendant's evidence was in support of those allegations, and not to prove a general bad character. The court held evidence of good character admissible. On principle and authority we hold that there was no error in the admission of the evidence of character.

It is contended, also, that the court erred in sustaining objections to defendant's cross-examination of plaintiff on her letters which were in evidence. The questions were directed to the meaning of certain statements in the letters. They were not intended to clear up ambiguities, and, since no reason is given for them, we cannot say that the court abused its discretion in excluding them.

[11] Objection is made to an instruction which told the jury that they might consider the letters in evidence in determining whether or not there was an express promise to marry. Letters, otherwise competent, are admitted for the purpose stated in the instruction. It did not emphasize the importance of the letters, and the objection to it is without weight.

Finding no error in the record, the judgment is affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

KUNKLE v. SOULE et al. (No. 9835.)

(Supreme Court of Colorado. June 7, 1920.)

1. Corporations ⟸212—Evidence as to issue of stock for assignment of process for extracting minerals held to show consideration.

In a stockholder's action to cancel shares of stock issued by a corporation to defendant in consideration of an assignment to the company of a process for extracting certain minerals from ores, where the only issue was whether the assignment was supported by a consideration, evidence *held* to show that the process, though compiled from other known processes, required skill to contrive, and, if it would work, had some commercial value, and therefore constituted a consideration.

2. Corporations ⟸204—Stockholders cannot repudiate transaction which corporation could not repudiate.

Where a corporation cannot repudiate a transaction whereby it has issued stock to a third person in consideration of the assignment of a process for extracting minerals from ores, its stockholders cannot repudiate it.

3. Corporations ⟸101—Corporation defrauded in issuing stock for an assignment of a worthless process may sue the assignor.

If a corporation which has issued stock to a third person in consideration of an assignment of a process for extracting minerals from ores has been defrauded, it may sue the assignor.

4. Fraud ⟸29—Defrauded stockholders may sue person inducing purchase.

Where stockholders have been induced by false representations of a third party to purchase stock in a corporation, they may maintain an action against him for deceit.

5. Corporations ⟸206(1)—Sale to corporation under false representations may be set aside by corporation or stockholder if it refuses to sue.

If an organizer of a corporation has induced others to subscribe for shares for the purpose of selling his property to the company when organized, and has misrepresented his property for that purpose, the company itself may set aside the transaction, and, if it refuses to do so, a stockholder may maintain the suit.

Department 2.

Error to District Court, Mesa County; Thomas J. Black, Judge.

Suit by H. E. Soule and another, stockholders of the National Radium Products Company, on behalf of themselves and all other stockholders similarly situated, against George Kunkle and another, to cancel shares of stock. Judgment for plaintiffs, and defendant named alone brings error, and moves for supersedeas. Reversed, and new trial granted, with leave to amend.

Walker & Heckman, of Grand Junction, for plaintiff in error.

M. D. Vincent, of Grand Junction, for defendants in error.

DENISON, J. The defendants in error brought suit against Kunkle and the National Radium Products Company to cancel 51,000 shares of stock in the defendant company which had been issued to defendant Kunkle. The trial was to the court. Judgment for plaintiff that the stock be surrendered. Kunkle brings error and moves for supersedeas.

The complaint stated that the only consideration for the stock was the assignment to the company by Kunkle of a certain process

Digitized by Google

for extracting uranium, vanadium, and radium from ores, and that the process was worthless.

A demurrer to this complaint was overruled, because, though it failed, the court thought, in its attempt to state a case of misrepresentation and deceit, the complaint did show the stock to have been issued without consideration.

Upon the trial evidence was offered looking toward a showing of deceit and fraud, but the court permitted no issue to be tried except want of consideration.

The evidence showed, by the minutes of the company's meetings, that the consideration for the stock was the assignment and disclosure by Kunkle to the company of a process for extracting the said minerals, alleged to have been contrived by him and to be efficient, and also the assignment of certain inventions of his which are called patents, but, it would seem, were not then patented. The directors passed a resolution to purchase these patents and this process and to issue the 51,000 shares of stock in payment, and it was done.

The defendants claimed that there were other considerations, among them certain personal property, consisting of chemical apparatus and laboratory outfit.

The company sold and assigned the patents to another company in which Kunkle was interested, and, in payment therefor, stock in that company was issued and distributed among the shareholders in the defendant company.

The court found that the process had "no assignable or market value," that the patents "have no market value," and that by assigning them the company "obtained nothing of value." It also found and decreed "that the defendant company deliver to the defendant George Kunkle the items of personal property, if any, now in the possession of the defendant company, which the defendant George Kunkle has heretofore contributed to or delivered to the defendant company." The court does not find the process or patents to be worthless, but merely without "assignable or market value." Exactly what "assignable" means in this connection we do not know.

Many corporations for the exploitation of patents, discoveries, mining claims, and what not issue their certificates of stock for property without market value. Very valuable property often has no market value.

The evidence is that the process, though compiled from other known processes, required skill to contrive, and, if it would work, had some commercial value.

[1] The judgment, then, is not justified by the evidence, because, while the only issue was consideration or not, a consideration was shown by undisputed evidence; a very poor and inadequate consideration, perhaps, but one that, without fraud, was unanimously accepted by the board of directors; nor is the judgment justified by the finding, because property without assignable or market value may be a good consideration for the issue of stock.

[2] The company itself cannot repudiate such a transaction, and so its stockholders cannot. Turner v. Markham, 155 Cal. 562, 102 Pac. 272; Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Ambrose, etc., L. R., 14 Ch. Div. 390; Foster v. Seymour (C. C.) 23 Fed. 65; Langdon v. Fogg (C. C.) 18 Fed. 5; Stewart v. St. Louis R. Co. (C. C.) 41 Fed. 736; Dickerman v. Northern Trust Co., 176 U. S. 181, 200–203, 20 Sup. Ct. 311, 44 L. Ed. 423.

[3, 4] If the company had been defrauded, it might have maintained some sort of action against defendant Kunkle. If plaintiffs had been induced by false representations of Kunkle to purchase stock, they might maintain an action against him for deceit.

[5] If Kunkle had started the company and induced others to subscribe for shares for the purpose of selling his property to the company when organized, and had misrepresented his property for that purpose, the company itself, according to Dickerman v. Northern T. Co., 176 U. S. 204, 20 Sup. Ct. 311, 44 L. Ed. 423, might have set aside the transaction, and, if the company refused to act, a stockholder might be so circumstanced as to maintain a suit. Possibly the facts are such that the complaint might be amended so as to state some such cause of action, but upon the only ground upon which the case was tried, want of consideration, the judgment, we think, cannot be sustained.

2. The finding of the court and the decree that property given by Kunkle to the company shall, upon the cancellation of his certificate, be returned to him, is inconsistent with the theory that there was no consideration. If such property was not given for the stock, the return of it ought not to be required; if it was, then the stock was not issued without consideration.

For the reasons above stated, the judgment should be reversed, and new trial granted, with leave to amend.

GARRIGUES, C. J., and SCOTT, J., concur.

Digitized by Google

BENISH v. JONES. (No. 9826.)

(Supreme Court of Colorado. June 7, 1920.)

1. **Executors and administrators ⟸451(2)—Where evidence as to ownership conflicting, directed verdict properly denied.**

In replevin to recover an automobile alleged to belong to plaintiff's intestate, wherein a third person intervened claiming ownership through purchase from deceased, and the evidence as to ownership, which was the sole issue, was conflicting, it was not error to deny intervener's motion for a directed verdict.

2. **Replevin ⟸52—Evidence that property was held by claimant as pledgee, and not as buyer, held within issues.**

In replevin by an administratrix for an automobile, wherein a third person intervened, claiming title under sale by deceased, evidence of an admission by intervener that he held the automobile as security for a debt incurred "in a little game among friends" *held* competent to show that the transaction was a pledge, and not a sale, as against an objection that it referred to a matter not pleaded.

3. **Gaming ⟸33—Pledgee of property delivered as security for gaming debt not entitled to possession.**

Where property is held as security for a gaming debt, the rule that, after property sold for a gambling transaction has been delivered to the purchaser, the transaction will not be reopened, does not apply, since in such a case the pledgee must show an existing valid debt, and a gaming debt is void.

4. **Replevin ⟸52—Claimant pleading ownership not entitled to rely on lien or pledge.**

In replevin, where an intervener pleads ownership, he cannot rely on possession under a lien or pledge.

5. **Appeal and error ⟸1064(1)—Instruction for plaintiff if property was held to secure gambling debt, if error, held harmless.**

In replevin for an automobile claimed by an intervener who merely pleaded ownership, an instruction that, if the automobile was delivered to him to secure a debt any part of which was incurred in gambling, the verdict should be for plaintiff, if erroneous because not specially pleaded by plaintiff, was harmless as to the intervener.

6. **Replevin ⟸52—Intervener claiming ownership has burden of proof.**

On the issue of ownership of property claimed by an intervener in replevin, the burden of proof is upon him.

7. **Replevin ⟸52—Plaintiff under general denial held entitled to show intervener's want of ownership.**

In replevin plaintiff under a general denial is entitled to the benefit of any evidence tending to show that the intervener, pleading ownership, did not own the property.

8. **Gaming ⟸20—Security for gambling debt not owned by holder.**

One holding property as security for a gambling debt does not own it.

9. **Replevin ⟸50—Intervener's allegation of ownership mere evidence tending to show ownership.**

The allegation of the intervener claiming property in replevin that he had purchased and paid for it is mere evidence tending to show him to be the owner.

Department 2.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Replevin by Margaret S. Jones, administratrix of the estate of Allen E. Jones, deceased, against the Shirley Hotel Company, wherein Hugo D. Benish intervenes. Judgment for plaintiff, and intervener brings error. Affirmed.

Deweese & McPhail, of Denver, for plaintiff in error. Clifford W. Mills, of Denver, for defendant in error.

DENISON, J. Margaret S. Jones, administratrix of the estate of Allen E. Jones, brought suit in replevin against the Shirley Hotel Company to recover an automobile which she claimed had belonged to her intestate. Benish intervened, alleging that he was the owner of the car; that he bought it of Allen E. Jones and paid for it and assumed charges against it of $51.67.

To this the plaintiff filed a general denial. The plaintiff had a verdict. The intervener brings error and moves for a supersedeas.

[1] There was no error in denying the intervener's motion for a directed verdict. There was conflicting evidence as to ownership, which was the only issue.

[2] One Morton Jones, a witness for the plaintiff, was permitted to testify that Benish told him that he (Benish) held the automobile as security for a debt incurred in "a little game among friends." This evidence was competent to show that the transaction was a pledge, and not a sale. The objection to it, therefore, that it referred to a matter not pleaded, was not sound.

[3, 4] The Colorado cases hold that, after property sold for a gambling transaction has been delivered to the purchaser, the transaction will not be reopened. But these cases are not in point if the property is held as security for a gaming debt, because in such case the pledgee, to maintain his position must show an existing, valid debt; but a gaming debt is void; so he cannot show a right of possession as security. Regardless of the question of gaming, however, the intervener cannot rest his right of possession on a lien or pledge because he did not plead it, but rested his case upon a plea of ownership. Gay v. Fretwell, 9 Wis. 186, 193, 194; Mellott v. Downing, 39 Or. 218, 64 Pac. 393.

[5-8] The court by instruction No. 3 told the jury that, if the automobile was delivered to secure a debt any part of which was in-

Digitized by Google

curred in gambling, the verdict should be for the plaintiff. Intervener excepted, and claims that the fact of gambling should have been specially pleaded, if the plaintiff intended to rely on it. It follows, however, from what has already been said, that the instruction, even if erroneous, was harmless, because, if the car was held as security for a debt, the intervener could not recover whether the debt was a gambling debt or not, since he had not so pleaded. We think, however, that the instruction was correct anyway. Upon the issue of ownership the burden was upon the intervener, and the plaintiff, under a general denial, was entitled to the benefit of any evidence that tended to show the intervener did not own the car. Payne v. Williams, 62 Colo. 86, 160 Pac. 196; Lavelle v. Julesburg, 49 Colo. 290, 293, 112 Pac. 774; Cordilla v. Pueblo, 34 Colo. 296, 82 Pac. 594; Alden v. Carpenter, 7 Colo. 87, 91–93, 1 Pac. 904; Mott v. Baxter, 29 Colo. 420, 68 Pac. 220; Saxonia v. Cook, 7 Colo. 569, 4 Pac. 1111. If he held it as security for a gambling debt he did not own it. Herd v. Vincent, 1 Tenn. (1 Overt.) 369; Dodge v. McMahan, 61 Minn. 175, 177, 63 N. W. 487.

[8] The allegation of the intervener that he had purchased and paid for the car was mere evidence tending to show him to be the owner. Hanna v. Barker, 6 Colo. 303, 313; Cuenin v. Halbouer, 32 Colo. 51, 74 Pac. 885; Pike v. Sutton, 21 Colo. 84, 39 Pac. 1084.

Judgment should be affirmed.

GARRIGUES, C. J., and SCOTT, J., concur.

CHICAGO, B. & Q. R. CO. v. PUBLIC UTILITIES COMMISSION et al. (No. 9786.)

(Supreme Court of Colorado. June 7, 1920.)

1. Railroads ⟸59—Order requiring stations void, if unreasonable.

Orders of state Public Utilities Commission, requiring a railroad company to erect and maintain new stations at specified places, are regulations made under the police power, and are void, if unjust and unreasonable.

2. Public Service Commissions ⟸35—Orders presumptively reasonable.

Orders of Railroad Commission are presumptively reasonable, and will not be overturned on a writ of review, unless it clearly appears that they are unjust and unreasonable.

3. Railroads ⟸59—Findings requiring station held supported by evidence.

Findings of state Railroad Commission, constituting basis of order requiring railroad company to erect and maintain a new station and industrial side track, *held* supported by the evidence.

4. Railroads ⟸59 — Order requiring station held reasonable.

An order of the state Railroad Commission, requiring a railroad to erect and maintain a station and industrial side track at a point between a station and a siding, 6.84 miles apart, *held* just and reasonable.

5. Evidence ⟸20(2)—Courts take judicial notice of federal control of railroads.

The Supreme Court will take judicial notice that on September 24, 1919, railroads were subject to Federal Control Act March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¾a et seq.).

6. Railroads ⟸5½, New, vol. 6A Key-No. Series—Federal control held not to deprive Railroad Commission of jurisdiction to order new station.

Federal Control Act March 21, 1918, § 15 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¾o), and general orders of Director General of Railroads, known as Order No. 58, and Supplement No. 1 and No. 2 to Order No. 12, *held* not to prevent the state Public Utilities Commission from assuming jurisdiction to make an order requiring a railroad to erect a new station and spur track.

En Banc. Petition by the Chicago, Burlington & Quincy Railroad Company against the Public Utilities Commission of the State of Colorado and others for a writ of review to determine the validity of an order of the Commission requiring petitioner to maintain a station with an industrial track. Order affirmed.

S. Harrison White, E. E. Whitted, and J. L. Rice, all of Denver, for petitioner.

Frank McLaughlin, of Denver, for respondents.

ALLEN, J. [1] This cause is before us on a writ of review to determine the validity of an order of the Public Utilities Commission requiring the Chicago, Burlington & Quincy Railroad Company to erect and maintain a station, with an industrial track, at a point on its line of railroad in Weld county. The railroad company complains of the order, contending that it is unreasonable and unjust. Orders of a commission, which require the erection and maintenance of stations at specified places, are regulations made under the police power. 12 C. J. 1268, 1269. The regulations are void, if unjust and unreasonable.

[2] Orders of a Railroad Commission are presumptively reasonable, and will not be overturned unless it clearly appears that they are unjust and unreasonable. 22 R. C. L. 784, § 39. Our duty is to examine the testimony, in order to determine whether there is competent testimony to support the findings of the commission, and whether the commission's order is just and reasonable. Chicago, R. I. & P. Ry. Co. v. Pub. Utilities Comm., 171 Pac. 86. The proposed new station is referred to in the briefs as "Omar." If estab-

Digitized by Google

lished, it would be located 57 miles east of Denver, between the stations of Roggen and Wiggins. Roggen is 11 miles west of the proposed station, and Wiggins lies 5 miles east. Crest is a small station 6 miles east of Roggen. A siding, known as Bronco, is located about 2 miles east of the proposed station.

The station at Crest and the siding of Bronco are 6.34 miles apart, and the location of the proposed new station lies between these two points. It appears from the findings of the commission that its principal reason for ordering the establishment of the new station is that farmers in the surrounding country "cannot go into or out of Crest or Bronco on account of sand," and "that the present facilities at Crest and Bronco are nearly inaccessible" on account of sand hills at those places. The commission in its findings stated that it "will consider the closing of the station at Crest permanently or making it a nonagency station, on application by" the railroad company. The order reads, in part, as follows:

"It is therefore ordered that the defendant [the railroad company], on or before 90 days from the date of this order, erect a suitable station building, install an agent therein, maintain an agency station, and construct an industrial track not less than 1,000 feet long and stockyard facilities usual at such stations at a point on defendant's line near the center of section 25, town 2, range 61, Weld county, Colorado, at mile post 484, with leave to remove the present industrial track at Bronco. * * *"

From the foregoing order, it appears that the siding at Bronco may be abolished, and the industrial track or switch at that point may be removed, by the railroad company.

[3, 4] Upon a review of the record, we conclude that there is sufficient evidence to support the findings of the commission, that the commission's conclusions are in accordance with the evidence, and that the order is just and reasonable. It is assumed, in connection with the expression of this opinion, that the commission will, as stated in its findings, "consider the closing of the station at Crest," and that upon application by the railroad company it will close such station permanently or make it a nonagency station.

[5] The only remaining question in this case is whether the commission had jurisdiction to make the order complained of, in view of the fact, of which this court takes judicial notice, that at the time the order was made, namely September 24, 1919, the railroad was subject to the Federal Control Act, being the Act of Congress of March 21, 1918 (section 10156 et seq., Barnes' Federal Code 1919 [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¾a et seq.]). As hereinbefore stated, the order of the commission requiring the new station at Omar was a police regulation. It is not disputed that the Federal Control Act did not affect the laws or the powers of the states respecting railroads, where not inconsistent with the provisions of the federal act. Section 15 of the act reads as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

Consistent with this section, the President, through the Director General of Railroads, promulgated General Order No. 58, dated February 20, 1919, which, in part, reads as follows:

"Transportation systems under federal control continue subject to the lawful police regulation of the several states, which were and are applicable to privately operated transportation systems in such matters as spur tracks, railroad crossings, safety appliances, track connections, train service, establishment, maintenance and sanitation of station facilities, investigation of accidents, and all other matters of local service, safety and equipment. It will be the policy of the Director General to cause the orders of the state commissions in these matters to be carried out."

[6] The foregoing General Order and the above-quoted section 15 of the Federal Control Act, taken by themselves, clearly sustain the Public Utilities Commission in assuming jurisdiction to make the order involved in this case. In the case of Commercial Club of St. James v. Chicago, etc. Ry. Co. (Minn.) 171 N. W. 312, it appears that the state Railroad and Warehouse Commission of Minnesota made an order directing the railroad company to erect a new railroad and passenger depot at St. James, Minn. Referring to the Federal Control Act, the court in that case said:

"Under General Order No. 58 of the Director General of Railroads, dated February 20, 1919, it is plain that Act Cong. March 21, 1918, c. 25 (U. S. Comp. St. 1918, §§ 3115¾a to 3115¾p), has no bearing upon the present controversy."

The railroad company in the instant case, however, contends that the commission was deprived of jurisdiction to make an order establishing a railroad station which would cost more than $1,000. This contention is made in reliance upon a promulgation of the Director General of Railroads, made at a time later than when General Order No. 58 was issued. In other words, the reliance is placed upon an order known as Supplement No. 2 to General Order No. 12, which amends Supplement No. 1 to such Order No. 12. Supplement No. 1 was issued November 12, 1918, several months prior to the time that General Order No. 58 was made, and provided that "no work involving a charge to capital account in excess of $10,000 shall be contracted for or commenced unless it be author-

Digitized by Google

ized by the Director of the Division of Capital Expenditures," except in certain cases. Supplement No. 2, on which the railroad company relies, does not purport to modify General Order No. 58, but merely substitutes the figures 1,000 for the number 10,000 which appeared in Supplement No. 1, so far as these two supplements are material to the present discussion. The pertinent part of Supplement No. 2 reads as follows:

"General Order No. 12 and Supplement No. 1 thereto are hereby amended to provide so that no work involving a charge to capital account in excess of $1,000 (instead of $10,000) shall be contracted for or commenced unless it be specifically authorized by the Division of Capital Expenditures."

We find nothing in either Supplement No. 1 or Supplement No. 2 which purports, or is intended, to limit the police powers of the states. These two orders do not refer to expenditures made in compliance with police regulations. They do not affect General Order No. 58, which plainly authorizes the order made in the instant case, according to the view we have previously expressed, and according to the holding in Commercial Club of St. James v. Chicago, etc., Ry. Co., supra. We therefore agree with the conclusion reached by the Public Utilities Commission with reference to the contention now under consideration. In its decision on a petition for rehearing in this case, the Commission stated:

"The commission is of the opinion that such Supplement (No. 2) does not constitute a limitation of its authority and is solely directed to the relations between operative officers and directing heads of the railroad administration, and that General Order No. 58 of the Director General was not modified thereby."

For the reasons above indicated, we cannot sustain the contention that the commission acted without jurisdiction.

The order and decision of the commission is affirmed.

Affirmed.

BAILEY, J., not participating.

PAGE v. JONES et al. (No. 2391.)

(Supreme Court of New Mexico. May 26, 1920.)

(Syllabus by the Court.)

1. Confusion of goods ⇐12—Replevin lies for number or quantity owned by plaintiff to be taken out of a mass.

If intermixed property is of the same kind, quality, and value, and if no advantage will result to either party by getting the identical property owned by him, even if that were possible, replevin will lie for the number or quantity owned by the plaintiff, to be taken out of the mass, where the proof shows the quantity or portion to which each party is entitled, and the intermingling was not brought about by the wrongful or fraudulent act of the party seeking relief.

2. Confusion of goods ⇐5½—Party negligently causing confusion does not forfeit his interest in the goods.

Where a confusion of goods is occasioned by the negligence of one, but the goods confused are of equal and uniform value; that is, when the mixture is approximately homogeneous, the party responsible for the confusion does not forfeit his interest in the goods, where there has been no fraud or intentional wrongdoing, and the evidence clearly shows the portion contributed by each of the parties.

3. Confusion of goods ⇐11—Failure to record partido contract does not make it void as to subsequent purchasers without notice.

Sections 41 and 42, Code 1915, which authorize the recording of partido contracts, are permissive and not mandatory, and a failure to record such a contract does not render the same void as to subsequent purchasers or mortgagees without notice.

Appeal from District Court, Quay County; Leib, Judge.

Action of replevin by Jennie P. Page against H. B. Jones and another, in which defendants gave a forthcoming bond and retained possession. Judgment for plaintiff for the property or for an alternative money judgment, and defendants appeal. Reversed and remanded, with directions.

E. R. Wright and J. J. Kenney, both of Santa Fé, for appellants.

Ed F. Saxon, of Tucumcari, and H. A. Kiker, of Raton, for appellee.

ROBERTS, J. Appellee sued appellant in replevin, seeking to recover possession of 740 head of sheep of varying ages. The writ was issued, and appellants gave a forthcoming bond and retained possession of the sheep. An answer was filed, and the cause put at issue, and was tried to a jury. Judgment was rendered for the appellee for possession of 550 ewes, 60 lambs, and 50 head of old ewes, and judgment for $5,000 in the alternative. From this judgment appellants appeal.

The facts out of which the controversy arose may be briefly stated as follows: During the lifetime of P. R. Page, the husband of appellee, he had with one Santiago Giddings for many years a number of sheep on "partido" contract. He died some time prior to October, 1915, at which time his widow, appellee here, made the partido contract upon which her right to the possession of the sheep in question here is dependent. Under

Digitized by Google

this contract she let to Santiago Giddings 600 head of ewes of different grades, the contract stipulating that he should use upon such sheep a designated earmark, which should also be placed on the increase. Giddings testified in the court below as a witness for appellee substantially to the following effect: That the earmark which he was required to use on the Page sheep by the terms of the contract was his own individual earmark; had been used by him for 30 years, and that such mark had never been recorded; that the earmark originally was the earmark of Jose A. Baca; that he had for a long number of years also had on partido contract some 900 head of sheep belonging to the said Baca, and that he had also had about 550 head of sheep belonging to the daughters of William B. Giddings, his brother, which he was running on partido; that all of these sheep, including the "Page sheep," had for many years been in the same earmark. Giddings bought the Baca sheep and the sheep belonging to his nieces some 2 or 3 years prior to the institution of this suit. He continued to run them all in the same earmark, and borrowed the money from the appellants to pay for the sheep so purchased, giving them back as security a chattel mortgage on the sheep. Two very dry years resulted in a great loss of sheep, so that Giddings had less than 1000 sheep left shortly prior to the institution of this suit. Appellants took possession of the whole flock of sheep under their mortgage, and appellee brought this action to recover possession of the sheep which Giddings had from her on partido. The effect of the judgment was to give Mrs. Page all the sheep which she was entitled to under the partido contract, with possibly a slight exception, putting the entire loss upon appellants or Giddings.

[1] Consideration of three questions will dispose of this case. Appellants argue first that replevin was not the proper remedy. In the case of Gonzales v. Ilfeld, 185 Pac. 1110, sheep let under a partido contract and intermingled with other sheep all marked with the same brand were replevied. There it was shown that all the sheep were of the same kind or quality, and that it was impossible to distinguish the sheep let under the different partido contracts. The point as to whether replevin was the proper remedy was not discussed by the court, although argued in the briefs. But this court must have considered that it was the appropriate remedy, otherwise it would have held that it was not.

In 23 R. C. L. p. 862, the rule is stated as follows:

"The general rule is that if property intermixed is of the same kind, quality and value, and if no advantage will result to either party by getting the identical property owned by him, even if that were possible, replevin will lie for the number or quantity owned by the plaintiff, to be taken out of the mass, when the mingling was not brought about by his act."

The rule deduced from the authorities we believe may be stated as follows: Where the common mass consist of fungible goods—that is, where each article is exactly like the other, such as oil in a tank, or grain in a bin, and the plaintiff is able to specify the number of articles in such mass belonging to him—an exception is made to the general rule, and the plaintiff is permitted to maintain replevin. See, also, 34 Cyc. 1359; Fines v. Bolin, 36 Neb. 621, 54 N. W. 990, and case note to the case of McDonald v. Bailey, 37 L. R. A. (N. S.) 267.

Here so far as appears the sheep put into the common mass were all of the same grade, quality, and kind, consequently appellee was entitled to maintain replevin for such aliquot part of such mass as she was able to show rightly belonged to her.

This then brings us to a consideration of the question as to what part of the sheep she was entitled. The judgment of the lower court gave her practically all of the sheep which she had originally put in the common mass, or rather which had been put into the common mass by Giddings. The most that could be claimed as to the act of Giddings in mixing the sheep belonging to Mrs. Page with the other sheep which he had on partido and afterwards purchased would be that it was negligently done. There is nothing in the evidence upon which to base any other claim. No fraudulent purpose or improper motive was shown or claimed.

[2] The rule is that where one fraudulently, willfully, or wrongfully intermingles his goods with those of another, so that there is no evidence to distinguish the goods of the one from those of the other, the party responsible for the confusion forfeits all his interest in the mixture to the other party, and in the case of agents, bailees, executors, administrators, and other trustees, occupying positions of trust and confidence, the rule as to the confusion applies when the mixing is merely negligent or careless. But these harsh rules are not generally applied where the confused goods, though indistinguishable, are of equal and uniform value; that is, when the mixture is approximately homogeneous. In such a case as this, the remedy is division in kind, or compensation for actual loss. Take, for example, the case of an administrator. Suppose he has in his hands 100 bushels of wheat belonging to the estate and 100 bushels of his own. The wheat being the same quality, it is dumped into the same bin. There is no doubt as to the exact amount contributed. It would be absurd to say that the administrator should lose the hundred bushels which he put in because of his negligence. Of course, if the wheat was of different grade, a different

Digitized by Google

rule would be applied, for the mixture would not be all of the same quality. For an exhaustive discussion of the subject, see the case of Claflin & Co. v. Con. Jersey Works, 85 Ga. 27, 11 S. E. 721. See, also, note to the case of Ayre v. Hixson, Ann. Cas. 1913E, 671. In the case of Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627, the court said:

"The common law in opposition to the civil law assigns the whole property, without liability to account for any part of it, to the innocent party, when there has been a confusion of goods, except in certain cases, or conditions of property. Chancellor Kent correctly observes that the rule is carried no further than necessity requires. 2 Kent's Com. 365.

"There is therefore no forfeiture of the goods of one who voluntarily and without fraud makes such an admixture. As when, for example, he supposes all the goods to be his own, or when he does it by mistake.

"And there is no forfeiture in case of a fraudulent intermixture when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule, and is fully sustained by authority. Lord Eldon, in the case of Lupton v. White, 15 Ves. 442, states the law of the old decided cases to be, 'if one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity; but if articles of a different value are mixed, producing a third value, the aggregate of the whole, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property; he must have the whole.' This doctrine is stated with approbation by Kent. 2 Kent's Com. 365."

In this case so far as appears from the evidence the sheep in question prior to the intermixing of the herd were all of the same kind, character, and quality, so that when confused, the mixture was approximately homogeneous. The parties know definitely the number of sheep contributed by each to the common mass, and the loss to the common herd in justice and equity should be shared by the parties in proportion to their interests in the commingled goods. The rule announced in the case of Gonzales v. Ilfeld, supra, practically disposes of this case. We there said:

"We agree with the trial court in its finding that it was through the fault and negligence of the appellant that the sheep in question were so marked and commingled as to render their identification impossible. His acts led to the confusion of the goods, but it is urged upon us that appellant's acts, although negligent, were in no sense fraudulent or wrongful, and that he should not be made to forfeit his property when the elements of willful, fraudulent, and wrongful commingling of the property are absent. We think this position well taken. * * *

"We therefore hold that the court should have permitted appellant to recover his proportionate share of the sheep marked with appellee's earmark, as there was no willful wrong nor fraud imputed to the appellant shown by the evidence nor found by the court in its findings."

If it be true, as testified to by Giddings, that the earmark in which he was required by the contract to carry the Page sheep belonged to him, there might not even be the element of negligence in the case. We think, however, that under the undisputed facts in the case the appellee was only entitled to her proportionate part of the confused property.

[3] Appellants further contend that sections 41 and 42, Code 1915, which authorize the recording of partido contracts, when the same have been reduced to writing, make the appellee's partido contract void as against the subsequent mortgage of the appellants, because such original partido contract was in writing and was not recorded.

Section 41 provides that—

"Copies of all contracts [partido] * * * may be filed with the county clerk * * * and when * * * so filed, they shall be notice to everyone."

Section 42 provides:

"And when a copy of such contract shall be filed * * * it shall be notice to every one that the person or persons in charge of such animals * * * had no right to sell or dispose of the same in any manner."

In the absence of statute, the registration or recordation of a contract of bailment is not necessary to its validity, either as between the bailer and the bailee, or as against third parties; but for the prevention of fraud statutes have been enacted in many states by which such registration or recordation is necessary to render the contract valid as against creditors or subsequent purchasers for value, and subsequent mortgagees without notice. 6 C. J. 1106.

The practice of recording transfers, which would include contracts was unknown to the common law. 24 A. & E. Enc. of Law (2d Ed.) p. 115, and 23 R. C. L. p. 170.

It follows therefore that since the whole matter rests on a statutory basis, the failure to record an instrument which is not required to be recorded by the terms or intendment of any statute has no effect on the rights of parties as they exist at common law, independently of the recording act. 24 A. & E. Ency. of Law (2d Ed.) p. 115, and 23 R. C. L. p. 234.

It will be noted from a reading of the two sections of the statute that the recording of a contract is permissive merely, and not mandatory. It will also be noted that the statute wholly fails to declare the effect of failure to record.

"The object of the recording act being to protect certain specific classes of persons against fraud, failure to record will not, in the absence of an express provision to that effect, render

Digitized by Google

the instrument wholly void and inoperative to convey the legal title; an unrecorded instrument is valid against every one except the classes of persons included within the terms of the statute." A. & E. Ency. of Law (2d Ed.) vol. 24, p. 116.

Applying these principles to the two sections of the statute here involved, the conclusion is inevitable that recording is permissive and not mandatory; that failure to record has no effect, either upon the rights of the parties to the contract, nor does it render the contract void as against subsequent purchasers or mortgagees without notice.

The case will be reversed and remanded to the district court, with instructions to apportion the property between the parties as their interests appear, and to enter judgment accordingly, and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

STATE ROAD COMMISSION v. INDUSTRIAL COMMISSION OF UTAH.
(No. 3476.)

(Supreme Court of Utah. May 18, 1920.)

1. Master and servant ⟸405(4)—Compensation claimant's evidence held to show employé killed by lightning was seeking shelter.

In a proceeding under Workmen's Compensation Act for compensation for death of an employé struck by lightning after having left a state road on which he worked, evidence *held* to justify finding that he was seeking shelter from a storm when killed.

2. Master and servant ⟸375(1) — Employé struck by lightning while seeking shelter from storm was injured in "course of employment."

Where an employé working on a state road left the road to seek shelter from a storm, and was killed by lightning before reaching the shelter, his death was the result of an accident occurring in the course of his employment, within Comp. Laws 1917, §§ 3112, 3113, as amended by Sess. Laws 1919, c. 63.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. Master and servant ⟸385(1) — "Average weekly wage" within compensation act defined.

Under Workmen's Compensation Act (Comp. Laws 1917, § 3132), requiring benefits to be based on the "average weekly wage" at time of injury, the average weekly wage, where the employment is continuous, may be computed by multiplying the average daily wage by 300 and dividing by 52; but, where the employment is intermittent, the average weekly wage is determined by dividing the aggregate amount earned by the number of weeks, including the weeks in which no work was done.[1]

4. Statutes ⟸206—Effect must be given to every word if possible.

In construing a statute effect must be given to every word if possible.

Proceedings under Workmen's Compensation Act for compensation for death of J. C. Johnson, opposed by the State Road Commission, employer. Award for claimant by the Industrial Commission, and employer brings certiorari. Award annulled, with directions.

Allen T. Sanford, of Salt Lake City, for plaintiff.

Dan D. Shields, Atty. Gen., and Jas. H. Wolfe, O. C. Dalby, H. Van Dam, Jr., and D. M. Draper, Asst. Attys. Gen., for defendant.

THURMAN, J. This case is before us on a writ of certiorari to review the proceedings of the defendant commission in the matter of an award to the dependents of one J. C. Johnson, deceased.

The findings and conclusions of the defendant are, in substance, as follows:

"That Joseph Clarence Johnson was employed by the State Road Commission, beginning in the month of February, 1919, and continuing until the 4th day of September, 1919, when he was dragging a portion of the state highway, when a thunder storm arose, and he left his team near a fence, and started toward a cabin in an adjoining field for shelter, and at a point about 150 feet distant from the team, and before reaching the cabin, he was struck by lightning and instantly killed. It was the duty of said Joseph Clarence Johnson, under his employment, to drag the state road after rains and at such other time as he was ordered so to do by his superior, and the payroll of the State Road Commission shows that his wages were $3 per day when he worked, and that he put in the following time: February, six days four hours, $19.50; March, ten days, $30.00; April, three days, $9.00; May, two days, $6.00; August, six days four hours, $19.60; total earned, $84.00. That decedent left surviving, as dependents, his widow, Harriet Elizabeth Johnson, together with Clarence W. Johnson, Theron D. Johnson, and Claire Elizabeth Johnson, minors, and that the widow and applicant expended the sum of $93.14 for funeral expenses. That from the guardianship proceedings in the district court of Emery county, state of Utah, it appears that the widow, Harriet Elizabeth Johnson, was appointed guardian for the said minors, and as such was authorized to make election to take compensation in behalf of the minors. That in the work of the State Road Commission, of constructing and maintaining roads, the customary time of employment is 5½ days per week, except as to the class of employés similar to decedent, whose duty it is to drag roads after storms, and that as to such employés their work comes only as would be required, as above stated.

"From the foregoing facts the commission concludes that the decedent came to his death as a result of an injury received by an acci-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Uintah Power & Light Co. v. Industrial Commission of Utah, 189 Pac. 875.

Digitized by Google

dent arising out of or in the course of his employment, and that the dependents are entitled to compensation upon the basis of an average weekly wage of $17.30."

Plaintiff contends the evidence is insufficient to sustain the finding that deceased was seeking shelter at the time he was killed. The evidence tends to show that the deceased was employed by plaintiff in January, 1919, to drag a portion of the state road in Emery county; that his employment continued intermittently until September 4 of the same year, when he was instantly killed by a stroke of lightning. No one saw the accident, but his body was discovered shortly afterwards in a field adjacent to the road on which he had been working. The body of deceased was eight or nine rods from the road, and there is no controversy as to the cause of his death. The field in which the body was found was occupied by deceased in his lifetime, and contained an old house several rods distant from the road. The body of deceased was found between the road and the house. As to how the deceased came to be at that point is entirely circumstantial. In his work he had been driving two span of horses attached to a drag. The horses and drag were found near the road, several rods removed from where the deceased had evidently left them, and the doubletree to which they were attached was broken. The evidence also shows that at the time of his death there was in that vicinity considerable thunder and lightning, with some rain, and manifestations of a heavier storm.

[1] The circumstances above detailed are amply sufficient to justify the finding that the deceased was seeking shelter at the time of his death. The question arises, "was seeking shelter," under such circumstances, such a departure from his work as to justify a conclusion that the accident did not arise in the course of his employment? Upon this question the defendant calls our attention to a paragraph from a standard author which seems to be in point:

"It cannot be said that the employment is broken by mere intervals of leisure such as those taken for a meal. If an accident happened at such a time there would be no break in the employment, even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises, or about his property, unless the workman is doing something wholly foreign to his employment. Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is minister-ing to his personal comfort or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshment, food, or fresh air, or to rest in the shade." Honnold, Work. Comp. p. 379 et seq.

See, also, Vandoren, Work. Comp. 40, 41.

Plaintiff also insists that the accident causing the death of deceased was the "act of God," and not an accident within the meaning of the Industrial Act. The contention is that an "Act of God" is by implication excluded. Comp. Laws 1917, § 3112, as amended in Sess. Laws 1919, subd. 5, at page 157, is relied on. It reads as follows:

"The words 'personal injury by accident arising out of or in the course of employment' shall include an injury caused by the willful act of a third person directed against an employé because of his employment. They shall not include a disease except as it shall result from the injury."

Plaintiff's rule of construction, as applied to the language quoted, is a two-edged sword. The Legislature, while engaged in excluding certain things from the category of accidents, ought to have excluded the "act of God," if such was its intention. It expressly excluded diseases not resulting from the injury. Expressio unius, etc.

[2] We not only feel justified in sustaining the finding that deceased was seeking shelter when the accident occurred, but likewise the legal conclusion that the accident occurred in the course of his employment and was one for which compensation should be allowed. We are of the opinion, however, that the accident did not arise out of the employment for the reason there does not appear to be any causal connection. This, however, in view of our present law, is immaterial. The insurer is liable whether the accident arose out of the employment or whether it arose in the course thereof. Comp. Laws 1917, § 3113, as amended by Sess. Laws 1919, p. 158. We conclude, therefore, that the deceased came to his death as the result of an accident received in the course of his employment, and that his dependents are entitled to compensation for the loss as provided by law.

The amount of compensation to be allowed is the difficult feature of the case. From the facts found the defendant reached the conclusion that the dependents were entitled to compensation upon the basis of an average weekly wage of $17.30, and accordingly made an award of 60 per cent. of that amount, or $10.38 per week for a period of 312 weeks, not to exceed in all the sum of $3,238.56.

The method of computation adopted by the defendant to ascertain the average weekly wage was to first ascertain the annual earnings, and divide that by 52, the number of weeks in a year. For this purpose 300 was assumed to be the number of working days in the year. This multiplied by $3, the daily

Digitized by Google

wage, amounted to $900, which sum, divided by 52, produced $17.30 as the average weekly wage. The question is, does the statute by which we are controlled justify such method of computation in the instant case? The findings show that the employment of deceased was intermittent; that the nature of the employment was such that he did not and could not have employment for 300 days in the year, either approximately or substantially. The findings themselves state the actual number of days the deceased was employed, the nature of the employment, and the conditions incident thereto. The number of days so found must have been all that was required in the employment. The total number of days of actual employment, according to the findings, was 28, and the aggregate earnings during a period of seven months, at $3 per day, was only $84. In arriving at the conclusion it did, the defendant evidently adopted some legal theory not deducible from any provision of the statute. Comp. Laws 1917, § 3142, says:

"The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits."

The statute furnishes no rule by which to compute the wage. We are compelled to blaze our own trail, and if possible construe the statute according to its plain meaning and intent. Undoubtedly the Legislature intended that the person injured, or his dependents in case of death, should be compensated for the loss upon some basis having a logical relation to his earnings in the employment. It certainly was not intended that, in every case where death resulted from accident in the course of employment, the dependents should be compensated as if the employment were continuous during all the working days of the year. No such conclusion is deducible from the language employed by the Legislature, and yet such, in effect, is the meaning of the statute as interpreted by the defendant in the case at bar. The intermittent character of the employment was not taken into consideration in making the computation. The compensation allowed the dependents is just the same as might have been allowed the dependents of a deceased person who had worked for $3 per day every working day in the year next previous to his death. The same method of computation was adopted by the defendant in a case recently decided by this court. Uintah Power & Light Co. et al. v. Industrial Commission of Utah, 189 Pac. 875.

[3] The controlling distinction, however, between that case and this is that in that case the employment was in its nature continuous throughout the year and for every working day in the year. Having found the daily wage, which was $4, this amount multiplied by 300, the assumed number of working days in the year, gave a result of $1,200 as the annual earnings. This divided by 52, the weeks in the year, determined the average weekly wage at the time of the injury. The rule adopted by the defendant in that case is reasonable and therefore permissible in every case where the employment is substantially continuous, even though the deceased is killed by an accident immediately after entering the employment.

[4] But where, as in the instant case, the employment in its nature is not continuous, but dependent upon certain conditions indeterminable in advance, we know of no rule by which to determine the average weekly wage at the time of the injury except by adopting a method of computation which gives effect to the word "average," as the same appears in the statute. It is the duty of the court to give effect to every word if possible. Unfortunately, precedents are of little or no avail in the present case. All of the adjudicated cases, as far as we have been able to examine them, are controlled by statutes almost, if not entirely, dissimilar to our own, as relates to the question now under consideration. Nearly every statute we have examined lays down specific rules for determining the basis of computation. Most of them use the words "average weekly wage" as the basis for computation, but they also prescribe the formula by which the average weekly wage is to be determined. The rules generally relate to employments continuous in their nature, and in such cases the rules quite frequently are substantially similar to the method adopted by the defendant in the present case. For instance, the number 300 is generally used as the number of working days in the year. If the work is substantially continuous throughout the year, this number is ordinarily used. We have carefully examined all of the cases called to our attention by defendant's counsel in their exceedingly able brief, but find no case which justifies the method adopted by defendant in a case of this kind. The statutes of many of the states as they relate to this particular question are found in the note to 9 N. C. C. A., commencing at page 531. Defendant cites the following cases in which many of the statutes are considered: In re Behrens, 188 App. Div. 66, 176 N. Y. Supp. 28; In re Prentice, 181 App. Div. 144, 168 N. Y. Supp. 55; Riley v. Motor Co. et al., 199 Mich. 233, 165 N. W. 745; Robbins v. Original Gas Co. et al., 191 Mich. 122, 157 N. W. 437; Erickson v. American Well Works, 196 Ill. App. 346; Fairchild v. Pennsylvania Railroad, 170 App. Div. 135, 155 N. Y. Supp. 751; Centlivre Beverage Co. v. Ross (Ind. App.) 125 N. E. 220; Interstate Iron & Steel Co. v. Szot (Ind. App.) 115 N. E. 599; Littler v. Geo. A. Fuller & Co., 223 N. Y. 369, 119 N. E. 554. None of these cases are in point as far as relates to the facts of the instant case, but many of them are instructive and well worth reading.

The last case cited above is a New York

Digitized by Google

case, and it suggests a reasonable rule for computation in a case of this kind under a statute such as ours. The commission in that case awarded compensation on the basis of 300 times the daily wage reduced to weeks. The facts were the employment only furnished work for about 30 weeks in a year. In reversing the award the court said:

"If the nature of the employment does not permit steady work during substantially the whole of the year the annual earning capacity of the injured employé *in the employment* is the proper basis of compensation. Section 14, subd. 3. The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness." (Italics ours.)

The opinion refers to an English case (Anslow v. Cannock Chase Colliery Co., L. R. App. Cas. 1909). The following excerpt from the opinion of Lord Loreburn is illuminating:

"The question is in regard to the way in which the average weekly earnings of a workman shall be computed in a case in which a normal and recognized incident of his work was fourteen weeks' stoppage and two weeks of general holidays during the year.

"The object of the act, broadly stated, is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. It is only that for a month he did not choose to earn. But if it is a part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less, over the year.

"I agree with what the learned Master of the Rolls says in his judgment when he uses the following language: 'In my opinion the true test is this: What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked.'"

The English Workmen's Compensation Act 1906, under which the opinion just quoted was rendered, as far as applicable here, reads as follows:

"(2) For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:

"(a) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where, by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

As to the meaning of the term "average weekly earnings," Halsbury, L. C., in Lysons v. Knowles & Sons, Ltd. (1901) A. C. 79, at page 87, said:

"I think it was in that popular sense, taking one day with another, that the Legislature used those words, and I think it is what everybody would understand by 'average' that his earnings were so much—not his agreed earnings by contract, there it would be definite—that if a man was employed only at irregular intervals or at irregular amounts you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid."

In Perry v. Wright, [1908] 1 K. B. 441, Fletcher Moulton, L. J., expressed the opinion, at page 456, that—

"The term 'average weekly earnings' signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident."

The above excerpts, both as to the statute and opinions cited, are found in Knowles, Workmen's Compensation, from page 189 to page 214, inclusive.

We have made a somewhat extended review of the English statute and cases for the reason that the statute appears to be, to some extent, in principle similar to the statute of this state as far as average weekly earnings are concerned. There seems to be no formula given by which the earnings may be determined, but the statute is suggestive of a method, and is therefore instructive to the officer or officers charged with the duty of administering the act. It will be noted the statute says, "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman has been remunerated."

In re Rice, 229 Mass. 325, 118 N. E. 674, Ann. Cas. 1918E, 1052, is of special interest because the employment was intermittent, and the conditions, to some extent, were similar to those existing here. The applicant was a schoolgirl who, after school hours each day, worked three hours for five days in a week, and all day Saturday in a weaving business, and earned approximately $3 per week. The accident board found that a person working as a weaver full time, six days a week, would average $7.50 a week, and allowed that sum as the basis of compensation. The Supreme Judicial Court, on appeal, held that the amount of compensation to be awarded under the statute was to be determined not by what the employé is *capable of*

Digitized by Google

earning, but by what was *actually earned*. It also held that, if there was such an employment as that of "spare weaver," similar in hours of service, kind of work, and requirements of skill to that of applicant during her term of employment, that might be used as a basis for determining the compensation to be awarded under the statute. Finally, the court, in effect, held that the words "average weekly wages," under the statute, should be interpreted in their common and ordinary sense, and should be computed by dividing the total amount earned by the number of weeks of employment. It will thus be seen that the Supreme Judicial Court of Massachusetts practically applied the English rule.

In Bartoni's Case, also a Massachusetts case, appealed from the Industrial Accident Board to the Superior Court (225 Mass. 349, 114 N. E. 663, L. R. A. 1917E, 765), it was held that the average weekly wages of a workman employed in a granite quarry, who, during the year preceding his injury, did not work for about 13 weeks of the year by reason of inclement weather that prevented work in a quarry, are to be computed by dividing the amount of his pay for the year preceding the injury by the number of weeks that he actually worked. The governing words of the statute, as stated by the court at page 351, are as follows:

"'Average weekly wages' shall mean the earnings of the injured employé during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employé lost more than two weeks' time during such period, then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted."

Following this quotation of the statute relating to average weekly wages, the opinion in the Bartoni Case says that this definition is significantly unlike any provision in the English act. The writer has some difficulty in noting the wide distinction suggested by the Massachusetts court, but the difference of opinion is not important.

It is contended by defendant's counsel with much force and considerable eloquence that, in computing the compensation to be awarded the dependents of an employé whose death was caused by accident, the earning capacity of the deceased, and not the amount previously earned, should constitute the basis of compensation. If by "earning capacity" is meant what the employé could have earned as the business was carried on, including the element of discontinuousness incident to the nature of the employment, we have little or no fault to find with the contention; but if by "earning capacity" is meant what the employé might earn on the assumption that he worked full time, or for three hundred days in the year, we cannot agree with the contention as applied to a case of this kind. Whenever the term "earning capacity" is used in cases arising under the Workmen's Compensation Acts it will generally be found that it has reference to earning capacity in the particular employment as it is carried on. When we consider the fact that no person can possibly have an earning capacity in a particular employment greater than the opportunities afforded by that employment, we obtain a clearer conception of what is meant by "earning capacity," as the term is used in this class of cases. To say that a person had an earning capacity of $3 per day for 300 days in the year, and that therefore his compensation, or that of his dependents, should be computed on the basis of $900 per year, or $17.30 per week, where the employment in which he was injured was intermittent and could only run for a small fraction of the time, is a manifest paradox. Such a contention has no logical basis upon which to stand. We must therefore find some other method of computation in the present case more in accord with the legislative intent.

Counsel for both parties in the case have injected into the discussion theories relating to the question of insurance. Plaintiff contends that the insurance fund as collected and maintained is not sufficient to pay full-time compensation in a case of this kind, where the employment is intermittent, and where the employé had employment for only a small portion of the time. Defendant, on the other hand, insists that the fund is collected and maintained so as to allow full-time compensation for every death by accident which may occur in the course of the employment, whether the employment be intermittent or continuous. It is sufficient to say that, as far as the present case is concerned, the theories advanced are academic. There is nothing in the record of the case to justify the court in giving such theories serious consideration. We are bound by a statute which says: "The average weekly wage of the person injured, at the time of the injury, shall be taken as the basis upon which to compute the benefits." The difficulty confronting the court is to construe that statute so as to give it effect in the instant case. It is impossible to construe it to mean exactly what it says. An average cannot be computed by means of a single factor. The ordinary meaning of the word implies that more than one factor must be considered. Webster defines the word, "A mean proportion, medial sum or quantity, made out of unequal sums or quantities." The Legislature evidently intended that the weekly wage should be computed with reference to some period of time, including the date of the injury. It intended that the wage at the time of the injury should be considered in connection with wages pre-

Digitized by Google

viously earned. For how long previous, the statute is silent. The Industrial Commission, and others upon whom the duty may be imposed, are left without a guide. They must determine the question as best they can. In the absence of a statutory formula we know of no better rule than that expressed in the English statute, supra: "The average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." We have shown, by the English decisions referred to, the method of computation adopted in that jurisdiction. If the workman is employed at irregular intervals or at irregular amounts, the wage is determined by dividing the aggregate by the number of weeks. In this case the defendant, in pursuance of a stipulation by the parties since the case was submitted, has furnished the court with a detailed statement of the days in different weeks covered by the employment in which the deceased was employed. Every period of seven days within which deceased did any work and the wages therefor are given. The period of employment commenced the 26th day of January, 1919, and continued intermittently until September 4th, the day of his death. The number of weeks covered by the intermittent employment was 31. The total amount earned was $91.50. This amount divided by 31 gives the sum of $2.95 as the average weekly wage. The fact will be noted that this method of computation takes into consideration not only the weeks in which he did some work, but also the weeks he did not work at all. This we conceive to be the spirit and meaning or the statute. The purpose evidently was to pay to the dependents of the deceased employé as compensation 60 per cent. of his average weekly earnings as the same may be calculated up to and including the date of his injury. This we have endeavored to do. It may be contended, however, that the weeks in which no work was done should not be considered in the computation—that only the weeks in which he did some work should be considered. Let us see what the result would be if that method were adopted. The number of weeks in which the deceased did some work was 18. Ninety-one dollars and fifty cents, the aggregate sum earned, divided by 18, gives as a result $5.08. This is certainly more liberal to the dependents of the deceased, but is it right? Will it stand the test of reason and common sense? Let us suppose that the deceased commenced work on the 26th day of January, and worked continuously a full week of six days at $3 per day. Let us suppose, further, that from then on to the 28th day of August he had no work, but on that day it rained. On the 29th he resumed work, and continued for six days until the moment of the accident. The amount earned would be $36, the number of weeks two, and the average weekly wage $18. The effect would be full compensation for the dependents of an employé who had employment for only two weeks in seven months and a fraction, the periods of employment being practically seven months apart. Under such method of computation 60 per cent. of the average weekly wage would amount to more than the entire wages earned in the employment by the employé when living. We do not believe the statute controlling in this case is susceptible of such construction. The question is, what did the deceased earn in the employment during the period of seven months and nine days next previous to his death? That divided by the number of weeks within that period must of necessity determine the average weekly wage under the Utah statute or else the statute has no meaning at all. If the average weekly wage in this kind of a case could be determined by taking the average weekly wage of all employés in the district in the same grade of employment, as provided in the English statute above quoted, the writer is of the opinion a more satisfactory result could be achieved; but that is a matter for the Legislature and not for the court. The minimum compensation in case of death is fixed by statute at $2,000, so that in any event all that can be said of our decision in the present case is that where the employment is intermittent it establishes the rule by which the average weekly wage of the employé under the act may be determined.

The conclusions of the defendant commission are not supported by the findings, and for that reason the award is annulled and set aside, with directions to defendant to proceed in accordance with the views herein expressed.

CORFMAN, C. J., and WEBER, J., concurs.

FRICK, J. I concur. I am free to confess, however, that I have had some difficulty in arriving at what to my mind seems a satisfactory conclusion in this case. After carefully considering the text of our Workmen's Compensation Act, and after comparing its provisions with those of other similar acts, and upon mature reflection respecting the controlling purpose of such acts, I can see no escape from the conclusion reached by my associate, Mr. Justice THURMAN. In this case it is conceded by both sides that the regular course of employment of the deceased was necessarily irregular and intermittent; that is, that the work he was employed to do was necessarily such that he could be employed only a portion of his time. It is also conceded that when he was not doing road work he was engaged in agricultural labor on his farm, an employment which is not embraced within the Workmen's Compensation Act. Keeping in mind, therefore, that in case of injury the purpose of the act is to compensate the injured employé for loss of time, and

Digitized by Google

in case of his death to compensate those who are dependent upon him for support for the actual pecuniary loss they will sustain by reason of being deprived of his earnings, it follows, as a necessary corollary, that the amount of compensation to either the injured employé, or, in case of his death, to those who are dependent upon him, ordinarily cannot exceed the amount the deceased earned in the particular employment in which he was engaged at the time of his death. Under such circumstances it is of the utmost importance to keep in mind two things: (1) That the compensation act does not cover the ground of old-line accident insurance; and (2) that it is the actual amount earned in the course of the employment, and not the earning capacity of the deceased, which constitutes the basis of compensation under the act. By what is actually earned is meant the wage that is paid to the employé in the course of his regular employment. If, therefore, the employment is continuous, the days that he may "lay off," even though voluntary, are not deducted when the average weekly earnings are ascertained. If, however, as here, the employment in its very nature is intermittent, and the employé necessarily can earn wages only a part of the time, then the average weekly wage thus earned during the whole period of the employment, or for at least such a length of time as will give the true average, must be taken as the basis for computing the amount that should be allowed under the statute. In order, therefore, to arrive at a just result it is necessary to ascertain the average weekly wage the employé earned in the regular course of his employment, ascertained as just stated, since that is what those who are dependent upon him for support are deprived of in case of his death, and that is what the statute contemplates shall be awarded to them during the period of time fixed in the statute. That such is the purpose of the statute is manifested in various ways by its language. The provision respecting the basis of compensation, as well as the provision which makes the amount of the pay roll the basis for contributions to the fund from which the compensation is paid, clearly indicate that such is the purpose of the act. Where the employment is regular and continuous, and the rate of wage is fixed, there can be no difficulty whatever in arriving at a just result. Where, as here, however, the regular employment is intermittent, the only correct method of arriving at a just result is the one pursued by Mr. Justice THURMAN in his opinion. The reason why, under such circumstances, the earnings for at least the period of time before stated must be reduced to a weekly average, is not hard to understand. Indeed, it is quite obvious. For example, if the regular course of the employment is intermittent, as here, and the employé works only one-third or less of the time covered by his employment, then his average weekly wage is necessarily less than what he actually earned in the particular week or on the particular day he was accidentally killed. In view, therefore, that the compensation which is awarded in each case under the statute is for a continuous weekly allowance, and not only for the one-third or less of the time the employé may have been actually engaged at work, his earnings must be averaged for the whole number of weeks, and in that way the correct amount which the statute assumes he contributed to those who were dependent upon him for support must be ascertained. If the compensation under the circumstances just stated, were based upon what the employé actually earned during the week or on the day he was killed, the dependents would receive the sum equal to three or more times the amount they were actually deprived of; that is, three or more times the amount he, in contemplation of the statute, could have contributed to them during the time he was employed.

If the act were intended to take the place of ordinary accident insurance, or if it were intended to cover losses other than those which are merely pecuniary, the case would be different. In this connection it must always be kept in mind, however, that where the work is regular and continuous, or substantially so, and the wages of the employé have been increased from time to time, then these circumstances must be considered when the amount of compensation to be awarded is determined. In each case the evidence relating to those matters should, however, be reflected in the findings, and be carefully considered in determining the amount to be allowed as compensation, and the statutory provisions in that regard should be carefully observed.

The method pursued by the Industrial Commission in fixing the compensation in this case, as clearly pointed out by Mr. Justice THURMAN, in my judgment is not only unsound in principle, but is in direct conflict with both the letter and the spirit of our statute, in that the compensation allowed is upon a basis as though the deceased worked all of the time when in fact he worked only a small part of the whole time during which he was employed in road work; and thus the amount awarded is far in excess of the earnings of the deceased, and hence far in excess of what his dependents could have received from the earnings derived from the work in which he was engaged. Moreover, the dependents in this case are allowed compensation for the time in which the deceased was engaged in agricultural work, which is expressly excluded from the act. If, therefore, the deceased had been killed while repairing his farm, or while doing something else on the

Digitized by Google

farm, his dependents would have been remediless.

It is true that by reason of the death of the deceased his dependents are deprived of his entire earning capacity. That, however, is a misfortune not covered by the statute (except as it may be covered by the minimum amount allowed) and therefore cannot be considered here. It is manifestly our duty to apply the law as we find it, and, in case any other tribunal, board, or commission over which the law requires us to exercise jurisdiction misinterprets or erroneously applies the law, it is our duty to correct the error in case the proceedings are brought here for review.

GIDEON, J. (concurring in part). The facts surrounding the employment of the deceased by the State Road Commission and the terms of the employment are not in dispute. The duty of the deceased was to drag or level the road after storms, and he was to determine the necessity for such work. In the very nature of the case his employment was intermittent. He might be required to do work once or oftener in one week, and again it might not be necessary to do any work for a period of several weeks. The record in this proceeding discloses that that is just what happened. It seems to be established beyond controversy that of the 81 weeks between the date of the first employment and the date of death there were only 18 weeks in which the deceased actually did any work. Mr. Justice THURMAN concludes that in arriving at the average weekly wage the court should take into consideration the full number of weeks from the commencement of his employment to his death. I can see no reason why that particular arbitrary rule should be adopted. Clearly the deceased was not an employé of the State Road Commission except at such times as he was actually engaged in the work. As indicated, there were weeks when he was not so employed. It will not be contended by any one that, if deceased had been struck by lightning during some week when he did no work for the road commission and while engaged at farm labor, he would be entitled to compensation for such accident. The rule should work both ways. If he was an employé during all of those weeks to the extent that that time must be considered in arriving at his average weekly wage, it would seem, a fortiori, that he was therefore such an employé as would be entitled to compensation in the event of accident. The rule adopted appears to be unnecessarily harsh upon both the employé and his dependents and contrary to the general spirit of the act. In many cases it would defeat the very purpose of the act, which is to compensate the widow and other dependents for the pecuniary loss sustained through the death of their provider. It is easy to perceive various kinds of intermittent employment where the employé is called upon to perform labor one week, and probably is not again called upon for several weeks. In such cases, if the entire number of weeks between the first employment and the time of the accident is to be used as a divisor in determining his average weekly wage, it might, and would likely result in reducing such average weekly wage to a sum trifling in comparison with what the employé was actually earning, or capable of earning by his labor. I cannot conceive that such was the intent of the Legislature. A more rational rule, it seems to me, since it is absolutely necessary to determine the average weekly wage, is to count the number of weeks during which he actually worked one or more days. Such, as I understand, is the position of the manager of the State Insurance Fund, as outlined in his letter addressed to the Industrial Commission under date of January 15, 1920.

The argument is advanced that to allow the applicants in this case full compensation as fixed by the commission would result in giving to the dependents (applicants) much more than the deceased would have received from the particular employment if the accident had not occurred and the employment had continued. If that element is to be considered in determining the amount of compensation to be awarded, then the award of the commission in the recent case of Amalgamated Sugar Co. et al. v. Industrial Commission, 189 Pac. 69, should not have been affirmed. The deceased there was employed by the Amalgamated Sugar Company at $4 per day, or $24 weekly. It is a matter of common knowledge that the duration of the operating season of sugar factories in this state is approximately 12 weeks. The total wage that the deceased in that case would have earned, therefore, had he worked the full season, would have been approximately $288. Notwithstanding that fact, his dependents were awarded an amount exceeding what his entire wages would have been from that employment had he continued therein for more than 15 years.

While I concur in the result, I do not agree with the method suggested by Mr. Justice THURMAN in determining the average weekly wage in employments of this kind.

Digitized by Google

J. R. WATKINS MEDICAL CO. v. LIZAR et al. (No. 9864.)

(Supreme Court of Oklahoma. June 8, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸300—New trial ⟸119—On failure to duly file motion for new trial Supreme Court cannot consider it or review trial errors.

Rev. Laws 1910, § 5035, requiring a motion for a new trial to be filed within three days after verdict, is mandatory, and, in the absence of a showing that the party filing it has been unavoidably prevented from filing it within the time specified in said statute, this court cannot consider it or review the errors occurring at the trial.

2. Judgment ⟸298, 341—During the term at which decrees and orders are made they may be set aside or modified.

It is a general rule of law that all the judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounced them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court.

3. New trial ⟸117(3)—Court on affidavits for new trial filed the first day of the succeeding term cannot set aside verdict rendered at previous term.

Affidavits disclosing misconduct on the part of the jury, filed during the term, but more than three days after the return of the verdict, are sufficient to invite the attention of the court, and would authorize the court in setting aside the verdict during the term of court wherein the verdict was rendered, but, unless the court acts at that term, it would be without jurisdiction, at a subsequent term to vacate any order or judgment rendered at a prior term upon the strength of said affidavits on a motion for new trial filed the first day of the succeeding term.

Error from District Court, Pawnee County; Conn Linn, Judge.

Action by the J. R. Watkins Medical Company against Jasper N. Lizar and others. Judgment for plaintiff, second motion for new trial sustained, and it brings error. Reversed and remanded.

L. V. Orton, of Pawnee, and Tawney, Smith & Tawney, of Winona, Minn., for plaintiff in error.

McCollum & McCollum, of Pawnee, for defendants in error.

PITCHFORD, J. Plaintiff in error commenced this action against the defendants in the district court of Pawnee county, and on the 29th day of September, 1917, judgment was rendered in favor of the plaintiff against the defendants. Within the statutory time defendants filed a motion for a new trial, which motion was on the 9th day of October, 1917, overruled. Defendants were given an extension of time to make and serve case-made, also time within which to file supersedeas bond, which bond was thereafter, on the 9th day of November, 1917, duly filed. On the same date of the filing of the supersedeas bond defendants filed the affidavits of N. H. Swalley, one of the defendants, and one F. A. Walker. The affidavit made by Swalley was to the effect that on the 28th day of September, 1917, after the jury had retired to consider their verdict, they were not held together, but were permitted to separate, and that affiant was approached by one, F. A. Walker, one of the jurors, who informed the affiant that F. A. Boyles, foreman of the jury, wanted $200 from the affiant, and that for the consideration of $200 Boyles would throw his influence and support to the defendants in the further deliberations of the jury in the cause.

The affidavit subscribed to by Walker was in corroboration of that made by Swalley. No motion or other writing was attached to these affidavits, and nothing filed in connection with them; neither were copies served on plaintiff or its attorney, nor notice of any kind given that the affidavits had been filed. These affidavits were filed 38 days after the filing of the motion for a new trial and 30 days after the motion for new trial had been overruled.

On January 3, 1918, the defendants made application for a further extension of time to make and serve case-made. On the following day the court granted 60 days' extension of time. On the 7th day of January, 1918, the same being the first day of the January term of court, defendants filed, without notice to plaintiff, or its attorney, another and second motion for new trial on the general statutory grounds and attached the two affidavits referred to. Permission to file this second motion was granted in the absence of plaintiff's attorney and without his knowledge.

When counsel for plaintiff learned of the filing of this motion, he immediately filed a motion to strike from the files the last motion for new trial. The motion to strike was never considered or decided by the court, and on the 23d day of February, thereafter, without notice to plaintiff, or its attorney, and in the absence of the attorney, the second motion for new trial was sustained by the court, and the verdict of the jury and judgment rendered on October 9, 1917, was set aside, and a new trial granted. The new trial seems to have been granted upon the information furnished the court by the affidavits of Swalley and Walker. From the order and judgment granting the new trial plaintiff appeals.

[1] Section 5035, R. L. 1910, provides that the application for new trial, with certain exceptions set out in the statute, must be filed within three days after the verdict or decision was rendered, unless unavoidably prevented. There is an unbroken line of deci-

Digitized by Google

sions of this court to the effect that the provisions of this section are mandatory.

In Ewert v. Wills et al., 178 Pac. 87, the second syllabus states:

"Where no motion for new trial has been actually filed within the statutory period, a recital in the record that the plaintiff 'in due form files his motion for a new trial, and the same being heard and considered is by the court denied,' is of no avail as a substitute for the filing of such motion."

To the same effect see Powelson v. State, 169 Pac. 1093.

In Roberts et al. v. Seals, 43 Okl. 467, 143 Pac. 199, it was said:

"Rev. Laws Okl. 1910, § 5035 (Comp. Laws 1909, § 5827), requiring a motion for a new trial to be filed within three days after verdict, is mandatory, and, in the absence of a showing that the party filing it has been unavoidably prevented from filing it within the time specified in said statute, this court cannot consider it or review the errors occurring at the trial. Held, further, that the trial court has no power to grant an extension beyond the time specified, and a filing mark upon such motion, showing same filed within the statutory period, is not conclusive. Held, further, that an agreement of counsel cannot work to effect an extension beyond the time specified in the statute."

The precise question presented by this appeal seems to have never been passed upon by this court. It is not claimed by the defendant that a new trial was granted upon newly discovered evidence, but that the verdict of the jury was secured by gross fraud.

Under section 5033, R. L. 1910, c. 60, p. 1365, we find that a new trial may be granted for any of the following causes:

"First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.

"Second. Misconduct of the jury or prevailing party.

"Third. Accident or surprise, which ordinary prudence could not have guarded against.

"Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice.

"Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property.

"Sixth. That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.

"Seventh. Newly discovered evidence, material for the party applying which he could not, with reasonable diligence, have discovered and produced at the trial.

"Eighth. Error of law occurring at the trial, and excepted to by the party making the application.

"Ninth. When, without fault of complaining party, it becomes impossible to make case-made."

The application for new trial must be made at the term the verdict, report, or decision is rendered, and except for the cause of newly discovered evidence, material for the party applying that he could not, with reasonable diligence, have discovered and produced at the trial, or impossible to make a case-made, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.

[2] Section 5267, R. L. 1910, provides that the district court shall have power to vacate or modify its own judgments or orders at or after the terms at which such judgment or order was made:

"First. By granting a new trial for the cause, within the time and in the manner prescribed by section 5035.

"Second. By a new trial granted in proceedings against defendants constructively summoned, as provided in section 4728.

"Third. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.

"Fourth. For fraud, practiced by the successful party, in obtaining the judgment or order.

"Fifth. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings.

"Sixth. For the death of one of the parties before the judgment in the action.

"Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

"Eighth. For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in section 5142.

"Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment."

Section 5268, R. L. 1910, provides:

"The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment, because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term."

Section 5269, R. L. 1910, provides:

"The proceedings to vacate or modify the judgment or order, on the grounds mentioned in subdivisions four, five, six, seven, eight and nine, of the second preceding section, shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition, a summons shall issue and be served as in the commencement of an action."

Section 5274, R. L. 1910, provides:

"Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivi-

Digitized by Google

sions four, five and seven, of section 5267, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or a person of unsound mind, and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."

The first motion for a new trial was filed within the statutory time, was overruled, and defendants given time to prepare and serve case-made. If the defendants thereafter, and during the term of court at which the verdict was returned, had discovered the misconduct of the juror Boyles in soliciting bribes, as set forth in the affidavit, this matter could easily have been brought to the attention of the court by timely motion, which motion should have been supported by affidavits, and also a showing that knowledge of this misconduct of the juror Boyles could not have been discovered within three days after the return of the verdict, through the exercise of due diligence. In this case the verdict was returned on the 29th of September, 1917. Mr. Swalley, one of the defendants who subscribed the affidavit attached to the second motion for new trial, states in the affidavit that he was approached on the night of the 28th of September, 1917, and at that time was informed of all the matters stated in the affidavit. Therefore, when the first motion for new trial was filed, on October 2d, thereafter this knowledge was in possession of the defendants, and the failure to incorporate this knowledge in the motion for new trial cannot be excused unless it is shown that the failure was unavoidable.

It is the contention of the defendants that, regardless of any statutory provision, the district courts of this state have the inherent right to vacate or modify their judgments during the term when such judgment was rendered; that they have the authority and jurisdiction over orders granting or denying a new trial, and that, if a motion to vacate or modify a judgment is filed during the term when such judgment or order was made, and no action taken upon such motion until the succeeding term, they have the same inherent right to consider such motion at the subsequent term as they would have had had the motion been considered at the term when such judgment or order was made, and that, when such papers or pleadings having been filed during the term, they would be sufficient to invite the action of the trial court and call into motion the power of the trial court to reconsider such order; that, if such papers or pleadings were not acted upon by the trial court during the term at which they were filed, but were acted upon at a succeeding term, the trial court would have the same inherent power to act as it would have had had it acted during the term at which such order was made and pleadings filed. The following authorities seem to sustain this contention: Hogan et al. v. Bailey, 27 Okl. 15, 110 Pac. 890; Barnes et al. v. Bruce et al., 165 Pac. 405; Parks v. Haynes, 52 Okl. 63, 152 Pac. 400; Blake et al. v. Baker, County Treasurer, et al., 167 Pac. 329.

[3] It is the further contention of the defendants that the affidavits of N. H. Swalley and F. A. Walker, being filed during the term of court at which the verdict was rendered, were sufficient to invoke the jurisdiction of the court to the extent that it would have the right to consider, at a subsequent term, the question of vacating the order theretofore made denying the new trial; this on the theory that, if a formal motion had been filed at the time and in the manner the affidavits were filed, there could be no question of the authority of the court to hear the formal motion at the subsequent term. We have not been favored with any decisions covering this contention, but counsel say that the general principles of the law covering these propositions were ample, and fully sustained the trial court in making the order at the subsequent terms vacating its prior order, and as shedding some light upon the question (among other authorities) we are cited to the case of State ex rel. Morrison v. City of Muskogee et al., 172 Pac. 796, wherein it is said:

"The nature of a pleading is determined, not by the title given it by the pleader, but by the subject-matter thereof, and a pleading in the form of a motion to dismiss, and so styled, setting up defensive matters, cannot be considered as a motion, but may be treated as an answer."

And in the case of Kee v. Satterfield, 46 Okl. 660, 149 Pac. 243, wherein it is said:

"Under the provisions of the Code, it is not necessary that a pleading state facts to bring the cause under any particular form of action at common law, but it is sufficient if the pleading state facts in a plain and concise manner, from which the court can see that the plaintiff is entitled to some legal or equitable relief."

It is true that the form of the pleading is not the controlling feature, but its substance is to be considered, and, if the substance is such as to present the question to the trial court for judicial determination, then ordinarily that pleading is sufficient to invoke the jurisdiction of the trial court, and the trial court could construe such pleading to be a different pleading from what it is designated, and to give such relief as the party might be entitled to thereunder.

Conceding that the court would have the right on its own motion to set aside the verdict and grant a new trial in the absence of any motion therefor, during the term, this right cannot be extended beyond the term. The mere fact of the affidavits being on file

Digitized by Google

would not satisfy the statute requiring the motion for a new trial; in other words, the affidavits cannot take the place of the motion. For the sake of argument, say that no motion had been filed in the case at bar, nothing further than the affidavits, and the court's attention had been called to these affidavits during the term; we do not think that it can be seriously contended that the court could not, of its own motion, have ordered the new trial, notwithstanding the order granted theretofore denying the new trial, but, when the term expired and no action had been taken by the court on the affidavits, the mere fact of the same having been filed during the term did not extend the power of the court to act upon them at a subsequent term.

The judgment of the lower court is therefore reversed, and remanded for further proceedings not inconsistent with the views herein expressed.

RAINEY, C. J., HARRISON, V. C. J., and JOHNSON and BAILEY, JJ., concur.
McNEILL, J., not participating.

SMITH v. WILLIAMS et al. (No. 10467.)

(Supreme Court of Oklahoma. May 25, 1920.)

(Syllabus by the Court.)

1. Indians ⇐15(1)—Restrictions on alienation of allotted lands depend solely upon acts of Congress.

When the question of restriction on the alienation of lands allotted to the Five Civilized Tribes or the right or power of alienation is involved, resort must be had to the acts of Congress relating to these matters, and to the acts of Congress alone.

2. Indians ⇐15(1)—Title cannot be acquired from allottee except according to acts of Congress.

The right on the part of an allottee of the Five Civilized Tribes to alienate his land and the right on the part of any person to purchase such land and acquire title thereto is peculiarly and strictly a statutory right, created by acts of Congress, and which is not possibly available except through the means which Congress has prescribed, and title cannot be acquired from such allottee upon equitable grounds.

3. Indians ⇐13—Enrollment records admissible to show quantum of Indian blood and patent records competent to show whether allotments are restricted.

On the question of quantum of Indian blood of an allottee, and the question as to whether his allotments were under restrictions, the enrollment records are competent as tending to show the quantum of blood and the records of patents to their allotments are competent as tending to show whether such allotments are under restrictions.

4. Cancellation of instruments ⇐38—Defendant in action to reform deed may file cross-bill to cancel it.

In an action to reform a deed, the parties defendant are not precluded from filing a cross-bill, alleging the invalidity of the deed and asking that it be canceled.

5. Jury ⇐14(6)—In action to reform a deed with cross-bill for cancellation parties are not entitled to a jury.

In an action for reformation of a deed, and upon a cross-bill by defendants for cancellation of same, where the relief sought by both parties is purely equitable in character and depends solely upon the exercise of the equity powers of the court, it is not error to refuse a demand for a jury.

Error from District Court, Pittsburg County; R. W. Higgins, Judge.

Action by J. M. Smith against John Williams, individually and as administrator of Joshua McCurtain, deceased, and Minnie Williams, née McCurtain, with cross-petition by the administrator. Judgment for defendants decreeing cancellation of plaintiff's deed, and he brings error. Affirmed.

Counts Brothers, of McAlester, and S. A. Horton, of Oklahoma City, for plaintiff in error.

W. J. Hulsey, of Hartshorne, for defendants in error.

HARRISON, J. This action involves the validity of a deed to restricted Choctaw lands. J. M. Smith brought the action against the heirs of Joshua McCurtain, a half-blood Choctaw, to reform a deed made to Smith by Joshua McCurtain, which deed was sought to be reformed on the ground of mutual mistake in description of the land. McCurtain's allotment comprised the east ½ and lot 2 of the N. W. ¼ of section 30, township 4 N., range 16 east. He attempted to convey to Smith 40 acres of this allotment, the said 40 acres being the N. E. ¼ of the N. W. ¼ of said section, but instead of describing said 40 acres the deed described lot 2, which would be the S. W. ¼ of the quarter section. Smith alleged that he was buying the N. E. ¼ of said quarter section instead of the S. W. ¼ of same, and that he paid $527 and a span of mules and wagon for the land, and, having no knowledge of the misdescription in the deed, went upon the land, which he thought he had bought, and improved it, clearing off the timber, putting the land in cultivation and placing a house and other valuable improvements thereon. He claims that upon the discovery of the mistake in the deed he asked McCurtain to correct same, and McCurtain promised to do so. McCurtain was taken sick, and Smith went to see him to have the deed corrected, but McCurtain was in too bad a condition to do so, and died without doing so. There-

Digitized by Google

after this suit was begun to reform the deed so as to make it describe the land which McCurtain intended to sell, and which Smith supposed he was buying and paying for, instead of the land described in the deed. John Williams, a son-in-law of Joshua McCurtain, and administrator of his estate, filed answer and cross-petition, alleging, in substance, that the deed which Smith sought to have reformed was void because the land described therein was the homestead allotment selected by deceased, and was therefore void as to the land described, and was also void as to the land intended to be described, for the reason that restrictions had not been removed from said land at the time the deed was executed, wherefore he prayed for cancellation of said deed as a cloud upon title.

The trial court rendered judgment in favor of defendants, and decreed the cancellation of Smith's deed. In rendering judgment, however, the trial court said:

"In other words, it is this, Mr. Smith took a deed to a portion of his homestead, and claims that it was a mistake; that it ought to have been to another portion of the homestead. Now, gentlemen, as far as mistake is concerned, I am under the impression from the evidence there was a mistake. That is this: I understand he deeded him one tract of land there when he intended to deed another, and the evidence bearing that out more strongly than anything else is that Mr. Smith went onto that which he had bought and commenced clearing it up and improving it and getting the fruits of it, and, there seeming to have been no objection from Mr. McCurtain that would look like that there was really a mistake, and if that was the only matter that confronted the court the court wouldn't have much trouble in deciding this lawsuit, but here is what is confronting the court: Apparently he seeks to buy the homestead of an Indian, where restrictions were placed upon it. It is the law that an Indian cannot sell his restricted land, a deed is absolutely void, of no force and effect, and Mr. McCurtain was selling to Mr. Smith homestead land upon which there were restrictions. I declare I wish, Mr. Smith, I could see some way to help you out of that, but I do not see any way right now. I hate to see a man lose his money, for Mr. Smith is a man that money comes by hard licks, but I do not know of any way of making a deed stand up from an Indian where it is restricted land. I will necessarily have to quiet title in favor of these defendants and order that they be given possession."

In the journal entry of judgment certain findings of fact and conclusions of law were made, the substance of all of which is that both the land described in the deed and the land which under the agreement of the parties should have been described were under restrictions which had never been removed, and that therefore the deed was void, and was ordered canceled as a cloud upon defendants' title.

The plaintiff, Smith, brings the case here and urges:

First. That Smith, having performed every obligation required on his part, and having in evidence of good faith gone upon the land and erected a house and other valuable improvements, cleared the timber off the land, and put same in cultivation, was entitled to specific performance of the contract between him and Joshua McCurtain.

Second. That the court erred in receiving and considering as evidence a certificate showing the roll number, age, and degree of blood of Joshua McCurtain, the allottee, and likewise erred in receiving the certificate of Gabe E. Parker, superintendent and custodian of the Choctaw Indian records, showing the land comprised in McCurtain's allotment.

Third. Erred in overruling plaintiff's demurrer to defendants' cross-bill.

Fourth. Erred in refusing plaintiff's demand for a jury.

The substance of plaintiff in error's contention under his first proposition is that the land which Smith thought he was buying was his surplus allotment, and that by mutual mistake it was not described in the deed; that in good faith he had gone upon the land, erected valuable improvements and put the land in cultivation, and had been continuously in possession of the land from the date of the deed to the time of this suit, that the heirs of McCurtain knew that Smith was in possession of the land under what he thought to be a deed to same, and that they acquiesced in same, and are estopped from denying the validity of the deed, and should be held to a specific performance of the contract between McCurtain and Smith. This contention might be well taken but for the fact that the land in question was Indian land and under the exclusive supervision of Congress, Congress had in very plain language expressly provided how valid title to Indian lands might be acquired, and, in order to prevent any and every attempt to convey title to such lands without full compliance with the method prescribed, it placed positive restrictions against the alienation of such land, and expressly declared that every contract to convey and every deed of conveyance before the removal of such restrictions should be absolutely void. Now this was the decisive feature which controlled the trial court, and is likewise the decisive question which confronts this court. If the land was under restrictions at the time the deed was obtained from McCurtain, then the deed to same is void, not because of the misdescription of the land, but because the contract to convey restricted land was itself void, McCurtain having no power to make a valid agreement to convey, because Congress had said that any such agreement before the removal of restrictions should be void. Hence the deed sought to be reformed was void,

Digitized by Google

not because of the fact that, through mistake it described the homestead allotment of McCurtain, but because the land intended to be conveyed was itself under restrictions which had not been removed, and therefore both the agreement to convey and the instrument of conveyance were void.

[1, 2] From the beginning, it has been the settled policy of this court, and also of the federal courts, in determining the validity of deeds to restricted Indian lands, to look to the acts of Congress alone.

In Wilson v. Greer, 50 Okl. 387, 151 Pac. 629, it is said:

"When the question of restriction on the alienation of lands, allotted to members of the Five Civilized Tribes, or the right or power of alienation, is involved, resort must be had to the acts of Congress relating to these matters, and to the acts of Congress alone."

This policy is reflected in all the adjudicated cases from this court and from the federal courts. Landrum v. Graham, 22 Okl. 458, 98 Pac. 432; Allen v. Oliver, 31 Okl. 356, 121 Pac. 226; In re Washington's Estate, 36 Okl. 559, 128 Pac. 1079; U. S. v. Allen, 171 Fed. 13, 103 C. C. A. 1; Truskett v. Closser, 198 Fed. 835, 117 C. C. A. 477; The 30,000 Land Suits (D. C.) 199 Fed. 811; Heckman v. U. S., 224 U. S. 413, 32 Sup. Ct. 424, 57 L. Ed. 820; Tiger v. Western Inv. Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Bledsoe v. Wortman, 35 Okl. 261, 129 Pac. 841; Oates v. Freeman, 57 Okl. 449, 157 Pac. 74.

This policy has been pursued by the courts, not because the courts have overlooked the fact that hardships which seemed inequitable have resulted in some instances, but because Congress has definitely and specifically prescribed the manner of acquiring title to the lands of the Five Civilized Tribes, and has expressly declared that title acquired in any other manner is absolutely null and void.

Before the acts of Congress allowing title to be acquired to such lands and prescribing the means of acquiring same, there was no means by which title to such lands could be acquired by any person, and no one attempted to do so. Hence when the various acts of Congress upon this question became the law, under which rights were extended to the Indian to convey under express conditions, and extended to other persons to purchase under express conditions, new rights were thereby enacted into existence which had not existed theretofore. Prior to such enactments, the Indian had no right to sell, he had no title in himself, and no one had a right to purchase. Such rights were created and given by Congress. They came from no other source, and are not to be determined by any other light; hence it is to the acts of Congress alone that we look for light on the question of the validity of a given deed to restricted Indian land.

[3] The principles of equity, though not overturned nor disregarded, are not controlling in such cases, for the reason that they are not applicable. The right on the part of an Indian to alienate his land, and the right on the part of any person to purchase such land and to acquire valid title thereto is peculiarly and strictly a statutory right created by acts of Congress, and which right is not possibly available except through the means which Congress has prescribed, for Congress has expressly said that any attempt to acquire such rights, except through the means prescribed by Congress, shall be absolutely null and void. Therefore title to restricted Indian land cannot be acquired from the allottee upon equitable grounds. The methods prescribed by Congress are exclusive.

Counsel for plaintiff in error cites the case of Brusha v. Board of Education, 41 Okl. 595, 139 Pac. 298, L. R. A. 1916C, 233, and a number of other cases announcing the same principles, and insists that the principles therein announced are applicable to the conditions created in the case at bar. This contention we readily concede might be true, but for the fact that this is Indian land, and that Congress in effect has said that the principles of equity and common law do not come into this class of cases until the statutes are first complied with, that the principles of equity and common law are not applicable in determining the rights of parties until such rights are first acquired by compliance with the acts of Congress. M., K. & T. Ry. Co. v. Kan. Pac. Ry. Co., 97 U. S. 491, 24 L. Ed. 1097; Stephens v. Smith, 10 Wall. 321, 19 L. Ed. 933; McDowell v. U. S., 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271; U. S. v. Babcock, 250 U. S. 328, 39 Sup. Ct. 464, 63 L. Ed. 1011, decided June 2, 1919.

We fully agree with the trial court that to enforce the law in this case will work a hardship upon J. M. Smith, and which, like the trial court, we may regret to see him bear. But again, as was said by the trial court, "there is no way around it." The law was in force at the time this deed was acquired, by following which a valid title could have been acquired, but his failure to follow the law has resulted in no title to the land, and, though the resulting hardships may be onerous, they cannot suffice to set aside the law.

As to the admission in evidence of the records complained of by plaintiff in error, one of such records tended only to show that McCurtain was a half-blood Choctaw, while the other tended only to show that the entire allotment of McCurtain was under restriction. Both of these facts were practically admitted, at least neither was seriously denied, and from what appears from the record neither could have been successfully denied; hence their admission did not constitute reversible error.

Digitized by Google

As to his third proposition, the overruling of plaintiff's demurrer to defendants' cross-bill, we think there was no error committed; the cross-bill neither in substance nor fact amounted to any more than to allege that plaintiff's deed was void, because it attempted to convey restricted land, and to ask that such deed be canceled, if such allegation be proven. We know of no rule, nor has any been cited, that would preclude defendants from denying the validity of plaintiff's deed, or from asking that it be canceled, if found to be void.

As to the fourth proposition there was no question of fact for the jury to find. It was a case purely equitable in character; the plaintiff asking for reformation of deed, and defendants asking for cancellation of same, both of which depended solely upon the court's construction of the law and upon the exercise of his equity powers. The refusal of demand for jury was not error.

The judgment is affirmed.

RAINEY, C. J., and JOHNSON, RAMSEY, McNEIL, and BAILEY, JJ., concur.

HIGGINS, J., not participating.

McDONALD v. STRAWN. (No. 9569.)

(Supreme Court of Oklahoma. June 1, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸987(1)—In law case matters of fact are not reviewable.

In actions at law only alleged errors of law, and not matters of fact, are reviewable by this court on appeal. See paragraph 1, opinion.

2. Appeal and error ⟸237(3) — Procedural requisites to obtain review of sufficiency of evidence to go to jury in a law case.

Whether or not there is sufficient evidence to go to the jury in a law case is a question of law, and that question must be presented: (1) To the trial court by a demurrer to the evidence or motion to direct a verdict, a ruling made, and exception saved; (2) the alleged error in sustaining or overruling the demurrer to the evidence or motion to direct a verdict must be preserved by a motion for a new trial, ruling thereon by the trial court, and exception saved. Then this court on appeal will review the alleged error of law committed by the trial court in sustaining or overruling such demurrer or motion to direct a verdict; otherwise the sufficiency of the evidence to support the verdict cannot be inquired into by this court. See paragraph 1, opinion.

3. Appeal and error ⟸237(3)—Nature of review on the evidence in an equity case by the Supreme Court stated.

Neither a demurrer to the evidence, nor a motion to direct a verdict (if tried to a jury), nor motion for a declaration of law, nor finding of fact, nor conclusion of law, is a necessary prerequisite to a review of the evidence in an equity case by this court on appeal; it being well settled that in equity cases this court will review the evidence as a question of fact, apply the law and the principles of equity thereto, and pronounce such judgment as the pleadings, the facts, and the principles of equity demand, and, if the judgment of the trial court is clearly against the weight of the evidence, its judgment will be reversed or modified accordingly. See paragraph 1, opinion.

4. Appeal and error ⟸237(1)—Failure to demur to evidence in a law case does not waive exceptions to instructions or rulings.

The failure to demur to the evidence in a law case or move to direct a verdict does not operate to waive exceptions to the instructions to the jury, or to the refusal to give certain instructions to the jury, or to the rejection or admission of evidence, or any other erroneous ruling, during the progress of the trial. See paragraph 2, opinion.

5. Principal and agent ⟸147(2)—One dealing with agent must discover whether agency is general or special.

It is incumbent upon a person dealing with an alleged agent to discover at his peril whether the assumed agency be general or special, that such pretended agent had authority, and that such authority is in its nature and extent sufficient to permit him to do the proposed act. See paragraph 3, opinion.

6. Principal and agent ⟸19, 119(1)—Burden of proving agency is on the party alleging it.

The law itself makes no presumption of agency, and the burden of proving agency, including not only the fact of its existence, but its nature and extent, rests ordinarily upon the party who alleges it. See paragraph 3, opinion.

7. Principal and agent ⟸22(1), 122(1)—Agent's declarations or admissions or claim of assumed powers will not establish agency.

The fact of agency being in issue, evidence of the alleged agent's own declarations, statements, or admissions, as distinguished from his sworn testimony as a witness, is not admissible against an alleged principal for the purpose of establishing, enlarging, or renewing his authority, nor can his authority be established by showing that he acted as agent, or that he claimed to have the powers which he assumed to exercise. See paragraph 5, opinion.

8. Principal and agent ⟸20(1)—Authority of agent cannot be proven by showing general repute.

The authority of a private agent to represent his principal is a fact, if in issue, that cannot be established by proof that he was generally reputed to be the agent. See paragraph 5, opinion.

9. Principal and agent ⟸123(7)—General repute as to agency held not evidence of authority to sell property.

General repute that one is agent for a farmer "in handling his cattle, stock, and other stuff during the latter part of his life" is no evidence

Digitized by Google

that such alleged agent had authority to sell the farmer's cattle, stock, and other stuff. See paragraph 5, opinion.

10. Trial ⟸83(2)—General rule is that objection that evidence is "incompetent, irrelevant, and immaterial" is no objection.

Except as modified by section 5070, R. L. 1910, making an objection to evidence on the ground that it is incompetent, irrelevant, and immaterial sufficient in the absence of a request from the trial judge or opposing counsel for more specific reasons, the general rule is that an objection that evidence "is immaterial," or is "incompetent, irrelevant and immaterial," or is "incompetent," is considered no objection. See paragraph 4, opinion.

11. Trial ⟸83(1)—Requisites of valid objection stated.

The rule that objections should always state the grounds thereof, and should present to the trial court the precise point relied upon by the party objecting, is based on two grounds: (1) To show the trial judge the exact point on which the ruling is asked, in order that he may act advisedly and not be misled; (2) that counsel for the opposing party may have an opportunity to obviate the objection if well taken, and that it is not the duty of the trial judge and opposing counsel to explore the whole domain of the law of evidence in an effort to discover why the evidence objected to is not admissible. See paragraph 5, opinion.

12. Trial ⟸83(1)—If admissibility of offered evidence clearly appears on its face, no reason for its exclusion is necessary.

The proper test for determining whether or not a thing is within a rule is to ascertain whether it is within the reason of the rule, and, if not within the reason of the rule, it is not within the rule; thus, if the inadmissibility of the evidence offered is clearly apparent on its face, no casting around by the court or opposing counsel for a ground of exclusion is necessary. See paragraph 5, opinion.

13. Appeal and error ⟸231(3)—General objection "objected to" will be noted where it clearly appears that the admitted evidence was prejudicial.

If it is apparent that the general objection, to wit, "Objected to," could not have been obviated, and that the evidence is clearly inadmissible for any purpose, this court, more as a favor than as the recognition of a right, may notice it, and will do so when it clearly appears the evidence admitted was highly prejudicial. See paragraph 5, opinion.

14. Reversal for error.

Record examined, and case reversed for error in overruling such general objection to the introduction of evidence.

Error from County Court, McCurtain County; J. D. Parks, Judge.

Replevin by H. C. McDonald, administrator of Paul Stephens, deceased, against Roscoe Strawn. Verdict and judgment for defendant, motion for new trial denied, and plaintiff appeals. Reversed, with direction to grant plaintiff a new trial.

This is a replevin action commenced in the county court of McCurtain county on March 11, 1915, by plaintiff in error, as administrator of the estate of Paul Stephens, deceased, to recover certain cattle from defendant in error, Roscoe Strawn. The plaintiff alleged that the cattle involved belonged to Paul Stephens, deceased, during his lifetime, and sought their recovery as a part of the assets of the estate. Defendant contended that he purchased the cattle from John Noah, nephew of Paul Stephens, as the agent of the deceased. The case was tried to a jury on April 18, 1917, and a verdict returned for defendant. The plaintiff in due time filed a motion for a new trial, which was overruled on May 7, 1917, and exception thereto saved. Notice of appeal was given, and the case is here on petition in error.

Armstrong & Jones, of Idabel, for plaintiff in error.

G. M. Barrett, of Hugo, and George T. Arnett, of Idabel, for defendant in error.

RAMSEY, J. (after stating the facts as above). [1] 1. The plaintiff in error contends that there was not sufficient evidence to sustain the verdict of the jury. This assignment of error is overruled because plaintiff failed to move the trial court to direct the jury to return a verdict in his favor. There is no direct appeal to this court from the verdict of a jury in an action at law. In actions at law this court on appeal considers only alleged errors of law, and not questions of fact.

Thus 2 Standard Proc. 434, says:

"An appellate court, in connection with appeals for the review of errors, is not a trier of facts."

And on page 409 the same authority says:

"The distinction between hearings de novo and statutory appeals in the nature of proceedings in error at common law has also an important bearing upon the subject of review. In the technical appeal, as in equity, the whole case is brought up, and all inference of fact, as well as conclusions of law, are before the appellate court, but a writ of error brings up only errors of law."

[2, 3] Speaking for the Eighth Circuit Court of Appeals in U. S. Fidelity & Guaranty Co. v. Board of Commissioners, 145 Fed. 151, 76 C. C. A. 121, Circuit Judge Sanborn said:

"The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a

Digitized by Google

declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends."

In the absence of statutory modification, the rule is well settled that the question whether or not there is sufficient evidence to go to the jury is a question of law, and must be presented first to the trial court, by demurrer to the evidence, or by motion to direct a verdict, or motion for nonsuit (the method varies in different jurisdictions), ruling thereon had and exceptions saved; otherwise that question cannot be reviewed by writ of error, appeal, petition in error, or whatever name the particular method of appellate review bears in different jurisdictions. Reavely v. Harris, 239 Ill. 526, 88 N. E. 238; State v. Young, 77 Ohio, 529, 83 N. E. 898; Wakely v. Johnson, 115 Mich. 285, 73 N. W. 238; Val Blatz Brewing Co. v. Interstate Ice & Cold Storage Co., 161 Mo. App. 531, 143 S. W. 542; Home Fire Ins. Co. v. Phelps, 51 Neb. 623, 71 N. W. 303; Seeman v. Levine, 205 N. Y. 514, 99 N. E. 158; Holder v. Giant Lumber Co., 161 N. C. 177, 76 S. E. 485; Landis Mach. Co. v. Konantz Saddlery Co., 17 N. D. 310, 116 N. W. 333; Fassett v. Boswell, 59 Or. 288, 117 Pac. 302; Molle v. Kewaskum Mut. F. Ins. Co., 134 Wis. 404, 114 N. W. 798; Keeley v. Ophir Hill Consol. Mining Co., 169 Fed. 601, 95 C. C. A. 99; Penn. Casualty Co. v. Whiteway, 210 Fed. 782, 127 C. C. A. 332; U. S. v. Diamond Match Co., 115 Fed. 288, 53 C. C. A. 90; Foster v. Crawford (C. C.) 80 Fed. 991. This court has adopted this rule. Muskogee Electric Traction Co. v. Reed, 35 Okl. 334, 130 Pac. 157; Reed v. Scott, 50 Okl. 757, 151 Pac. 484; Schmucker v. Clifton, 162 Pac. 1094; Holland Banking Co. v. Dicks, 170 Pac. 253; Oaks v. Samples, 57 Okl. 660, 157 Pac. 739; Norman v. Lambert, 167 Pac. 213.

The rule in Oklahoma is this: Whether or not there is sufficient evidence to go to the jury in a law case is a question of law, and that question must be presented: (1) To the trial court by a demurrer to the evidence or motion to direct a verdict, a ruling obtained, and exceptions saved; (2) the alleged error in sustaining or overruling the demurrer to the evidence or motion to direct a verdict must be preserved by motion for a new trial, ruling thereon by the trial court, and exception saved. Then this court on appeal will review the alleged error of law committed by the trial court in sustaining or overruling the demurrer or motion to direct a verdict; otherwise whether there is sufficient evidence is a question not reviewable in this court. See Shawnee Mut. Fire Ins. Co. v. School Dist., 44 Okl. 3, 143 Pac. 194, and Hughes v. Meler, 43 Okl. 166, 141 Pac. 770.

If there can possibly be any doubt about this rule having no application to appeals in equity cases, we will put that question to rest, as we deem it wise and expedient to leave as little uncertainty as possible about the proper procedure in the trial of cases, either at law or in equity.

As above held, an appeal in an action at law can present to this court only questions of law, whereas in equity cases this court reviews the evidence as a question of fact, applies the law and principles of equity thereto, and pronounces such judgment as the pleadings, the facts, and the principles of equity demand. Suits in equity are tried de novo on appeal in this court upon the entire record and the evidence, and if the judgment of the trial court is clearly against the weight of the evidence, its judgment will be reversed or modified accordingly. This court, in a well-considered opinion by Justice Riddle in Schock v. Fish, 45 Okl. 12, 144 Pac. 585, distinguished between the functions of this court in an equity case and in an action at law, and stated the reasons for this difference at length. Schock v. Fish has been followed and approved by an unbroken line of decisions. See Tucker v. Thraves, 50 Okl. 691, 151 Pac. 598; Wimberly v. Winstock, 46 Okl. 645, 149 Pac. 238; Jolly v. Fields, 65 Okl. —, 166 Pac. 117; Hawkins v. Boynton Land, Mining & Inv. Co., 59 Okl. 30, 157 Pac. 753; Clayton v. Oberlander, 59 Okl. 35, 157 Pac. 929; Coley v. Dore, 56 Okl. 443, 156 Pac. 164; Mitchell v. Leonard, 55 Okl. 626, 155 Pac. 696; Jones v. Thompson, 55 Okl. 24, 154 Pac. 1139; Rees v. Egan, 166 Pac. 1038; City of Chickasha v. O'Brien, 58 Okl. 46, 159 Pac. 282; Mathews v. Sniggs, 75 Okl. 108, 182 Pac. 703.

This court in an action at law will not review the alleged errors of the trial court in instructing or refusing to instruct the jury, unless requests were made and objections and exceptions saved as provided by the statutes, but in equity cases the verdict of the jury is merely advisory. The court may disregard the findings of the jury, and, where the court makes its own finding, no error can be predicated upon the instructions to the jury. Watson v. Borah, 37 Okl. 357, 132 Pac. 347; City of Chickasha v. O'Brien, 58 Okl. 46, 159 Pac. 282; Apache State Bank v. Daniels, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520. There is no reason for a demurrer to the evidence in an equity case tried before the court or before a jury, or for a motion to direct a verdict, or for a declaration of law by the chancellor as a prerequisite to the review by this court of the whole case, including evidence. 2 Standard Proc. pp. 237, 409, 435, 446; 3 Cyc. 260; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220; 3 C. J. 839. But a timely motion for a new trial is necessary in equity in order that the trial court may have an opportunity to correct its errors on the law and the facts.

[4] 2. Plaintiff contends in his petition in error that the trial court erred in the admission of evidence introduced by defendant to prove the agency of John Noah, over the ob-

Digitized by Google

jection and exception of the plaintiff. The assignment of error is too general to comply strictly with the rules of this court, but we are not going to be very captious about formalities in this case, because an examination of the record tends strongly to show a miscarriage of justice. The defendant contends that John Noah was the agent of the intestate owner of the cattle with authority to sell the same, and that he (defendant) purchased the cattle from Noah as such agent. There being no motion by the plaintiff to direct a verdict in his favor, we cannot reverse this case for want of evidence to sustain the verdict in defendant's favor, but errors in instructing the jury and admitting or rejecting evidence are reviewable by this court, although no demurrer was filed to the evidence or motion made to direct a verdict. This court has authority to review any error of law committed during the progress of the trial, where there was objection and exception. Actions at law for the recovery of money or specific real or personal property shall be tried by a jury unless a jury is waived, and, as above pointed out, whether there is sufficient evidence to go to the jury is a question of law which must be raised in the trial court by demurrer or motion to direct a verdict. But the failure to demur to the evidence or move for a directed verdict does not operate to waive exceptions to any other erroneous ruling during the progress of the trial. In Schmucker v. Clifton, 162 Pac. 1094, this court considered the assignment of error that the instructions to the jury were erroneous, although there was neither a demurrer to the evidence nor motion for a directed verdict. The failure to demur to the evidence or move for a directed verdict is nothing more nor less than an admission that there is enough evidence to go to the jury. That admission, however, means the evidence the trial court has permitted to be introduced, and if the trial court erroneously admitted evidence over the objection and exception of a party, it is obviously unnecessary for such party to move for an instructed verdict or demur to the evidence in order to prevent a waiver of his exception to a ruling on the admission or rejection of certain evidence. Even in the federal courts the failure to move for a directed verdict does not waive exceptions to the ruling of the court on the admissibility of evidence. Eli Mining & Land Co. v. Carleton, 108 Fed. 24, 47 C. C. A. 166; U. S. Fidelity & Guaranty Co. v. Board of Commissioners, 145 Fed. 144, 76 C. C. A. 114; Seeman v. Levine, 205 N. Y. 514, 99 N. E. 158.

[5, 6] 3. The law itself makes no presumption of agency, and, as defendant bases his title to the cattle on a purchase from John Noah, alleged agent of the owner, the burden of proving Noah's agency, including not only the fact of its existence, but its nature and extent, rests upon the defendant. There is no evidence that the plaintiff, or his intestate, conceded the agency and then contended that it had been terminated or that it was a limited or restricted agency. It is incumbent upon a person dealing with an alleged agent to discover at his peril whether the assumed agency be general or special, that such pretended agent had authority, and that such authority is in its nature and extent sufficient to permit him to do the proposed act. Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; United States v. Boyd, 5 How. 29, 12 L. Ed. 36; Pullman Co. v. Meyer, 195 Ala. 397, 70 South. 763; Mechem on Agency (2d Ed.) vol. 1, §§ 255 and 298; Texas Co. v. Quelquejeu, 263 Fed. 491; Mechem on Agency (2d Ed.) vol. 1, § 743; Sloan v. Brown, 228 Pa. 495, 77 Atl. 821, 139 Am. St. Rep. 1019; Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; Swindell v. Latham, 145 N. C. 144, 58 S. E. 1010, 122 Am. St. Rep. 430; Blum v. Whipple, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553.

[10] 4. Practically the only evidence in the record tending to show agency was the testimony of defendant, narrated on pages 19 and 20 of his counsel's brief, as follows:

"That he knew who looked after Paul Stephens' cattle, that John Noah looked after the cattle," and "that it was generally known (and must have been known to witness) that John Noah was the agent of Paul Stephens during the latter part of Paul Stephens' life."

Defendant was asked by his counsel this question:

"State whether or not, Mr. Strawn, it was generally known that John was the agent of Paul Stephens in handling his cattle, stock, and other stuff during the latter part of his life?"

The record here shows that this question was "objected to by the plaintiff, objection overruled, to which plaintiff then and there, by his attorney, duly excepted." It is contended that the objection is general, and therefore a nullity, because it was not sufficient to advise the trial court wherein the question was improper. Except where modified by statute, it is a well-settled rule that objections should always state the grounds thereof, and should present to the court the precise point relied upon by the party objecting. This rule is based on two grounds: (1) To show the trial judge the exact point on which the ruling is asked in order that he may act advisedly and not be misled; and (2) that counsel for the opposing party may have an opportunity to obviate the objection if it is well taken. 8 Ency. Pl. & Pr. 218–226. An objection that a question is immaterial is tantamount to no objection at all. Eli Mining & Land Co. v. Carleton, 108 Fed. 24, 47 C. C. A. 166. An objection that the evidence is "incompetent, irrevelant, and immaterial" is equivalent to

Digitized by Google

no objection. Burlington Insurance Co. v. Miller, 60 Fed. 254, 8 C. C. A. 612. See, also, R. R. Co. v. Hall, 66 Fed. 868, 870, 14 C. C. A. 153; Equipment Co. v. Blair, 79 Fed. 896, 25 C. C. A. 216; U. S. v. Shapleigh, 54 Fed. 126, 4 C. C. A. 237; Ward v. Mfg. Co., 56 Fed. 437, 5 C. C. A. 538; Insurance Co. v. Frederick, 58 Fed. 144, 7 C. C. A. 122; Railroad Co. v. Henson, 58 Fed. 531, 7 C. C. A. 349; Minchen v. Hart, 72 Fed. 294, 18 C. C. A. 570, 8 Ency. Pl. & Pr. 227, 228; Ohio, etc., Ry. Co. v. Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638.

Section 5070, R. L. 1910, makes an objection to evidence on the ground that it is incompetent, irrelevant, and immaterial cover all matters ordinarily embraced within such objections, and makes it unnecessary "to specify further the grounds of such objections or to state the specific reasons whereby the question is so objectionable," unless the court or opposing counsel inquire of the objector wherein the question is so objectionable, and thereupon the objector shall state specifically his reasons or grounds for such objection. It may be difficult to see why, if, under the general rule, an objection to a question on the ground that it is incompetent, irrelevant, and immaterial is tantamount to silence, a simple statement that "I object" is any less available, things equal to the same thing being equal to each other; but section 5070, R. L. 1910, put a good deal of noise into the former, leaving the latter still insufficient. This court, in Fender v. Segro, 41 Okl. 318, 137 Pac. 103, and in Bishop-Babcock-Becker v. Estes Drug Co., 163 Pac. 276, holds that "objected to" or "I object" is not sufficient under section 5070, and that it is the general rule. See, also, Midland Valley R. Co. v. Ezell, 36 Okl. 517, 129 Pac. 734.

[11, 12] 5. But there is this exception to the general rule: If the objection cannot be obviated or if the evidence is clearly inadmissible for any purpose, a general objection is sufficient. We have shown that the reason for the general rule is this: The ground of the objection should be specific enough to advise the trial court the exact point on which the ruling is asked, and also advise opposing counsel. It is neither the duty of the trial judge nor opposing counsel to explore the whole domain of the law of evidence in an effort to find out just why the evidence objected to is not admissible. The proper test for determining whether or not a thing is within a rule is to ascertain whether it is within the reason of the rule, and, if not within the reason of the rule, it is not within the rule. Thus, if the inadmissibility of the evidence is apparent on its face no casting around by the court or counsel for a ground of exclusion is necessary.

Thus, in Espalla v. Richard, 94 Ala. 159, 10 South. 137, the judgment of the trial court was reversed because it permitted a witness to testify before the jury to a conversation between defendant's son and the plaintiff; defendant not being present. The Supreme Court held that the evidence was hearsay and not admissible on any theory, could not be regarded as part of the res gestæ, and was wholly inadmissible. The objection to the testimony was general and without specifying any particular grounds. The court said:

"It is suggested for the appellee that there was a failure to specify any particular ground of objection to the admissibility of this evidence. The illegality of the evidence was apparent upon its face; to ascertain this it was not necessary for the court to look to any fact that was not stated by the witness in detailing the conversation. No casting around to discover a ground of exclusion was required. It was obvious, without reference to any extrinsic fact, that Mr. Richards' statement to the salesman in his store was mere hearsay so far as Mrs. Ryan was concerned. In such case the court should sustain the objection without demanding a specification of what is already patent."

In Lowenstein v. McCadden, 92 Tenn. 614, 22 S. W. 426, the judgment was reversed because the trial court permitted a witness to testify over a general objection to what occurred at a former application for a receiver between the parties. The court said:

"Upon principle, it is the duty of a party objecting to evidence to communicate at the time to the court and the opposite party the grounds of his objection, for the obvious reason that they should have an opportunity of acting advisedly, and not be intrapped into error. Garner v. State, 5 Lea, 218. It is plainly the duty of counsel to take the judgment of the court on the specific ground there made, so that this court can review it. The contrary practice gives the party an opportunity to state one ground in the court below, which may be properly overruled, and to rely upon an entirely different ground here. Iron Co. v. Dobson, 15 Lea, 409. But when evidence is not competent for any purpose, or is wholly irrelevant, a general objection for incompetency and irrelevancy would be sufficient. *In such a case a simple objection would be sufficient.* Such forms of general exception are, however, exceedingly perilous; for, if it appears that the testimony is competent or relevant for any purpose, the exception will be unavailable. The evidence excepted to in this case was not competent for any purpose, and introduced collateral matters which were res inter alios acta, and highly prejudicial to plaintiff in error." (Italics ours.)

In State v. Soule, 14 Nev. 453, a judgment of conviction was reversed on a general objection to the introduction of a written statement of a codefendant not made in the presence of the defendant. The court said:

"It is undoubtedly true, in criminal as well as in civil cases, that, as a general rule, the point of objection should and must be specifically stated, to the end that the attention of the

Digitized by Google

court may be directed thereto, and that the opposite party may have an opportunity to obviate the objection if it be in his power to do so. Sharon v. Minnock, 6 Nev. 382. But it is also true that, if the statement of Gorman was not competent evidence against appellant for any purpose, and was prejudicial to his case, it was error to admit it against his general objection, on the ground of incompetency alone. An objection to evidence on the ground of incompetency and illegality, without a specification of the point of incompetency or illegality, does not avail the objecting party, in case the objection is overruled, if the evidence is admissible for any purpose; but if it is wholly incompetent and inadmissible for any purpose, a general objection on the ground of incompetency is sufficient, and the error will be considered and corrected on appeal."

This same rule has been announced in the following cases: Sneed v. Osborn, 25 Cal. 627; Voorman v. Voight, 46 Cal. 397; Ward v. Wilms, 16 Colo. 86, 27 Pac. 247; Alcorn v. Chicago & A. R. Co., 108 Mo. 81, 18 S. W. 188; Connor v. Black, 119 Mo. 126, 24 S. W. 184; Kent v. State, 42 Ohio St. 426; Hodges v. Hodges, 106 N. C. 374, 11 S. E. 364; Turner v. City of Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Clauser v. Stone, 29 Ill. 114, 81 Am. Dec. 299; Am. Car & Foundry Co. v. Brinkman, 146 Fed. 712, 77 C. C. A. 138; Pittsburg & W. Ry. Co. v. Thompson, 82 Fed. 720, 27 C. C. A. 383; Miller v. State, 12 Lea (Tenn.) 223.

[7-9] It is hornbook law that the authority of a private agent to represent his principal is a fact, if in issue, that cannot be established by proof that he was generally reputed to be the agent. Mechem on Agency (2d Ed.) vol. 1, § 290; 16 Cyc. 1211; 31 Cyc. 1656 and 1665.

The question objected to was whether or not "It was generally known that John (Noah) was the agent of Paul Stephens in handling his cattle, stock, and other stuff during the latter part of his life." There is no evidence in the record that Paul Stephens held John Noah out as his agent with authority to sell his cattle or stock, and John Noah could not confer authority upon himself or make himself Stephens' agent by merely saying he was. Evidence of his own declarations, statements, or admissions, as distinguished from his sworn testimony as a witness, is not admissible against an alleged principal for the purpose of establishing, enlarging, or renewing his authority, "nor can his authority be established by showing that he acted as agent, or that he claimed to have the powers which he assumed to exercise." Mechem on Agency (2d Ed.) vol. 1, § 285; R. P. Smith & Sons v. Raines Dry Goods Co., 87 Okl. 39, 130 Pac. 133; Okl. Automobile Co. v. Benner, 174 Pac. 567. The defendant was asked this question: "Q. Do you know who looked after Paul Stephens' cattle? A. Yes sir. Q. Who looked after them?" Here plaintiff's counsel objected to the question "as being leading." The court overruled the objection, and the plaintiff excepted. The evidence sought by the questions propounded to the defendant as to whether or not it was generally known that John Noah was the agent of Paul Stephens in handling his cattle, stock, and other stuff, and who looked after Paul Stephens' cattle, was inadmissible for any purpose, and was highly prejudicial, because the answers to these questions constituted about the only evidence that could even excite a suspicion that John Noah had any authority as agent to sell Paul Stephens' cattle. Simply authority to "look after cattle" cannot by the longest stretch of imagination amount to or imply authority to sell; nor is general repute that one is agent for a farmer "in handling his cattle, stock, and other stuff during the latter part of his life" any evidence of authority to sell. Camden Fire Ins. Ass'n v. Jones, 53 N. J. Law, 189, 21 Atl. 458; 23 Atl. 166; Moore v. Skyles, 33 Mont. 135, 82 Pac. 799, 3 L. R. A. (N. S.) 136, 114 Am. St. Rep. 801. If defendant had any real evidence to show agency, he should have been ready to introduce it on the trial of this case.

[13, 14] It is not intended to overrule or modify the rule announced by this court in Fender v. Segro, 41 Okl. 318, 137 Pac. 103, Bishop-Babcock-Becker Co. v. Estes Drug Co., 163 Pac. 276, and Midland Valley R. Co. v. Ezell, 36 Okl. 517, 129 Pac. 734. We simply supplement the rule announced in those cases with this exception: If it is apparent that the general objection could not be obviated, or if the evidence is clearly inadmissible for any purpose, this court, more as a favor than as the recognition of a right (Miller v. State, 15 Lea [Tenn.] 179), may notice it, and will no doubt do so when it clearly appears the evidence was highly prejudicial.

The judgment of the trial court is reversed, and the case remanded to the county court of McCurtain county, with directions to grant plaintiff a new trial.

RAINEY, C. J., and HARRISON, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

Digitized by Google

SOUTHERN PAC. CO. v. LARRIMORE.
(No. 1778.)

(Supreme Court of Arizona. June 18, 1920.)

1. Carriers ⟸180(2) — Initial carrier contracting for through transportation may limit liability to own line.

Any obligation of a carrier to transport goods beyond its own terminus being a matter of contract, and not a legal duty, it may, if contracting for through transportation, limit its liability to its own line; this not being a limitation of its common-law liability as carrier.

2. Pleading ⟸34(2) — Specific charge after general averment held not to show unreasonable delay on line of initial carrier.

Complaint against initial carrier, which contracted to carry to destination on another line, by contract limiting liability to its own line, charges no unreasonable delay on its own line; a sweeping charge of unreasonable delay in transportation between initial point and a point on line of connecting carrier being followed by particulars stating the delay was at the latter point.

Cunningham, C. J., dissenting.

Appeal from Superior Court, Santa Cruz County; W. A. O'Conner, Judge.

Action by R. C. Larrimore against the Southern Pacific Company and another. From a judgment for plaintiff, the named defendant appeals. Reversed.

The appellee by his original complaint in this action sought to recover damages of the appellant, alleged to have accrued to appellee by reason of injury to 69 head of mules, caused through the negligence of appellant in transporting same from Nogales, Ariz., to Buckeye, Ariz., under contract with the appellee. The appellee amended his complaint and brought in the Arizona Eastern Railroad Company as a party defendant, and alleged:

That the Southern Pacific Company's lines of railroad extend from Nogales, Ariz., to Maricopa, Ariz., and that the Arizona Eastern Railroad Company's line of railroad begins at Maricopa and extends through Phœnix to Buckeye, Ariz.; "that the plaintiff [appellee] is informed and believes, and therefore alleges, that the line of the Arizona Eastern Railroad Company aforesaid from Maricopa to Buckeye is under the control of the said defendant Southern Pacific Company, and that the Southern Pacific Company engaged the defendant Arizona Eastern Railroad Company to transport and convey said mules from Maricopa, Ariz., to Buckeye, Ariz."

The appellant, Southern Pacific Company, sets forth in its answer:

That the 69 mules were received for shipment January 28, 1915, and were shipped in two cars from Nogales, Ariz., to Buckeye, Ariz., under a written contract entered into January 27, 1915, by which "plaintiff expressly agreed to and with the defendant (Southern Pacific Company) that in case said live stock should be destined to any point off the railroad of this defendant, the responsibility of this defendant, whether as common carrier or otherwise, should cease and utterly determine upon arrival of said live stock at the station where said live stock should leave the railroad of the defendant in the course of such transportation to destination, and that this defendant should not be liable or responsible to plaintiff for any loss or damage whatsoever that might occur to said animals after same left its said line of railroad, or that might occur to said animals on any of defendant's connecting carriers."

The answer of the Southern Pacific Company further states:

"That the defendant transported said animals without any unusual delay and without any rough handling from the said town of Nogales, Ariz., to the station of Maricopa, Ariz., on the line of railroad of defendant, and delivered said animals at said station of Maricopa at about 3 o'clock a. m. January 29, 1915, in as good condition as it had received them, to that certain other railroad company, to wit, the Arizona Eastern Railroad Company, a separate and distinct corporation from this defendant."

The answer further denies that any damage was done to the mules through the negligence of the defendant, and avers that, if any damage was done to the mules by the connecting carrier (Arizona Eastern Railroad Company), the defendant was not responsible therefor, under its contract with the appellee.

The jury returned a verdict against each company for $300, that is, against the Southern Pacific Company for $300, and against the Arizona Eastern Railroad Company for $300, and judgment was rendered accordingly. The Southern Pacific Company alone appeals.

Francis M. Hartman, of Tucson, for appellant.

Barry & Barry, of Nogales, for appellee.

BAKER, J. (after stating the facts as above). [1] The undisputed evidence shows that the appellant received 69 mules from the appellee at Nogales, Ariz., destined to Buckeye, Ariz., a station on the line of the Arizona Eastern Railroad Company, and loaded them into two cars, and carried them to Tucson, Ariz., and thence to Maricopa, Ariz., where the cars containing the mules were delivered to the said Arizona Eastern Railroad Company, a connecting carrier, and was by the last-named company carried to Phœnix, Ariz. The Arizona Eastern Railroad Company was unable to transport the animals any farther towards Buckeye, Ariz., their destination, ow-

Digitized by Google

ing to a washout on its road, and they remained in Phœnix for several days in a crowded, muddy, and filthy corral, where they were prevented from lying down and resting. The appellee finally receipted for the mules at Phœnix and drove them himself to Buckeye. The delay in transportation of the animals and their ill treatment at Phœnix resulted in damages to the appellee. The question is whether the appellant is liable for these damages. Independent of contract, the appellant was under no duty or obligation to transport appellee's mules beyond its own terminus. 1 Hutchinson on Carriers, § 226. Then, since appellant was not by law a common carrier as to the mules at the time of the occurrence of the alleged damages on the line of the Arizona Eastern Railroad Company, its liability depends solely upon its contract with appellee. 3 Wood on Railroads, par. 452a. The written contract between the parties for the shipment of the mules called for through transportation from Nogales, Ariz., to Buckeye, Ariz. If this were all of the contract, the appellant would be liable for the damages occurring to the mules because of the default of the Arizona Eastern Railroad Company, but the contract for through transportation contained the express stipulation that—

"The responsibility of the first party, whether as common carrier or otherwise, shall cease and utterly determine upon the arrival of said live stock at the station where the said live stock is to leave the road of the first party in the course of transportation to destination."

The undisputed evidence shows that the station referred to in the contract was Maricopa. This stipulation in the contract was binding upon the appellee. It is well settled that, the obligation of a carrier to transport goods beyond the terminus of its own line being a matter of contract, and not a legal duty, the carrier may if he contracts for through transportation, by the contract limit his liability to his own line; for such a limitation does not relieve him from his common-law liability safely to carry and deliver to the connecting carrier. 1 Hutchinson on Carriers, § 233; 4 Elliott on Railroads, par. 1438; Myrick v. Ry. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Atlantic Coast Line Ry. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; Dodge v. Chi., St. P., M. & O. Ry. Co., 111 Minn. 123, 126 N. W. 627; Little Rock & Ft. S. Ry. Co. v. Odom, 63 Ark. 326, 38 S. W. 339; Jones v. Ry. Co., 89 Ala. 376, 8 South. 61; Railroad Co. v. Shomo, 90 Ga. 496, 16 S. E. 220; Hoffman v. Railway Co., 8 Kan. App. 379, 56 Pac. 331; Railroad Co. v. Bourne et al., 15 Ky. Law Rep. 445; Fremont, etc., Ry. Co. v. N. Y., etc., Ry. Co., 66 Neb. 159, 92 N. W. 131, 59 L. R. A. 939; Harris v. Railroad Co., 36 Misc. Rep. 181, 73 N. Y. Supp. 159; Bird v. Railway Co., 99 Tenn. 719, 42 S. W. 451, 63 Am St. Rep. 856; Hunter v. Railroad Co., 76 Tex. 195, 13 S. W. 190; Tolman v. Abbot, 78 Wis. 192, 47 N. W. 264; Ill. Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92.

In Atlantic Coast Line R. Co. v. Riverside Mills, supra, Mr. Justice Lurton, speaking of a provision in a contract exempting the initial carrier from liability for a loss or damage not occurring on its own portion of the route, says:

"Such a provision is not a contract for exemption from a carrier's liability as such, but a provision making plain that it did not assume the obligation of a carrier beyond its own line, and that each succeeding carrier in the route was but the agent of the shipper for a continuance of the transportation. It is therefore obvious that at the common law an initial carrier under such a state of fact would not be liable for a loss through the fault of the connecting carrier to whom it had, in due course, safely delivered the goods for further transportation"—citing Railroad Co. v. Pratt, 22 Wall. 123, 22 L. Ed. 827; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; So. Pac. Co. v. Interstate Commerce Commission, 200 U. S. 536, 554, 26 Sup. Ct. 330, 50 L. Ed. 585.

The allegation in the appellee's amended complaint that "plaintiff is informed and believes, and therefore alleges, that the line of the Arizona Eastern Railroad Company aforesaid from Maricopa to Buckeye, Ariz., is under the control of the said defendant Southern Pacific Company," remained wholly unproven. The undisputed evidence shows that the Arizona Eastern Railroad Company was an independent line not under the control of the appellant, and owned, operated, and controlled its own railroad and auxiliary property. There is therefore no reason to charge the appellant with liability for the damages on the ground that the Arizona Eastern Railroad Company was under its control, or that any partnership relation existed between the appellant and that company.

Enough has been said to show that the appellant was not liable for the damages resulting from the default of the Arizona Eastern Railroad Company in the transportation and ill treatment of the mules.

[2] But the appellee insists that the appellant was responsible for negligence occurring on its own line.

The complaint does not charge any unreasonable delay in transporting the mules over the line of the appellant. The facts set forth in the complaint as constituting a breach of the contract of carriage are as follows:

"That, in violation of said agreement, defendants failed and neglected to transport and deliver said mules to the destination hereinabove mentioned, with safety and without unreasonable delay; that at Phœnix, Maricopa county, Ariz., said mules were held by defend-

Digitized by Google

ant's agents until the 2d day of February, 1915, in a crowded, muddy, filthy and excessively damp corral, where, by reason of the said condition of the said corral, they were prevented from lying down and resting; that said defendants and its agents wholly failed, neglected, and refused to transport said mules from Phœnix to Buckeye, and that by reason of such failure, neglect, and refusal plaintiff was obliged to, and did, drive said mules on foot from Phœnix to Buckeye on or about the 10th day of February, 1915; that on the 30th day of January, 1915, when plaintiff was notified by defendants' agents that said mules would not be transported by rail further than Phœnix, a total of more than 40 hours had been wasted in transporting said mules by said defendants and their agents; that by reason of the delay in transporting said mules and the ill usage to which said mules were subjected, as hereinabove described, said mules depreciated in value between Nogales and Phœnix to the extent of $15 per head, or $1,035 in all. * * *"

While there is a sweeping charge of unreasonable delay transporting mules from Nogales to Phœnix, the pleader descends to particulars by stating that the delay was at Phœnix, and that the injury occurred there, and by reason of defendants' failure to transport mules from Phœnix to Buckeye. There is no allegation of unreasonable delay or injury or negligence between Nogales and Maricopa, the distance the mules were transported over the appellant's line.

In Ecton v. Chi., B. & Q. Ry. Co., 125 Mo. App. 223, 102 S. W. 575, it is said:

"Plaintiff based his right to recover in his pleadings on defendant's negligence in delaying trains at numerous points."

And it was held he was confined to his allegations. The court said:

"No other sort of negligence is pleaded, and it is a fundamental rule, constantly enforced, that when the charge is specific, no other can be urged than that which is specially pleaded. Chitty v. Ry. Co., 148 Mo. 75 [49 S. W. 868]; Grissmore v. Ry. Co., 118 Mo. App. 387 [94 S. W. 306]; Breeden v. Mining Co., 103 Mo. App. 176 [76 S. W. 731]."

In the Chitty Case, 148 Mo. 64, 49 S. W. 868, the rule is stated as follows:

"It is furthermore the law that, when a plaintiff alleges specific acts of negligence on the defendant's part, his evidence, and likewise his right of recovery, will be limited to the specific acts charged, and this rule obtains even where a general averment of negligence precedes the averment of specific acts of negligence in the petition."

If it be granted that there was evidence of delay on the appellant's line, it is aside from any allegation of the complaint that it was unreasonable or negligent, or that damages were sustained by reason thereof. The only delay or negligence charged is at Phœnix, and thence to Buckeye, all occurring on the line of the Arizona Eastern Railroad Company.

The complaint shows clearly that it was drawn upon the theory that the appellant was liable under the contract of carriage for delay or injury to stock, negligently occurring on the line of the connecting carrier, and, since we have found otherwise, it follows that no liability is alleged or proved as against the appellant.

The curious situation is presented in the case of judgment for separate amounts against the appellant and the Arizona Eastern Railroad Company. Upon appellee's theory of the case, the only verdict and judgment authorized was one against the appellant for the whole amount of the damages. It was error to enter judgment against each one of the companies, but, since the Arizona Eastern Railroad Company does not appeal, and remains satisfied with the judgment against it, we make no further mention of the error, only to say that certainly the appellee has no cause to complain of the result. He is lucky.

From what has been said it necessarily follows that it was error to refuse the appellant's motion for an instructed verdict. The judgment is reversed, without remanding the cause.

ROSS, J. concurs.

CUNNINGHAM, C. J. (dissenting). I do not concur in the construction placed on the special shipping contract by the majority opinion. The liability of the Southern Pacific Company for injury to the animals while such animals were in the custody of the Arizona Eastern Railroad Company as a connecting carrier is determined from the special contract of shipment.

Without any doubt, the A. E. R. Co. acted as the agent for the initial carrier, the S. P. Co., in performing a number of obligations assumed by the S. P. Co. by such special contract. The special contract provides that, in case it becomes necessary to deliver the animals to the shipper at an intermediate point before the destination named in the contract is reached, such delivery may be made, after notice, and when notice is given delivery must be accepted by the shipper. The A. E. R. Co. delivered the animals at Phœnix for the reason it was unable to deliver them at the destination named in the contract because of floods and destruction of its railroad between Phœnix and Buckeye, the destination named in the special contract. Thus the connecting carrier performed that condition of the special contract for and in behalf of the principal, the S. P. Co.

The special contract provided that the shipper would be furnished transportation from the point of shipment to the destination named in the contract and return to

Digitized by Google

starting point for one person to accompany the animals in case the shipment comprised two carloads of animals. Two cars were shipped, and at Phœnix the A. E. R. Co. changed the original contract naming the destination as Buckeye to read Phœnix, because of said floods, and issued to the shipper a return ticket from Phœnix to Nogales, in strict conformance with the condition of the S. P.'s special contract. The only theory upon which the said transportation could have been issued, entitling the holder to travel over the separate and connecting roads in return from the point of destination as finally established, Phœnix, to Nogales, the starting point, is that of performance of the original special carriage contract. The A. E. R. Co., in so performing such condition, certainly did so for and in behalf of the S. P. Co., the contractor. The freight bills cover the charges for the entire distance from Nogales to Phœnix. The charge for such entire distance is $58 per car, and the additional sum of $1 per car advanced. These freight bills are issued by the A. E. R. Co., and the bill for each car bears notation that the car to which it relates was diverted to Phœnix because of the inability of the company to take shipment to destination.

The shipper paid said freight bills at Phœnix, as demanded. Can it be claimed that the A. E. R. Co. was not the agent of the S. P. Co. for the purposes of demanding and collecting the freight charges for entire distance, including the service of the S. P. Co.? I think not. These circumstances, in my opinion, clearly permit of no inference other than that the A. E. R. Co. acted as the agent of the S. P. Co. in the performance of the shipping contract; certainly it was the agent of the S. P. Co. in the performance of the conditions in the contract it is conclusively shown to have performed.

This being the case, what kind of a contract existed by which it carried the two cars of animals from Maricopa to Phœnix? I am of the opinion that such service was rendered at the instance of the S. P. Co. and by the A. E. R. Co. as the agent of the S. P. Co., and not as the party contracting with the shipper by an independent agreement; that the connecting line of the A. E. R. Co. is the instrumentality used by the S. P. Co. with the use of which the S. P. Co. was able to and did perform its special contract. The power of the S. P. to contract to ship the freight the entire distance provided for in the contract, including a shipment over connecting lines, is not disputed. Such is the law unless the charter of the corporation provides otherwise. Railroad Co. v. Pratt, 22 Wall. 126, 22 L. Ed. 827; O. & M. Ry. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693.

But the contention is that the S. P. Co. is exempt from liability for damages occurring to the animals while they were in the care of the connecting carrier, and that the injury arising from any cause is conceded to have occurred after the A. E. R. Co. took the shipment at Maricopa into its care. The special contract of shipment contains the stipulation relied upon as exempting from liability.

The contract does not name an amount as a rate agreed upon, but sets forth that the shipper, "in consideration of a special rate which is thus attained, and of divers other good and sufficient considerations," enters into the contract. The contract contains the stipulation as follows:

"It is hereby further understood and agreed by second party that in case the live stock herein described be destined to any point off the railroad of the first party, or to a point beyond the destination to which the rate is named herein, all common carriers engaged in the transportation of said live stock to destination of said live stock shall have and enjoy the special privileges and exemptions herein accorded to first party, when the rate or rates charged by such common carrier or carriers conditioned on agreement limiting carriers' liability: Provided however, that the responsibility of first party, whether as common carrier or otherwise, shall cease and utterly determine upon arrival of said live stock at the station where the said live stock is to leave the road of the first party in the course of transportation to destination: Provided, further, that Southern Pacific Company is not to be," etc.

No connecting road is mentioned in the contract. There was no mention of compensation to any other party, and nothing was said of change to any other company on the way from Nogales to Buckeye.

I am content to understand from this stipulation that the liability of first party, whether as common carrier or otherwise, shall cease and utterly determine upon arrival of said live stock at the station where the live stock is to leave the road of the first party in course of transportation to destination whenever the contract provides that connecting carrier shall assume the duty of carrying the live stock to destination, by an agreement with the shipper. To a certainty, the liability of the initial carrier does not cease under the common law while the connecting carrier is engaged in the capacity of agent for the initial carrier in performing the special shipping contract. In order to avoid liability for any of the acts of its agent, such exemption from liability must be expressed in unequivocal terms. Mynard v. Syr., Bing. & N. Y. R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28.

It is well settled that a common carrier cannot by notice or special contract limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. The Pacific Deady, 17, Fed. Cas. No. 12644;

Digitized by Google

Phila. R. Co. v. Derby, 14 How. 486, 14 L. Ed. 502; York Co. v. Central Railroad, 3 Wall. 107, 18 L. Ed. 170; Walker v. Transportation Co., 3 Wall. 150, 18 L. Ed. 172; Express Co. v. Kountze Bros., 8 Wall. 342, 19 L. Ed. 457; Railroad Co. v. Mfg. Co., 16 Wall. 318, 21 L. Ed. 297; Steamboat New World v. King, 16 How. 469, 14 L. Ed. 1019; Mobile & O. R. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Empire Transp. Co. v. Wamsutta Oil Co., 63 Pa. 14, 3 Am. Rep. 515; Knowlton v. Erie R. R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Jones v. Voorhees, 10 Ohio, 145; Fillebrown v. G. T. Ry. Co., 55 Me. 462, 92 Am. Dec. 606; Sager v. Portsmouth, 31 Me. 228, 50 Am. Dec. 659; Mich. Sou. R. R. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; O. & M. R. R. Co. v. Shelby, 47 Ind. 471, 17 Am. Rep. 719; School Dist., etc., v. Boston R. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Adams Express Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Nashville R. R. Co. v. Jackson, 6 Heisk (Tenn.) 271; Ketchum v. American Express Co., 52 Mo. 390; N. O. Mut. Ins. Co. v. N. O. R. R. Co., 20 La. Ann. 302; Southern Express Co. v. Moon, 39 Miss. 822; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Berry v. Cooper, 28 Ga. 543; Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732; Flinn v. Phil., etc., R. R. Co., 1 Houst. (Del.) 469; Parsons v. Monteath, 13 Barb. (N. Y.) 363; Moore v. Evans, 14 Barb. (N. Y.) 524; Cent. R. & Bank. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

The general words of exemption used in this contract are "that the responsibility of first party, whether as carrier or otherwise, shall cease and utterly determine upon arrival of said live stock at the station where the said live stock is to leave the road of the first party in the course of transportation to destination." This, of course, is whenever a connecting carrier has assumed to carry the shipment on its own responsibility under a contract with the shipper, expressed or implied. But, if the general words can be given effect without including negligence, the contract will not release from the negligence. Holsapple v. Rome, W., etc., R. R. Co., 86 N. Y. 275; Mynard v. Syr., Bing. & N. Y. R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28, supra. The leading cases upon the questions of the power of common carriers to limit their common-law liability as such carriers are Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455, and Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470. The exhaustive notes annexed to such cases need no discussion.

The plaintiff claims that the mules were injured by the carelessness and negligence of the carrier, and the general words of the special contract relied upon by the S. P. Co. to exempt it from liability are broad enough to cover negligence of its servants and agents. Such stipulation is ineffective to exempt the carrier from liability for injury occurring through the negligence of its servant or its agent, the connecting carrier.

I therefore dissent from the construction placed on the special shipping contract in evidence. I dissent from the force and effect given the contract. I do concur in the order reversing the judgment against the S. P. Co. I do not concur in the order rendering a judgment in this court in favor of the S. P. Co. I am of the opinion that the cause should be remanded, with instructions to the lower court to grant a new trial as the rights of the parties may appear. In no case should the plaintiff be permitted to recover from the S. P. Co. the amount recovered from the A. E. R. Co. if the said judgment is satisfied. Otherwise the plaintiff would be allowed a double recovery for injuries suffered from the negligence of the S. P. Co. through its agent, the A. E. R. Co. When the agent has satisfied the judgment for such injuries, the principal's liability ceases.

GENARDINI et al. v. KLINE. (No. 1718.)

(Supreme Court of Arizona. June 18, 1920.)

1. Appeal and error ⟸1207(3) — Including after remand on appeal in judgment in possessory action, rents accruing after judgment not reversible error.

Inclusion in a judgment rendered in an action for possession of real estate, on motion for judgment in accordance with mandate of Supreme Court, of rents accruing after entry of original judgment, did not violate the mandate of the Supreme Court; failure to make an independent motion for judgment for the rent being of little moment so far as the merits were concerned.

2. Ejectment ⟸125 — Statute contemplates that rental value determined in possessory action may be basis of motion for rent after judgment.

Civ. Code 1913, par. 1646, relating to motions for rental value of property after judgment, contemplates that rental value of the premises in a possessory action may become an issue determinable in a regular trial and before a jury, if requested, and the rental value thus found is to guide and control the judgment for rent that accrues after judgment and before delivery of possession, or that accrues pending appeal, when sought by the summary proceeding of a motion, in view of paragraphs 1627–1647.

3. Motions ⟸1, 26—Must be supported by affidavit.

A motion is not a pleading, although it is often directed at a pleading and usually grows

Digitized by Google

out of a pending cause, and if it is based on some matter of fact it must be supported by affidavit that the facts are true.

4. Motions ⟸14—May be oral.

Unless required by statute to be in writing, a motion may be oral.

5. Motions ⟸1—"Motion" defined.

A "motion" is an application made to a judge or to the court for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Motion.]

6. Ejectment ⟸125—Motion for judgment for rent accruing after judgment in possessory action may be informal.

The Legislature used the word "motion" in Civ. Code 1913, par. 1646, relating to motions for judgment for rents accruing after judgment and before delivery of possession in possessory actions, in its generally accepted meaning, and a successful contestant in an action to recover real property may make his application informally.

7. Ejectment ⟸136—Rule for estimating damages for withholding farm land stated.

Farm lands are generally not let by the month but by the season, and consequently damages for land must be based upon the season, and hence Civ. Code 1913, par. 1644, is not to be applied in construing paragraph 1646, as to rental value accruing after judgment and before delivery of possession in a possessory action.

8. Constitutional law ⟸306—Ejectment ⟸125—Statute permitting judgment for rent accruing after judgment and before surrendering possession in a possessory action does not deny due process.

Civ. Code 1913, par. 1646, providing for a motion for judgment for the rental value of premises between judgment and delivery of possession in a possessory action, does not violate the due process of law clauses in Const. art. 2, § 4, and the Fourteenth Amendment to the United States Constitution.

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

Action by Mose Kline against D. J. Genardini, S. L. Butler, P. Morgosin, and Francisco Gallego. Judgment for plaintiff, and defendants appeal. Affirmed.

John F. Ross, of Tombstone, and Bruce Stephenson and Doan & Doan, all of Douglas, for appellants.

Boyle & Pickett, of Douglas, for appellee.

ROSS, J. The present case is ancillary to and grows out of another case hereinafter mentioned, and is over the rental value of lots 21 and 22, block 82, of the city of Douglas, and the buildings thereon. It arises in this manner: In the superior court of Cochise county the plaintiff (appellee) and defendants (appellants), as such, contested the right to the possession of said premises. On February 28, 1917, judgment awarding the possession to appellee, Kline, was entered, and as a part of said judgment, and based upon the jury's answer to an interrogatory, the rental value of said premises from July 1, 1916, to January 25, 1917, was fixed at $200 per month for the purpose of fixing appellee's damages for withholding possession from him. Thereafter appellants appealed the case to the Supreme Court, where the judgment of the superior court was affirmed with slight and unimportant changes. 19 Ariz. 558, 173 Pac. 882. Upon the return of the mandate to the lower court, August 17, 1918, counsel for both parties being present, appellee moved "for judgment against appellants in accordance with the mandate of the Supreme Court duly issued, and did in open court give notice of motion for judgment against appellants for the rent or rental value of said premises as provided by paragraph 1646, R. S. Ariz. 1913, to be made on the 24th day of August, 1918." Appellants at the time waived the statutory ten days' written notice thereof. The hearing on the motion was continued from August 24 to August 31, 1918. On the last-named date, all parties being represented, appellee presented to the court a form of judgment for the court's signature. This judgment, it appears, was in conformity with the mandate and, in addition, awarded appellee as damages, pending the appeal, $1,110, based upon a rental value of premises at $200 per month. The minute entry made by the clerk of the court shows this as what took place:

"Counsel for defendants (appellants) objects to the form of judgment presented on the ground that the same does not conform to the mandate of the Supreme Court of the state of Arizona. Court heard counsel in the premises, granted the motion and overruled the objections of the defendants (appellants), and signed and entered judgment for plaintiff (appellee) as presented."

The statute under which the motion for judgment for rental value of premises, pending the appeal, was made, reads as follows:

"The plaintiff may have judgment for the rent or rental value of the premises which accrues after judgment and before delivery of possession, by motion in the court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment is stayed by appeal and bond given to suspend the judgment, in which case the motion may be made after the affirmance thereof." Paragraph 1646, Civil Code, 1913.

It is proper, we think, to state that no motion was made for a new trial, and, so far as shown by the record, the trial court's attention was not called to the second and third errors now urged for the first time as grounds for reversing the judgment. The

Digitized by Google

trial court therefore was given no opportunity to examine these two questions here for review.

Appellants assign three errors, as follows: (1) "The court erred in entering judgment as entered, for that said judgment entered did not conform to the mandate of the Supreme Court; (2) the court erred in rendering judgment against the appellant D. J. Genardini for $1,110 on the said motion for rent or rental value of said premises for the period pending the appeal, without taking evidence to support the same;" and (3) it is claimed that, inasmuch as no evidence was submitted in support of motion, appellants' property was taken without due process of law, in violation of section 4, art. 2, of the Constitution of Arizona, and the Fourteenth Amendment to the Constitution of the United States.

[1] From the above statement of facts (which are stipulated by counsel), we think it unnecessary to give much attention to the first point. If the court had jurisdiction of the parties and the subject-matter of the motion, and at the time the formal written judgment on the mandate was presented to him he was shown that appellee should recover the rent that had accrued pending the appeal, we cannot see how appellants could be prejudiced by including in that judgment also the item of rent. Its inclusion in the judgment did not disregard nor violate in the slightest the mandate of the Supreme Court, and whether the course adopted, or the more formal course of a separate and independent motion for judgment for rent, was followed, was of little moment so far as the merits of the question to be decided was concerned.

The second error assigned is of a more serious nature. It is the contention of appellants that it was the duty of the court, upon the hearing of motion for judgment for rent or rental value of premises that had accrued pending the appeal, to take and hear evidence for the purpose of ascertaining such rental value, and that, the conceded fact being that no evidence was adduced, the judgment for rent was erroneous. They say:

"This statute (paragraph 1646) is silent on the question as to how the court will determine the amount of rentals due for the premises during such period of time, but, in the very nature of things, such a motion does raise an issue of fact as to what the rental value of said premises is for such period that must be determined by the court."

On the contrary, it would seem that the issue of fact as to the rental value had already been settled in the trial of the right of possession, and that the provisions of paragraph 1646 were intended to give the successful litigant an easy, quick, and inexpensive remedy to recover the rent of premises pending the appeal. Paragraph 1646 does not stand alone. It is only a part of the statute law concerning "actions for the recovery of real property." Paragraphs 1627–1647, Civil Code. Its meaning and purpose can be seen only by considering it in connection with all the text on the subject-matter. Under paragraph 1631, damages, including rents, may be asked for in the complaint. Paragraph 1641 mentions use and occupation of the premises as items that may be recovered. Paragraph 1643 limits the amount of rent that may be collected from the tenant therein named "to the rent in arrears at the time of suit brought * * * and that which may afterwards accrue during the continuance of his possession."

[2-5] The law contemplates, therefore, that the rental value of the premises in a possessory action therefore may become an issue, as it did in the present case, determinable in a regular trial and before a jury, if requested. The rental value thus found is to guide and control the judgment for rent that "accrues after judgment and before delivery of possession," or that accrues pending appeal when sought by the summary proceeding of a motion. This must be so when we take into consideration the ordinary functions of a motion. A motion is not a pleading, although it is often directed at a pleading and usually grows out of a pending cause. If it is based on some matter of fact, it must be supported by affidavit that the facts are true. Unless required by statute to be in writing, it may be oral. A motion is an application made to a judge or to the court for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant. 19 R. C. L. 671, 672–675; 22 Cyc. 3, title "Motions."

[6] If appellants' contention is well founded, the "motion" referred to in paragraph 1646 is not a motion as generally understood, but is in fact a complaint for debt that may be traversed and the issue tried, if demanded, before a jury. It would seem more reasonable to assume that the Legislature used the word "motion" in its generally accepted meaning, and, if so, the statute gives to the successful contestant in an action to recover real property the right to make application informally, and by motion for judgment for rent or rental values which acrues after his judgment of possession based upon the value of such rent as found in the main action.

Nor do we think a different conclusion is demanded because in paragraph 1644 it is provided, in case the defendant is a cropper, the value of the premises for the cropping season shall be found and he permitted, upon executing a bond in double the amount to plaintiff, to remain on the premises until crops are harvested or until the 1st day of February next succeeding.

[7] The rule for estimating damages for the withholding farm lands is necessarily different from the rule applicable to other

Digitized by Google

real property. Farm lands are generally not let by the month but by the season, and consequently damages or rent must be based upon the season. Butterfield v. Kirtley, 115 Iowa, 207, 88 N. W. 371.

It is suggested that rental values fluctuate, and to adopt the value fixed by the court for the time the premises were occupied prior to the entry of judgment as the value after the time of entry of judgment until possession is given over would certainly work a hardship upon one or the other of the parties. This is no more true than when the parties fix the values by agreement, for in such case rental values may go up or down, but the agreement stands. While under an agreement fixing the value of rents the rental value may increase or decrease and no relief be had, the loser in a contest over the possession of realty is compelled to pay the rental value fixed by the court only so long as he chooses to retain possession thereof. He may surrender possession and be relieved from the obligation to pay rent at any time he chooses.

[3] What we have said with reference to the second point, we think, fully disposes of the third and last errors assigned. The appellants had their day in court upon the issue of the rental value of the premises and in a trial free from error a jury fixed that rental value at $200 per month.

The judgment of the lower court is affirmed.

BAKER, J., concurs.

CUNNINGHAM, C. J. (specially concurring). I concur in the order affirming the judgment, but in so doing I do not concur in the construction placed on paragraph 1646 as to the status in pleading of the motion therein mentioned.

I regard the procedure by motion under paragraph 1646 as a special proceeding upon a summary application made in the original action after judgment, else no appeal is allowed from an order based on such motion to this court. Paragraph 1227, subd. (6), C. C. Ariz. 1913, provides an appeal from a final order made in such proceeding where the order affects a substantial right. The procedure intended in such matter is wholly different from the procedure required by chapter 26, title 6, Revised St. 1913, "motions" in suits pending. Paragraph 1646 requires written notice of the motion to be given the opposing party. Such notice must be filed with the clerk of the court, else why in writing?

Paragraph 659, C. C. Ariz. 1913, a part of the chapter prescribing the procedure on motions in suits "pending," is instructive, if not binding, authority, to wit:

"All motions required by law or by any rule of court to be in writing, shall be filed with the clerk and a copy served on the adverse party or his attorney."

The "notice" mentioned in paragraph 1646 in the "motion" referred to in 696, if such paragraph controls directly or by analogy. The notice referred to is the pleading required to invoke the action of the court. Paragraph 418, C. C. Ariz. 1913, requires that—

"The pleadings shall be in writing, and signed by the party, or by his attorney, and filed with the clerk of the court."

At the hearing of the application for a judgment for rent accruing pending the appeal the defendants were present and had their day in court, and did not question the course of procedure followed in the matter. When the court acted the defendants appealed, and on appeal in this court they, for the first time, allege that they are denied due process of law, when they have not heretofore claimed such injury. By their silence when it was their duty to speak, they are not now permitted to speak to the injury of their adversaries or to place the trial court in error.

For these reasons alone, I concur in the order of affirmance of the judgment.

GILMORE v. WINGATE. (No. 1755.)

(Supreme Court of Arizona. June 25, 1920.)

1. Evidence ⟸441(9)—Parol warranty cannot be grafted on written contract of sale.

Where a contract of sale is written, a parol warranty cannot be added thereto.

2. Evidence ⟸442(6)—Written contract held not to purport to contain all terms so as to exclude parol warranty.

A written instrument enumerating hay, live stock, and farm implements, and reciting that the seller had received a check for $200 and was to receive the balance on a fixed date, did not purport to be a complete legal obligation, and hence evidence of a parol warranty as to the live stock was admissible.

3. Sales ⟸442(8)—Though seller warranted cattle free from contagious disease, buyer cannot recover for mere exposure of his own herd to infection.

Where a seller of cattle warranted that they were free from contagious abortion, the buyer, who commingled the cattle with his own herd, cannot recover damages for the mere exposure of his animals to infection; it not appearing that he had sold any of the exposed animals, and the exposure not lessening their value for dairying, for which they were used.

Digitized by Google

4. Appeal and error ⟸1031(6) — Instruction allowing improper measure of damages will be presumed prejudicial.

An instruction which enunciated an improper measure of damages, allowing a recovery to which plaintiff was not entitled, will be presumed prejudicial, for it must be supposed that the jury paid heed thereto.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Action by Claude Wingate against Harry A. Gilmore. From a judgment for plaintiff and from the denial of his motions for directed verdict, judgment non obstante, and for new trial, defendant appeals. Reversed and remanded.

Townsend & Stockton, of Phœnix, for appellant.

P. H. Hayes and L. L. Pearson, both of Phœnix, for appellee.

LOCKWOOD, Superior Judge. This was an action by Claude Wingate against Harry A. Gilmore for the sum of $7,428 as damages for the alleged breach of an express warranty of the soundness of certain cattle sold by the defendant to plaintiff October 15, 1917. Plaintiff alleged that he bought a herd of dairy cows from defendant, under an express oral warranty that they were free from a disease known as contagious abortion; that said warranty was untrue, and by reason of the cattle being afflicted with such contagious abortion they were of inferior value of themselves, lost their calves, and by being mingled with other cattle of plaintiff exposed them to the disease, which exposure might have caused the latter to become infected also, and greatly reduced their value. Defendant answered, denying all the material allegations of the complaint. The case was tried to a jury, and a verdict returned in favor of plaintiff for the sum of $2,000 and judgment was entered thereon. Defendant, at the proper time during the trial, moved for a directed verdict, and for judgment non obstante, and for a new trial thereafter, which motions were severally denied by the trial court, and defendant now appeals from the denial of each and all of said motions and from the judgment.

Defendant makes 13 assignments of error, which fall naturally into 4 classes. Assignments 1 to 4, inclusive, attack the alleged warranty; 5 and 6, the sufficiency of the evidence to support the verdict; 7, 8, 12, and 13, the admission and rejection of certain evidence; and 9, 10, and 11, plaintiff's claim of damages for mere exposure of his original herd to contagion.

[1, 2] So far as the objection to the warranty is concerned, defendant is quite correct in his contention that an oral warranty cannot be added to a written contract of sale. Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Thompson v. Libby, 34 Minn. 374, 26 N. W. 2.

The instrument claimed to be a contract of sale in this action, Defendant's Exhibit 2, is as follows:

"Hay
12 calves
70 cows
10 heifers
2 mowers
1 rake
1 derrick
1 separator can
1 bull

Building feed rack bull pen to be left on place.
I have received check for 200.00.
Balance of 10,560 to be paid Oct. 15, 1917.
"[Signed] Harry A. Gilmore.
"Claude Wingate."

Without going into detail, this court is of the opinion that on its face it does not, as was said in Germain Fruit Co. v. Armsby Co., supra, "contain such language as imports a complete legal obligation" (Frank v. Eltringham, 65 Miss. 281, 3 South. 655; Collins v. Keller, 62 Or. 169, 124 Pac. 681; Mossie v. Cyrus, 61 Or. 17, 119 Pac. 485, 624; Oglesby Gro. Co. v. Williams Mfg. Co., 112 Ga. 359, 37 S. E. 372; Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366), and is therefore no bar to the proof of a contemporaneous oral warranty, such as that relied on by the plaintiff.

[3] Assignments 10 and 11, however, present a more serious problem. Plaintiff in his complaint alleged, among other things, as follows:

"That as a result thereof (commingling of cows) said disease might quickly spread and be communicated to all plaintiff's original 61 dairy cows; as a direct consequence of which plaintiff's said 61 head of cows were greatly reduced in value and were not worth, in their then probably infected and diseased condition, to exceed $60 per head; that as a result and consequence plaintiff sustained damages to the said 61 head of cattle in the sum of $2,928."

And the trial court gave the following instruction:

"If you find that the Gilmore cattle were infected with contagious abortion at the time of the sale to the plaintiff, and that the plaintiff, in ignorance of the fact that the Gilmore cattle were so infected, if you find that they were infected, commingled his herd with such diseased cattle, and you further find from the evidence that after the diseased condition of the Gilmore cattle became known to the plaintiff that it was not practicable for him to separate his original herd from the diseased cattle, and that by such commingling his herd were exposed to disease and thereby reduced in market value, the loss and damage to the plaintiff's original herd is measured by the difference in value of the cows immediately prior to the commingling and their value after becoming exposed to disease by such commingling."

Digitized by Google

And it refused defendant's request for an instruction withdrawing from the jury the question of damages caused by a possible or probable infection of the cattle owned by plaintiff before the purchase of the diseased cattle. This raises squarely the question of whether damages may be recovered for a mere exposure to disease, where there is no evidence of actual infection.

So far as I can discover, while there are many cases reported where the question of breach of warranty of the soundness of live stock has been litigated, and the elements and measure of damages discussed, there is no case in the United States even suggesting that mere exposure to infection, without showing that the disease was communicated to live stock not embraced in the sale, gives a right of recovery for loss in value of the animals exposed. Damages are, of course, allowed for the original diseased stock (Pinney v. Andrus, 41 Vt. 631; Bradley v. Rea, 14 Allen [Mass.] 20; Cary v. Gruman, 4 Hill. [N. Y.] 625, 40 Am. Dec. 299; Stevens v. Bradley, 89 Iowa, 174, 56 N. W. 429), for animals to which the disease is communicated (Joy v. Bitzer, 77 Iowa, 73, 41 N. W. 575, 3 L. R. A. 187; Packard v. Slack, 32 Vt. 10; Marsh v. Webber, 16 Minn. 418 [Gil. 375]; Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 287), for expenses of treatment and quarantine of exposed stock (Larson v. Calder, 16 N. D. 248, 113 N. W. 104; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 919).

But in each case where damages were allowed for anything but the animals sold and those to which the disease was actually communicated, there was an allegation and proof of real, and not merely possible or speculative, damages. In this case it appears clearly that plaintiff was engaged in the dairy business, and both the purchased cattle and his own were to be used for that purpose. It is also unquestioned that the exposure of dairy cows to contagious abortion in no manner affects their actual value so far as use is concerned. The only conceivable way in which plaintiff could be injured, so far as the exposed cows are to be considered, is that possibly, if he desired to sell them, some buyer might not care to take them, except for beef purposes. Assuming, without admitting, that if plaintiff had attempted to make a sale of the exposed cattle, and had been forced to part with them below their market value, he might claim damages, yet not only was there no evidence on this point submitted to the jury, but anything relating to sales was carefully excluded.

Damages, in the absence of some special rule to the contrary, are supposed to be compensatory, and awarded for actual loss, and it would seem to be unjust, indeed, in this case to allow plaintiff to recover for a loss in the market value of cattle merely exposed to disease when, so far as the record shows, it was never communicated, the cattle were never sold, and plaintiff never lost a cent, in truth, by reason of the exposure.

[4] If error was committed in the giving of improper and refusal of proper instructions on this point, it necessarily follows that it was prejudicial. Under the case as submitted to the jury, they were told that loss and damage from exposure to disease was a material element to be considered by them, and on a general verdict it is only reasonable to suppose they did give it weight.

The other assignments of error deal with questions of evidence, and need not be discussed. It is presumed that, in view of the opinions expressed herein, if any error was so committed, it will be avoided in a subsequent trial.

This case should be reversed and remanded to the superior court of Maricopa county for a new trial.

CUNNINGHAM, C. J., and ROSS, J., concur.

BAKER, J., being disqualified and announcing his disqualification in open court, the remaining Judges, under section 3 of article 6 of the Constitution, called in Hon. ALFRED C. LOCKWOOD, Judge of the Superior Court of the state of Arizona, in and for the county of Cochise, to sit with them in the hearing of this case.

MESA CITY v. LESUEUR et al. (No. 1769.)

(Supreme Court of Arizona. June 18, 1920.)

1. Negligence ⇐61(1)—"Proximate cause" of injury defined.

Where several proximate causes contribute to an accident and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless, without its operation, the accident would not have happened.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

2. Municipal corporations ⇐840—City liable for negligence concurring with act of animal.

If a city was negligent in constructing a sewer system, in not tamping down the dirt and thus leaving a depression, resulting in the flooding of a basement, it was not relieved from liability for the flooding merely because the water came from a break in the banks of an irrigating ditch, caused by a gopher or some other burrowing animal.

3. Municipal corporations ⇐840—Negligence ⇐61(1) — Defect in sewer not remote cause of injury, though flood precipitated by burrowing gophers.

Whether a cause which contributes to an accident is proximate is not determined with

Digitized by Google

reference to the order in which several contributing elements succeed one another, but with reference to the efficiency of these elements, and negligence of a city in leaving a depression while constructing sewer was not rendered remote by reason of the fact that a subsequent act of a gopher, or other burrowing animal, caused a break in the bank of an irrigation ditch which resulted in the flooding of plaintiff's basement; the water following the depression negligently left by the city.

4. Negligence ⟸59—Proximate cause of injury defined as to anticipation of damages.

It is not necessary to defendant's liability that the consequence of his negligence should have been foreseen, it being sufficient if the damages are the natural, though not the necessary or inevitable result of the wrong; the test being whether ordinary prudence would have suggested to the person sought to be charged that his act or omission would probably result in damages to some one.

5. Negligence ⟸121(5)—Plaintiff must show proximate cause of injury.

In an action for negligence, it is incumbent upon the plaintiff, not only to prove negligence on the part of defendant, but also to show that such negligence was a proximate cause of the damages.

6. Negligence ⟸136(25) — Proximate cause question of fact.

What is the proximate cause of an injury is usually a question of fact.

7. Appeal and error ⟸1064(1) — Erroneous instruction not reversible error unless prejudicial.

Mere error in an instruction may not be sufficient to warrant the interference of the Supreme Court, for an error for which a reversal is to be directed must be one which operates prejudicially to the appellant.

8. Damages ⟸113—Measure for injuries to personal property difference in value immediately before and after.

The measure of damages for injuries to personal property less than its destruction is the difference in the value of the property immediately before and immediately after the injuries, and not the cost of restoring them, the resulting loss of trade, etc.

9. Appeal and error ⟸1068(4) — Erroneous instruction as to measure of damages harmless.

An erroneous instruction as to measure of damages was harmless to defendant, where the uncontradicted evidence showed that the damage exceeded the verdict.

Cunningham, C. J., dissenting.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Action by J. W. Lesueur and G. C. Spilsbury, copartners, doing business under the firm name and style of the Lesueur-Spilsbury Company, against Mesa City. Judgment for plaintiffs, and defendant appeals. Affirmed.

This was an action by the appellees to recover damages from the appellant for the negligent flooding of a cellar warehouse, whereby the goods and merchandise of the appellees, stored in the cellar, were damaged and destroyed. The principal undisputed facts of the case are correctly stated in the brief of counsel for appellees, as follows:

"The city of Mesa in 1916 undertook to construct a city sewer system within the city. To this end the city entered into a contract with a contracting firm to construct the sewer system according to plans and specifications therefor prepared by an engineer employed by the city for that purpose.

"The contract under which this sewer system was constructed provided that all the work of the contractors should be done 'under the direction and to the satisfaction of the engineer of the said town.' And it was done.

"The contract further provided that the contractor should make such connections with the sewer as the property owners along the line should desire, and extend such connections to the property owners' property line.

"One of the main lines of the sewer system installed by the city under the contract was laid down the center of McDonald street in said city, and was laid at a depth of 8 or 10 feet. McDonald street runs north and south at right angles with Main street, the principal business street in Mesa. The First National Bank of Mesa owned and occupied its lot on the corner of Main and McDonald streets, facing north on Main street 84 feet, and east on McDonald street 77 feet. The plaintiff company was engaged in a general merchandise business in Mesa. Their store fronted on Main street immediately west of the bank. The company also owned and occupied in connection with their store a warehouse situated immediately south of the bank building and fronting east on McDonald street. Along the east property line of McDonald street there was reserved and used as a sidewalk a strip 10 or 12 feet in width, and for many years prior to the building of the city sewer an irrigating ditch had been constructed and used by the city for carrying irrigating water to the city lots, which ditch ran along the outer edge of the space reserved for sidewalk.

"At the time the sewer system was built and the connections above mentioned were made, the bank had constructed a cement sidewalk along the east line of its property on McDonald street, which cement sidewalk covered the entire sidewalk reservation from its building to the irrigating ditch above mentioned—width of 10 or 12 feet—and had also replaced the irrigating ditch above mentioned, with a cement gutter the length of its sidewalk.

"Thereafter the irrigating water flowed in said gutter to the end of the sidewalk, and then dropped into the earth irrigating ditch above mentioned. Running south from the south end of the bank sidewalk and through the center of the reserved sidewalk space above mentioned was a narrow sidewalk about 3 feet in width, leaving a space of 3 or 4 feet in width between the sidewalk and the buildings

Digitized by Google

on one side and the irrigating ditch on the other unpaved.

"The sewer contractor in performance of his contract with the city was required to make a sewer connection with the bank building at a point about 6 or 8 feet north of the south end of the wide cement sidewalk above mentioned. In order to avoid the inconvenience of having to tunnel and excavate a trench under the whole width of the wide sidewalk, in which to lay this sewer connection, the contractor dug the trench along or near to the south end of the wide sidewalk, to the basement wall of the plaintiff's warehouse, thus cutting through the earth irrigating ditch above mentioned, and then scooped the earth out from under the wide cement sidewalk and threw it up on each side of the narrow sidewalk. After laying the connecting pipe to the property line of the bank building, the contractor threw back the earth into the excavation thus made, and, instead of tamping it firmly and compactly, as his contract required, attempted to settle it by letting water into it. After thus settling the earth-filled trench, this earth fill settled, and left a depression where the excavation had been, and in which the sewer connection was laid. About one year thereafter the earth irrigating ditch above referred to broke at the point where it had been intersected and cut by the contractor in laying this sewer connection, and the water from this irrigating ditch followed the depression along the line of the insufficiently and improperly filled excavation made by the contractor in laying the bank sewer connection, and ran through the basement wall of the plaintiff's warehouse, filling it to a depth of 6 to 8 feet with water, and damaged the goods and merchandise of the appellees."

The appellees in their complaint claimed $5,000 damages, and the jury returned a verdict in their favor in the sum of $2,500.

G. W. Silverthorn, of Mesa, and F. H. Swenson, of Phœnix, for appellant.

Kibbey, Bennett & Jenckes, of Phœnix, for appellees.

BAKER, J. (after stating the facts as above). The only reasonable construction of the verdict in this case is that the negligence of the appellant in excavating the trench from the main line of the sewer laid down in the middle of McDonald street to the basement wall of the appellees' warehouse and insufficiently tamping down the loose earth returned to the trench, was the proximate cause of the damages to the appellees' goods and merchandise. This is the negligence or fault charged in the complaint. It is maintained by the appellees that the uncontradicted evidence shows that when the irrigating ditch broke at the point of its intersection with the trench the water escaping from the irrigating ditch flowed down the depression in the trench, caused by the insufficient tamping, to the basement wall of the warehouse, and thence made its way into the cellar, and did the damages complained of. The appellant does not seriously contend that it was not negligent in the work of excavating the trench and insufficiently tamping down the loose earth thrown back into the trench, but seeks to avoid liability for the damages suffered on the theory that its negligence was not the proximate cause of the damages complained of, for the reason that the water was let out of the irrigating ditch into the negligently filled trench by a gopher, or other burrowing animal, in the banks of the irrigating ditch, and that such work of the gopher, or other burrowing animal was an intervening cause without which the damages complained of would not have happened, and that therefore the appellant is not liable.

The correctness of the appellant's assumption that the break in the banks of the irrigating ditch was caused by a gopher or some other burrowing animal might well be questioned. There is much evidence in the record, pro and con, upon the point; but, since there was no special finding of the jury upon the question, it is impossible to say what the jury believed was the cause of the break. But we do not understand that if it was true that a gopher or other burrowing animal caused the break, such fact would make any difference in the liability of the appellant.

[1] It is a principle of law, well established by the authorities, that where several proximate causes contribute to an accident, and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless without its operation the accident would not have happened. These rules have full support in the text-books, as well as in our cases. 29 Cyc. 497; 1 Shear. & R. Neg. par. 10, note 2, and cases cited; 16 Am. & Eng. Enc. of Law, 440–442; Crandall v. Cons. Tel., etc., Co., 14 Ariz. 322, 127 Pac. 994; Phœnix Ry. Co. v. Beals, 20 Ariz. 386, 181 Pac. 379.

Mr. Bishop in his work on Noncontract Law (paragraph 39) thus states the proposition:

"When the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. This is one form of a universal principle in the law that he who contributes to a wrong, either civil or criminal, is answerable as doer. And it is immaterial to this proposition whether that to which he contributes is the volition of a responsible person, or of an irresponsible one, or whether it is a mere inanimate force, or a force in nature, or a disease."

[2] This rule, imposing liability on a defendant, applies where the concurring cause may be the act of an animal for which the defendant is not responsible, if the injury would not have resulted but for his negligence. Thus Mr. Sutherland in his comprehensive work on Damages, vol. 1 (9th Ed.) at par. 37, says:

"There may be intervening operations of nature, acts produced by the volition of animals

Digitized by Google

or of human beings, innocent acts of the injured party, or of third persons, and even tortious acts of the latter, and the chain of cause and effect not be necessarily broken or the result rendered remote. The test is not to be found in any arbitrary number of intervening events or agents, but in the character and in the natural and probable connection between the wrong done and the injury."

See, also, 29 Cyc. 499; McDonald v. Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768.

Applying the foregoing principles, it is plain to be seen that the utmost the appellant can claim is that the action of the gopher concurred with the appellant's negligence in producing the damages. This is the sum total of the whole argument, and under the authorities cited that fact does not relieve the appellant from liability.

Under the evidence, the jury was fully justified in finding that, had the trench been properly constructed, and the loose earth properly tamped down, the damages would not have occurred, even though a gopher had perforated the banks of the irrigating ditch and let the water out. In such case, there would have been no depression or conduit through or over which the water might run to the basement wall of the appellees' warehouse.

[3] It is insisted, however, that the causes were not concurrent because they did not happen at the same time, and it is reasoned that the action of the gopher, being nearest in point of time to the damages, was the proximate, and the appellant's negligence the remote, cause of the damages. But the law upon this point is clear. Whether a cause which contributes to an accident is proximate or not is not determined with reference to the order in which the several contributing elements succeed one another, but with reference to the efficiency of these elements. 29 Cyc. 491; 16 Am. & Eng. Enc. of Law, 436, 444; Lawson, Rights, Rem. & Pr. p. 1743, § 1029. The jury, under the evidence, might well have concluded that the negligently constructed trench was the efficient cause of the damages, although it was first in point of time in the succession of events.

[4] The appellant argues that it had no reason to anticipate that damages to the appellees' goods and merchandise might result as a consequence of its negligence. While there are some loose expressions in the books to the effect that one is not liable for negligence unless the results of his acts might reasonably have been foreseen by him, the true doctrine, as we understand it, is that it is not necessary to a defendant's liability that the consequence of his negligence should have been foreseen. It is sufficient if the damages are the natural, though not the necessary or inevitable, result of the wrong; such damages as are likely, under ordinary circumstances, to ensue from the act or omission in question. The test, after all, is, Would ordinary prudence have suggested to the person sought to be charged with negligence that his act, or omission, would probably result in damages to some one? The particular result need not be such as that it should have been foreseen. 29 Cyc. 493–495.

[5, 6] Of course, it was incumbent upon the appellees, not only to prove negligence on the part of the appellant, but also to show that such negligence was the proximate cause of the damages. What is the proximate cause, that is, the immediate and operating cause of an injury, is often a vexatious question. It is, however, usually a question of fact. Mr. Justice Strong, in Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, stated the rule to be followed in the solution of the question as follows:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

We think there was sufficient testimony to take the case to the jury on this proposition. The instructions given by the trial court on the subject were correct, and with the finding of the jury thereunder we are not disposed to interfere.

[7-9] The appellant takes exception to the following instruction given by the trial court to the jury with reference to the method proper to be adopted by the jury in arriving at the amount of damages sustained by the appellees, viz.:

"If you believe from the evidence that the city in the construction of said sewer connection had been negligent in any particular in doing said work, and that by reason of such negligence water was discharged into plaintiff's basement storage room and thereby damaged or destroyed plaintiff's goods therein kept, then plaintiff is entitled to damages. His damage would be the depreciation in the value of the goods submerged, the cost of restoring them to a condition for sale, the actual difference between the value of the goods in their condition and the prices for which they were sold, if they were sold, and the resultant loss of trade resulting therefrom, and in the difference in cost of replenishing said stock of goods if you find there was such an increased cost in obtaining new goods to replace the old."

Without pausing to point out the particulars, we are fully convinced that the instruction on the measure of damages is erroneous. But mere error in an instruction may not be sufficient to warrant the interference of this court. The error for which a reversal is to be directed must be one which operates prejudicially to the appellant. 4 Corpus Juris, 908. The measure of damages for injuries to personal property less than its destruction is the difference in the value of the property immediately before and immediately after the injuries. 2 Sedgwick on Damages, par. 435.

Digitized by Google

The uncontradicted evidence in this case shows that the value of the goods damaged was $5,312, before the cellar was flooded (giving the appellees by far the worst of the calculation), and that these goods were damaged to the extent of two-thirds of their value by the water. The difference, therefore, between the value of the goods before the damage and immediately thereafter was $3,500, and the verdict was for $2,500. It is quite clear that the appellant was not prejudiced by the erroneous instruction.

We have discussed all the questions presented by the record which appear of importance. We find no reversible error in the record, and, believing that the case was justly decided in the lower court on its merits, we affirm the judgment.

ROSS, J., concurs.

CUNNINGHAM, C. J. (dissenting). I dissent from the order affirming the judgment. I am convinced that the erroneous instruction on the measure of damages recoverable is calculated to deprive the defendant city of a fair trial. For that reason, a new trial should be granted; the error being manifest. We are not able to say definitely that no injury resulted from a glaring error.

SLATTERY v. GROSS et al.

(Supreme Court of Oregon. June 22, 1920.)

Department 2.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

On rehearing. Original opinion modified.

For former opinion, see 187 Pac. 300.

H. E. Slattery, of Eugene, for appellant.

A. C. Shaw, of Portland, for cross-appellants.

E. R. Bryson and O. H. Foster, of Eugene (Smith & Bryson and L. Bilyeu, all of Eugene, on the brief), for respondents.

BENNETT, J. In this case there is a petition for rehearing on behalf of plaintiff, and another in behalf of defendants Gross and McCallum.

The plaintiff claims that she is still not fully protected by the decree outlined in the original opinion, and the defendants Gross and McCallum ask that the decree shall provide that execution issue in favor of the defendants Nancy J. Shelley and J. M. Shelley against the plaintiff, as well as McCallum and Gross, and also that it adjudicate the rights of these latter defendants among themselves. It is claimed that the defendant McCallum has paid $180 more than Gross, and that this should be taken account of, and that the decree should also provide for a judgment over, in case one of these defendants shall prove insolvent, or one shall be compelled to pay more than his share.

Of course the plaintiff is entitled to recompense for any loss she may suffer by reason of the default of the defendants, and the decree in this case should provide for a judgment in her favor against each of the defendants, for one-sixth of the market value of the property in question, in case it is sold on foreclosure, as in the decree provided, less any sums which may have been otherwise realized by plaintiff on such one-sixth interest. She would not be entitled to recover the excess paid by her, as that might be much more than the real value of the property. The decree will provide that the circuit court shall retain jurisdiction of the cause, to find the value of the property and the amount of plaintiff's claim remaining unsatisfied, if any, at the end of a foreclosure proceeding, and to enter general judgments in favor of the plaintiff therefor in accordance with foregoing.

We think the pleadings and the record of the appeal are not in such shape that we can give the Shelley defendants a personal decree against the plaintiff, or against the Matlock estate, and in that regard the decree of the court below must stand. Neither do we think there are any issues made by the pleadings upon which we could try out the rights of Gross and McCallum, as between themselves. They make no separate appearance but join in one answer. There is no allegation that one has paid more than the other, and no allegation that either is insolvent, and no prayer for relief as between each other. The decree, however, should be without prejudice to the rights of either, as against the other, which may grow out of the transaction.

We think, however, that the previous opinion should be modified as to the distribution of any amount received from a foreclosure (if there shall be any) after satisfying the claim of Mr. and Mrs. Shelley, and the claim of the plaintiff, so that such surplus shall be divided between the defendants Gross and McCallum in proportion to the amounts which shall have been previously collected from each, rather than by equal division, as indicated in the original opinion, and that the court below shall retain jurisdiction to fix such amounts, if that shall be necessary. In all other respects the original opinion is adhered to.

The petitions for rehearing are denied.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Digitized by Google

BROWN v. McCLOUD.

(Supreme Court of Oregon. June 15, 1920.)

1. **Animals ⟸100(4)—Damages by trespassing sheep sufficiently proven.**

Evidence *held* sufficient to support a finding that land depastured by sheep was damaged to the extent of $250.

2. **Damages ⟸6—Certainty not essential to recovery.**

Where defendant's sheep, and those of other parties, trespass upon plaintiff's land, and damage it by eating the grass and bedding upon it, the approved practice is to leave the question as to the amount of the damage done by defendant's sheep to the good sense of the jury as reasonable men to form from the evidence the best estimate that can be made under the circumstances.

3. **Damages ⟸6—Need not be exactly calculated.**

It is not a sufficient reason for disallowing damages claimed that they cannot be exactly calculated, it being sufficient that from approximate estimates of witnesses a satisfactory conclusion can be reached.

4. **Animals ⟸92—Trespass to herd sheep upon unfenced land.**

That lands were unfenced and stock could roam thereon at will did not authorize defendant to herd or drive his sheep upon the land, nor to permit them to graze thereon.

5. **Trial ⟸191(11)—Charge on damages not erroneous as suggesting that exemplary damages might have been allowed if prayed for.**

An instruction, "there is only one kind of damages which you may find in this case, that is compensatory damages; no exemplary damages are asked, and therefore you may only allow compensatory damages, if any at all"—was not erroneous as implying that, if exemplary damages had been asked by plaintiff, it would have been the duty of the jury to allow them.

6. **Costs ⟸184(1)—Double mileage and per diem fees to witness allowed without showing actual payment.**

Court did not err in allowing double mileage and per diem fees to a witness for plaintiff under L. O. L. § 818, although there was no showing that the witness was actually paid double fees.

7. **Witnesses ⟸14, 24—Witness may, but is not required to, demand double fees in advance.**

A witness entitled to double fees under L. O. L. § 818, may demand his fees in advance, but, in order to collect the same, he is not required to do so.

Appeal from Circuit Court, Harney County; Dalton Biggs, Judge.

Action by R. H. Brown against Donald McCloud. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for damages on account of trespass by defendant's sheep. For about 30 years plaintiff has been engaged in the sheep business in Harney county, Or., and is the owner of 560 acres of unfenced pasture land situated about 75 miles south of Burns, Harney county, in what is known as the "Steen's Mountain Country." The complaint is in the usual form. The answer consists of a denial of the averments of the complaint, except as to the ownership of the land.

The testimony indicated that in 1917 there was growing upon the plaintiff's lands a good crop of natural wild grasses, which the plaintiff was reserving for use as fall range for his sheep. The defendant is likewise engaged in the sheep business, and during the summer of 1917 was running a band of approximately 2,900 sheep. He leased 40 acres of land near that of plaintiff, and ran the sheep on the public range in the vicinity of plaintiff's land. Between August 5th and September 10th of that year defendant, without the consent of plaintiff, grazed his band of sheep on plaintiff's lands, resulting in the eating off of the grasses growing thereon and denuding the pasture, and rendering the same worthless for that year. Plaintiff was away from the lands during the time. Upon returning to them about September, and ascertaining the condition, he demanded payment of defendant and instituted this action for $500 damages. Upon trial of the case before a jury a verdict for plaintiff was rendered in the sum of $250. From the consequent judgment defendant appeals.

W. H. Brooke and P. J. Gallagher, both of Ontario, for appellant.

M. A. Biggs, of Ontario, for respondent.

BEAN, J. (after stating the facts as above). [1] It is contended by defendant that plaintiff did not show what, if any, damage was done to his land by defendant's sheep. This contention is not supported by the record. The plaintiff, testifying in his own behalf, stated in regard to this point that in the latter part of September, 1917, the grass was all eaten off the land; that the sheep had bedded there; and that he placed the reasonable market value of the growing grass on the land for that year at $500 or $600.

John Mason, a witness for plaintiff, testified that he tended camp for one B. B. Clark, a sheepman who was running sheep on the range; that he counted the defendant's sheep; that in going back and forth for supplies between September 15, and October 5, 1917, he saw defendant's sheep grazing on plaintiff's land four different times, saw the bedding place of the sheep there several times, and the herder's bed on the land twice. When he first saw the defendant's band of sheep on the land the grass was "pretty

Digitized by Google

good." After the sheep had grazed thereon "the grass was all gone."

Claud Smyth, a witness for plaintiff, testified, in effect, that during the season of 1917 defendant had a band of about 3,000 wethers ranging in the neighborhood of plaintiff's lands; that in the latter part of August he saw them 300 or 400 yards from plaintiff's land; that there were fresh tracks all over the lands; and that he did not see nor know of any other sheep in that neighborhood at the time. He also testified that he had known the land in question all his life, and placed the reasonable market value of the grass growing thereon at $1 per acre; that in the latter part of August or the first part of September he saw the lands, and "there was no grass there." Other witnesses testified to the same effect in regard to the market value of the grass on the land for that season.

It was the defendant's claim and he introduced testimony tending to show that plaintiff's land had not been depastured by defendant's sheep. The testimony on behalf of plaintiff sustained the complaint. It was as definite as to the amount of damages as it could well be in a case of this kind.

[2] It was in evidence that other stock trespassed upon plaintiff's land during that season. Defendant complains that the court submitted to the jury the question of how much damage, if any, plaintiff was entitled to recover from defendant. Where the injury occasioned by the tortious act of a defendant is indistinguishable from that arising from a like act of others, the approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances. Jenkins v. Penn. R. Co., 67 N. J. Law, 331, 51 Atl. 704, 57 L. R. A. 309; Ogden v. Lucas, 48 Ill. 492.

[3] It is not a sufficient reason for disallowing damages claimed that they cannot be exactly calculated. It is sufficient if, from proximate estimates of witnesses, a satisfactory conclusion can be reached. 17 C. J. § 91, p. 761. There was no error in the trial court thus submitting the question for determination.

[4, 5] Defendant criticizes instruction No. 2, which is to the effect that, if the jury found "that the defendant entered the premises of the plaintiff, that would constitute a trespass, unless it was with the consent of the plaintiff." It is claimed that the land was situated where sheep were "accustomed to cross at will," and that the charge did not cover the law. At one time this was a much mooted question in the range country. The lands were unfenced, and stock could roam thereon at will; but this fact did not authorize the defendant to herd or drive his sheep upon the plaintiff's land nor permit them to graze thereon. This has been the rule in this state since the rendition of the opinion in the case of French v. Cresswell, 13 Or. 418, 11 Pac. 62, 17 Am. Neg. Cas. 217. This case was cited and followed in the cases of Bileu v. Paisley, 18 Or. 47, 51, 21 Pac. 934, 4 L. R. A. 840; Strickland v. Geide, 31 Or. 373, 49 Pac. 982; and Pac. L. Co. v. Murray, 45 Or. 103, 107, 76 Pac. 1079. As we read the record, the same question is raised in the present case in a different form. Error is predicated upon instruction No. 6, which is as follows:

"There is only one kind of damages which you may find in this case; that is compensatory damages. No exemplary damages are asked, and therefore you may only allow compensatory damages, if any at all; and by compensatory damages is meant damages in such an amount as will pay the plaintiff for the injury, if any, done by the defendant's sheep."

We think this instruction is fair and within the law. Defendant suggests that the charge implies that if exemplary damages had been asked by plaintiff it would have been their duty to allow them. We cannot give the language such meaning. The instruction is favorable to the defendant in limiting the amount that might be found by the jury. The learned counsel for defendant did not present the law set forth in this part of the charge in language more acceptable to the defendant or request any more specific instruction. We find no error in the charge submitting the cause to the jury.

[6, 7] Error is assigned in the allowance of double mileage and per diem fees to Sid Skinner, a witness for plaintiff. This witness resided and was served outside of Harney county and more than 20 miles from the place of trial, and was compelled to attend as a witness upon the trial pursuant to section 818, L. O. L., and was entitled to double fees. Burrows v. Balfour, 39 Or. 488, 65 Pac. 1062. The objection made is that it is not shown that the witness was actually paid double fees. A witness may demand his fees in advance, but in order to collect the same he is not required to do so. The same rule would apply to double fees as to single.

Believing that the case was fairly tried, and finding no reversible error in the record, the judgment of the lower court is affirmed.

Digitized by Google

STATE v. ZULLIG.

(Supreme Court of Oregon. June 22, 1920.)

1. Homicide ⟸174(8)—Evidence that defendant said that he did not question his children concerning death of wife held admissible.

In a prosecution for uxoricide, where the state relied on circumstantial evidence, it appearing that the woman was killed with defendant's own gun and that he was the only adult known to be in the vicinity, evidence that defendant stated he did not question his two boys, both of whom were less than five years old, because they could not or would not answer, etc., together with evidence as to the intelligence of the children, was admissible under L. O. L. § 727, providing that evidence may be given of the declarations, acts, or omissions of the parties, for if, as claimed by defendant, his wife was killed while he was away driving in cows, it would seem most natural that he would question his children, and not make false statements as to their intelligence.

2. Criminal law ⟸364(4) — Statements by defendant as to inability of his children to give information as to the crime not res gestæ.

The doctrine of res gestæ applies, where declarations of third parties are offered in evidence, or where the declarations of a party in his own favor are offered, so statements by defendant, who was accused of uxoricide, that he did not attempt to inquire as to the crime from his young children, because they could not or would not talk, are not admissible as part of the res gestæ.

3. Criminal law ⟸1054(1), 1064(4)—Objection to inquiry of district attorney as to story of defendant's children not reviewable, where no exception nor ground for new trial.

The act of the district attorney in inquiring as to the story of defendant's children of the killing of their mother, whom defendant stated he had not questioned, etc., *held* not preserved for review; there being no exception, and the matter not being made a ground for motion for new trial.

4. Criminal law ⟸351(10)—That defendant authorized taking of his children out of jurisdiction admissible.

In a prosecution for uxoricide, evidence that before the trial defendant by written order authorized the taking of his children, who had been present at the offense, out of the jurisdiction, is admissible, although defendant might well have been actuated by proper motives.

5. Homicide ⟸268—In prosecution for uxoricide, evidence held sufficient to go to jury.

In a prosecution for uxoricide, where defendant was the only adult in the vicinity, and his wife was killed with his own gun, circumstantial evidence *held* sufficient to carry the case to the jury.

6. Criminal law ⟸741(6)—Question of weight of circumstantial evidence peculiarly for jury.

The question of the weight of circumstantial evidence is peculiarly for the jury.

7. Homicide ⟸250—Where there is doubt as to grade of offense, jury should find manslaughter.

Under L. O. L. § 1528, where the jury in a prosecution for uxoricide are in doubt as to the grade of the offense, they should find defendant guilty of manslaughter.

8. Criminal law ⟸1144(8)—Jury being in part selected by defendant, presumption is that they will be impartial.

The presumption on appeal, the jury being in part selected by defendant, is that the jury will be entirely fair and impartial.

In Banc.

Appeal from Circuit Court, Lake County; L. F. Conn, Judge.

Robert Zullig was convicted of homicide, and he appeals. Affirmed.

Robert Zullig, the defendant, was indicted by the grand jury of Lake county, Or., for murder in the second degree. He was charged by the indictment with the shooting of his wife, Emma Zullig, in the northern part of Lake county on October 11, 1918. The defendant and his wife lived in an isolated part of the county, where the settlement was sparse, and there were no neighbors closer than several miles away.

The fact that deceased came to her death from two gunshot wounds fully appears from the direct evidence of those who saw the body and examined the wounds the ensuing day, but the evidence connecting the defendant with the killing is entirely circumstantial, and consists largely of his own statements and conduct in relation to the death of his wife. On the evening of the 11th of October, 1918, the defendant appeared about 9 o'clock in the evening at the house of a neighbor, living 7 or 8 miles from his home, and reported that his wife was dead, that she had been shot, and that he thought it was an accident. He further stated that after supper that evening he went away to a pasture, about a mile and a quarter distant from his house, to drive in his cows, and that when he got back to the gate near the house he met his little boy carrying their gun; that, seeing the gun, he thought something had happened, and immediately went to the house, and found his wife lying dead in the front yard.

The next day at the coroner's inquest it developed that Mrs. Zullig had been shot twice—one ball having entered the right breast, and ranged backward and a little up, and was found just under the skin over the middle of her left shoulder blade. The other ball had passed through the left arm, broken it about the middle of the arm, and entered the left side, and, being deflected by a rib, apparently, had turned downward, also lodging just beneath the skin near the spine, and about a half an inch below the twelfth

Digitized by Google

rib. The evidence tended to show that these bullets had been fired from a Marlin rifle belonging to the defendant, and which usually hung on two nails in an alcove in the sitting room in the back central portion of the house. The two children of the defendant and the deceased, who were living with them on the place, were boys—one about two and the other a little over four years old. According to the evidence, the defendant told several people, about the time and shortly after the killing, that he made no effort to get the children, and especially the older boy, to tell what had happened, because they could not or would not talk—that they could not speak in sentences, so he could get any information from them. The evidence of other witnesses tended to show that these children were more than ordinarily intelligent, and that the older one, especially, was fully able to talk and tell a story, and give his impressions in a childish way.

After the arrest of the defendant the children were placed in the custody of a neighbor, who kept them to within a week or ten days before the trial, when they were taken away by a Mr. Staheli, a brother-in-law of the defendant, and a brother of the deceased, upon a written order of the defendant, and he is supposed to have taken the children to somewhere in the East.

Gus C. Moser and Roy K. Terry, both of Portland, for appellant.

George M. Brown, Atty. Gen., and T. S. McKinney, Dist. Atty., of Lakeview, for the State.

BENNETT, J. (after stating the facts as above). The errors relied upon, upon this appeal, refer principally to the admission of evidence on behalf of the state, as to the intelligence and capacity of these children, and their ability to talk and give a statement of the occurrence, and the statements of the defendant as to his reason for not questioning them, and that they were unable to talk, and the denying of defendant's motion for a directed verdict and to set aside the judgment for lack of evidence.

[1] We think there was no error of the court in admitting the evidence as to the intelligence and capacity of the children. As there were no eyewitnesses to this tragedy, except the defendant himself and these two children, and the state was compelled to depend entirely upon circumstantial evidence to connect the defendant with the death of his wife, his every word and act in relation to the transaction, in so far as it might tend to show guilt upon his part, was exceedingly important. If his actions in relation to the occurrence were extraordinary or unusual in any regard, or if his explanation of any of his actions was unreasonable and improbable, it became a circumstance to be weighed against him, together with the other circumstances, by the jury.

It was a reasonable contention on the part of the prosecution, which might weigh more or less strongly with the jury, that an innocent man, coming home after a short absence, and finding his wife shot to death in the yard, and the children of that age immediately about, would immediately have commenced to solicitously inquire from them as to the way in which the tragedy had occurred, and to address himself as best he could to obtain from their childish intellect and childish minds some clue to the cause and manner of the homicide. If he did not do so—if he did not make any inquiry from them whatever, or seek in any way to obtain any information—the jury might consider it unusual and unnatural conduct, which would weigh very heavily against the truth of his story. If, in addition to this, he gave false statements as to the capacity and intelligence of the children, and offered this as an explanation for his unnatural and unusual conduct, it might add strongly to the weight of his actual failure to inquire.

It would seem only natural that an innocent man, if confronted with a situation of this kind, should not only inquire himself of his children in every possible way, but should assist and encourage the neighbors to talk with them about it, and make inquiry, so that every possible clue which might indicate the real cause of the homicide, and the person who was the cause of it, might be obtained. Most persons, we may assume under such circumstances, would have been anxious to have the neighbors know that he had nothing to cover up, and that he was ready and willing to throw any light upon the transaction which could possibly be secured. If the defendant did not do this—made no inquiry himself from the children as to how the homicide had occurred, and discouraged others from inquiring of them by disparaging their ability to talk and making it appear less than it was—that was certainly a circumstance to be weighed against him with other circumstances in arriving at a conclusion as to whether his story as to his absence at the time his wife was shot, and his innocence of any participation in the tragedy, was true.

[2] It is urged on behalf of the defendant that these declarations of the defendant in relation to the capacity of the children—not being made at the immediate time of the homicide, and not being directly in relation to that occurrence—were not part of the res gestæ, and a number of authorities, amongst others State v. Smith, 43 Or. 109, 71 Pac. 973, and State v. McCann, 43 Or. 155, 72 Pac. 137, are cited to support the contention. These cases would be squarely in point, if

Digitized by Google

the admissibility of this testimony depended upon the doctrine of res gestæ. But the admissibility of this evidence did not depend upon that doctrine at all. The doctrine of res gestæ applies where the declarations of third parties are offered in evidence, or where the declarations of a party in his own favor are offered. In either of these cases the declaration is only admissible if it was made immediately at the time of the transaction and was a part of the occurrence.

This evidence was not admissible upon that ground, nor for the purpose of impeaching the defendant as a witness. It was admissible, however, under another elementary principle—that the declarations of a party, either in a criminal or civil action, are admissible against him as declarations against interest. This principle is too elementary and too well established to be subject to any question. It was so at common law. In Greenleaf on Evidence (16th Ed.) vol. 1, § 171, it is said:

"The general doctrine is that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence."

And again in section 195:

"In general, a party's conduct, so far as it indicates his own belief in the weakness of his cause, may be used against him as an admission, subject, of course, to any explanations he may be able to make removing that significance from his conduct. In particular, 'falsehood is a badge of fraud, and a case which is sought to be supported by means of deception may prima facie, until the contrary be shown, be taken to be a bad and dishonest case;' and this applies equally to civil and to criminal cases."

And section 727, L. O. L., provides that evidence may be given on the trial of "the declaration, act, or omission of a party as evidence against such party."

In the case of State v. Smith, supra, cited by appellant, the declarations of the defendant were offered by the defendant himself, in his own favor, and of course such self-serving declarations were not admissible in evidence in his favor, unless they were a part of the res gestæ. In State v. McCann, supra, the person whose declarations were offered in evidence was not a party at all, but a witness, and the declarations offered were offered for the purpose of impeachment. These cases do not bear at all upon a case like the present, where the admissibility of the evidence depended upon the fact that it was a declaration of the defendant out of court, against his own interest, and in the nature of an admission, and was offered against him, and not in his favor.

There was, therefore, no error in this case in admitting the declarations of the defendant that he had made no inquiry of the children as to the circumstances of his wife's killing, and his explanation of the reason why he did not, and of the falsity of that explanation, if it was false. If the four year old boy was an ordinarily—or more than ordinarily—intelligent boy, and was able to tell a story in relation to anything that had occurred, as was testified by the witnesses, and if he was able to tell these comparative strangers a story of how the killing occurred, it would surely be true that the defendant himself, who was their father, could also have talked with him and elicited some story as to the death of their mother, and how it came about, and if he made no such inquiry, and did not attempt to do so, as he told several witnesses, according to their testimony, and gave a false reason for not doing so, these were circumstances which the jury had a right to consider.

[3] It is also urged on behalf of the defendant that it was improper for the district attorney to ask the witness in the presence of the jury, as to the story which the children had given of the transaction, giving to the defendant and his attorney the opportunity to object to the testimony, if he saw fit. There was no exception to the conduct of the district attorney in this regard, and the court immediately ruled the question improper, and there was, of course, no exception to any ruling of the court. Neither was any alleged misconduct of the district attorney in this regard made a ground for a motion for a new trial. Under these conditions, we do not think the propriety or impropriety of this question, under the circumstances, is before the court for decision.

Under such conditions the district attorney is sometimes placed in a more or less embarrassing position. Here, having proved the fact necessary to his case, that the child was able to and would talk about what had occurred, and was able to and did talk about the occurrence, and tell a story as to how his mother's death occurred, the jury would naturally expect to hear what that story was, and would, if the state did not offer to prove the same, be likely to conclude that there was something in the statement that would be against the theory of the state, and that the state had therefore prevented the same from being disclosed. The children themselves had been removed from the state and were out of reach of a subpœna. Probably the district attorney made the order of proof to clear his skirts of any apparent suppression of evidence, leaving it to the defendant to object to the testimony, if he desired to have it excluded.

Individually, the writer of this opinion can see no impropriety upon the part of the district attorney in offering to present this proof, and giving the attorneys for the defendant an

Digitized by Google

opportunity to admit or exclude the testimony, as they saw fit. But in any event it is clear that the question is not before the court, and there is no error of the court in that regard which could result in a reversal.

[4] Neither do we think there was any error in admitting the written order of the defendant to Mr. and Mrs. Hinner, directing them to turn the children over to defendant's brother-in-law, to be taken out of the state. It is true that the action may have been entirely innocent on the part of the defendant, and may have been taken for the best interests of the children; but coming, as it did, so immediately prior to the trial, it was a circumstance which might, in the judgment of the jury, bear upon the other evidence in the case, and, taken together with the fact that the defendant did not, immediately after the killing, make any inquiry of the children, as to how the death of the mother had occurred, and discouraged others to do so by asserting that they could not talk, the jury might be justified in drawing the inference that he sent them away to prevent their evidence, especially that of the older child, from being presented to the jury. While the circumstance may not have been of great weight, yet it was properly a matter for the jury to consider, and to be presented to them for that purpose.

[5] The only other question presented in the case is as to the sufficiency of the evidence to sustain the verdict and make it proper for the court to deny the motion for a directed verdict. We think the evidence was entirely sufficient to make the question one for the jury. That the woman was killed, and killed by two gunshot wounds, was beyond question. So far as the evidence disclosed, the defendant—according to his own statement—was the last known adult person who saw her before she was killed, and the first one present after she was killed.

It seems perfectly plain that there were only five possible theories upon which her death could be explained. (1) Suicide; (2) accident; (3) accidental killing by the four year old child; (4) an attack and killing by some outside person during the interval between the time when the defendant claims to have gone for the cows and his return; (5) killing by the defendant, and the resulting untruthfulness of his story in relation thereto. The jury may have eliminated all these theories, except the last, as unreasonable and improbable.

They may very well have considered the suicide theory as unreasonable, and even impossible. In the first place, there was no evidence to show that the deceased was in such a state of health, or in such mental condition, as to be at all likely to commit such an act, and indeed the effect of defendant's own statements was against any such conditions. Then, too, the character of the gun and the character of the wounds and their range might have seemed to the jury to make it impossible that she could herself have fired the two shots in such a way as to make the wounds and take the range which they did.

The theory of accident might seem to the jury just as impossible. The fact that those two wounds, one of which broke the left arm of the deceased, and the other passed through the heart, and must have been almost immediately fatal, and the fact that the gun was a lever gun, which would have to be reloaded by throwing a cartridge from the magazine to the barrel, before the second shot could be discharged, together with the points where the bullets entered and the range they took, might well have made it seem to the jury impossible that both these shots were fired by accident, or that one was fired accidentally and the later one intentionally.

The difficulties in sustaining the theory that the deceased reloaded the gun by the lever and fired one of these shots herself after the other one had taken effect, which would have to be done, after her left arm was broken in the one case, or after she was shot through the heart in the other, are obvious. It was just as difficult to explain the occurrence upon the theory that the four year old child fired both of these shots from some childish impulse, and was able to reload the gun between the firing of the two shots.

There were also difficulties, although perhaps not so entirely insuperable, in the way of the theory that the homicide was committed by an outsider, in an attempt to rob or commit some vicious attack. There is no evidence that any one had been seen in the immediate vicinity on that evening, and the evidence tended to show that search was made and no tracks were found in the soft, sandy soil immediately surrounding the premises. There was no evidence of any struggle, or that the clothes of deceased were torn in any way. The evidence seems to have conclusively established that the shots in question were fired with the defendant's gun, which usually hung on nails in the middle or back portion of the house. It would have to follow, if the killing was done by an outside person, that he had in some way succeeded in getting possession of defendant's own gun, and then, after killing Mrs. Zullig with it, threw it down partially loaded and made his escape.

Whether any of these theories were reasonable and probable, was for the jury. If these theories were eliminated, it would seem to follow inevitably that the defendant's story in relation to the homicide was not true, and that he himself had committed the crime.

Digitized by Google

Then there were a number of affirmative circumstances which might bear more or less against the defendant—his delay in going for help after he reached home; his waiting to remove the cartridges from the gun and to wash and clean it; his hesitation and reluctance in announcing the death of his wife, and in explaining what he claimed to know of it when he reached Anderson's that night; his disinclination and refusal to permit any of the neighbors to stay at the house that night, when they got there about midnight; his wiping and cleaning up the blood about the premises before any one reached there to inspect it; his failure to show any interest in tracing the cause of the death at the coroner's inquest and afterwards; his failure to inquire of the boy, or to make any effort to find out anything about it; his claim that the boy could not talk sufficiently to tell a connected story, which the jury may have believed false; the burning up of his wife's clothing, which she wore at the time she was killed; the sending the children away immediately before the trial; and many other circumstances were before the jury for its consideration. It is only fair to say that there were also circumstances and features in the conduct of the defendant, which seemed in his favor, but all these circumstances for and against were for the jury, and were submitted and no doubt weighed by it.

[6] A case of circumstantial evidence is peculiarly one for the jury. It is for them to weigh the probabilities and the different theories presented; to say whether each theory is reasonable or possible; to weigh the conduct of the defendant as presented by the evidence, and say whether it indicated conscious guilt or was the natural action of an innocent man under such circumstances. It is not for us to say what our conclusion would be, in view of the same evidence, and under the same circumstances; but we think the evidence was entirely sufficient to make the case one for the consideration of the jury.

[7] If the jury believed that the defendant did the killing, but they were in doubt, and could not tell whether it was malicious or under sudden provocation, which would reduce it to manslaughter, they were bound to give defendant the benefit of the doubt, and bring in a verdict for the lesser offense. L. O. L. § 1528. There was no error, therefore, in refusing to direct, or in refusing to set aside the verdict when rendered, and grant a new trial.

[8] The jury was selected partly by the defendant, and must be presumed to have been entirely fair, and the case was submitted to it under instructions of which there is not the slightest complaint.

We think the judgment of the court below must be affirmed.

McFARLAND v. HUENERS.

(Supreme Court of Oregon. June 22, 1920.)

1. Appeal and error ⟸417(1) — Liberality should be indulged in judging sufficiency of notice of appeal.

Great liberality should be indulged in, in judging the sufficiency of notice of appeal.

2. Appeal and error ⟸419(2)—Discrepancy in date of judgment not fatal to notice of appeal.

Mere discrepancy in the date of judgment, as recited in the notice of appeal, is not fatal, where the judgment is otherwise sufficiently identified by the transcript to inform the adverse party fairly as to the judgment really appealed from.

3. Appeal and error ⟸419(1)—Notice of appeal is sufficient if it indicates the judgment appealed from.

The only question in determining the sufficiency of notice of appeal is whether it appears from notice and transcript, including bill of exceptions and undertaking, that judgment brought up in transcript is really the one appealed from in the notice, and that respondent was fairly notified thereof.

4. Appeal and error ⟸419(2)—Notice of appeal sufficient, though misstating date of formal entry of judgment.

Notice of appeal *held* sufficient under L. O. L. § 550, though it stated October 20th as the date of judgment, which was not formally entered by the clerk until the 25th, though, under section 201 he should have entered it on the 20th.

5. Bills and notes ⟸103(1)—Misrepresentation that change in contract did not increase obligations of maker not a defense.

The buyer of land was liable on his note given for part of the price, despite his allegations that plaintiff seller and his associates induced the buyer to make a change in the contract by falsely representing the law to the effect that by the change his obligations and liabilities on the notes and mortgages executed by him would be no greater.

6. Evidence ⟸441(11)—Parol agreement limiting liability of maker of note cannot be shown.

A parol agreement at time of execution of a note that the payee will rely on the mortgage executed by the maker, and not assert any personal liability against the maker, is invalid, and cannot be successfully asserted to vary terms of note.

7. Pleading ⟸236(7)—Allowance of amendment to answer to present new defense within discretion of court.

Allowance of amendment to the answer presenting an absolute new defense, if admissible at all, was within the sound discretion of the trial court.

Digitized by Google

8. Pleading ⟸236(7)—Refusal to permit defendant to amend answer to present new defense not abuse of discretion.

In action on note given for part of price of realty, refusal to permit defendant to amend his answer to present an absolutely new defense *held* not such an abuse of trial court's discretion as would justify interference by Supreme Court.

9. Bills and notes ⟸443(3)—Assignment as collateral supports recovery by assignee.

An assignment of a note to plaintiff as collateral security is sufficient title to support recovery in his behalf.

10. Appeal and error ⟸883—Party cannot complain that attorney's fee agreed on as reasonable was included in verdict.

In action on note given for part of the price of realty, agreement of parties in open court through their attorneys as to the matter of attorney's fees is binding on them, and defendant cannot complain on appeal because the fee which he agreed was reasonable was included in the directed verdict for plaintiff.

In Banc.

Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by H. M. McFarland against John H. Hueners. From judgment for plaintiff, defendant appeals. Affirmed.

This is an action at law brought by the respondent against the appellant and his wife, to recover upon a promissory note for the sum of $3,600 and interest. The note was given as a part of the purchase price for a certain tract of land in Jackson county, purchased by the defendant, John H. Hueners from one L. M. Lyon, who was the original payee of the note.

The deal for the land was originally made several months prior to the date of the note. According to the original transaction there was to be no note or mortgage, but the defendant made a payment in cash and took a bond for a deed, by which the land was to be transferred to him only upon the completion of the payments agreed upon. This original transaction was in June, 1911, and in March, 1912, the arrangement in relation to the deal was changed by mutual consent, and the land was then actually deeded to the appellant. He made an additional payment on the purchase price, and, there being still a balance of $6,600 due thereon, he and his wife executed two separate promissory notes, each of which was secured by a separate mortgage on the land, the one for $3,000 and the other being the note in question for $3,600. The first note and mortgage for $3,000 seems to have been given direct to the plaintiff, McFarland, at the request of Lyon. The note sued upon, and the mortgage to secure the same, was executed to Lyon and he afterwards transferred it (apparently as collateral security) also to McFarland.

The defendants filed an answer, putting in issue the transfer of the note from Lyon to the plaintiff, and then alleging as an affirmative defense the previous transaction, preceding the execution of the note, substantially as hereinbefore stated, and that the defendants were induced to consent to the change in the arrangement and the execution of the note in question, by a representation that they would "be under no other or greater obligation for the purchase price of the land than was represented in the original agreement," and that, relying thereon, they executed the note in question, and the mortgage to secure the same, as well as the note and mortgage given to McFarland to secure the payment of the first $3,000. Defendants also allege that the representations were false and fraudulent, and made for the purpose of deceiving, and did deceive, the defendants. A reply was filed, putting in issue the allegations of defendants' answer.

At the trial the plaintiff placed in evidence the note in question, with proof of its execution and transfer to the plaintiff, and then rested. The defendants then offered to prove the facts stated in the answer, to which there was an objection, substantially upon the ground that the answer presents no defense, and that the facts stated therein in relation to the previous transaction were immaterial. This objection being sustained, the defendants asked leave to amend, by adding to the answer an allegation that the plaintiff, at the time of the execution of the note, promised and agreed with the defendants that he would not ask for a personal judgment against them, but would look wholly to the property for the satisfaction of the notes and mortgages; and also, by adding a claim for damages in the sum of $3,600, as a counterclaim. The amendment was denied, and the defendant having rested, the plaintiff moved for an instructed verdict, which was granted.

The defendant John H. Hueners served and filed a notice of appeal to this court, and there is a motion to dismiss the appeal upon the ground that the notice does not sufficiently describe the judgment in the case, and that Minnie Hueners, one of the defendants and the wife of the appellant, was not made a party to the appeal and was not served with notice of the appeal.

W. E. Crews, of Medford, for appellant.
A. E. Reames, of Medford, for respondent.

BENNETT, J. (after stating the facts as above). The first question to be considered is the motion to dismiss the appeal. The notice of appeal is as follows:

Digitized by Google

"In the Circuit Court of the State of Oregon for Jackson County.

"H. M. McFarland, Plaintiff, v. John H. Hueners et al., Defendant.

"To the above-named plaintiff, H. M. McFarland, and to A. E. Reames and M. Purdin, His Attorneys:

"You and each of you will take notice that the above-named defendant, John H. Hueners, hereby appeals to the Supreme Court of the state of Oregon from the order and judgment made and entered in the above-entitled court and cause on the 20th day of October, 1917, in favor of the plaintiff, H. M. McFarland, and against the defendant John H. Hueners, and from the whole thereof, and particularly from the order of the court directing the jury in said cause to return a verdict in favor of the plaintiff, as prayed for in his complaint, and also from the order of the court in refusing to grant defendant's motion for a nonsuit at the conclusion of plaintiff's case, and from the action of this court denying defendant's request to file an amended answer.

"Dated at Medford, Oregon, this 6th day of December, 1917. W. E. Crews, Attorney for Defendant.

"Due service of the above notice of appeal is hereby admitted this 6th day of Dec. 1917. A. E. Reames, by A. B. Hinck, Attorney for Plaintiff."

As a matter of fact the judgment appears from the transcript to have been formally entered in court on the 25th day of October, instead of on the 20th day of October, as described in the notice of appeal.

It is claimed by respondent that on account of this discrepancy in the date, and because it does not otherwise more fully describe the judgment, and does not specifically name the other defendant, Mrs. Hueners, in the title, it was not sufficient to give this court jurisdiction of the appeal. The cases of Neppach v. Jordan, 13 Or. 246, 10 Pac. 341, Crawford v. Wist, 26 Or. 596, 39 Pac. 218, Hamilton v. Butler, 33 Or. 370, 54 Pac. 200, and Keady v. United Ry. Co., 57 Or. 325, 100 Pac. 658, 108 Pac. 197, are cited to sustain that contention. Judged by the rule announced in some of these earlier cases, the notice of appeal in this case might not be sufficient; but we think the later cases in this court, under the later provisions of the statute, are more liberal. An appeal may now be taken by oral notice in open court, and, if not so taken, it may be by written notice, but the statute says:

"It shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party, or his attorney that an appeal is taken to the Supreme * * * Court * * * from the judgment, order, or decree, or some specified part thereof." L. O. L. § 550.

In Raiha v. Coos Bay Coal & Fuel Co., 77 Or. 275, 143 Pac. 892, Mr. Justice Moore, delivering the opinion of the court, said:

"Under the practice formerly prevailing in this court, a notice of appeal as indefinite as the one under consideration would probably be regarded as insufficient [citing cases relied upon by respondent herein]. The later decisions, however, are to the effect that if, from an inspection of the notice of appeal it can be determined by fair construction or reasonable intendment, and without resort to evidence aliunde the transcript, that the appeal is taken from the judgment or decree in a particular case, it will be sufficient to confer jurisdiction of the cause. * * * An oral notice of appeal, given when the judgment or decree is rendered, is now sufficient to secure a transfer of the cause. * * * As consonant with this late enactment, the procedure that heretofore obtained, with respect to the manner of inaugurating an appeal, has been so modified as to avoid all technicalities, and a written notice is now held to be sufficient if it complies with the requirements of the statute hereinbefore quoted, and, if from an inspection thereof the adverse party could not have been misled as to the order, judgment or decree undertaken to be reviewed."

[1] We think this is the true rule, and that great liberality should be indulged in, in judging the sufficiency or the notice of appeal.

In Robinson v. Phegley, 93 Or. 299, 303, 177 Pac. 942, it is said:

"This court has always been averse to dismissing appeals on account of mere technical defects in the notice, where it has been evident that no one could be misled by a slight defect or omission."

[2] It is now well settled that the mere discrepancy in the date of a judgment, as recited in the notice of appeal, is not fatal, where the judgment is otherwise sufficiently identified by the transcript, to inform the adverse party fairly as to the judgment really appealed from. Moorhouse v. Donica, 13 Or. 435, 11 Pac. 71; Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675.

[3] The only question, therefore, is as to whether or not it appears from the notice of appeal and the transcript, including the bill of exceptions and undertaking, that the judgment brought up in the transcript is really the one appealed from in the notice of appeal, and that the respondent was fairly notified thereof by such notice.

It is certified by the judge of the court below, and appears from the bill of exceptions, that while the judgment in this case was not formally entered until the 25th, the trial was had and the verdict actually directed on the 20th day of October—the day stated as the date of the judgment in the notice of appeal.

Section 201 of the Code (L. O. L.) provides:

"When judgment is given in any of the cases mentioned in sections 199 and 200, it shall be entered within the day it is given. When a trial has been had before the court without a jury, judgment shall be entered by the clerk in conformity with the findings within the day the findings are filed. If the trial be by jury,

Digitized by Google

judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned."

If the clerk had properly performed his duty the judgment would have been entered on the 20th, the same day the verdict was directed and filed, and the day stated in the notice of appeal. The appellant seems to have assumed that what "ought to have been done was done," and that the judgment was actually given on the 20th, as it should have been. Through some oversight of the clerk, the formal entry seems to have been postponed until the 25th.

It also appears from the notice of appeal that the case in which the appeal is taken was one in which there was an instructed verdict in favor of the plaintiff, and it appears from the transcript that such a directed verdict was returned in the case brought up, and which verdict was returned, as we have seen, on the very day stated in the notice of appeal.

[4] Under the facts so presented by the transcript, we cannot doubt that the judgment brought up on the transcript is the one appealed from, and that the respondent was so fully informed by the notice.

There is no intimation that there was any other case pending at that time between McFarland and Hueners; and, in the absence of any showing, we cannot assume that there was such another action pending, and that there was a trial and directed verdict in that other action, on the same day as in this cause.

The contention that the appellant's wife was an adverse party upon whom notice of appeal should have been served presents a very close question, and the previous decisions of this court do not seem to be in complete accord. The following cases seem to support the contention that such a codefendant is an adverse party upon whom the notice of appeal must be served. Moody v. Miller, 24 Or. 179, 33 Pac. 402; Templeton v. Morrison, 66 Or. 493, 131 Pac. 319, 135 Pac. 95; D'Arcy v. Sanford, 81 Or. 323, 159 Pac. 567.

The cases of U. S. National Bank v. Shefler, 77 Or. 579, 143 Pac. 51, 152 Pac. 234, and Davis v. First Nat. Bank of Albany, 86 Or. 474, 161 Pac. 93, 168 Pac. 929, seem to hold directly to the contrary.

In this case the two defendants appeared jointly, and united in the same answer. They were both represented by the same attorney, and this attorney prepared and signed the notice of appeal in the cause. It is doubtful if the notice was sufficient, but in the state of the authorities we have concluded to dispose of the case upon the merits. So considering the case, we think the respondent must prevail.

[5] The matter set up in the original answer did not amount to a defense. The claim that plaintiff and Lyon had induced the defendant to make the change in the contract by representation, that his liabilities and obligations would be no greater on the notes and mortgages then executed by him than they would have been under the original arrangement was at most a misrepresentation as to the law governing the transaction.

In 20 Cyc. 19, section (b), the law is thus epitomized:

"It is presumed that the law is equally within the knowledge of all persons, and assertions of law, although false, such as misrepresentations as to the legal effect of a particular written instrument or obligation, are as a general rule, regarded as mere expressions of opinion, and cannot be made the basis of an action for deceit."

And again in the same volume on page 54:

"In accordance with the principles above stated, a misrepresentation as to a matter of law made by a vendor as an inducement to the sale is regarded as an expression of opinion which ordinarily does not constitute actionable fraud."

If there are any circumstances in which such fraudulent representations as to the law would constitute a good cause of action, or a good defense, they are not presented in this case.

[6] The amendment offered by the defendant, in which he undertook to allege a positive agreement, at the time of the execution of the note, and as a part of that transaction, that plaintiff would rely upon the mortgage alone, and would not assert any personal liability against the maker of the note, would have been no defense unless it was in writing, for it is too well settled to justify the citation of authorities that such an agreement in parol is invalid, and cannot be successfully asserted to vary the terms of a written contract.

Here the agreement sought to be alleged was in the very face of the promissory note, by which the defendant expressly agreed to make himself personally liable.

As we understand it, there was not at the time of the trial, and is not now, any contention that there was such an agreement as the one sought to be relied on, in writing; and, of there had been such a contention, it should have been presented to the court upon the application to amend, as, in the absence of such writing, the amendment would be idle and useless.

Besides, the amendment presents an absolutely new defense—a positive agreement against personal liability, which had not been at all alleged in the original answer.

[7, 8] Assuming that such an amendment would have been admissible at all, at that stage of the proceeding, it was within the sound discretion of the court, and the record does not show such an abuse of discretion as would justify an interference by this court.

In Pacific Co. v. Cronan, 82 Or. 388, 392,

Digitized by Google

161 Pac. 692, 693, it is said by Mr. Justice McBride:

"The allowance or refusal of an amendment is largely a matter of discretion of the court, and must depend upon the peculiar circumstances of each particular case; the general rule being that the ruling of the trial court upon the question will not be disturbed unless there is an abuse of discretion or an absolute disregard of some affirmative statute."

See, also, Sharkey v. Portland Gas Co., 74 Or. 327, 144 Pac. 1152.

[9] As to the sufficiency of the proof of the assignment of the note, it is well settled that an assignment to the plaintiff as collateral security is sufficient title to support a recovery in his behalf.

"Ordinarily the pledgee of a chose in action may sue in his own name. It follows that where negotiable paper is transferred as collateral security, the holder may sue thereon in his own name, either as having the legal title or as being the real party in interest." 8 C. J. 844, § 1104.

See, also, Negotiable Instruments Law, section 5870, L. O. L.

[10] The matter of attorney's fees seems to have been agreed upon by the parties through their attorneys in open court; and we think is binding upon them, and that the defendant is not in a position to complain because an attorney's fee, which he agreed in open court was reasonable and fair, was included in the directed verdict.

The judgment of the court below is affirmed.

BURNETT, J., concurs in result.

WAYMIRE v. ATCHISON, T. & S. F. RY. CO. (No. 22562.)

(Supreme Court of Kansas. June 5, 1920. Rehearing Denied July 10, 1920.)

(Syllabus by the Court.)

Master and servant ⇐137(4)—Carrier sued under federal act held not negligent in failing to warn section man.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) to recover for the death of a section foreman who, with the other section men, rode on a hand car following a freight train into a station and stopped his car within a car length or two at the rear of the train, which was backed up without the giving of any signal and struck and killed the foreman, *held*, on the facts stated in the opinion, the railroad company owed the deceased no duty to warn him of the backward movement of the train.

Appeal from District Court, Butler County.

Action by Jessie L. Waymire, administratrix of Joseph E. Waymire, deceased, against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to enter judgment for defendant.

J. D. Houston, of Wichita, and Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant.

Dale, Amidon, Buckland & Hart, of Wichita, Ezra Branine, of Newton, J. M. Pleasant and Geo. J. Benson, both of El Dorado, and Glenn Porter, of Wichita, for appellee.

PORTER, J. In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) plaintiff recovered a judgment for $11,000 damages for the death of her husband, Joseph E. Waymire, who was a section foreman, and whose death was caused by an accident at the station of Douglass, Kan., about 6 o'clock in the evening of September 28, 1916.

At Douglass the railroad extends north and south. Waymire, with four other section hands returning from work, rode on their hand car behind freight train No. 37, which came into the station from the north on the main track. Standing on the passing track east of the main track and headed north was freight train No. 1809, waiting to move north on the main line when train No. 37 should pass south and clear the switch; 171 feet south of the switch stand was a clearance post which indicated the widest distance between the passing track and the main line. Waymire desired to move his hand car south of the switch to avoid the necessity of removing it from the track and to make way for train No. 1809. He followed train No. 37 south of the switch stand, keeping his hand car at an average distance of about two car lengths from the rear of the train. It was claimed by the plaintiff that the train backed up and struck the hand car, causing the injuries which resulted in Waymire's death. The train crew, including the brakeman, conductor, and engineer of No. 37, testified that the train was not backed at any time while it was at the station; and the defendant's testimony was that the backward movement of the rear cars was caused by the running out of the slack, after the engine came to a standstill. The jury found, however, that the train backed. The finding was based upon the dying declaration of Waymire and the testimony of Mrs. Waymire. In his dying statement Waymire said that the train backed up. The Waymires lived near the scene of the accident, and Mrs. Waymire testified that she was out in the yard and saw the two

Digitized by Google

trains standing at the station, and her husband coming in on the hand car, and that train 37 backed up about two car lengths. The train consisted of 70 cars and was more than a half mile long. While there was a conflict in the evidence, the finding of the jury determined the fact that the train made a backward movement after it had come to a standstill.

Several minutes before train No. 37 made any backward movement, it had stopped at the station in order to unload merchandise from one of the forward cars. In this position, the rear of the train extended some distance north of the passing track switch and obstructed the main line, so that it was necessary for the rear brakeman, P. U. Hershler, to go back a quarter of a mile to flag trains that might be approaching from the north. After being recalled and while he was returning Waymire's hand car overtook him, and he got on the hand car and rode to within two car lengths of the rear of the way car. His testimony was that he stepped off the hand car while it was in motion, ran ahead, climbed on top of the way car, and walked forward on top of the train several car lengths in order to signal to the head end and notify the other members of the crew that he had returned to the train. The evidence shows that he was the only member of the train crew who knew that the hand car was following immediately behind the train. He testified that after the backward movement of the cars he returned to the end of the train and learned that Waymire had been injured. None of the other section men was injured. The evidence does not disclose whether they jumped or how they escaped injury.

The testimony of a number of experienced railway men, including the conductor and engineer of train No. 1809, a section foreman, and a roadmaster was, in substance, that in their judgment it would not be safe for the hand car to follow along within two or three car lengths of a train on the main track, because of the danger that the train might make a backward movement, and that when the train stopped south of the clearance post Waymire should have backed his car past the post or have taken the car off the track; that by doing either of these things he could have avoided all danger. The defendant also introduced the printed rules of the company, which provide that all persons engaged in track or bridge work shall keep a sharp lookout for trains from either direction and shall not assume that a train may not come for any certain time, nor act on the assurance of any person to that effect, and must protect themselves at all times, when necessary, with proper signals; that the greatest care must be exercised by section men and bridgemen while using hand cars on the main track to avoid collisions with trains.

The jury made a finding that their verdict was based on the negligence of the defendant in improperly handling train No. 37, by moving it backward without giving a signal. They were asked to state which employé was guilty of the negligence, and answered that it was the rear brakeman. They found that the employés in control of the train knew of the dangerous proximity of the deceased to the rear of the train before the collision and that the employés learned of this fact from the rear brakeman, "who rode in on the hand car and knew its position." They found that Waymire was not guilty of negligence contributing to his death; that just before the collision occurred the hand car came to a standstill about two or three car lengths from the rear of the train; and that the trainmen, after stopping the train, reversed the engine and moved the train toward the point of collision with the hand car.

Finding No. 14 was to the effect that there was no necessity for Waymire to follow on through the north switch behind the southbound train, aside from the inconvenience of removing the hand car from the track at some point north of the switch in order to let train No. 1809 pass; and, further, that there was nothing to prevent Waymire from easily avoiding the collision by removing the hand car from the track at some point north of the switch. The finding that just before the accident occurred the employés in charge of the train knew of the position of the hand car and of Waymire must be construed as meaning that notice to the rear brakeman of these facts was notice to the engineer and conductor of the train who were in charge of the movement of the train. It appears, however, that Hershler was at one end of the train and the engineer was at the other end and that the train was more than a half mile in length. The findings of notice and negligence are obviously based upon the theory that it was the duty of the rear brakeman, upon reaching the top of the train, to notify the engineeer at the other end of the train of the position and situation of the hand car.

The defendant contends that the only question involved in the case is whether in the operation of a railroad "a train is obliged to keep out of the way of a hand car, or a hand car to keep out of the way of a train"? In our view of the case, this is the controlling question. Because, if it be assumed that notice and knowledge of the rear brakeman respecting the situation of the hand car was the knowledge of the other members of the train crew, the question in its last analysis is whether those in charge of the train owed Waymire the duty to

Digitized by Google

Wholly aside from any question of negligence on the part of Waymire, or the question of assumption of risk, the undisputed facts disclose there was no omission of any duty the defendant owed to him, and for that reason the judgment must be reversed and the cause remanded, with directions to render judgment for the defendant.

All the Justices concurring.

KANSAS FREE FAIR ASS'N v. GEORGIA CASUALTY CO. (No. 22696.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Insurance ⟸514—Exception of risk under casualty policy until after insured's payment of adjudged loss is valid condition.

A condition of a casualty insurance policy was to the effect that the casualty company should not be liable for any loss under the policy until after a final judgment had been rendered in a suit against the insured for damages and the loss so adjudged had been paid in money. *Held*, that the provision is valid, and that there must be substantial compliance with it to mature a liability of the casualty company to the insured.

2. Insurance ⟸514 — Insured's payment of notes held to comply with conditions of casualty policy.

The insured gave its promissory notes to the judgment creditors, who thereupon accepted the same as payment and entered satisfaction of the judgments; but whether this constituted a substantial compliance with the provision as to payment is not determined, as the promissory notes, which were afterwards reduced to judgments against the insured, were actually paid in money by the insured, and it is *held* that such payments accomplished the purposes of the contract provision and amounted to a substantial compliance with the insurance contract.

3. Insurance ⟸622(2)—Provision requiring suit on casualty policy within 90 days after date of judgment for loss is invalid.

A stipulation in an insurance contract that an action thereon can only be brought within 90 days after the date of a judgment for the loss is repugnant to the provisions of section 17 of the Code, and is therefore invalid.

Appeal from District Court, Shawnee County.

Action by the Kansas Free Fair Association against the Georgia Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Atchison, of Topeka, for appellant.

Edwin D. McKeever, of Topeka, for appellee.

JOHNSTON, C. J. The Kansas Free Fair Association brought this action against the Georgia Casualty Company upon a policy of insurance issued by the latter, indemnifying the plaintiff against loss or damage that might occur as the result of automobile races at a fair held by plaintiff. Judgment in favor of the plaintiff was rendered, and from it defendant appeals.

During the races held by the plaintiff on September 17, 1917, an automobile left the track and went through a fence, which struck and injured a boy named Alfred Scott. For this injury an action was brought by Scott against the fair association, and he recovered a judgment for $2,000 against the association, which upon review was affirmed in this court. Later the father of the injured boy recovered a judgment against the fair association for $987 expended by him in providing medical attention and treatment for his injured son. The casualty company elected to and did defend against these claims for the fair association. Shortly afterwards the fair association demanded that the casualty company pay and satisfy the judgments obtained by the Scotts, but the demand was refused mainly on the ground that under the policy there was no liability against the casualty company for the loss until the judgment had been paid and satisfied by the assured. The fair association being without funds, it gave its promissory notes to the judgment creditors, and thereupon satisfaction of the judgment was entered. The notes were not paid, and suits were subsequently brought by the Scotts upon these notes against the fair association, and judgments in their favor were rendered, and subsequently these judgments were paid and satisfied.

Before the rendition of the judgments on the notes, and the entry of satisfaction of the judgments, the present action was brought by the fair association against the casualty company upon the theory that the giving of the notes and the satisfaction of the judgments rendered thereon matured a liability against that company. The casualty company still contended that it was not liable for the loss until the final judgments for the damages against the assured had been paid in money. After this action was brought, and after the judgments based upon the notes had been paid and satisfied by the fair association, the plaintiff upon leave amended its petition, setting forth the payment in money of the judgments rendered upon the notes that had been given in satisfaction of the judgments for damages against the fair association. Upon the testimony the trial court held that the plaintiff was entitled to recover the indemnity provided for in the policy of insurance.

[1, 2] It is contended by the defendant that under the facts, about which there is no substantial dispute, it is not liable upon its

Digitized by Google

contract of insurance. The contract provided in substance that the casualty company should not be liable upon the policy until after a final judgment had been rendered against the assured for the loss sustained, and for which payment in money had been made by the assured. Contracts of this character have been before the court, and it has been held that a stipulation of the kind in question is valid, and that a liability against the insurance company does not arise, unless the loss sustained has been paid by the assured in satisfaction of a judgment rendered against the assured for the loss. Carter v. Insurance Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155. In a later case and under a similar provision it was ruled that:

"Payment in money by a policy holder of his loss and expense, after trial of the issue, is a condition precedent to action on his policy." Emerson v. Indemnity Association, 105 Kan. 242, 182 Pac. 647.

It is contended by the defendant that the execution of the promissory notes by the plaintiff, and the acceptance of the same by the judgment creditors, was not a payment within the meaning of the contract. On the other hand, plaintiffs insist that payment in cash is not essential to a right of recovery, but that payment in property or in notes accepted in lieu of money is substantial compliance with the stipulation of the contract, and is sufficient to enable the assured to recover against the insurer if payment is made in good faith and the judgment debt is actually extinguished. The following authorities are cited in support of its contention: Herbo-Phosa Co. v. Philadelphia Casualty Co., 34 R. I. 567, 84 Atl. 1093; Kennedy v. Fidelity & Casualty Co., 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673; Stenbom v. Brown-Corliss Engine Co., 137 Wis. 564, 119 N. W. 308, 20 L. R. A. (N. S.) 956; Seattle & S. F. R. & Nav. Co. v. Maryland Cas. Co., 50 Wash. 44, 96 Pac. 509, 18 L. R. A. (N. S.) 121; Rodgers v. Pacific Coast Casualty Co., 33 Cal. App. 70, 164 Pac. 1115; Taxicab Motor Co. v. Pacific Coast Cas. Co., 73 Wash. 631, 132 Pac. 393; Komula v. General Accident, F. & L. A. Corp., 165 Wis. 520, 162 N. W. 919; McBride v. Ætna Life Ins. Co., 126 Ark. 528, 191 S. W. 5; Gardner v. Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540. As supporting the contrary view, that a judgment cannot be satisfied except by the direct payment of money, the defendant cites: Eberlein v. Fidelity & Deposit Co., 164 Wis. 242, 159 N. W. 553; Curtis & Gartside Co. v. Ætna Life Ins. Co., 58 Okl. 470, 160 Pac. 465; Hebojoff v. Globe Indemnity Co., 35 Cal. App. 390, 169 Pac. 1048; Treloar v. Keil & Hannon, 36 Cal. App. 159, 171 Pac. 823.

In the present case it is not necessary to determine whether the giving and acceptance of the notes can be regarded as a payment in money, so as to render the defendant liable on the contract of indemnity, since it was shown under an amended and supplemental pleading that the money had actually been paid in satisfaction of the judgments rendered upon the notes. Although payment of the loss was made indirectly through the medium of notes reduced to judgments and the payment of these in money, it amounted to a substantial compliance with the contract. It was immaterial to the defendant whether payment was made in currency, or through the medium of checks, drafts, notes, judgments, or other kind of obligations, so long as the medium employed was actually converted into money and paid on the judgments rendered for the loss. The fact that entries of satisfaction of the judgments for the loss were made prior to the conversion of the obligations into money and the payment of the same to judgment creditors is not a matter of concern to the defendant, so long as the judgment debts were actually discharged by the payment of money. The purpose of the provision is the protection of the defendant against fraud in the payment of losses. Here the claims for damages were contested in actions defended by the casualty company itself, and judgments were rendered, about the good faith or validity of which there is no question. The losses have been actually paid by the insured and the judgments satisfied. The payment of the losses was not theoretical, but actual, and the plaintiff now seeks to reimburse itself for losses that were fixed by final judgments, which have been fully paid in money. The purpose of the contract provision has been accomplished by a substantial compliance with its terms.

[3] Attention is also called to the provision requiring suits to be brought for the loss within 90 days from the date of the judgment and that a greater time has elapsed. Evidently the delay was occasioned by the litigation of which an account has been given. However, this limitation is not a bar to recovery by the plaintiff, as the Code provides that:

"Any agreement for a different time for the commencement of actions from the times in this act provided shall be null and void as to such agreement." Gen. Stat. 1915, § 6907, subd. 7 (Code Civ. Proc. § 17).

See Erickson v. Commercial Travelers, 103 Kan. 831, 176 Pac. 989.

It was brought within the period prescribed by the Code, and that is sufficient.

The judgment is affirmed.

All the Justices concurring.

Digitized by Google

STATE ex rel. HENDRY, County Atty., v. BOARD OF COM'RS OF McPHERSON COUNTY et al. (No. 22751.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Schools and school districts ⟸42(2)—Canvass of election to establish rural high school cannot be challenged in the state's action to enjoin an election to disorganize it.

Where the canvassing board declares that an election has resulted in favor of a proposal to establish a rural high school, the correctness of the canvass cannot be challenged by the defendants in an action brought by the state to enjoin an election called to vote upon the question of disorganizing the school.

2. Injunction ⟸80—Lies at suit of state to prevent holding an unauthorized election.

Injunction may be granted at the suit of the state to restrain public officers from taking steps preparatory to the holding of an election for which the law makes no provision.

3. Schools and school districts ⟸42(2)—Rural high school established after the statute cannot hold election to disorganize.

The provision of the statute that, "if any rural high school shall heretofore have voted to organize" and certain other conditions exist, an election may be held to vote upon the proposition to disorganize it, does not authorize such an election with respect to any school established after the enactment of the statute.

Appeal from District Court, McPherson County.

Action for injunction by the State of Kansas, on relation of Alex S. Hendry, County Attorney, against the Board of County Commissioners of McPherson County and others. Demurrer to petition overruled, and judgment for plaintiff, and defendants appeal. Affirmed.

Frank O. Johnson, Gust Nyquist, and P. J. Galle, all of McPherson, for appellants.

G. F. Grattan and James A. Cassler, both of McPherson, C. M. Williams, of Hutchinson, and Alex S. Hendry, of McPherson, for appellee.

MASON, J. On May 13, 1919, an election was held upon the question whether a rural high school should be established in McPherson county, in conformity with the statute. Gen. Stat. 1915, § 9348, as amended by Laws 1917, c. 284, § 2. The vote was canvassed and the proposition was declared carried. On June 24 the organization of the district was effected by the election of a school board, which on the same day contracted for supplies to the amount of $150 and for the renting for ten months of a building for school purposes. On June 28 a petition purporting to be signed by a majority of the electors of the district was filed with the county clerk asking that an election be called to vote upon the question of the disorganization of the school. On July 7 the county commissioners made an order calling such an election. On July 11 this action was brought by the state on the relation of the county attorney against the commissioners and other officers to enjoin the holding of the election, and the various ministerial acts preliminary thereto, on the ground that no such proceeding was authorized by the statute. A demurrer to the petition was overruled, and an answer was filed; the court sustaining a demurrer to all of it excepting a general denial. The case was submitted upon the pleadings, and a judgment was rendered in favor of the plaintiff, enjoining the performance of any acts looking to the holding of the election. The defendants appeal.

[1] 1. The portion of the answer to which a demurrer was sustained contained an allegation that five ballots (enough to affect the result) cast at the election at which the proposal to establish the school was submitted, which should have been counted in the negative, were rejected altogether because marked with a cross near, instead of within, the square provided for the use of the voters. The appellant's argument appears to concede that the rules peculiar to the Australian ballot system should control—a matter concerning which there may be some doubt. Abrahams v. School District, 97 Kan. 325, 155 Pac. 16. Neither that question nor the correctness of the result reached on the canvass of the returns of the election need be now determined. The present action is one brought by the state to enjoin the holding of the election to vote upon the disorganization of the school, on the ground that such a proceeding is unknown to the law. If the plaintiff is otherwise entitled to the relief sought, its right thereto cannot be impaired by any defect in the steps by which the establishment of the school was brought about. If it be true that the electors of the district decided against the establishment of the school, that fact obviously could not justify the holding of an election not warranted by the statute to vote upon a proposition for its disorganization.

[2] 2. It is urged that an action will not lie to enjoin the holding of an election, or the preliminary acts necessary thereto. Such is without doubt the general rule. Duggan v. Emporia, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912A, 719; 9 R. C. L. 1001. See, however, 22 Cyc. 885, 886; 2 Joyce on Injunctions, §§ 1386, 1386a; State ex rel. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; and State ex rel. Lamb v. Cunningham, Secretary of State, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep.

Digitized by Google

27. The present case, however, differs in two respects from those in which that rule has ordinarily been applied. Here the action is brought in behalf of the public, and not of individuals, and the objection is not based upon the existence of mere irregularities in the procedure followed, but upon the contention that the election is one for which there is no legal authority whatever. The government may invoke the aid of a court of equity without showing a pecuniary interest.

"The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." In re Debs, 158 U. S. 564, 584, 15 Sup. Ct. 900, 906 (39 L. Ed. 1092).

"The state may maintain injunction against a public officer to restrain him from a violation of his official duty, although other remedies may be open, and he may have given a sufficient bond. It has an interest in seeing that the will of the Legislature is not disregarded, and need not, as an individual plaintiff must, show grounds of fearing more specific injury." State v. Lawrence, 80 Kan. 707, 103 Pac. 889.

If in fact the law does not contemplate the holding under any circumstances of such an election as that here involved, we think it within the province of a court of equity, at the instance of the representative of the public, to interfere to prevent the doing of an entirely fruitless act, involving some expense and perhaps serving as a practical impediment to the functioning of a school.

[3] 8. Prior to 1917 the law in relation to rural high schools made no provision for a vote upon a proposition for disorganization. At the legislative session of that year an act was passed amending it in many respects and adding to the section relating to the establishment of such a school this provision:

"If any rural high school shall heretofore have voted to organize under the provision of this section, and shall not have accumulated any property, nor incurred any expense or obligation, nor issued any bonds or other evidence of indebtedness, such rural high school may be disorganized upon a petition, notice, and election presented, given and held for the disorganization of such rural high school upon the same terms and provisions as are hereinbefore prescribed in this section for the establishing and locating thereof, except that such petition shall pray, such notice shall declare and such election shall be held for the disorganization of said rural high school; provided, that this shall not affect any district in which a suit has been brought concerning the organization, or issuance of bonds." Laws 1917, c. 284, § 2.

The language quoted makes the provision for disorganization applicable only to such rural high schools as had already been established. It could be held to apply to the school here involved only by adopting a construction that would give to the word "heretofore" the effect of "heretofore or hereafter." It is true that great liberality of interpretation of words indicating the period to which a statute relates is allowed for the purpose of carrying out the manifest will of the Legislature. State ex rel. v. City of Lawrence, 101 Kan. 225, 165 Pac. 826. But we discover nothing in the present instance to suggest that the framers of the law in question desired to affect any schools excepting such as at the time of its passage had already been created. This court has recently refused to give to "heretofore" the force of "theretofore" even when that construction might have prevented a statute from being held unconstitutional. Patrick v. Haskell County, 105 Kan. 153, 160, 181 Pac. 611. The rule that a retrospective operation of a statute is disfavored is based largely upon the policy of avoiding interference with antecedent rights, and in any event could be of no aid here, because, whether the statute has a prospective operation or not, it does explicitly affect districts already created. It seems reasonable to suppose that the Legislature intended to supply a means of disposing of schools which at the time of the enactment were known to have become dormant, rather than to adopt a practice which in effect would allow an immediate reconsideration whenever the people of a district might in the future vote to establish a rural high school.

We conclude that the Legislature intended the provision regarding disorganization to apply only to districts which were in existence when it was enacted. This conclusion justifies the injunction against the election, and makes it unnecessary to consider any of the other questions that have been argued.

The judgment is affirmed.

All the Justices concurring.

Digitized by Google

LAVERTY et al. v. LARNED OIL & GAS CO. et al. (No. 22667.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸931(6)—Only competent evidence is presumed to have been considered by trial court.

Rule followed that in a trial by the court it will be presumed that only competent evidence was considered.

2. Homestead ⟸117—Husband's extensions of oil lease on homestead without wife's consent not valid.

The lease in question is *held* to be of such character as to require the joint consent of the wife, and to render extensions agreed to by the husband alone, of no legal effect.

Appeal from District Court, Wilson County.

Action by C. J. Laverty and another against the Larned Oil & Gas Company, a partnership consisting of E. E. Frizelle and two others, to cancel an oil lease. Decree for defendants, and plaintiffs appeal. Reversed, and cause remanded, with directions.

S. H. Piper, of Independence, and A. H. Ward, of Neodesha, for appellants.

J. L. Stryker, of Fredonia, and J. W. Finley, of Chanute, for appellees.

WEST, J. The plaintiffs sought to cancel an oil lease, failed in their action, and appeal from an adverse decree. The pivotal provision in the instrument was this:

"The second party agrees to commence an oil or gas well on said premises on or before February 1, 1918, or in lieu thereof this lease is void from the agreed date."

The well was not begun in the time specified, and two extensions were granted, and the petition alleged that during the periods thus covered no well was begun, that the conditions of the lease had been broken, and the defendant notified that its lease was thereby forfeited, and demand made in writing for surrender and release.

The defendant alleged that it had paid the required rental; that the plaintiffs had requested it not to drill upon the land, but to drill upon other land, and thereby waived the provisions of their lease; and that when an attempt was made to drill upon their land the plaintiffs refused to permit such an attempt to be carried out. The plaintiffs by their reply alleged that the request to the defendant not to drill upon the land was void, because verbal and in violation of the statute of frauds.

The court found and decreed that the plaintiffs were not entitled to cancellation, that it would be inequitable to decree cancellation, and that the plaintiffs were estopped by representations to the defendant, and ordered that unless the defendant should begin drilling within a certain date fixed the lease would be forfeited. Error is assigned upon the admission and exclusion of evidence, the denial of a new trial, and on the decree as contrary to the evidence.

Counsel in their brief condense these assignments into three points: The termination of the lease, the admission and exclusion of testimony, and the denial of a new trial; but in their written, as well as their oral, argument they base their contention almost exclusively on the proposition that the alleged waivers were not joined in by the plaintiff Lulie Laverty, and that, as the land covered by the lease was the homestead of the plaintiffs, the husband could not waive any of the provisions of the lease amounting to a change therein without the joint consent of his wife; hence such attempted waiver by him alone was void and of no effect.

[1, 2] As the trial was before the court, the presumption is that proper evidence only was considered in reaching its conclusion (Wilson v. Colborn, 106 Kan. 440, 188 Pac. 430), and we will follow counsel on both sides, and assume that the real determining question in the case is the effect of the wife's failure to join in the alleged waiver. The lease in question granted for a term of ten years—

"the following described premises, * * * full and exclusive authority to enter upon said premises, and to drill, operate for, and procure oil, gas, and minerals, together with the right of taking upon said premises and removing therefrom, any machinery, tools, lumber, pipe, casing, and other things necessary in said work, and to construct on said premises, and remove therefrom, pumping plants, tanks, pipe lines, and other things necessary in the operation of this lease, avoiding as far as possible damage to said premises and growing crops. * * *"

This instrument is of such character as to involve the homestead rights of each of its owners. Land Co. v. Gas Co., 43 Kan. 518, 23 Pac. 630; Gas Co. v. Land Co., 54 Kan. 583, 38 Pac. 790. Assuming that, when the time limit expired, the lease, according to its terms, became void, then an extension must necessarily be equivalent to a new lease, and unless the original lease would be valid without the wife's joint consent such extension would not be valid. See opinion in Watson v. Watson, on second motion for rehearing, 189 Pac. 949, and cases cited.

The provisions quoted make it plain that the instrument involved the occupation of the homestead. It is conceded that the wife did not join in the extension agreements. While

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

it was argued that she had knowledge of them, and while she may have tacitly consented to all but the last one, she in no wise lent her consent to that one. Sometimes invoking the homestead right may seem unfair, and appear to work a hardship; but this furnishes no reason for removing any of the restrictions which the Constitution and statute have placed around a Kansas home.

The decree is reversed, and the cause remanded. with directions to enter a decree in accordance herewith.

All the Justices concurring.

ANDERSON et al. v. PIPER et al.
(No. 22750.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Continuance ⟸54—Voluntary dismissal and a second action for same relief waived error in denying continuance.

Voluntary dismissal of their action by the plaintiffs after denial of their motion for a continuance, and immediate commencement of a second action for the same relief, waived error committed in denying the continuance.

2. Refusal to reinstate first action.

The proceedings examined, and *held*, the court did not abuse its discretion in refusing to reinstate the first action.

Appeal from District Court, Montgomery County.

Will contest by Andrew Anderson and others against S. H. Piper, executor of Herman Anderson, deceased, and another. From the dismissal of an action without judgment on the merits and from an order sustaining a demurrer to a second petition, plaintiffs appeal. Affirmed.

T. H. Stanford, of Independence, for appellants.

S. H. Piper, Chas. D. Shukers, and Chester Stevens, all of Independence, for appellees.

BURCH, J. The notice of appeal includes two appeals under the above title. The first presents for review proceedings culminating in dismissal of an action without judgment on the merits. The second presents for review an order sustaining a demurrer to a second petition for the same relief.

[1] The action was one to contest a will. The judge of the district court was disqualified, and the judge of another district was called to hear the case. On May 5 the case was set for trial on May 23, and all parties were notified. On May 23 the judge pro tem. appeared, called the case, and the defendants announced themselves ready for trial. The plaintiffs were not ready, and asked for a continuance, which was denied. Thereupon the plaintiffs dismissed the action. On the next day the plaintiffs refiled their suit. On July 5 the plaintiffs filed a motion to reinstate their former case, which was heard and denied in September.

Any error committed in denying the continuance was waived by the voluntary dismissal and commencement of the second action.

[2] The evidence offered at the hearing of the motion to reinstate was directed to the situation at the time continuance was refused, and was conflicting. The motion was heard by the judge pro tem., and his determination of the matter is conclusive. The claim that the case was irregularly called for trial is not sustained, and, nothing else approaching, abuse of discretion is disclosed.

The appeal from the ruling sustaining a demurrer to the second petition is not argued, presumably because the subject is covered by the decision in the case of Medill v. Snyder, 71 Kan. 590, 81 Pac. 216.

The judgment of the district court is affirmed.

All the Justices concurring.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

DALE v. ARMSTRONG. (No. 22600.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. **Master and servant ⟸302(1)—Scope of employment defined.**

An employer was sued for damages resulting from personal injuries sustained in a collision with an autotruck negligently driven by his employé. The employé was required to deliver a box at a stated place, and had deviated from the course of his employment to do an errand for a third person. *Held*, if the place where the accident occurred were a place where the driver, confining his conduct strictly to the business of delivering the box, might properly be, and if, when at that place, the driver's movements were impelled by a purpose to deliver the box, the jury was authorized to say he was within the scope of his employment.

2. **Master and servant ⟸330(2)—Testimony as to scope of employment held immaterial.**

The driver was not permitted to testify that he would not have been at the place where the collision occurred but for the deviation, and that in going on to the place of delivery he intended to make a slight detour from the most direct route. *Held*, the evidence was not material.

Appeal from District Court, Sedgwick County.

Action by John T. Dale against M. B. Armstrong. Judgment for plaintiff, and defendant appeals. Affirmed.

Brubacher & Jochems and T. W. Sargent, all of Wichita, for appellant.

Stanley, Stanley & Hegler, of Wichita, for appellee.

BURCH, J. The action was one against an employer, for damages resulting from personal injuries sustained in a collision with an autotruck negligently driven by his employé. The question was whether or not the driver was within the scope of his employment when the collision occurred. The plaintiff recovered, and the defendant appeals.

[1] The defendant's place of business is on Douglas avenue, a street running east and west in the city of Wichita. Four blocks north of Douglas avenue is the parallel street of Central avenue. Between the two is Second street. The first street east of the defendant's place of business, which runs north of Central avenue, is Topeka avenue. East of Topeka avenue are the following parallel streets: Emporia avenue, St. Francis avenue, Cleveland avenue, and Mathewson avenue. The driver of the truck, Morris, was required to deliver a box at a residence on Mathewson avenue north of Central avenue. Another employé of the defendant, Handley, asked the driver to take him to his home to get his overcoat. They went west on Douglas avenue three blocks to Main street, north on Main street to Central avenue, and west on Central avenue five and a half blocks to Handley's home. After Handley procured his overcoat they went east on Central avenue, crossed Topeka avenue, and had reached Emporia avenue when the accident occurred. Central avenue is paved as far east as St. Francis avenue. From there to Mathewson avenue it is not paved, and it is crossed by some railroad tracks.

No complaint is made of the instructions, which submitted to the jury the question whether or not, after going for Handley's overcoat, Morris had resumed his errand of delivering the box, and was acting in the scope of his employment when the accident occurred. The jury returned the following special findings of fact, which are not contested:

"(1) Q. If you find the defendant, Armstrong, or his agents guilty of negligence, state fully each and all acts of negligence. A. By driving carelessly, and not watching where he was going.

"(2) Q. At the time the injury complained of occurred, were Ambrose Morris and H. M. Handley returning from Handley's house or home, where they had gone to get Handley's overcoat? A. No.

"(3) Q. If you find Handley had gone to get his coat, and was returning from this mission when the injuries to the plaintiff occurred, then state was he getting his coat for his own personal purposes. A. He was not returning from getting his coat at the time of the accident.

"(4) Q. If you answer the last question 'No,' then state fully for what purposes he was getting his coat. A. From Topeka and Central west to fifth block on West Central and return east to Topeka and Central on mission for his coat, from Topeka east on Central on mission of delivering box.

"(5) Q. Was the usual and direct, regular and proper route from the Armstrong Music Company's place of business in Wichita, Kan., to 513 Mathewson street as follows: East on Douglas avenue to Cleveland avenue; then north on Cleveland to Central avenue; then east on Central to Mathewson, or north on Topeka avenue to Second street; then east on Second street to Cleveland avenue; then north on Cleveland avenue to Central; then east on Central to Mathewson, north on Mathewson to 513 Mathewson? A. Yes; with other routes including north on Topeka to Central; then east on Central to Mathewson; then north on Mathewson to point of delivery.

"(6) Q. Was Mr. Handley's home, or the place where he and Morris went to get Handley's overcoat, on that route? A. No.

"(7) Q. At the time of the collision on Central avenue, were Handley and Morris on the usual, regular, and customary route from Armstrong Music Company's place of business to Mathewson street where the box was to be delivered? A. Yes; one of them."

Digitized by Google

The defendant contends he was not allowed to present his case fairly to the jury, because of the exclusion of material evidence. Morris was not permitted to testify that in delivering the box he would not have been at Central and Emporia avenues, where the accident occurred, if he had not gone on the errand for Handley, and that, if the accident had not occurred, he intended to go east on Central avenue to St. Francis, south on St. Francis to Second, east on Second to Cleveland, north on Cleveland to Central, and then east on Central to Mathewson. The offered evidence was not material.

If the place where the accident occurred were a place where the driver, confining his conduct strictly to the business of delivering the box, might properly be, and if when at that place his movements were impelled by a purpose to deliver the box, the jury was authorized to say he was then within the scope of his employment. Intention and locality concurred to place him there. Whether or not he would have been there but for the deviation, and what course convenience might have suggested he should take from there on, were not important. There are authorities which would sustain a finding of fact that Morris was within the scope of his employment from the time he left Handley's house, but it is not necessary to approve or disapprove them. The question of when the course of deviation has turned back into the course of employment is a question of fact (notes 47 L. R. A. [N. S.] 662; L. R. A. 1916A, 957), and the observations just made are well within any reasonable rule.

[2] Whatever may be said respecting the propriety of the court's rulings, the offered evidence was sufficiently covered by testimony which Morris was permitted to give. He described two so-called usual and ordinary routes of travel from the defendant's place of business to the place where the box was to be delivered, neither one of which would touch the place of the accident, and he then described what route he would take in making the delivery. He said he would go east on Douglas to Cleveland, down Cleveland to Central, and over on Central to Mathewson, and he gave the facts relating to the desirability or undesirability of Central avenue as part of a direct route to Mathewson from the place of the accident.

The unpaved condition of east Central avenue did not deter Morris from including a portion of it in his preferred route to Mathewson, and the other "usual and ordinary" route which he described crossed railroad tracks. After weighing the testimony, the jury was satisfied the route by way of Topeka avenue to Central, and then east on Central to Mathewson, was just as "usual and direct, regular and proper," as any other, and so found.

There is nothing else of importance in the case, and the judgment of the district court is affirmed.

All the Justices concurring.

WATERS et al. v. HATFIELD et al.
(No. 22732.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Mines and minerals ⟸78(1)—Oil and gas lease construed to require completion of well within 60 days, except for unavoidable delay.

An oil and gas lease for the term of one year, "and so long thereafter as oil or gas shall be produced," containing a provision by which the lessees agreed to complete a well on the premises within 60 days from the date of the lease, or in case of a failure to complete a well within that time to pay to the lessors $15 "in advance for each additional month such completion is unavoidably delayed," is construed to mean that a well should be completed within 60 days, except that its completion might be deferred by some unavoidable delay.

2. Mines and minerals ⟸78(7)—Findings supported by evidence held to entitle lessor to cancel the lease.

In an action to cancel such lease, a finding supported by sufficient evidence that no well had been commenced or completed within the 60-day period, and that the failure was not the result of any unavoidable delays, entitled plaintiffs to a decree setting aside the lease.

Appeal from District Court, Montgomery County.

Action by G. D. Waters and others against J. M. Hatfield and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Banks & O'Brien, of Independence, for appellants.

Chester Stevens and Chas. D. Shukers, both of Independence, for appellees.

PORTER, J. The action was one to cancel an oil and gas lease, in which the plaintiffs prevailed, and the defendants appeal.

Except for a single word in one clause, the instrument was an ordinary oil and gas lease for the term of one year "and so long thereafter as oil or gas should be produced or operations continued." The stated consideration was the payment in cash of $520 and "the covenants and agreements hereinafter contained, on the part of the parties of the second part to be paid, kept, and performed." The lessors were to receive a royalty of one-eighth of all the oil produced and saved from the premises, and gas was to be piped to within 50 feet of their residence

Digitized by Google

on the premises for their domestic use, free of charge.

The controversy turns over the effect to be given to a clause by which the lessees agreed—

"to complete a well on said premises within sixty (60) days from the date hereof, or in case of a failure to complete a well within the time above specified, to pay to the first parties fifteen dollars ($15) in advance for each additional month such completion is unavoidably delayed from the time above mentioned for the completion of such well, until the well is completed or this contract is surrendered, as is hereinafter provided; such payment for delays shall be made by check mailed to credit of parties of first part or deposited to their credit in" a certain bank at Elk City.

Plaintiff's evidence showed that the land embraced in the lease lies within an extensive gas field, and that at the time of the trial there was only one well within 300 feet of plaintiffs' land with a daily capacity of 23,000,000 cubic feet of gas, and within a quarter of a mile of another well with a daily capacity of 20,000,000 cubic feet. There was evidence that the defendants had a drilling rig of their own within four miles of the land at the time the lease was delivered, and that no effort was made by them to move a drilling rig on plaintiffs' land, and that no well had been commenced or completed. The trial court found that the defendants made no effort to develop the land within 60 days from the 10th day of August, 1918, the date the lease was executed, and that this failure was not the result of any unavoidable delays; that on October 12 plaintiffs caused a written notice to be served upon defendants, declaring that the lease was void for the defendants' failure to keep and perform the conditions and covenants of the lease.

As conclusions of law the court held that the lease provided by its terms that a well should be completed within 60 days, except that its completion might be deferred by some unavoidable delay, and that by reason of the omission and neglect of the defendants to keep and perform this covenant they had forfeited their rights, and judgment was entered canceling and setting aside the lease.

[1, 2] Whether, as plaintiffs contend, the $520 cash payment was what is commonly known in the oil fields as a bonus paid the landowner to induce him to give the lease, and was not intended as rental, nor to defer drilling, nor to cover any neglect or omission on the part of the lessees, it is plain that part of the consideration was expressly stated to be the performance by the lessees of the covenants and promises contained in the instrument itself.

It is argued by the defendants that, inasmuch as forfeitures are not favored in law and are despised in equity, it should be held that the clear grant, giving to defendants the rights as lessees for a period of one year, and as much longer as oil or gas might be found in paying quantities, cannot be cut down by implication or by ambiguous expressions. Authorities are cited to the effect that, where a term is demised in clear and apt words, it can only be defeated by words as strong and express as those by which it is created. Rose v. Lanyon, 68 Kan. 126, 74 Pac. 625. It is insisted that the clause upon which the plaintiffs rely does not, by any clear, express language, cut down the one-year period granted by the preceding clause; that, if the word "unavoidably" had not been written in the lease, we would have the ordinary oil and gas lease, and by the payment of $15 monthly rental in advance the lessees could postpone drilling if they desired, and still hold the lease for the full period of one year. It is urged that the inquiry for the court is, not what either of the parties necessarily intended the lease to mean, but what does it in fact mean? The defendants say:

"It means that the lessees agreed to complete a well * * * within 60 days, * * * or * * * in case of a failure to complete a well within the time above specified, they would pay to the lessors for each month they were unavoidably delayed the sum of $15. It means just that and nothing more. It does not mean that in case there should be no unavoidable delay * * * there should be no delay at all. That is what plaintiffs want to construe it to mean. Their idea doubtless is that the parties would not be foolish enough to allow a delay without any particular reason and not require a rental, and require it only when the delay was unavoidable, and still allow the lease to remain in force."

Defendants' argument is that there was no absolute agreement on their part to drill a well within 60 days; that the lease does not say nor mean that. It is insisted that the lease was granted for one year, the only limitation being that the lessees should complete a well within the 60 days or pay a certain rental for such time as they were unavoidably delayed; and attention is called to the fact that the trial court made a finding that defendants were not unavoidably prevented from commencing and completing a well within 60 days. It is therefore argued that, in order to cut down the the 1-year period expressly granted by the lease, it is necessary for the court to read into the 60-day clause a provision that there could be no delay except where it was unavoidable.

The defendants' construction of the lease, followed to its logical conclusion, would render the provision for completing a well within 60 days of no effect. By mere proof that they had determined to make no effort to drill a well within 60 days, and that their failure was not caused by unavoidable de-

Digitized by Google

lay, the lessees could keep the lease in force for 1 year without the payment of the $15 per month. The agreement to complete a well within 60 days would not be binding, because of the alternative provision:

"Or in case of a failure to complete a well within the time above specified, to pay" $15 for each additional month completion is unavoidably delayed.

We cannot agree with defendants' contention that it is not the duty of the courts to determine what the parties to the contract intended. In any contract where the parties disagree as to the meaning of its terms, the question to be determined is: What must the parties be held to have intended by the terms used? The provision requiring completion of a well within 60 days was express, and not implied, and in our opinion it cannot be ignored. The defendants were not unavoidably delayed, so that we may disregard entirely the provision requiring them to pay $15 a month; but what becomes of their express agreement to complete a well within 60 days in case they were not unavoidably delayed? It was an express covenant that formed part of the consideration for the granting of the lease, its violation warranted the judgment canceling the lease, and it follows that the judgment must be affirmed.

All the Justices concurring.

HOME LUMBER CO. et al. v. HOPKINS, Atty. Gen., et al. (No. 22761.)

(Supreme Court of Kansas. Feb. 7, 1920. On Motion for Modification, June 5, 1920.)

(Syllabus by the Court.)

1. Partnership ⟸3—Trusts ⟸30½(1), 210—Agreement held to create a "trust" and not a "partnership"; bondholders are not individually liable for obligations of trust.

An agreement and declaration of trust provided for the transfer of property to trustees who were given power to issue negotiable certificates to shareholders, carry on a general business, invest and reinvest the funds of the estate at will, pay dividends at their discretion, and make proportionate distribution of the assets among the shareholders at the end of 20 years. The shareholders had no authority to instruct or direct the trustees, and had no control either as individuals or in association except to elect the trustees, and no personal liability could arise against them upon any contract, obligation, or action entered into or taken by the trustees, and persons dealing with the trustees could only look to the trust estate for satisfaction. *Held*, that the agreement created a "trust" and not a "partnership," and that the shareholders cannot be held individually liable for the obligations of the trust.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership; Trust.]

2. Corporations ⟸28(1)—Trust, though unincorporated, held a "corporation," which may sell stock only by conforming to regulations.

The trust, although an unincorporated company, is deemed to be a corporation, within the meaning of section 6 of article 12 of the state Constitution, since the agreement under which the company is organized has been given and is claiming to exercise and enjoy powers and privileges not possessed by individuals and copartnerships, and therefore it can only sell securities and stock within the state by conforming to the regulations imposed by statute upon corporations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporation.]

Dawson, J., dissenting.

On Motion for Modification.

3. Corporations ⟸642(2)—Sale of stock in foreign corporation or trust is not a "doing of business."

A sale of the shares of stock in the trust in question is held not to be the "doing of business," within the accepted meaning of that term, and the plaintiff is entitled to sell its shares in the state, if upon the inquiry by the state charter board the plaintiff is found to measure up to the conditions and qualifications prescribed by the statute as to the right to sell securities within the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

4. Corporations ⟸648 — Mandamus ⟸87—Application of foreign corporation held to require state charter board to pass on its right to sell stock in state.

Under the facts of the case it is found to be the duty of the state charter board to consider and pass upon the merits of plaintiff's application for permission to sell shares of stock in the trust, and, having declined to do so, the writ of mandamus to compel such action is granted.

(Additional Syllabus by Editorial Staff.)

5. Corporations ⟸642(6)—"Doing of business" by foreign corporation defined.

The "doing of business" is the exercise of some of the functions and the carrying on of the ordinary business for which a corporation is organized, and single and isolated transactions do not ordinarily constitute it (citing 3 Words and Phrases, § 2155).

Original mandamus proceedings by the Home Lumber Company, a trust estate, and J. K. Stanland and others, as trustees of such estate, against Richard J. Hopkins, Attorney General of the state of Kansas, and others,

Digitized by Google

composing the State Charter Board of the state of Kansas, to compel the board to consider plaintiff lumber company's application for permission to sell its stock in the state and to find whether plaintiff had complied with statutes and is entitled to sell its stock within the state. Writ issued on motion for modification.

Wheeler, Brewster & Hunt, of Topeka, for plaintiffs.

Richard J. Hopkins, Atty. Gen., Maurice McNeill, of Topeka, and W. H. Thompson, of Kansas City, for defendants.

JOHNSTON, C. J. This proceeding was brought by the plaintiff to compel the state charter board to consider its application for permission to sell its stock and securities within the state, and to find and determine whether the plaintiff had complied with the statutes of the state and is entitled to dispose of securities and stock in Kansas. The plaintiff, an unincorporated association, submitted its agreement or declaration of trust under which it was organized and its plan of operations to the charter board, with a request that it be permitted to sell its stock and securities within the state. That tribunal concluded that the agreement created a partnership and was not such an organization as was entitled to sell securities and stock in Kansas, because the agreement created partnership liabilities and the plan of business was inequitable and unfair. The board therefore declined to investigate or consider the solvency of the company, whether its plan of business was otherwise honest and fair to investors, its advertising matter free from deception, and whether or not the reasonable value had been placed upon the assets of the company which was offered in exchange for property and securities. Having determined that each shareholder became liable as a copartner and that the business of the sale of its securities and stock was to be conducted upon a plan regarded to be unfair and inequitable, the board deemed it unnecessary to proceed further with the investigation.

[1] The first and principal question presented for determination is whether the company as organized constitutes a partnership. If the shareholders are not partners liable for the debts of the company, and the business contemplated is not contrary to law or public policy, it was the duty of the charter board to investigate and determine the merits of the plaintiff's application. The agreement is a declaration of trust in which parties transfer to trustees certain property interests, and for the purpose of defining the interest of each subscriber in the estate the trustees were to issue negotiable certificates of shares to the extent of 150,000, each of the value of $1, and which they might, if they deemed it expedient, increase to 1,000,000 shares. They engaged to use the property and proceeds of the shares sold in a general manufacturing, mercantile, or commercial business, in any and all of its branches, to buy, sell, hypothecate, or otherwise deal in bonds and stocks, debentures, notes, and all forms of obligations of corporations, countries, states, counties, and municipalities or persons. In fact they were authorized to buy, sell, and deal in all kinds of property and to carry on all kinds of business not inconsistent with law. It was stipulated that the trustees should not be less than three nor more than five in number, to be elected annually by the shareholders at their meetings, and vacancies in the number of trustees are to be filled by the remaining trustees.

In respect to the functions, obligations, and liabilities of the trustees, it is provided:

"The trustees shall hold the legal title to all property at any time belonging to the trust, and shall have and exercise the exclusive management and control of the same; they shall assume all contracts for, and obligations and liabilities in connection with or growing out of, the property assigned to them by the subscriber and mentioned in the schedule filed with the trustees, also, in the management of the same; and to the extent of the value of such property and business, but not personally, shall agree to hold the subscriber and any persons associated with and acting with him harmless and indemnified from and against any loss, cost, expense, or liability upon, or by reason of, or in connection with any contract, obligation, or liability; they may adopt and use a common seal with such designs as they, in their discretion, may deem best suited to disclose the purposes of the company; they may collect, sue for, receive, and receipt for all moneys at any time due to said trust; they may employ counsel to begin, prosecute, defend, or settle suits at law, in equity, or otherwise, with the consent of all the trustees given at a meeting called for that purpose, but not otherwise, unless the general power shall at any time be delegated by a full board meeting to any one particular individual member or members, in writing; they may borrow money for the purposes incidental to the proper management in like manner as they may deem best to secure said loans; and they shall incur no debt or loan liability except such as may be incidental to the proper management of the property held by them and the other proper carrying out of the purposes of their trust.

"In addition to the shares to be originally issued to the subscriber as hereinbefore provided, the trustees shall issue and sell at public or private sale, upon such terms and for such prices as they may deem expedient, such additional shares as may be necessary to provide funds to carry on and accomplish the purposes hereinbefore mentioned and set forth. The total amount to be issued by said trustees shall not in any event exceed 1,000,000 shares. The trustees may accept property or services in lieu of cash for the shares issued by them, and they shall be the sole judges of the value of such services or property.

"So far as strangers to this trust are concerned, a resolution of the trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that

Digitized by Google

such act is within the powers of the trustees, and no purchaser from the trustees or one loaning money to the trustees shall be bound to see the application of the purchase money or other consideration paid or delivered by or from said purchaser or loaner to or for said trustee."

Other provisions in the agreement are to the effect that the trustees may make, amend, and repeal by-laws, may elect officers and appoint agents and fix their compensation, may pay themselves such compensation as they deem to be reasonable, and they shall not be liable for errors of judgment, and shall pay only such dividends as they deem advisable, the amount of such dividends to be left wholly to their discretion. The trust is to continue not longer than 20 years, and when ended the trustees are to wind up its affairs, liquidate its assets, and distribute the same among the holders of the shares according to the number of shares held by each. It was also provided that the death of the shareholder should not determine the trust nor entitle the legal representatives of such shareholder to an accounting or to take any action in any court or elsewhere against the trustees, but that the regular representatives of the deceased shareholder should succeed to the rights of the decedent. There were further provisions that—

"The ownership of shares hereunder shall not entitle the shareholders to any title in or to the trust property whatsoever or right to call for a partition or division of same, or for an accounting, or for any voice or control whatsoever of the trust property or of the management of said property or business connected therewith by the trustees. The trustees shall have no power to bind the shareholders personally, and the subscriber and his assigns and all persons and corporations extending credit to, contracting with, or having any claim against the trustees shall look only to the funds and property of the trust for payment under such contract or claim, or for the payment of any debt, damage, judgment, or decree, or of any money that may otherwise become due or payable to him from the trustees, so that neither the trustees nor the shareholders, present or future, shall be personally liable therefor. In every written order, contract, or obligation which the trustees shall give or enter into, it shall be the duty of the trustees to stipulate that neither the trustees nor the shareholders shall be held for any personal liability, under or by reason of such contract, order, or obligation."

As will be observed, the title as well as the exclusive management and control of the property of the trust are absolutely vested in the trustees. The shareholders have no voice or control in the property or its management and no right even to call for an accounting by the trustees. They can exercise no authority as individuals nor in association except to elect the trustees, and when new trustees are elected they have the same absolute authority and control that are specified in the declaration of trust. It is expressly stated that no personal liability of a shareholder can arise by reason of any contract the trustees may make, any obligation they may assume, or any judgment rendered against them, and to put the matter of personal liability beyond cavil it is provided that in every written order, contract, or obligation, given or entered into by the trustees, they are required to write into it the provision that the shareholders as well as the trustees shall be free from any personal liability. Under the declaration all persons extending credit to the trustees or entering into contracts with them must look alone to the funds and property of the trust estate for payment.

Whether an agreement committing the possession and control of property to trustees for the benefit of shareholders creates a trust or partnership depends upon the interest transferred and the extent of the control given to the trustees. If the title is transferred to them and they are given the exclusive power to act as principals in the management of the trust property, a true trust is created, but, if the shareholders are coproprietors and the trustees are subject to the control of the shareholders in the management of the trust, it is deemed to be a partnership. Such a test has been applied in Massachusetts, where a large volume of business is done under trust agreements. The cases of Hoadley v. County Commissioners, 105 Mass. 519; Whitman v. Porter, 107 Mass. 522; Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284; Williams v. Boston, 208 Mass. 497, 94 N. E. 848; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; Priestly v. Treasurer & Receiver General, 230 Mass. 452, 120 N. E. 100—are examples of those which fall on the partnership side of the line. On the other hand, Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083, and Williams v. Milton, 215 Mass. 1, 102 N. E. 355, illustrate the type of agreements which are held to create a pure trust. In the Williams v. Milton Case there is a full discussion of the elements entering into the two classes of agreements, and the line dividing them is clearly pointed out. It was said:

"The difference between Hoadley v. County Commissioners, 105 Mass. 519 (involving the same indenture as that in Gleason v. McKay, 134 Mass. 419), Whitman v. Porter, 107 Mass. 522, Phillips v. Blatchford, 137 Mass. 510, Ricker v. American Loan & Trust Co., 140 Mass. 346 [5 N. E. 284], and Williams v. Boston, 208 Mass. 497 [94 N. E. 848], on the one hand, and Mayo v. Moritz, 151 Mass. 481 [24 N. E. 1083], on the other hand, lies in the fact that in the former cases the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their prop-

Digitized by Google

erty. The property is their property. They are the masters. While in Mayo v. Moritz on the other hand there is no association between the certificate holders. The property is the property of the trustees and the trustees are the masters. All that the certificate holders in Mayo v. Moritz had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in Mayo v. Moritz, 151 Mass. 481, 484 (24 N. E. 1083]: 'The scrip holders are cestuis que trust, and are entitled to their share of the avails of the property when the same is sold,' and that is all to which they were entitled. In Mayo v. Moritz the scrip holders had a common interest in the trust fund in the same sense that the members of a class of life tenants and the members of a class of remaindermen (among whom the income of a trust fund and the corpus are to be distributed respectively) have a common interest. But in Mayo v. Moritz there was no association among the certificate holders just as there is no association although a common interest among the life tenants or the remaindermen in an ordinary trust. For a decision in this commonwealth somewhat like Mayo v. Moritz, ubi supra, see Hussey v. Arnold, 185 Mass. 202 [70 N. E. 87]. See, also, in this connection Makin v. Savings Institution at Portland, 23 Me. 350 [41 Am. Dec. 389]; Burt v. Lathrop, 52 Mich. 106 [17 N. W. 716]." 215 Mass. 8, 9, 102 N. E. 357.

Another case in line with the theory of Williams v. Milton, supra, is the Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460, 75 N W. 911, 41 L. R. A. 252, where a deed of trust was executed by a debtor in which creditors joined. It was said:

"An insolvent debtor made a deed of trust, in which his creditors joined. By the terms of the deed, the trustee was to continue the business of the debtor as long as he should deem it for the interests of the creditors so to do. The entire management and control of the business were intrusted to him. Whenever the trustee deemed it best to discontinue the business, the property was to be sold, and the claims of all the creditors signing the deed were to be paid from the proceeds; the surplus, if any, to go to the debtor. Held, that the creditors signing the deed did not thereby render themselves the real proprietors of the business, and, therefore, that they were not liable to creditors of whom the trustee had purchased goods in the prosecution of such business. The relation created by the instrument was that of trustee and beneficiary, and not that of principal and agent." Syl. 1.

Still another case closely in point is Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273, which is as follows:

"An association organized and doing business under a declaration of trust, the beneficial interest under which is divided into transferable shares, the title to the property being in the trustees only who are given the most ample powers of management and control, and are prohibited from binding the shareholders personally; the shareholders not being liable for any assessment; persons contracting with the trustees being required to look to the fund and not to the trustees or stockholders; power being given the trustees to declare dividends, is in its nature a true trust and not a partnership, and the holders of the 'stock,' so called, are not under individual and personal liability for any of the obligations or indebtedness of the trust." Syl. 1.

See, also, Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; In re Associated Trust (D. C.) 222 Fed. 1012; Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601; Cox v. Hickman, 8 H. C. L. 268; Smith v. Anderson, 15 Ch. Div. 247; Crowther v. Thorley, 82 W. R. 330; In re Siddall, 29 Ch. Div. 1; In re Thomas, 14 Q. B. Div. 379; In re Faure Electric Accumulator Co., 40 Ch. Div. 141; Wrightington on Unincorporated Associations, p. 49; Chandler on Express Trusts under the Common Law, p. 19.

Following the rule of the authorities, it is clear that the shareholders herein cannot be regarded as partners. They had surrendered proprietorship in the property to the trustees and have no control over it or of the business done by the company, and neither can they be held liable upon any contract or obligation of the trustees. The latter act as proprietors and principals, and conduct the business free from the control of the shareholders, and may make and change investments whenever they deem best and make or withhold dividends in their discretion. They do not take orders or directions from shareholders and are in no sense the agents of the shareholders. While stock is issued to shareholders, the shares give no right except to furnish a basis for the division of profits and for a distribution of the property and funds when the trust is concluded. The stock measures the voting strength of shareholders when trustees are elected, but the fact that they choose trustees with the powers conferred by the declaration of trust is not such control as to make the trustees their agents or give the shareholders the character of partners. It follows that the state charter board was not warranted in denying the application of the plaintiff upon the ground that it was a partnership.

[2] It does not follow, however, that the plaintiff as organized is entitled to a permit to sell its stock and securities even if it is found to be solvent, its assets substantial and sufficient, and its plan of business such as would be fair and equitable towards investors. To meet the requirements of our law the company must bring itself within the rules applicable to corporations and conform to the regulations imposed by statute on corporations. The Constitution expressly provides that—

Digitized by Google

"The term corporations, as used in this article, shall include all associations and joint-stock companies having powers and privileges not possessed by individuals or partnerships; and all corporations may sue and be sued in their corporate names." Const. art. 12, § 6.

The first section of article 12 provides that corporations may be created under general laws, and that no special act conferring corporate powers may be passed by the Legislature. It requires no argument to show that the plaintiff has and is proposing to exercise powers and privileges not possessed by individuals and copartnerships. There is first the limited liability under which both shareholders and trustees are exempted from all personal liability. The corpus or joint property is to be continued during the existence of the trust freed from the rules of joint tenancy or tenancy in common, and the organization is not dissolved by the death of a shareholder or trustee. The interest of the shareholder is represented and measured by negotiable shares of stock, which gives voting power much the same as does corporate stock. A common seal is to be adopted and used substantially as is done by corporations, and the trustees "may elect officers who shall have the authority and duties usually incident to like officers in corporations." It is not necessary to the validity of the action of the trustees that there should be a concurrence of all of them, but it is provided that a majority of those present and voting at any meeting shall be sufficient. Other provisions already mentioned give the company powers and privileges beyond those possessed by individuals and partnerships, and within the rule of the Constitution the organization is to be regarded as a corporation. Many statutory provisions have been enacted for the organization and regulation of corporations which are wholly inconsistent with the organization and plan of the plaintiff company, and with which it will manifestly be unable to conform. For this reason the writ of mandamus applied for is denied.

BURCH, MASON, PORTER, WEST, and MARSHALL, JJ., concurring.
DAWSON, J., dissenting.

On Motion for Modification.

JOHNSTON, C. J. The plaintiff asks for a modification of the decision and judgment formerly rendered as to the right of the plaintiff to sell its stock in Kansas, or rather as to the duty of the state charter board to examine and pass upon its application to sell shares of stock in the state. From expressions employed in the pleadings and briefs of the plaintiff, it was assumed that the application filed with the state charter board asked permission to sell not only shares of stock but other securities as well. As one of the purposes for which the company is organized is to buy, sell, and hypothecate bonds, debentures, notes, obligations, and other securities issued by private and public corporations and individuals, it was assumed that plaintiff was asking for permission to carry on the business of dealing in securities in Kansas. It now appears that it is not asking for permission to do business in the state, but only that it may sell shares of its stock within the state. Because of this misapprehension, some language was used at the close of the former opinion that was not appropriate to the real question involved.

[3, 5] The principal controversy which divided the parties was whether the plaintiff as organized was a true trust or a partnership, and it was determined that the trust agreement created a trust, and that the shareholders are not under any partnership or personal liability for the obligations or indebtedness of the trust. Upon a somewhat cursory examination the state charter board decided that the plaintiff was a partnership and that the shareholders were personally liable for the debts of the trust, and therefore declined to go further in the examination of the application or to pass upon its merits. The board assumed that plaintiff was seeking to do business in Kansas under an organization not recognized in the state. The permission sought, however, was not admission into the state for the purpose of doing business, and was no more than an opportunity to sell shares of stock with a view of raising money on which to do business. The general holding of the courts is that the doing of business is the exercise of some of the functions and the carrying on of the ordinary business for which the company is organized. 8 Words and Phrases, § 2155; Thompson on Law of Corporations, § 7936; Barse Live Stock Co. v. Range V. C. Co., 16 Utah, 59, 50 Pac. 630. Single and isolated transactions do not ordinarily constitute the "doing of business" (Osborne v. Shilling, 74 Kan. 675, 88 Pac. 258, 11 Ann. Cas. 319), and neither can the sale of shares or the ownership of stock of a nonresident company be regarded as within that term (Payson v. Withers, 19 Fed. Cas. 29, No. 10,864; United States v. American Bell Telephone Co. [C. C.] 29 Fed. 17).

[4] The right of the plaintiff to have its application considered is to be determined by what it is proposing to do now, and not by what it may hereafter undertake to do. It has been rightly decided that under the Constitution the plaintiff is to be treated as a corporation, and if it should apply for permission to do business in the state it would be subject to the corporation law so far as the same is applicable to that class of corporations. Of course there are provisions

Digitized by Google

of the law relating to corporations that are not applicable to companies like the plaintiff, and the Legislature has not as yet enacted statutes peculiarly applicable to that class of corporations. It will be time enough to determine what regulations should be applied when they are imposed upon a company like the plaintiff, or when a question arises as to their right to do business in the state. Regardless of its corporate character, or even of the lack of it, the plaintiff is entitled to have its application considered by the state charter board upon its merits, and upon the theory that there is no personal or partnership liability of shareholders, the same as if the application had been made by any other person, company, or corporation. It devolves upon the board to inquire as to the solvency and responsibility of the plaintiff, the sufficiency of its assets, the trustworthiness of those representing and managing it, the fairness, honesty, and equity of its plan, the security afforded investors, that its funds will not be dissipated or misappropriated, and if it is found to measure up to the statute in these and other respects a permit may be issued to it. Laws 1919, c. 153.

Having determined that the plaintiff is not a partnership, and, further, that the proposed sale of shares in the trust is not the "doing of business," within the accepted meaning of that term, it was the duty of the state charter board to consider and pass upon the merits of plaintiff's application, and the writ of mandamus as prayed for will therefore be issued.

All the Justices concurring.

STAINBROOK v. WILSON. (No. 22554.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

Brokers ⇐66—Agent to sell who purchases property at a profit to himself, held liable on agreement to divide commissions with another agent.

Where the owner of a farm offers a commission to a real estate agent to secure a purchaser for his farm at a stated price, and the real estate agent enters into an agreement with a second real estate dealer whereby they are to co-operate in effecting a sale of the farm and divide the commission between them, and the second real estate dealer buys the farm himself from the owner, without the owner's knowledge of the agreement between the real estate dealers, and without knowing that the second real estate dealer had been induced to become interested in the farm through the agency of the first, and where the owner accordingly abates the price for substantially the amount he would have to pay as a commission, and the second real estate dealer profits accordingly, the latter is liable to the first real estate dealer for one-half of the commission which they had agreed to divide between them.

Appeal from District Court, Linn County.

Action by Dan Stainbrook against A. W. Wilson. Judgment for plaintiff, and defendant appeals. Affirmed.

John A. Hall, of Pleasanton, for appellant.

Chas. F. Trinkle, of La Cygne, for appellee.

DAWSON, J. This was a suit for one-half of a real estate dealer's commission.

The plaintiff conducted an auto service garage in La Cygne, and casually transacted some real estate business in addition thereto. One C. E. Pollman of La Cygne had a farm of 257½ acres near by. Pollman promised to give plaintiff $500 as a commission to find a buyer for the farm at $65 per acre. In April or May, 1918, the plaintiff met the defendant, another real estate dealer, and told him about the Pollman place, and, according to plaintiff's testimony—

"I had a conversation with Wilson about the place. * * * Wilson said he had some buyers for some of this bottom land, or thought he could sell some of it, and we would divide the commissions. I said that we would look at a place when we come back, we will stop and look at it. We were to divide the commission half and half—fifty-fifty. On the way back we stopped and looked at Ed Pollman's farm, consisting of about 257 acres, located about 2½ miles from La Cygne. We drove through the farm in the car. We talked about the price of the farm, which was $65 per acre, and I was to get $500 if we sold it for $65 per acre. * * * After that Wilson sent two or three or four prospective buyers down to see the farm, and he was down himself two or three times, I think. I drove them out to the farm."

In August of the same year the defendant himself bought the farm directly from Pollman for $16,000, which was $237.50 under the net amount Pollman would have realized if he had received his stated price of $65 per acre, and if he had been required to pay a commission of $500. Pollman testified:

"I first met Mr. Wilson about the 1st of August. * * * Well, Mr. Wilson met me there, and asked me if I had a bottom farm for sale. I told him I did, and he asked me what I wanted for it. I told him $65 an acre, and I made the same proposition to Mr. Wilson. Well, he handed me his card before that time, showing that he was a real estate man, and I made him the same proposition that I made to all the rest of the real estate men around town, that I would give him $500 if he sold the place. * * * I gave him a written agree-

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

ment, stating that I would take $16,232.50, and that agreement was $500 less than the $65 an acre. * * *

"Q. What did this item of $500 represent, that you say you took off? A. It was in accordance with my first proposition that if he sold the place for $65 an acre, I was to give him $500. * * *

"Q. Then this item of $500, deducted from the sale price in your written agreement with the defendant did represent the commission on the sale of that farm? A. If he sold the farm for $65 an acre.

"Q. After taking off this item of $500, the price was reduced to $16,232.50, was it not? A. I think that's right."

When Stainbrook learned that defendant had purchased the farm, he demanded from him half the commission. Wilson denied liability. This action was begun. Stainbrook pleaded the facts, and the testimony in his behalf tended to establish his cause of action. On behalf of Wilson, it was admitted that Stainbrook gave Wilson his first information about the Pollman farm, while Stainbrook was driving Wilson for hire on some land inspection in that community.

Defendant's testimony:

"Q. What is your best recollection as to what he said he wanted? A. I don't remember that he said just exactly the price on it, and I asked him how many acres he had, and he said he thought there was about 270 acres, and we drove down there and looked over the farm the best I could—in fact, I didn't take particular note of it—and we came back to La Cygne, and I said, 'Mr. Stainbrook, if you will go to the owner of this farm and get a written contract listed at a net price to you, I will try to sell it, I believe I can do it, and we will whack up the commission; I can't afford to take a straight commission on a farm; it is 75 miles from where I live down to that farm.'

* * * * * *

"A. * * * There was nothing said in regard to Stainbrook and I, other than I told him if I had some of that land for sale, I thought I could sell some of it, and we spoke of the Pollman place and went on and looked at the place. Mr. Stainbrook and I had our conversation at the garage when we came back. I then went home. * * * I came back to La Cygne, and I went to Stainbrook and said, 'Did you get that written agreement with that fellow?' And he said, 'No.' * * *

"Q. Then what did you do? A. He told me the man that ran the butcher shop owned the land. I never knew the man, and I went up there, and some one told me who Pollman was, and I met him coming across the street in La Cygne, and I gave him a card and introduced myself and asked him if Stainbrook had the farm listed for sale, and he told me he had not."

The defendant also showed that he paid $16,000 for the farm, and became responsible for a contract of Pollman concerning the sowing of wheat, and obligated himself to pay interest due or to become due on a $3,500 mortgage on the farm, and to pay the taxes. While the record is not clear on these points, it is inferable that the interest was not due until the following March, that the taxes were not then a lien on the land, and that defendant acquired an interest in the wheat for which he agreed to become responsible.

On rebuttal, plaintiff testified:

"Q. Did you have any conversation there in which Mr. Wilson asked you if you had gotten this net agreement with Ed Pollman for the price of this farm? A. If I had gotten it? I told him I wouldn't get it, that Ed would do what he agreed to.

"Q. Did Mr. Wilson ever ask you to get an agreement for a net price on the farm? A. Not no net price, we was to get an agreement so he couldn't back out if we made a sale we wouldn't lose out. * * *

"Q. Did Mr. Wilson ever tell you he wouldn't have anything to do with the land unless you did get a written agreement? A. No, sir; he never did. * * *

"A. I remember of telling him I wouldn't get it."

From a verdict and judgment for $250 in plaintiff's favor, defendant appeals.

This is another fact case, of the kind so often brought to this court, and as to which this court can seldom do little except to set down its controlling features and then affirm the judgment. Defendant says the demurrer to plaintiff's evidence should have been sustained. In view of those portions of the evidence which we have quoted, such contention is manifestly incorrect. Defendant says: "No contract was ever completed between Stainbrook and Wilson." That was a fair contention to make in view of the conflict of testimony, until the jury had determined whether Stainbrook or Wilson was telling the truth, but it is a waste of words to argue that now.

Appellant contends:

"There was nothing in the relationship between Wilson and Stainbrook which made Wilson liable to Stainbrook for a commission when Wilson discontinued negotiations with Pollman as Pollman's agent and began to deal with Pollman on the basis of vendor and purchaser."

Why not? They made the agreement to undertake the sale of Pollman's farm and to divide the $500 commission. Wilson owed Stainbrook the duty of good faith in their joint project to effect a sale of the farm and thus jointly to earn the $500. He could not, without notice to Stainbrook and without his consent, ignore his agreement and make an independent bargain with Pollman whereby Stainbrook would be deprived of his half of the commission. By purchasing the property himself he secured an abatement of $500 on the price from Pollman, which was equivalent to a commission. Pollman so testified. That the abatement was not precisely the sum of $500 is immaterial. Pollman was not informed that Stainbrook

Digitized by Google

had interested Wilson in the farm, or that Stainbrook had taken Wilson into a deal whereby they were to co-operate in the sale of the farm and divide the commission. Under such circumstances, while Pollman had reduced the price because he was not liable for a commission, Wilson by reason of his dealings with Stainbrook and because of his bad faith towards Stainbrook profited to the extent of $500 in the acquisition of the farm by himself. Neither law nor good conscience would permit him to deprive Stainbrook of his share of the $500 under such circumstances.

No error of law nor miscarriage of justice inheres in this result, nor can anything further be discerned which would justify discussion.

The judgment is affirmed.

All the Justices concurring.

Ex parte JACKSON. (No. 22964.)

(Supreme Court of Kansas. June 5, 1920. Rehearing Denied July 10, 1920.)

(Syllabus by the Court.)

Habeas corpus ⊂=22(1)—Defendant is not entitled to a release so long as any part of his jail term has not been fully served.

Delays in the execution of a judgment imposing a term of imprisonment on a defendant in a criminal case, which were caused by an abortive parole, an abortive appeal, a stay of proceedings, and an application to a district judge for a parole, for all of which the defendant was himself responsible, do not relieve the defendant from the judgment; and the expiration of the time when he would have been entitled to his release from jail if he had been promptly incarcerated and continuously kept in jail on and from the date when he was sentenced is not an execution of the sentence and judgment, and ordinarily he will not be entitled to release on habeas corpus so long as any portion of his term in jail has not been duly served.

Application by Chauncey Jackson for a writ of habeas corpus against Hugh Larmier, Sheriff of Shawnee County, Kan., for a discharge from custody under an alleged void commitment. Discharge denied, and petitioner remanded to the sheriff's custody to serve the unexecuted part of a jail sentence.

Elisha Scott, of Topeka, for petitioner.

Paul H. Edgar, of Topeka, for respondent.

DAWSON, J. This is an application for a writ of habeas corpus. The petitioner was prosecuted in the court of Topeka for a public offense. He pleaded guilty, and on January 9, 1920, he was sentenced to the county jail for 90 days. At the same time he applied to the judge of the court of Topeka for a parole. A parole was granted. Within a few days the Attorney General notified the judge of the court of Topeka—a court of limited jurisdiction—that he had no judicial power to grant paroles, and so the petitioner was again taken into custody on January 17, 1920. Thereupon the petitioner applied to the district judge of Shawnee county (first division) for a parole. This was heard in part and continued for further evidence, but a stay of proceedings was granted; and on January 20, the petitioner appealed to the district court from the judgment pronounced against him by the court of Topeka on January 9. On February 14, the district judge denied the petitioner's application for a parole; and on March 13, his appeal from the judgment of the city court was dismissed on motion of the state because the appeal was taken too late, and a mandate of the district court was issued, directing that the judgment of the court of Topeka be executed. Pursuant thereto, the petitioner was incarcerated in the Shawnee county jail until April 26, when he applied to this court for a writ of habeas corpus. Pending our determination of this application the petitioner has been at liberty on bond.

The gist of the petitioner's claim of right to release on habeas corpus is because the commitment was void:

"That it was not issued until a long time after said judgment had fully expired; and that said justice of the peace had no right or authority to issue said commitment or warrant at the time, in that, it has long since expired and is void on its face and is without any authority, in that said respondent has no legal authority therein for confining your petitioner in the county jail of Shawnee county."

While the above chronicle shows the divers and sundry maneuvers made by this petitioner to avoid the judgment and consequences of his crime, it plainly shows that he has not yet served the adjudged term of 90 days in jail. Petitioner invokes the old rule that one who has been sentenced to a term of imprisonment is entitled to his discharge at the time when that term would have ended if he had been promptly incarcerated when sentenced. That rule, although a debatable one and one given more significance in olden times than now, covers causes of official neglect and indifference, irregularities for which the defendant has been in no way responsible, where the delay in incarcerating the defendant has been unreasonable; and where judgment has been pronounced upon an arrangement that the sentence of imprisonment was only a formality, and that it would probably not be executed at all. In such a case if the defendant is permitted to

---

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

go at large until long afterwards, habeas corpus may be invoked. In re Krig, 105 Kan. 695, 185 Pac. 1044. But here there was no considerable delay; the postponement of the petitioner's imprisonment was caused by the abortive parole, the abortive appeal, the stay of proceedings, and the application to the district judge for a parole. For all of these maneuvers to avoid or delay his incarceration the petitioner was responsible; and after all these proceedings were ended the time thereby consumed was only from January 9 to March 13, a little over two months. Even the old rule for which the petitioner contends would not cover this situation.

The court is of opinion that the petitioner's case comes within the general principle laid down in State ex rel. v. Piper, 103 Kan. 794, 176 Pac. 626, in which it was held that where a delay in executing a sentence of imprisonment, although unusual, was not unreasonable under the circumstances, the judgment of imprisonment was not satisfied until it had been fully executed, and that the essential portion of the sentence in a criminal case is the punishment, including the kind of punishment and the amount thereof, and that the "expiration of time without imprisonment is in no sense an execution of the sentence." See, also, Ex parte John Eldridge, 8 Okl. Cr. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625; 16 C. J. 1335, 1336.

The petitioner's discharge is denied, and he is remanded to the custody of the sheriff to serve the unexecuted portion of the 90 days' term of imprisonment, which was imposed on him by the court of Topeka.

All the Justices concurring.

MATTHEWS et al. v. JOHNSON.
(No. 22864.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Mines and minerals ⟹97—Joint enterprise under oil lease held not to constitute partnership.

Under the evidence, it is *held* that the joint enterprise in which the parties herein were engaged did not constitute a partnership.

2. Mines and minerals ⟹78(7)—Lessees held under evidence entitled to forfeit rights of drilling contractor.

The evidence is deemed sufficient to support the contention that the plaintiffs were entitled to have the rights of the defendant in an oil and gas contract adjudged to be forfeited because of the noncompliance of the defendant with the terms of the contract.

Appeal from District Court, Sedgwick County.

Action by W. H. Matthews and three others against T. C. Johnson, to forfeit defendant's interest under a drilling contract, and for the appointment of a receiver. Judgment for plaintiffs, other than W. H. Matthews, forfeiting the drilling contract, and that it remain in full effect as to plaintiff W. H. Matthews, and defendant appeals. Modified and affirmed.

Jean Madalene, of Wichita, for appellant.

R. E. Angle, J. N. Haymaker, Robt. C. Foulston, and A. V. Roberts, all of Wichita, for appellees.

JOHNSTON, C. J. This action involves the right of the parties in an oil and gas lease as affected by a drilling contract executed by plaintiffs to the defendant. The parties, five in number, obtained a lease on September 23, 1916, which was to run for a period of four years, and it provided, if oil and gas was not produced in paying quantities within the term, it should expire and thereafter should be of no force and effect. Each of the parties had a share in the lease of different proportions. In order to develop the property, the plaintiffs, four in number, entered into a drilling contract with Johnson, the fifth member of the party, on March 31, 1919, and it provided that the defendant should take possession of the property and drill oil and gas wells on it. It stipulated that he should commence operations on or before May 1, 1919, and that the payment for and erection of a derrick should be deemed the commencement of operations. It was further provided that defendant would begin drilling operations on or before June 1, 1919, and, failing in this, he was to forfeit the derrick erected on the premises. There was a further provision that he was to deliver to the plaintiffs one-eighth of the oil produced, and, further, that upon the completion of the first well the drilling of a second should be commenced within 60 days thereafter, and that the drilling should be continued in like manner until eight wells had been drilled, and that his failure to drill wells as stipulated should be deemed an abandonment of the contract by him, except as to that part of the land on which producing wells had been drilled. The defendant did not pay for and erect a drilling derrick upon the property on May 1, 1919, as stipulated, but he did obtain material for a derrick and placed it on the premises about May 26, 1919. A derrick had not been erected nor had drilling operations begun on June 1, 1919, as the contract provided, and no drilling had been done on November 8, 1919, when this action was commenced.

The plaintiffs asked for the appointment of a receiver as a means of protecting the interests of the several parties in the lease, and also for the forfeiture of the defendant's

Digitized by Google

interests under the drilling contract. The court found and adjudged that the plaintiffs other than W. H. Matthews were entitled to a forfeiture of the drilling contract, including the derrick on the premises, and as to Matthews it was held that the contract should remain in full force and effect. A stipulation of the parties was made, providing for the operation of the lease during the progress of the litigation, but it was agreed that it should not prejudice the rights of any of the parties, nor affect the the determination of the questions at issue upon the pleadings.

[1, 2] It is conceded by the defendant that he failed to comply with the conditions of the drilling contract, but he contends that there was a sufficient excuse for his delay, and that no good grounds for adjudging a forfeiture existed. One excuse is that on May 29, 1919, W. H. Matthews agreed to extend the time for beginning drilling operations until July 15, 1919. It appears that W. H. Matthews did sign such an agreement, but it is clear that he acted only for himself, and had no agency or authority to represent or bind the other plaintiffs. This was recognized by the defendant, who requested Matthews to procure the consent and signatures of the other plaintiffs to the extension agreement. They refused to consent to an extension, and declined to sign the agreement. Whatever effect it may have had on Matthews, who did sign the incomplete agreement, it did not affect the rights of those who refused to sign it. The court correctly held that there was no partnership relation between the parties, and that the consent of Matthews had no binding effect upon the other plaintiffs. There were good grounds for the forfeiture. The derrick was not erected in compliance with the agreement, and drilling operations were not begun at the time stipulated. The life of the oil and gas lease was of short duration, expiring by its terms in September, 1920, and therefore time was an important element of the drilling and development contract. There was no such laches or delay on the part of plaintiffs in asserting a forfeiture as will deprive them of the right to insist on a cancellation of the drilling contract, and the clearing of the way so that development of the lease may promptly proceed. While forfeitures are not favored, the plaintiffs were clearly entitled to the relief that was awarded. Doornbos v. Warwick, 104 Kan. 102, 177 Pac. 527.

There is nothing substantial in the excuses of the defendant to the effect that suits of forfeiture were threatened, nor in the claim that the point at which a well was to be drilled had not been fixed by agreement.

W. H. Matthews complains of the ruling refusing a forfeiture as to him. He contends that the extension agreement which he signed and by reason of which he was denied relief was not binding upon any of the parties because all of them did not join in its execution, and, according to defendant's testimony, he too regarded the consent and signatures of the other parties to be necessary to an effectual agreement. Assuming, however, that it was binding upon W. H. Matthews, it appears that he only consented to an extension of 45 days, which would carry it up to July 15, 1919. Defendant, however, did not commence operations at that time, nor was any drilling done by him up until the commencement of the action. We therefore think that equity required the forfeiture and cancellation of the drilling contract as to W. H. Matthews as well as the other plaintiffs. The judgment will be modified to that extent, and, when so modified, is affirmed.

All the Justices concurring.

DANA et al. v. KANSAS NATURAL GAS CO. (No. 22563.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Attorney and client ⟹166(2)—Evidence in action for attorney's fee held to sustain a judgment for plaintiffs.

The record presenting a question of fact only which was correctly determined by the trial court, it is *held* that the judgment must be affirmed.

(Additional Syllabus by Editorial Staff.)

2. Appeal and error ⟹931(6) — Improper evidence received on trial before court presumed disregarded.

On a trial before the court without a jury the presumption is that, even if improper evidence was received, the chaff was sifted from the wheat in reaching its conclusion.

Appeal from District Court, Montgomery County.

Action by J. H. Dana and another against the Kansas Natural Gas Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Thomas S. Salathiel, of Independence, and Geo. T. McDermott, of Topeka, for appellant.

F. S. Jackson, of Topeka, and A. M. Etchen, of Coffeyville, for appellees.

WEST, J. The defendant appeals from a judgment in favor of the plaintiffs for attorney's fee.

[1] The petition alleged that in 1902 the plaintiff Ziegler contracted with the People's Gas Company for a retainer of $100 a month, and $25 a day and actual expenses for the days employed out of his office, and in ad-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

dition to be furnished free gas for heating and lighting his residence and office. In 1905, he formed a partnership with the plaintiff Dana, with which firm the contract was continued except the per diem was increased to $50 instead of $25, and free gas for heating and lighting the residence of plaintiff Dana was added; that in August, 1905, the People's Gas Company sold to McDowell, who orally requested the plaintiffs to continue in their employment as formerly with the People's Gas Company, and they were regularly paid therefor until December, 1908; that in January, 1909, it was agreed between the plaintiffs and John J. Jones, attorney for the defendant, the Kansas Natural Gas Company, that the employment should be continued as before without the $50 per diem, and such employment continued through 1909 and 1910, the defendant having in 1910 succeeded the People's Gas Company; that during 1911, and up to December, 1912, the defendant by virtue of this agreement furnished gas to the plaintiffs, but failed to pay their monthly salary of $100, vouchers therefor being sent in and adjustment thereof being promised. Judgment was prayed for, and the unpaid balance of $1,200 with interest from January 1, 1912. The defendant denied that the alleged services were rendered or had been accepted, and denied the authority of Jones to employ the plaintiffs as alleged, and averred that they had been notified in 1910 that no further payment would be made. The court found in favor of the plaintiffs, and rendered judgment for $1,710.

The defendant assigns as error the overruling of the demurrer to the plaintiff's evidence, the denial of a new trial, and the rendering of judgment for plaintiffs. The court did not err in overruling the demurrer to the plaintiff's evidence, which fairly supported the allegations of their petition.

[2] The motion for a new trial assigned as error the admission of objectionable testimony and the exclusion of admissible evidence. As to the first, the trial was before the court without a jury, and if any improper evidence was received the presumption is that the chaff was sifted from the wheat by the trial court in reaching its conclusion. Wilson v. Colborn, 106 Kan. 440, 188 Pac. 430.

These matters, however, are not discussed in the defendant's brief, but the position is there taken that the defendant by purchasing the property of the People's Gas Company did not become obligated on its personal executory contract; that a contract for the continued services of the law firm was not assignable, and that the contract in this case terminated by the discontinuance of the employer's business.

We think, however, with counsel for the plaintiffs, as suggested in their briefs, that the question is not one of law, but one of fact as to whether or not the plaintiffs performed services for the Kansas Natural Gas Company which have not been paid for. All the conundrums propounded by the counsel for the defendant are merely academic, in view of the testimony found in the record touching the performance and acceptance of legal services, which testimony justified the conclusion reached by the trial court. It appears that Mr. McDowell wrote to the auditor to notify the plaintiffs that their serivices were no longer desired, but neither the addressee nor Mr. Jones, to whom the letter was shown, informed the plaintiffs of its contents, and they continued to hold themselves in readiness to attend to business for the defendant and to refuse offers of business against it. Of course, as it takes two to make a bargain, it takes two to unmake one, and a mere undisclosed desire to sever the contract relations was not sufficient.

The judgment is affirmed.

All the Justices concurring.

EIKELBERGER v. INSURANCE CO. OF NORTH AMERICA. (No. 22328.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Insurance ⟸78—License to a local agent does not change the general law as to his authority.

A license issued by the state insurance department to the local agent of an insurance company at the company's request is merely a regulatory permit; but neither the license itself nor the statute concerning its issue has the effect of defining the agent's powers to bind his company, nor do they change the general law of agency. His powers are merely those which his company expressly or impliedly confers upon him, according to the general law of principal and agent.

2. Insurance ⟸241—Offer to surrender note on surrender of policy does not violate anti-discrimination law.

Where an insurance company contracts to carry the fire risk on property for a term of years, and the insured gives his promissory note to pay for such insurance, and the insurance contract provides that the company shall not be liable for any loss or damage that may occur to the property while the note given for the premium remains in default, it is not a substantial violation of the anti-discrimination law, when a fire loss occurs during the default of the maker of the note and while the insurance is suspended, for the insurance company in denying its liability to offer to surrender the note in exchange for a surrender of the insurance policy, without claiming any

Digitized by Google

portion of the insurance premium earned before the insured defaulted in the payment of his note.

Appeal from District Court, Saline County.

On rehearing. Former judgment of reversal adhered to.

For former opinion, see 105 Kan. 675, 189 Pac. 139.

Stone, Gamble, McDermott & Webb, of Topeka, and H. O. Caster, of Bartlesville, Okl., for appellant.

Z. C. Millikin, of Salina, and E. E. Brookens, of Topeka, amicus curiæ.

DAWSON, J. Out of abundance of caution in disposing of the plaintiff's claim of right to recover on a fire insurance policy which by its express terms was suspended and inoperative at the time the plaintiff suffered a fire loss, and prompted also by a request by the state department of insurance, amicus curiæ, a rehearing was granted in this case.

However, after a careful consideration of new briefs of counsel, and the oral arguments also, the court cannot discern that it failed to consider and decide, deliberately and correctly, every proposition involved in the case so far as presented by plaintiff and defendant in the trial court; and, unless the suggestions raised by the amicus curiæ disclose an erroneous result, our former decision (105 Kan. 675, 189 Pac. 139) will have to stand.

The department of insurance, amicus curiæ, raises two main propositions:

"First. An insurance agent has such authority as is given him by the general law of agency, by the statutes of the state of Kansas, and by the license which the department issues him. Such authority cannot be cut down by a private, secret, undisclosed agreement or understanding between the agent and the company.

"Second. Under the anti-discrimination law of 1909 (Gen. Stat. 1915, §§ 5363–5373) every company subject to the act must have uniform rates and must charge every person exactly the same premium for equal protection. Premium is earned only while the insurance contract is in force. Risk and premium go hand in hand. If one ceases the other ceases. In other words, rates must be absolutely uniform."

[1] On the first of these, counsel for the insurance department argue, that, because of the broad language of the act providing for the issue of licenses by the department to the local agents of fire insurance companies upon their written request, every agent so licensed is in effect a general agent of his company. The pertinent provisions of the licensing act (Gen. Stat. 1915, §§ 5178, 5179) read:

"Sec. 5178. It shall be unlawful for any person, company or corporation to transact the business of insurance or guaranty, or do any act toward transacting such business, unless the said person, company or corporation shall have been duly authorized under the laws of this state to transact such business and shall have received proper written authority from the superintendent of insurance in conformity with the provisions of the laws of this state relative to insurance and guaranty. * * *

"Sec. 5179. Any insurance company not organized under the laws of this state may appoint one or more general agents in this state, with authority to appoint other agents of said company in this state. A certified copy of such appointment shall be filed with the superintendent of insurance, and agents of such company appointed by such general agent shall be held to be the agents of such company as fully, to all intents and purposes, as if they were appointed directly by the company. Agents for any such company in this state may be appointed by the president, vice president, chief manager or secretary thereof, in writing, with or without the seal of the company; and when so appointed, shall be held to be the agents of such company as fully as if appointed by the board of directors or managers in the most formal mode."

It is rather a remarkable contention that these statutory provisions are in effect a ban upon the otherwise undoubted power of a fire insurance corporation to limit the authority with which it may clothe its local agent at any outlying crossroads in Kansas. Corporate powers are not conferred by licensing acts. The latter are regulatory and permissive, and the grants of corporate power are to be found in the corporation law of the state. The governing body of a corporation is its board of directors. Its officers, even its president, only exercise such powers as are expressly or impliedly conferred upon them by the governing body. The corporation may create officers and agents, general and special, with broad or restricted powers, and the corporation is bound and only bound by their acts when such acts are within the real or apparent scope of the authority conferred upon them. The law of agency is a very large subject and one which could scarcely be touched in a single opinion, however much we might be disposed to display our learning on that subject. It must suffice here to say that the license issued by the insurance department to a local insurance agent, at the request of his principal, is merely the state's permit for him to ply his business, and a tacit admission by the insurance superintendent that so far as he is advised the licensee is an honest man or at least a man of fair business reputation. One effect of the statute—perhaps its main purpose—is to exercise the state's right, through its superintendent of insurance, to bar a known swindler or other disreputable or untrustworthy person from posing as an insurance agent to the detriment of the public. Hauser v. Ins. Co., 206 N. Y. 455, 100

Digitized by Google

N. E. 52, 42 L. R. A. (N. S.) 1139, 1142, Ann. Cas. 1914B, 263.

There is no question of any secret agreement between the company and its local agent in this lawsuit.

Substantially the same point raised by the insurance department has required the attention of other courts, but none of them appear to have had any difficulty in reaching the same conclusion which we do. Wood v. Fireman's Insurance Co., 126 Mass. 316; Barry, etc., Lumber Co. v. Insurance Co., 136 Mich. 42, 98 N. W. 761; Lauze v. Insurance Co., 74 N. H. 334, 68 Atl. 31.

It must be held, therefore, that a license issued by the state insurance department to the local agent of an insurance company at the company's request is merely a regulatory permit; but neither the license itself nor the statute concerning its issue has the effect of defining the agent's powers to bind his company, nor do they change the general law of agency.

[2] Passing to the insurance department's second proposition, there is nothing substantial in the contention that the insurance company violated the spirit of the anti-discrimination law when it offered to remit the part of the premium earned at the time of the default of plaintiff to pay his premium note —a matter of some $6.40. Being haled into court by plaintiff, the company might without prejudicing its defense have counterclaimed for that small sum. Counsel for the department expatiate on the virtues of the anti-discrimination law, to all of which the court heartily subscribes, including the writer, who vindicated that law before the court of last resort (German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189), but neither its terms nor its spirit require its administration with such subtle nicety as counsel contend for.

The rule of reason applies to this act as to all legislation and to all jurisprudence; and the act is not offended against by an insurance company which merely forgoes its right to collect a trifling sum due it for carrying an insurance risk for seven months rather than go to the expense of reducing its claim to judgment. Dubbs v. Haworth, 102 Kan. 603, 606, 171 Pac. 624. Such a judgment might be uncollectible, and the company would merely be throwing good money after bad.

We are advised in argument that the insurance rate on a three-year contract is the sum of two separate yearly rates. If so, a person who buys and pays for a three-year policy gets a different rate from one who buys his insurance for three years on annual policies. A man who occupies his insured property himself gets a lower rate than he would if the property were occupied by a tenant. The nature, location, etc., of property all enter into the making of different insurance rates, and this is altogether proper. These reasonable differences in rates do not violate the act. It would make a mere fetich, an interminable and oppressive nuisance, of a wise and efficient statute to interpret the anti-discrimination law in any other fashion. So long as the defendant pursues the same general policy towards all those of its patrons who have to buy their insurance on credit, or who give notes for their insurance, there is no violation of the act; but the court does not mean to intimate that the department may not reasonably supervise and change, or suggest reasonable changes, in the general business policy of insurance companies towards persons who obtain insurance on credit and then fail to pay.

The court holds that, where an insurance company contracts to carry the fire risk on property for a term of years, and the insured gives his promissory note to pay for such insurance, and the insurance contract provides that the company shall not be liable for any loss or damage that may occur to the property while the note given for the premium remains in default, it is not a substantial violation of the anti-discrimination law, when a fire loss occurs during the default of the maker of the note and while the insurance is suspended, for the insurance company in denying its liability to offer to surrender the note in exchange for a surrender of the insurance policy, without claiming any portion of the insurance earned before the insured defaulted in the payment of his note.

The former judgment of reversal is adhered to.

All the Justices concurring.

JOHNSON et al. v. HAY et al. (No. 22754.)

(Supreme Court of Kansas. June 5, 1920. Rehearing Denied July 10, 1920.)

(Syllabus by the Court.)

1. Banks and banking ⟹43—Uncollectible note charged by state bank to profit and loss account held to belong to it, and not to its former stockholders.

Among the assets of a state bank was a promissory note that was uncollectible, and it was charged to the profit and loss account, under an agreement among the stockholders to consider the note as a dividend, and, if it were ever collected, the proceeds should belong to them. Subsequently they sold their stock, and long afterwards, claiming to own the note, brought suit thereon against the maker. Their evidence showed that no dividend was, in fact, declared, and that none could have been lawfully declared at the time of the transaction under which they claim, and also that they nev-

Digitized by Google

er paid anything to the bank to take up the loss occasioned by the note. *Held*, that the note was part of the assets of the bank, and that the former stockholders had no interest therein.

2. Attachment ⟸19—Defendant filing cross-petition against his codefendant is entitled to have an attachment issued against his property.

Where one who is joined as a defendant files a cross-petition against his codefendant, his relation to the latter is that of a plaintiff, and he is entitled, on proper showing, to have an attachment issued against the property of his codefendant.

3. Limitation of actions ⟸199(1)—Question for the court.

Various complaints of error raised by the defendant (maker of the note) *held* to be without merit.

Appeal from District Court, Republic County.

Action by F. M. Johnson and others against James Hay, the Belleville State Bank, and others, with cross-petition and attachment by defendant Bank on the property of defendant Hay. Judgment for defendant Bank against plaintiffs for costs, and against defendant Hay for amount of note and sustaining the attachment, and plaintiffs appeal, and defendant Hay takes a cross-appeal. Affirmed.

W. D. Vance and R. E. McTaggart, both of Belleville, for appellants.

E. S. Nelson, N. J. Ward, and J. F. McClure, all of Belleville, Edgar Bennett, of Washington, Kan., and W. J. Moss, of Fairburg, Neb., for appellees.

PORTER, J. On July 26, 1901, the defendant James Hay borrowed $300 from the Belleville State Bank for which he gave his 90-day note secured by a chattel mortgage on live stock. A few days afterward he absconded, left the state, and did not return until 1917, about the time of the death of his mother, from whom he inherited an interest in property. The plaintiffs, who were stockholders of the bank in 1901, claimed they owned the note and brought this action against Hay to recover the amount due thereon. The bank was joined as a defendant, and filed its cross-petition setting up its ownership of the note, and asking judgment against Hay. At the same time it procured an attachment which was levied upon Hay's property. The affidavit for the attachment alleged that Hay procured the loan by false and fraudulent representations to the effect that the property included in the chattel mortgage belonged to him and was free and clear of incumbrance, when, in fact, it was covered by mortgages held by other banks. The trial resulted in a judgment in favor of the bank against plaintiffs for costs, and against the defendant for the amount of the note and sustaining the attachment. The plaintiffs bring the case here for review, and the defendant has also filed notice of a cross-appeal.

[1] 1. Plaintiffs claim that when the note was executed the stock of the Belleville State Bank was owned by E. L. Johnson, F. M. Johnson, Oliver Johnson, R. T. Stanfield, and J. R. Caldwell, none of whom had much banking experience; that, when it was discovered that the note could not be collected and that it was necessary to charge it off the books and place it in the profit and loss account, the stockholders conceived the notion that, by considering the note as a dividend, each stockholder would take his proportionate share of the note in the event it was ever collected. It was shown that no dividend was actually declared, and that the bank was in no condition to declare a dividend, but the note was taken out of the "note case" where live assets were kept and was placed in an envelope, marked, "James Hay note, charged off."

The plaintiffs' evidence showed that on October 7, 1901, the stockholders of the bank had a meeting in which they authorized the following entry upon the minute book of the bank: "Loss on securities, $300.00 James Hay note." E. L. Johnson testified that he was one of three stockholders who had active management of the bank, and at the meeting they talked over whether they would put up the money as individuals or would charge the note to the earnings account and make a dividend of it, and decided to let the earnings of the bank take care of the note; that there was no money in the earnings account at that time, and the note was not actually charged to that account until November 4, 1901, at which time there was in the earnings account the sum of $230.49; that as a result the account was overdrawn, and the balance was taken care of by subsequent accumulations and earnings.

In 1912 plaintiffs sold their stock to Luther Bonham and they claim that he made an oral agreement with them that out of the assets of the bank which were to be delivered to the purchaser the James Hay note was to be excepted. One of the plaintiffs testified in substance that in the sale of the stock he said to Mr. Bonham, "Here is the note that we want to keep out; it belongs to the stockholders; * * * this note was charged off from the assets of the bank and turned over to the stockholders, and they appointed me as custodian of the note for the reason that some time in the future we expected this note to be valuable to us," and that Bonham said, "All right." This was contradicted by Bonham, who testified that he never saw the note, and that no reservation of it was made in the sale, that the note was not considered and did not appear on the register of the

Digitized by Google

bank, and that the matter of charged off paper was not discussed.

Even without the testimony of Bonham, in our opinion, the trial court rightly directed the jury to return a verdict against the plaintiffs. The petition does not allege, nor does the evidence show, that the plaintiffs purchased the note or paid for it, or that it was actually declared as a dividend out of the assets of the bank. Besides, the statute provides that before a dividend can be declared 10 per cent. of the profits must be carried to the surplus fund (section 551, Gen. Stat. 1915), and there is the further provision that:

"No bank officer or director thereof shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by such bank equal to or exceeding its undivided profits then on hand, no dividend shall be made, and no dividend be declared by any bank while it continues its banking business to any amount greater than its net profits on hand, deducting therefrom its losses, to be ascertained by a careful estimate of the actual cash value of all its assets at the time of making such dividend; the present worth of all maturing paper shall be estimated at the usual discount rate of the bank." Section 553, Gen. Stat. 1915.

Plaintiffs' evidence not only established the fact that they had no right to or ownership in the note, but that it was the property of the bank. No dividend was, in fact, declared, and none could have been lawfully declared at the time of the transaction under which plaintiffs claim. Of course, the mere fact that plaintiffs in their talk at the time the note was charged off considered the transaction as making a dividend of the note ought not to be controlling. If they had assessed themselves or in some way put up the money to meet the loss the bank had sustained, the fact that they concluded to regard the note as a dividend might not of itself prevent them from claiming ownership of the note. But they do not claim to have paid a dollar to the bank to take up the loss occasioned by the note. Their claim is that by an arrangement among themselves the note was charged to the earnings account, to be subsequently taken care of by future earnings. Of, course, the future, as well as past, earnings of the bank would belong to the bank, and not to the stockholders. A corporation exists as an entity separate and apart from the shareholders. Bank v. Milling Co., 101 Kan. 446, 167 Pac. 1036, L. R. A. 1918A, 574, and authorities cited. When plaintiffs disposed of their shares in the bank, they could not lawfully carry away with them any property belonging to the bank, and this note, regardless of its value at the time, was an asset of the bank the same as all other notes and property carried in the profit and loss account of the bank.

[2] 2. The defendant James Hay has served notice of a cross-appeal. He is satisfied with the decision holding that the plaintiffs have no right to recover, but complains of the ruling directing a verdict against him in favor of the bank. His claims of error hardly rise to the dignity of serious contentions. It is insisted that the bank offered no evidence in support of its cross-petition, and no testimony to prove its ownership of the note, and therefore there was no evidence to sustain a judgment against him; and attention is called to the fact that both the defendant Hay and the bank objected to plaintiffs' testimony, and demurred to it when plaintiffs rested. But plaintiffs' evidence established the fact that the note, which was given to the bank in the first place, still belonged to it, and that it had never been paid. Merely because one of the plaintiffs testified that a notation on one of the books of the bank indicated, in his opinion, that the note had been paid in some manner, was no evidence of payment, especially in the face of the undisputed evidence that the note never had been paid. The bank introduced evidence to contradict that of the plaintiffs with reference to what occurred at the time of the purchase of the bank's stock by Bonham, and it was not necessary for it to offer testimony to prove facts which the plaintiffs' evidence had established.

Because the provisions of the Code authorize the plaintiff, in certain cases, to have an attachment against the property of the defendant, it is seriously urged that the bank, being a defendant, could not procure an attachment against a codefendant. Although named as a defendant in the action, the bank occupied the position of a plaintiff in its cross-action against Hay, and was entitled to procure an attachment the same as if the action had been brought originally by it as plaintiff. It was not necessary for the bank to offer evidence on its own behalf to sustain its attachment, because plaintiffs' evidence showed that when Hay obtained the loan from the bank he falsely represented that certain personal property belonging to him was free and clear of incumbrances, while, in fact, it was covered by mortgages to another bank. There was abundant evidence to sustain the attachment on the ground of fraud.

[3] The question of the statute of limitations was one of law, and not of fact, when it appeared beyond any dispute that the defendant's absence from the state tolled the statute.

The judgment is affirmed.

All the Justices concurring.

Digitized by Google

FLACK et al. v. BREWSTER. (No. 22543.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Witnesses ⟸219(4)—Testimony of physician as to deceased patient's mental capacity may be admitted where heirs waive statutory privilege.

In an action by heirs of a deceased grantor, contesting the validity of a deed executed by the grantor to her sister shortly before her death, upon the ground of the unsoundness of her mind at the time of the execution, the testimony of a physician who attended her in her last illness as to knowledge gained by him in his professional capacity, relating to her mental condition, may be admitted, where the heirs of the deceased grantor have waived the statutory privilege afforded by section 321 of the Civil Code (Gen. St. 1915, § 7223).

2. Witnesses ⟸217—Grantee of deceased incompetent held not entitled to object to testimony of grantor's physician as to capacity.

As the defendant in the action, although a sister of the deceased grantor, claimed no rights as heir or devisee, but defended solely on the basis of being the grantee in the deed, she is not entitled to assert the statutory privilege or object to the testimony of the physician in regard to the competency of the grantor.

Appeal from District Court, Montgomery County.

Action by W. F. Flack and others against Mattie Brewster to set aside a deed to defendant by one alleged to have been mentally incompetent. Deed set aside and partition or property among plaintiffs and defendant ordered, and defendant appeals. Affirmed.

C. J. Bryant and Chas. D. Shukers, both of Independence, for appellant.

Geo. H. Wark, of Caney, and Thos. E. Wagstaff, of Independence, for appellees.

JOHNSTON, C. J. The plaintiffs brought this action against their sister, Mattie Brewster, to cancel and set aside a deed executed to her by Mary Clifford, who was a sister of all the parties to this action. It was alleged that the instrument was executed and delivered a few days before the death of Mary Clifford, when she was mentally incapable of executing the instrument or of transacting business of any kind. From the testimony the court found that she did not have the mental capacity to execute the deed, and therefore set it aside and directed a partition of the property among the plaintiffs and defendants; they being her only heirs.

[1] The principal contention on this appeal is that the testimony of two physicians who attended Mary Clifford in her last illness, which related to information as to her mental capacity gained by them while attending her in a professional capacity, was improperly admitted. The testimony was admitted over the objection of the defendant and the grantee in the deed which was attacked. The objection is based on the statute providing that—

"The following persons shall be incompetent to testify: * * * Sixth, a physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, defect, or injury, or the time, manner or circumstances under which the ailment was incurred, or concerning any knowledge obtained by a personal examination of any such patient, without the consent of the patient." Gen. Stat. 1915, § 7223 (Code Civ. Proc. § 321).

The plaintiffs contend that the disqualification of the witnesses may be waived and that the objection to the privileges was not available to the defendant. They insist that, as heirs at law and interested in the protection of the estate of the deceased, they could, and by the offer of the evidence did, waive the privilege, and that defendant was defending as grantee in the deed and was asserting no rights as heir and was therefore not in a position to invoke the privilege or make the objection. There is considerable conflict in the authorities as to the application of the rule and as to when and by whom the privilege may be waived. It has been held in a testamentary proceeding that the patient is the person interested in preserving unbroken the confidence reposed in his physician and after his death there is no one to assert the privilege. Allen v. Public Administrator, 1 Bradf. Sur. (N. Y.) 221. In Wharton on the Law of Evidence, § 591, it is said:

"The privilege, it should also be remembered, is meant to protect the living in their business relations, and cannot be invoked when the question arises as to the intention of a deceased person in respect to the disposition of his estate."

See, also, Staunton v. Parker, 19 Hun. (N. Y.) 55. Many authorities, however, hold that the privilege survives to personal representatives of the deceased, his family and those personally interested in protecting his reputation and estate. 4 Wigmore on Evidence, § 2386. That author says:

"The privilege, furthermore, is that of the patient as such, not of the party; hence the claim should be made by the patient himself, in accordance with the analogy of other privileges (ante, §§ 2270, 2321), though this rule is seldom observed in practice. The privilege, furthermore, may be claimed by the representative of a deceased patient, as his personal successor, but not by a mere assignee of a contract interest."

On the other hand, it has been held that the prohibition of the statute is founded on

Digitized by Google

public policy, and unless it has been expressly waived by the patient the testimony of the physician can never be revealed; that a waiver may not be made by an executor or administrator and that any party to an action can object to evidence coming within the prohibition unless the patient, the person for whose protection the statute was enacted, has waived the privilege, and that when the patient is dead the matter is forever closed. Westover v. Ætna Life Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1. In re Flint, 100 Cal. 391, 34 Pac. 863, adopted the rule of the Westover Case just cited, and held that the heirs of a deceased person who contest his will cannot waive the privilege attaching to communications of a deceased person. In the opinion it is said:

"His rights are not buried in the grave, and heirs and devisees quarreling among themselves over a division of his patrimony, in justice to his memory, should not be allowed to waive the privilege."

In these cases others of a similar import are cited.

In our state a more liberal view has been taken as to the matter of waiver. For instance, it has been held that, as the statute provides that the patient himself may consent to the testimony of the physician, no question of public policy is involved. The prohibition imposed on the physician is the privilege of the patient and not of the physician, nor yet of the public, and therefore a patient may make a valid contract waiving the privilege afforded him in the statutory prohibition. Insurance Co. v. Brubaker, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267.

In an action to recover possession of a tract of land alleged to have been conveyed to another when the grantor was of unsound mind, a physician who had attended the grantor in her last illness was offered as a witness by the surviving sisters and heirs at law, but the testimony was rejected and upon appeal it was held that the evidence was admissible. In the syllabus of the case it was said:

"The heirs at law of one who has been treated by a physician may waive the provisions of the statute making a physician incompetent to testify to any knowledge obtained in his professional capacity from the patient." Fish v. Poorman, 85 Kan. 237, 116 Pac. 898.

In another case deeds which had been executed shortly before the death of the grantor were assailed upon the ground that the grantor was without mental capacity to make them, and it was held that the testimony of an attending physician as to his knowledge obtained in a professional way might be received where the privilege was waived by his heirs at law. It is said that—

"This is in accord with the best judicial thought in this country on this subject, and takes nothing from the effect of defendants' citations." Bruington v. Wagoner, 100 Kan. 10, 164 Pac. 1057. See the authorities therein cited.

[2] While the privilege is personal to the patient and may be waived by him, the general rule is that after his death the privilege may be waived by his legal representatives and those interested in the preservation of his estate. The plaintiffs herein, who are suing as the heirs of the deceased, effectually waived the privilege by offering the evidence. They were interested in preserving the estate of the deceased, which would have been largely diminished if effect had been given to the invalid instrument. The defendant, however, is defending as grantee and not as heir or devisee, and in this litigation she stands in the attitude of a stranger to the estate. Although she is a sister of the deceased, she is not asserting any claim by reason of heirship or relationship to the deceased, and has no greater right to invoke the privilege than would an outsider if the deed had been made to him. Restrictions on the full development of the facts and the ascertainment of the truth of a controversy are strictly construed, and, the privilege being personal in its nature, it should not be extended by implication, especially after the death of the one for whose benefit it was given. In regard to the light in which the statutory privilege is to be viewed, it has been said:

"The statute is not remedial in any proper sense of that term, as some courts would hold, but merely grants a privilege to persons in specified relations if they see fit to take advantage of it; and the terms of the statute will not be extended by implication or by interpretation, but will be strictly construed in favor of the competency of witnesses." Armstrong v. Topeka Ry. Co., 93 Kan. 493, 144 Pac. 847, citing numerous cases.

Speaking of the policy and effect of the privilege, Professor Wigmore said:

"That the relation of physician and patient should be fostered, no one will deny. But that the injury to that relation is greater than the injury to justice—the final canon to be satisfied—must most emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation to-day are such that the answer can hardly be seriously doubted. * * * Certain it is that the practical employment of the privilege has come to mean little but the suppression of useful truth; truth which ought to have been disclosed and would never have been suppressed for the sake of any inherent repugnancy in the medical facts involved." 4 Wigmore on Evidence, § 2380.

Of course, the prohibition of the statute must be given the effect intended by the Legislature, but so far as it is open to interpre-

Digitized by Google

tation it should be strictly construed instead of reaching for an implication that would operate to suppress the true facts necessary to a just determination of the issue involved. Looking at the question in that light, we conclude that the plaintiffs waived the privilege and that the defendant, standing in the position of assignee or grantee, is not entitled to invoke the privilege or object to the admission of the testimony offered. Although challenged, the testimony in the case is deemed to be sufficient to support the findings of the trial court, and its judgment is therefore affirmed.

All the Justices concurring.

KINKEL v. CHASE et al. (No. 22524.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

Appeal and error ⊂⊃1097(1)—Trial errors settled by former appeal will not be considered.

On a former appeal (Kinkel v. Chase, 102 Kan. 275, 169 Pac. 1134) a new trial was ordered on a single issue of fact. *Held*, that complaints of trial errors involving matters that were settled by the former appeal will not be considered, and, there being sufficient evidence to sustain a finding by the court on the one question sent back for trial, the judgment is affirmed.

Appeal from District Court, Morris County.

Action by A. R. Kinkel against Fred F. Chase and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. L. Huggins, of Emporia, and W. J. Pirtle, of Council Grove, for appellants.

James A. Troutman, of Topeka, and Edwin Anderson, of Council Grove, for appellee.

PORTER, J. This case is here for the second time. In the former opinion (Kinkel v. Chase, 102 Kan. 275, 169 Pac. 1134) practically every question raised by Chase in the present appeal was decided adversely to him. On the former appeal Kinkel was the appellant.

The facts out of which the litigation arises were stated more fully in the former opinion than will be necessary here. Some one brought an action in the district court of Morris county against A. R. Kinkel (the plaintiff in the present suit) and Dyson Jackson on a promissory note, and judgment was rendered against them on the 23d day of June, 1913. A. R. Kinkel satisfied the judgment as to himself, and in the manner set forth in the former opinion became duly subrogated to the rights of the judgment plaintiff. He brought this action to have that judgment declared a lien upon certain lands in Morris county which he claimed Jackson owned and had transferred in fraud of creditors. The same day Kinkel's judgment was rendered another judgment was taken against Dyson Jackson in the same court. The action was a creditors' bill, and the judgment declared that 420 acres of land to which Jackson formerly held the title had been transferred by him in fraud of his creditors. At the first trial Kinkel attempted to rely upon that judgment to prove the fraudulent disposition of Jackson's property. He was a stranger to the action. It was not brought for the benefit of all the creditors, nor for the benefit of all those who might see fit to join therein, and the trial court held that Kinkel could not rely upon the judgment and sustained a demurrer to his evidence.

The action of the trial court, in holding that Kinkel could derive no benefit from the judgment to which he was a stranger, was approved in the former opinion, but it was said, however, that:

"The judgment which plaintiff owns against Dyson Jackson was a lien upon the equitable interests of Dyson Jackson in the real estate in question from the first day of the term at which it was rendered. It was of record when Chase purchased the land. All that remained for Kinkel to establish was that, when Dyson Jackson repurchased the land, he took the title in the name of his wife and son in fraud of creditors." 102 Kan. 280, 169 Pac. 1136.

It was therefore held that the court should not have sustained the demurrer, because, if the real estate in fact belonged to Dyson Jackson on June 23, 1913, Kinkel's judgment was a lien. The case was therefore remanded, with directions to permit Kinkel to try out the question of fraud.

On the second trial attorneys for Chase insisted upon retrying all the issues, and the whole case was gone over again. This was not in accordance with the mandate, but no one was prejudiced, because the issue which the court had to try was determined on the evidence of one witness. The evidence was sufficient to sustain the finding that Dyson Jackson, in fraud of his creditors, procured a reconveyance of some of the land to a member of his family; that he was the equitable owner of the land when Kinkel's judgment was rendered. That ends the litigation. It is unnecessary to consider the complaint that certain court records were admitted which were not competent. The trial was by the court, and the presumption is that only competent evidence was considered. Rulings on the admission of evidence in trying issues which were settled by the former appeal need not be considered. Besides, it is difficult to conceive how the admission of record evidence of the former suits and actions could have prejudiced the defendants, since the court determined upon other evidence the

Digitized by Google

sole issue of fact sent back for trial. Kinkel was entitled to the decree declaring his judgment a lien upon the land.

Affirmed.

All the Justices concurring.

MANROSS v. UNCLE SAM OIL CO.
(No. 22547.)

(Supreme Court of Kansas. June 5, 1920. Rehearing Denied July 10, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸1039(13), 1064(1)—Verdict for balance of salary not reversed, because petition did not allege a wrongful discharge, or because instructions were based on unsound theory.

Where an employé, who was discharged before the expiration of the term of his employment, recovers of his employer what his salary would have amounted to, less what he was able to earn during the remainder of the period, the judgment being based upon a verdict which necessarily implies a finding, after a full and fair hearing of the issue, that the discharge was wrongful, a reversal will not be ordered because the petition did not allege that fact, or because in the instructions language was used indicating the adoption of the theory of constructive service, even assuming that theory to be unsound.

2. Trial ⟸194(20)—Recovery for wrongful discharge a matter of computation for trial court.

The amount of recovery in case of a finding in favor of the plaintiff upon the issue referred to *held* to have been a matter of computation, properly determined by the trial court.

3. Trial ⟸340(5)—No reversal for court's addition of interest expressly excluded by verdict.

Where there is no real controversy over the amount of recovery, and the verdict expressly excludes interest, a judgment will not be reversed because of an addition on that account made by the court.

Appeal from District Court, Wyandotte County.

Action by O. B. Manross against the Uncle Sam Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. H. Brady and Arthur J. Mellot, both of Kansas City, for appellant.

James F. Getty, of Kansas City, for appellee.

MASON, J. On August 1, 1910, O. B. Manross was employed by the Uncle Sam Oil Company for one year at a salary of $2,050, payable $150 on the 1st days of September and October and $175 a month thereafter. On October 14 he was discharged. In November, 1910, he brought an action against the company for $175 as his compensation for the month of October. He recovered a judgment for that amount, which was reversed in December, 1912, because of the omission of an instruction to the effect that the general manager of the company had authority to discharge the plaintiff, if sufficient cause existed, and in that case he could recover only what was due him at the time of his discharge. Manross v. Oil Co., 88 Kan. 287, 128 Pac. 885, Ann. Cas. 1914B, 827. In June, 1916, the plaintiff amended his petition so as to claim a recovery for $2,212.50, being the full amount of the agreed salary, with interest, less what he had been paid. He was given judgment for the sum, with interest, less what he testified he had been able to earn at other employment during the remainder of the year, amounting to $648. The defendant appeals.

[1] 1. The petition, after setting out the contract of employment, alleged that the plaintiff had at all times been ready to perform the services required of him thereunder, and had performed them so far as permitted by the defendant. Under various assignments of error the defendant urges that no recovery should have been permitted as compensation for constructive services, because the theory on which such recovery has sometimes been allowed is unsound, and is not, and ought not to be, recognized in this jurisdiction; and that no recovery should have been permitted as damages for the breach of contract because that was not pleaded, the petition not alleging a wrongful discharge.

The common-law doctrine of "constructive service," by which an employé wrongfully discharged is permitted to recover wages as such for the period subsequent to his discharge, being founded on fiction, has not been widely accepted in this country, the remedy of an action for damages for a breach of the contract being regarded as adequate and more in keeping with the modern tendency to conform the pleadings to the actual facts. Notes, 5 L. R. A. (N. S.) 439, and 6 L. R. A. (N. S.) 50. The constructive service theory appears to have received some recognition in this state (James v. Parsons, 70 Kan. 156, 158, 78 Pac. 438), but its soundness need not be passed upon in this case. The defendant in the opening statement on its behalf admitted the validity of the contract of employment, asserted that the plaintiff was discharged for incompetency and insubordination, and "elected to submit the case upon that issue." The vital controversy between the parties was whether the plaintiff was discharged wrongfully or rightfully. That question was fairly submitted under an instruction (of which the defendant complains) that it was all the jury had to determine. The measure of recovery applied by the

Digitized by Google

court was the amount of the unpaid salary, less what the plaintiff testified that he had been able to earn at other work after his discharge, during the remainder of the year covered by his contract. This did no injustice to the defendant, whether the amount awarded be regarded as damages for the breach of the contract, or as compensation for constructive service. Whether or not the petition was defective in not alleging that the plaintiff had been wrongfully discharged, no prejudice could possibly have resulted to the defendant from the omission, and it would be manifestly unjust to reverse the judgment by reason thereof.

The jury were told that they might return a verdict for the plaintiff if they should find that he had carried out his part of the contract so far as permitted, and was ready, willing, and able to finish it according to its terms. This instruction is objected to as adopting the common-law doctrine referred to. Considered in connection with that previously stated, it amounted to no more than saying that the plaintiff's claim was valid if the fact that he did not perform the services for which he was employed was due, not to any fault on his part, but to the action of his employer—in other words that his discharge, which the parties agreed had taken place, was wrongful. The verdict necessarily implied a finding that the defendant wrongfully discharged the plaintiff, and, that being true, the objections made to it lack substance; they concern matters of procedure having no relation to the fair determination of the essential issue of fact upon which the rights of the parties depended.

[2] 2. An instruction was given to the effect that the amount of recovery was not in dispute—that if the plaintiff was found to have been wrongfully discharged he was entitled to the salary promised him, less what he had been paid and what he testified he had been able to earn. The defendant complains of this as invading the province of the jury. The plaintiff's testimony as to what he had earned and that it was all he was able to earn during the remainder of the year after his discharge was uncontradicted. The cross-examination developed nothing to discredit it, and the defendant introduced no evidence on the subject. There was no occasion to submit the matter to the jury, for if that had been done, and a larger allowance had been made for the possible earnings of the plaintiff, the verdict could have been set aside as without support. Hollicke v. Railway Co., 99 Kan. 261, 161 Pac. 594.

[3] 3. The amount of recovery indicated by the court and adopted by the jury included no allowance for interest, the verdict explicitly so stating. The court in rendering judgment corrected the omission, and complaint is made on that account. There was no real controversy of fact as to the amount of recovery, and the addition of the interest by the court is not a ground of reversal. Smith v. Railway Co., 90 Kan. 757, 136 Pac. 253.

The judgment is affirmed.

All the Justices concurring.

WOODBURN v. HARVEY et al. (No. 22542.)*

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Evidence ⟸419(4)—Parol evidence admissible to prove grantee assumed mortgage.

Where mortgaged property is conveyed, and the deed contains no recital that the grantee assumes and agrees to pay the incumbrance, parol evidence is competent and admissible to prove such agreement, and, when thus established, the grantee is bound thereby.

2. Mortgages ⟸280(5) — Evidence held to show verbal agreement by a grantee to assume and pay mortgage.

The evidence to prove a verbal agreement by a grantee of mortgaged property that he would assume and pay the mortgage examined, and *held* to meet the requirement of the rule that the proof of such parol obligation must be clear and convincing.

3. Mortgages ⟸459(3) — Pleadings held to raise issue whether grantee verbally assumed mortgage.

The pleadings sufficiently raised the issue involved to require the overruling of appellant's objection to the introduction of evidence.

Appeal from District Court, Jackson County.

Foreclosure action by E. D. Woodburn against Dora E. Harvey and B. C. Hamilton. Judgment for plaintiff, holding defendant Hamilton primarily liable and defendant Harvey liable only as a surety, and Hamilton appeals. Affirmed.

W. G. Hamilton and J. B. Larimer, both of Topeka, for appellant.

Monroe, Hursh, Sloan & Monroe, of Topeka, for appellees.

DAWSON, J. This lawsuit involves the question of primary and secondary liabilities between the defendants in a foreclosure suit, with which the successful plaintiff is not concerned. The defendant Dora E. Harvey owned a house and lot in Holton. She desired to procure a homestead in Colorado. She had a friend, B. C. Hamilton, in whom she fully confided, and he undertook to aid her, and to guard her interest in that project. With his help and approval, she made a

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 191 Pac. 468.

Digitized by Google

deal with one Ptomey, whereby she obtained a relinquishment of a Colorado homestead, in consideration of which she agreed to convey her Holton property to Ptomey, but before conveying it to him she was to mortgage the Holton property, and give part of the money borrowed thereon to Ptomey, and keep part of it herself, and, as she did not care to trust to strangers, it was also agreed that her friend, Hamilton, should take the title to the Holton property after it was mortgaged.

The arrangements leading up to this agreement were made in a bank in Colorado, and this lawsuit arises on the question whether the agreement covered the matter of the assumption of the mortgage debt by Mrs. Harvey's grantees. After receiving the conveyance, Hamilton paid half the semiannual interest on the mortgage on two occasions, and made inquiry of the mortgagee as to whether Ptomey was likewise paying half of it, and on a subsequent occasion Hamilton paid all the semiannual interest then due. Later there was default. The mortgagee brought suit to foreclose; Mrs. Harvey and Hamilton being the defendants. Mrs. Harvey pleaded that her codefendant assumed and agreed to pay the mortgage, and that he was primarily liable. Hamilton admitted that he acquired the property after the execution of the mortgage, but denied that he assumed and agreed to pay it.

On this joinder of issues, a jury was waived, and the cause was tried by the court. Judgment was entered for plaintiff, and the court made a finding:

"The court further finds that the allegations and averments made and contained in the answer of Dora E. Harvey with reference to the assumption and agreement to pay said note and mortgage are true, and that by reason thereof the said B. C. Hamilton is primarily liable on said indebtedness, and the defendant Dora E. Harvey is liable only as surety."

Part of the decree reads:

"It is further considered, ordered, adjudged, and decreed that, if at any time the defendant Dora E. Harvey is compelled to pay this judgment, or any part thereof, she shall have a judgment over against her codefendant, B. C. Hamilton, for the amount so paid by her, with interest thereon at the rate herein provided."

The defendant Hamilton assigns various errors which will be noted. His chief complaint relates to the admission of incompetent and prejudicial evidence. The deed conveying the Holton property from Mrs. Harvey to Hamilton merely recited that the conveyance was subject to the mortgage incumbrance. It did not recite that the grantees assumed and agreed to pay the mortgage. Mrs. Harvey was permitted to testify concerning the negotiations leading up to and involved in the transaction:

"Q. What, if anything, was said in that conversation about whether Hamilton and Ptomey were to assume this mortgage? * * * A. Mr. Hamilton said they would arrange it, and have the banker do the business, and see it was done straight.

"Q. What was said as to whether they would agree to pay this mortgage? A. They said they accepted the place subject to the mortgage, as soon as I could put the mortgage on, as I had not done so at that time.

"Q. What did they say as to who was to pay the mortgage, whether you were to pay it or they? A. The banker read the deed after he made it out, and I said, 'Will I be responsible for that?' and he said, 'No; they take the responsibility.' * * *

"Q. Was anything said at that time about anything else to be put in the deed? * * * A. It was supposed to be finished up after I had the mortgage on the place, as there was none then. The deed was made out subject to that mortgage, but the deed does not show anything there.

"Q. Did Mr. Hamilton, in your negotiations out there, make any statements wherein he said anything about whether he would or would not assume this mortgage? * * * A. So far as I remember, just to the effect he, as my friend, would see everything went perfectly straight, and I would have no more responsibility.

"Q. What did Ptomey say about it? * * * A. That's what they were to do.

"Q. Did he say so? A. Yes.

"Q. Did Hamilton say they would do that? A. The deed was made; a joint deed.

"Q. What did Hamilton say? Did he tell you he would see the mortgage was paid; that he would pay it? A. I cannot say he said he would pay, but he said he would see I was fairly dealt with, and that they assumed the mortgage.

"Q. Hamilton said that, did he? A. Yes."

[1, 2] Was this evidence competent? Appellant says it was not pleaded that there was a mistake in the deed, nor was there any allegation or claim of fraud, and he relies on the rule that parol agreements made prior to or contemporaneous with the execution of a written instrument are inadmissible to alter or contradict the terms of that instrument. Undeniably that is a sound rule, and some of the cases cited by appellant seem to have applied it to controversies not easily distinguishable from the case at bar. On the other hand, however, it must be said that the trial court had ample authority for his ruling that there can be an enforceable parol obligation by a purchaser of mortgaged property to assume and pay the mortgage.

In Fisher v. Spillman, 85 Kan. 552, 554, 555, 118 Pac. 65, 66, which was a case where the mortgagor of property had sold it to a person who orally agreed to assume and pay the mortgage debt, this court said:

"It has been repeatedly held that parol agreements of this character need not be in writing; that a parol agreement by the purchaser of

Digitized by Google

property to pay the purchase price to a third person in payment of a debt due from his vendor is not within the statute of frauds. Mfg. Co. v. Burrows, 40 Kan. 361, 19 Pac. 809; Neiswanger v. McClellan, 45 Kan. 599, 26 Pac. 18. A promise made to a debtor by a third person to pay his debt is not a promise to answer for the debt of another, within the statute of frauds, and need not be in writing. Center v. McQuesten, 18 Kan. 476."

In Smith v. Kibbe, 104 Kan. 159, 163, 178 Pac. 427, 428, it was said:

"Although the assumption of the debt was not expressly mentioned in the deed executed by Haney to them, the written contract executed in pursuance of a verbal agreement contained an express promise to assume and pay the debt. This promise and assumption was just as binding as if it had constituted a provision of the deed. To be valid, it was not essential that the agreement be a part of the deed, nor that the promisor should have signed any writing."

In Wilson v. King, 23 N. J. Eq. 150, the first paragraph of the syllabus reads:

"A parol agreement by the grantee, at the time of taking a deed, that he would assume a mortgage upon the property as part of the consideration, will be enforced in equity. A covenant in the deed that the premises are free from incumbrances, or any other covenant, will not estop the assignee of such mortgage from recovering on such undertaking."

In Jones on Mortgages, § 750, it is said:

"Even a verbal promise by a purchaser to assume and pay a mortgage is valid, and may be enforced in equity, not only by the grantor, but by the holder of the mortgage. * * * The assumption of the payment may be proved by parol evidence, although the deed to the purchaser contains covenants of warranty, and makes no mention of the mortgage, or is simply subject to it."

In Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901, the syllabus, in part, reads:

"1. If the amount of a prior mortgage is to be paid by the grantee of land as part of the purchase price, he is held to have assumed the debt, and express words to that effect in the deed are unnecessary. * * *

"3. The fact that a mortgage debt upon the property was assumed by the purchaser as part of the consideration may be shown by parol, although the deed contains full covenants of warranty and makes no reference to the mortgage."

In the body of the opinion the Illinois court said:

"The appellant, however, contends that, inasmuch as Ziese conveyed his equity to Auguste Boenert 'by a warranty deed with full covenants, and nothing was said about the payment of incumbrances,' oral evidence showing that the grantee, Auguste Boenert, assumed the incumbrance, was incompetent. The rule of this court is against this contention. In Drury v. Holden, supra, it is stated (page 137): 'It is said the deed from Daggett to Drury contained full covenants of warranty, to which there was no exception; that thereby Drury's grantor covenanted that he would warrant and defend the lots conveyed, against the holders of all incumbrances. The covenants extended only to what was conveyed, and that was not the lots absolutely, but the lots subject to the incumbrance.' And on page 138: 'It is objected that oral evidence was inadmissible to show that the amount of the incumbrances was deducted from the amount of the purchase price, and allowed to Drury. The evidence, being in regard to what constituted the consideration of the deed to Drury and that the amount of the incumbrances was included in and formed a part of the consideration, was clearly competent, under the rule which permits parol evidence upon such subject of the consideration of a deed.' In Lloyd v. Sandusky, 203 Ill. 621, after referring with approval to the case above quoted, we said (page 631): 'Whenever the question has come before this court, it has been uniformly held that the statement of the amount of the consideration and acknowledgment of its receipt in the deed were formal recitals, their only operation, in law, being to prevent a resulting trust, and that they might be explained, varied, and contradicted by parol evidence.'"

See, also, 27 Cyc. 1344, 1345.

With the competency of the foregoing quoted evidence thus established, the appellant's next contention, that the assumption of the mortgage by Hamilton was not proved, needs little discussion. Not only did Mrs. Harvey so testify, but her mother likewise testified:

"Q. What, if anything, was said during these negotiations there by Mr. Hamilton with reference to assuming and agreeing to pay this mortgage they wanted Mrs. Harvey to place on the property here? What was said? A. They said they expected to pay the mortgage.

"Q. When the banker asked if they expected to pay the mortgage, they said they would? A. Yes; that was the understanding. * * *

"Q. Make that statement as near as you remember? A. I told you they said they would put it in when she sent on the mortgage. * * *

"Q. Did Mr. Hamilton assist in this transaction, where Mrs. Harvey traded for Colorado land? A. I think he did.

"Q. Do you know? A. We found out afterward; we did not know at the time.

"Q. Was he present when you were out there looking at the land? A. Yes; went with us part of the time; we thought he was our friend."

A daughter of Mrs. Harvey also testified that, on the way back from Colorado, she had a conversation with Hamilton:

"Q. What statements, if any, did Hamilton make about whether he agreed to pay the mortgage your mother had put on the place? * * * A. Mentioned trading off the place for a car, and I asked what that had to do with the place, and he said he got one-half for getting the folks out there and keeping them; and I asked what they were going to do about the mortgage, and he said they assumed it; it was to be paid by them."

Digitized by Google

The court feels bound to hold that Hamilton's agreement to pay the mortgage was clearly established by the evidence to which the trial court manifestly gave full credence. In 27 Cyc. 1348, 1349, it is said:

"If the deed contains no such clause or covenant, but reliance is placed on a verbal contract to pay the mortgage, it may be established by parol evidence, which, however, must be clear and convincing. The fact that the grantee paid interest, or a part of the principal of the debt, or negotiated with the mortgagee in regard to its payment, is pertinent."

[3] Another contention of appellant is that the court erred in overruling his objection to the introduction of evidence on the ground that Mrs. Harvey's pleadings had stated no cause of action against him. She pleaded that Hamilton purchased the property from her, and that he assumed and agreed to pay the mortgage, and prayed that he be held primarily liable therefor. Hamilton's answer traversed those allegations. The issue thus raised was virtually all that was in controversy in the lawsuit. Hamilton's objection to the introduction of evidence to determine that issue was properly overruled.

The judgment is affirmed.

All the Justices concurring.

SMALL et al. v. SMALL. (No. 22706.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Pleading ⟸364(5)—Striking from petition allegation of facts showing fiduciary relation and oral trust agreement held error.

In an action to establish a trust in lands and other property by implication of law, where the plaintiffs claim that the defendant procured from his mother in her lifetime transfers of all her property, under an oral trust agreement that upon her death he would make an equitable distribution of it between himself and the plaintiffs, it was error to sustain a motion to strike from the petition statements of facts and circumstances tending to show the existence of a fiduciary relation between the defendant and his mother inducing her to make the conveyance and oral agreement.

2. Pleading ⟸368—Petition to establish trust in lands and other property and for an accounting stated a single cause of action.

In an action to establish a trust in lands and other property and for an accounting, it is *held* that the petition states but a single cause of action, and that it was error to sustain a motion requiring the plaintiffs to separately state and number different causes of action.

(Additional Syllabus by Editorial Staff.)

3. Pleading ⟸11—Rule that evidence should not be pleaded does not state the whole law of pleading.

The general rule that evidence should not be pleaded does not state the whole law of pleading, as the facts essential to show a cause of action are often evidentiary in character.

4. Appeal and error ⟸960(1)—Pleading ⟸368—Motion to separately state and number is addressed to trial court's discretion.

A motion to separately state and number is addressed largely to the discretion of the court and ordinarily is not reviewable.

Appeal from District Court, Harper County.

Action by A. C. Small and others against H. B. Small. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

E. C. Wilcox and Myrtle Youngberg, both of Anthony, for appellants.

T. A. Noftzger, of Wichita, R. P. McColloch, of Trenton, Mo., and Geo. W. Cox, of Wichita, for appellee.

PORTER, J. Melissa J. Small, a widow, died intestate. She was the mother of three children, Albert, Reuben, and H. B. Small. Albert and Reuben died, intestate, prior to the death of their mother. Their children, the plaintiffs, and H. B. Small, defendant, are the only heirs at law of Melissa J. Small. This action is one in which plaintiffs seek to have certain property belonging in her lifetime to Mrs. Small decreed to be held by defendant as a trustee of a constructive trust for the use and benefit of all the heirs. It was alleged in the petition that soon after his mother's death the defendant took possession of all the property, consisting of real estate in Harper county and moneys to the amount of about $5,000, secretly disposed of or appropriated it to his own use, and has refused to disclose to plaintiffs the instruments or conveyances by which he claims to own the property. The court sustained defendant's motion to strike from the petition statements, in substance, to the following effect:

[1] In her declining years Melissa J. Small frequently expressed a desire for an equitable distribution of her property among her children and grandchildren; for several months before her death she was much concerned about that matter; the defendant, taking advantage of this condition of her mind, and contriving and intending to secure from her the whole of the estate, induced her to intrust him with the property on the representation that he would see that her estate was equitably and justly distributed between himself and the grandchildren; that he frequently called his mother's attention to other estates that had been dissipated by court proceedings, and he gave her a number of

Digitized by Google

instances where transfers of such property had been made to one member of the family, who afterwards saw to an equitable distribution; and he offered his services to her for that purpose, and so continued to work upon her feelings until (she yielded to his demands). All of this part of the petition save and except the words "she yielded to his demands" was stricken out on the ground that it was redundant, irrelevant, and evidential. The motion was filed in January, 1919, shortly after the action was commenced. It was sustained in June, and the defendant was given 20 days to answer the petition as it stood with the portion stricken out. In October, having looked the petition over again, defendant came to the conclusion there was not enough left to constitute a cause of action, and filed a perfectly good demurrer. Without pressing the demurrer, he filed a motion to require plaintiffs to separately state and number their causes of action. At this stage of the proceeding plaintiffs appealed from the order striking out parts of the petition, and also assigned as error the order requiring several causes of action to be separately stated and numbered.

In support of the court's ruling defendant thus states his contention:

"The words stricken from the petition are merely nonessential averments of alleged reasons why the said Melissa Jane Small placed her property in charge of the defendant to be distributed at her death. We submit that, if the plaintiff can prove that Melissa Jane Small in her lifetime did place her said property in charge of the defendant to be distributed at her death, it would neither be necessary nor proper for them to prove her reasons for doing so. Such averments therefore cannot affect the rights of the parties, and it was within the discretion of the trial court, on motion of the defendant, to order them stricken out."

[2, 3] The general rule that evidence should not be pleaded does not state the whole law of pleading. It often occurs that the facts which are essential to show a cause of action are evidentiary in character. In pleading fraud it is necessary to allege the facts which it is claimed show the fraud, and likewise necessary to prove facts of the same general character. In the circumstances of this case where the plaintiffs rely upon a trust arising by implication of law, it was necessary to show the existence of a fiduciary relation between the defendant and his mother, inducing the transfer to him of her property.

The defendant, in support of his contention, cites the case of Drake v. First National Bank, 33 Kan. 634, 7 Pac. 219, where it was held:

"That allegations of what the parties intended or desired, or why they made the contract, or why they made it as it was made, and what the parties understood and agreed to be its 'legal purport and effect,' are irrelevant and redundant—mere surplusage."

The Drake Case is not at all in point. The action there was upon a contract in writing, and, of course, the terms of the contract could not be varied by evidence of what induced the parties to make it, or what they understood was its legal effect. If plaintiffs in the present case relied upon a written contract, they would not be asking a court of equity to establish a constructive trust by implication of law. They are relying in part upon an oral agreement, or arrangement, not in writing, and which, of itself, would not be sufficient to raise the implication of a trust, but which, under certain conditions, may be used by a court of equity in aid of such implication. That the court struck from the petition matters of vital importance to plaintiffs' cause of action is apparent from a very recent decision (Silvers v. Howard, 106 Kan. 762, 190 Pac. 1), which may be said to answer every contention raised by the defendant. In that case the court had under consideration section 1 of the trust statute (Gen. Stat. 1915, § 11674), prohibiting the creation of a trust concerning lands unless in writing (except such as may arise by implication of law). The statute and the exceptions in the statute were carefully analyzed, and it was held:

"If a fiduciary relation exist between the grantor and grantee in a deed absolute, and the deed be induced by the relation for a trust purpose, breach of the confidence reposed may amount to constructive fraud, from which a trust may arise by implication of law." Syl. 4.

"If such a conveyance be accompanied by an oral trust agreement, the agreement may be considered as one of the circumstances of the case. It may aid implication of a trust, but is not sufficient, standing alone, to raise the implication." Syl. 5.

In the opinion it was said:

"The mere fact that a conveyance is made by a child to a parent, or by a parent to a child, without consideration, is not enough to raise a trust by implication. Clester v. Clester, 90 Kan. 638, 135 Pac. 996, L. R. A. 1915E, 648. There must be a confidential relation, a transaction induced by the relation, and a breach of the confidence reposed. When those conditions are satisfied, the law implies a trust."

It was error to sustain the motion to strike out.

[4] While a motion to separately state and number is addressed largely to the discretion of the court and is, ordinarily, not reviewable, it is manifest that but one cause of action was stated. Before a court of equity can mold the proper decree in a case of this kind there must be an accounting, which is only an incident to the real cause of action.

The judgment will be reversed and the cause remanded for further proceedings.

All the Justices concurring.

Digitized by Google

In re STARR'S ESTATE.

STARR et al. v. GRIMES.

(L. A. 6371.)

(Supreme Court of California. June 9, 1920. Rehearing Denied July 3, 1920.)

Exemptions ⟸50(1)—Insurance money of deceased leaving no spouse or minor children not exempt.

Proceeds of life policies, the annual premium of which does not exceed $500, although exempt to the insured during his life, under Code Civ. Proc. § 690, subd. 18, are to be treated as nonexempt property subject to decedent's debts, where there is no surviving spouse or minor children of the decedent; section 1465, relating to distribution of property, having no application in the absence of such persons.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

In the matter of the estate of Joseph L. Starr, deceased, of which Helen L. Starr is administratrix. From a decree directing her to pay judgment, Mrs. M. E. Grimes, the administratrix, and her coheirs appeal. Affirmed.

W. A. Martin and Leland S. Bower, both of Los Angeles, for appellants.

Jesse F. Waterman, of Los Angeles, for respondent.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN, of the District Court of Appeal, First Appellate District, while acting as Justice pro tempore of this court in the place of Mr. Justice MELVIN. It is adopted as the opinion of the court.

Joseph L. Starr died intestate in the county of Los Angeles, leaving an estate which consisted wholly of a life insurance policy of approximately $1,200, payable to his executors, administrators, and assigns, the annual premium upon which did not exceed $500. He left him surviving as his only heirs at law seven children all over the age of 21 years. Helen L. Starr, one of such children, was appointed administratrix of the estate. During administration the respondent obtained a judgment against the administratrix for some $1,600, to be paid in due course of administration. In due time the final account of the administratrix was settled and allowed, but the court denied her petition that the balance in her hands be distributed to the heirs of the deceased, and directed that she pay it to the respondent in liquidation and discharge pro tanto of her said judgment. The administratrix of the estate and her coheirs have appealed from the part of the decree directing such payment. In support of their appeal it is their claim that the whole of the estate is exempt from the payment of debts, and should be distributed to them after the payment of the costs of administration.

The provisions of our Code applicable to the situation described are found in section 690 of the Code of Civil Procedure, subdivision 18 of which, in enumerating the kinds of property exempt from execution, specifies "all moneys * * * accruing or in any manner growing out of any life insurance" policy, etc., if the annual premiums paid do not exceed $500; and section 1465 of the same Code, which declares that all exempt property may be set aside for the use of the surviving spouse, or, in case of his or her death, to the minor children of the decedent. There is no doubt that under these sections the policy was exempt from execution during the lifetime of the deceased, and the proceeds after his death. The difficulty that arises in this case results from the fact that there is no express provision for the distribution of exempt property after the death of the debtor except in the case provided for in section 1465, Code of Civil Procedure. Here there was no one entitled to take the property under this provision. There was, therefore, no reason why this property should not be administered in the same manner as any other property belonging to the estate. The law requires that such property shall be applied first to the payment of the debts of the deceased, and after such payment shall be distributed to the heirs. The exemption was intended to apply to the decedent, and upon his death to the surviving spouse, and if there were no surviving spouse then to the minor children of the deceased.

The special provision contained in said section 1465 relating to the distribution of property which during the lifetime of the decedent had been exempt from execution, having as its only beneficiaries the surviving spouse and minor children of the decedent, has no application in the absence of persons comprised within these classes, with the necessary result that such property is to be treated as nonexempt property, and is therefore, like it, subject to the payment of the decedent's debts.

The judgment is affirmed.

WILBUR, LENNON, and SLOANE, JJ., concur.

Digitized by Google

PEOPLE v. NIINO. (Cr. 2297.)

(Supreme Court of California. June 10, 1920.)

1. Criminal law ⟸1159(2)—Judgment not reversed if supported by evidence.

The Supreme Court will not reverse a judgment given upon a verdict, unless there is no evidence to support it, or when the evidence relied upon to uphold it is so inconsistent or improbable as to be incredible, or when it so clearly and unquestionably preponderates against the verdict as to convince the court that it was the result of passion or prejudice on the part of the jury.

2. Homicide ⟸270—Sanity of defendant for jury.

In a prosecution for homicide, sanity of the defendant *held*, under the evidence, for the jury.

3. Criminal law ⟸452(2) — Witnesses acquainted with defendant competent to testify as to sanity.

In a prosecution for murder, where witnesses testified that they had known defendant for many years and were well acquainted with him and saw him frequently, *held*, that the court did not abuse its discretion in allowing such witnesses, as intimate acquaintances of the defendant, to give their opinion upon his mental sanity, under Code Civ. Proc. § 1870, subd. 10.

4. Criminal law ⟸1153(2)—Competency of intimate acquaintance to testify as to sanity matter within discretion of trial court.

The determination of the question as to whether or not one is an intimate acquaintance with another, and therefore competent, under Code Civ. Proc. § 1870, subd. 10, to give an opinion as to mental sanity, is to a great extent within the discretion of the trial court, whose ruling thereon will not be disturbed except where the evidence is such as to leave no just room for question that the discretion has been improperly exercised.

5. Criminal law ⟸1035(3)—Remark of court not objected to not error.

A remark by the court, when a question arose as to whether or not one of defendant's witnesses should be permitted to give his testimony through an interpreter, "They can all speak English, but they won't," cannot be complained of on appeal, where the remark, when made, was not assigned as misconduct.

6. Criminal law ⟸656(2)—Remark of court not prejudicial.

A remark by the court, in a homicide case, when a question arose as to whether or not one of defendant's witnesses should be permitted to give his testimony through an interpreter, "They can all speak English, but they won't," *held* not prejudicial.

In Bank.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

T. Niino was convicted of first degree murder, and he appeals. From the judgment and an order denying his motion for a new trial. Judgment and order affirmed.

F. E. Kilpatrick and H. Scott Jacobs, both of Hanford, for appellant.

U. S. Webb, of San Francisco, and J. Charles Jones, of Sacramento, for the People.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN, of the District Court of Appeal, First Appellate District, while acting as justice pro tempore of this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court:

The defendant was convicted of murder in the first degree. He moved for a new trial, which motion was denied, and he was thereupon sentenced to suffer the death penalty. He prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

At the trial it was shown by the undisputed evidence that on October 27, 1919, the defendant shot and killed a young Japanese woman named Misco Hayashi, whom he desired to marry, but whose father had repeatedly refused consent thereto. Upon the last of such refusals the defendant almost immediately procured a double-barreled shotgun, went to the place where the young woman was at work in a vineyard picking grapes, and there deliberately fired two shots into her face and throat, causing almost instant death.

In support of his appeal the defendant contends that the evidence is insufficient to sustain the verdict, that the court erred in admitting certain testimony, and that the court and prosecuting attorney were guilty of misconduct prejudicial to the rights of the defendant.

[1, 2] Defendant contends that the evidence is insufficient to support the verdict. In view of the gravity of the case we have carefully examined the record in order to learn if this contention can be maintained, and after such examination we are satisfied that it cannot. This court will not reverse a judgment given upon a verdict unless there is no evidence to support it, or when the evidence relied upon to uphold it is so inconsistent or improbable as to be incredible, or when it so clearly and unquestionably preponderates against the verdict as to convince the court that it was the result of passion or prejudice on the part of the jury. People v. Willard, 150 Cal. 553, 89 Pac. 124. The record before us discloses no such case. The evidence upon the only issue of fact in the case—the soundness or unsoundness of mind of the defendant—was conflicting. Witnesses were introduced by the defendant who testified that in a town in Japan of about 1,600 inhabitants, where the defendant was reared, his maternal grandfather and his mother were reputed to be in-

Digitized by Google

sane; also that his brother and sister, as well as he himself, acted queerly, and were all regarded as mentally defective. There was also evidence tending to show that the defendant a few years before the trial had contracted syphilis; that he was subject to fits and was the victim of some nervous disturbance. A witness was also called who testified that the defendant was more excited and showed more concern over being served with summons and complaint in a justice's court suit than upon his arrest under the present charge. Two medical men, testifying as experts, after an examination of the defendant, and in answer to a hypothetical question, gave it as their opinion that the defendant was not sane on the day he shot the deceased. On the other hand, there were a number of witnesses introduced by the prosecution, intimate acquaintances of the defendant, whose opinion on this question was contrary to that of the doctors. Under such evidence, it was clearly a question of fact for the jury to determine whether, at the time of the homicide, the defendant was sane; and their conclusion that he was, as evidenced by their verdict, will not be disturbed by this court. People v. Willard, supra.

The defendant's claim as to the improper admission of testimony is directed to that of six of the nine witnesses called by the prosecution and who, as intimate acquaintances of the defendant, testified that on or about the day of the homicide he was of sound mind, and is founded upon the contention that none of these witnesses was such intimate acquaintance within the meaning of subdivision 10 of section 1870 of the Code of Civil Procedure, which provides that an intimate acquaintance may, upon a trial, give his opinion as to the mental sanity of a person.

One of these witnesses had known the defendant for seventeen years, and the latter had, during four or five years of that time, worked for him. He worked satisfactorily and their relations were friendly and up to a week of the shooting he visited and associated with the defendant.

Another witness testified that he, too, had known the defendant for about seventeen years; that within that time the defendant had worked for him during four or five plowing seasons, the last occasion being about two years before the trial; that he frequently saw the defendant after that, and in fact, had seen him the day before the shooting; that he and the defendant were on friendly terms and had often played cards together.

A third witness testified that he had known the defendant for sixteen or seventeen years; that during the first part of their acquaintance the defendant was engaged in business and during that time they seldom met, but later the defendant sold his business and went to the country, and thereafter the witness saw much of the defendant and they became well acquainted.

Still another witness testified that he had known the defendant about nine years, during which time they had worked together at different places, including that at which the homicide was committed. Another witness was a friend and associate of the defendant for four years.

The testimony of the other witnesses introduced as to this phase of the case was similar to the evidence just briefly detailed.

[3, 4] These witnesses were Japanese, and each of them testified that, in his opinion, the defendant was sane on the day of the homicide. No error was committed in allowing these persons, as intimate acquaintances of the defendant, to give their opinion upon his mental sanity. The determination of the question as to whether or not one is an intimate acquaintance of another, and therefore competent, under subdivision 10 of section 1870 of the Code of Civil Procedure, to give such opinion, is of necessity, to a great extent, within the discretion of the trial court, and the ruling of that court will not be disturbed except where the evidence is such as to leave no just room for question that the discretion has been improperly exercised. People v. Clark, 151 Cal. 207, 90 Pac. 549. It is plain that the court, in the instant case, did not abuse its discretion in admitting the testimony of the witnesses referred to.

[5, 6] During the trial a question arose as to whether or not one of defendant's witnesses should be permitted to give his testimony through an interpreter, upon which the court remarked, "They can all speak English, but they won't." It is claimed on behalf of the appellant that this observation by the court constituted misconduct which seriously affected his right to a fair trial. No such claim was made at the time of the occurrence, and the remark was not then assigned as misconduct. Moreover, we do not regard it as such, and we cannot perceive how it could have had an influence on the jury prejudicial to the defendant's substantial rights. Nor do we find any merit in the point that the prosecuting officer indulged in an unfair imputation against defendant's counsel which was prejudicial to the defendant. If the imputation charged was made, it was unfair, but it cannot be regarded as having had any effect on the right of the defendant to a fair and impartial trial.

It follows from the foregoing that the judgment and order should be affirmed, and it is so ordered.

ANGELLOTTI, C. J., and SHAW, LAWLOR, WILBUR, LENNON, OLNEY, and SLOANE, JJ., concur.

Digitized by Google

SOUTH SAN FRANCISCO PACKING & PROVISION CO. v. JACOBSEN et al. (S. F. 8829.)

(Supreme Court of California. June 10, 1920.)

1. Sales ⟸52(7)—Finding that purchaser did not obtain possession by means of worthless check held warranted.

In an interpleader action involving disposition of proceeds of three carloads of hogs, finding that purchaser who at times between the date he gave a check and its presentation had on hands funds more than sufficient to cover the check was not guilty of fraud in obtaining delivery by means of a worthless check *held* warranted despite other contradictory evidence.

2. Sales ⟸199—Whether title passes at delivery depends on intention as shown by circumstances.

Whether title to personal property passes through a sale thereof at the time of its delivery depends upon the intention of the parties as shown by all the facts and circumstances of the case.

3. Sales ⟸202(2, 3)—Title to hogs held not to pass where check for price was dishonored.

Where hogs were sold under an arrangement that check should be given at time of delivery, the sale should be treated as one for cash, and where the check was dishonored title did not pass; for, while delivery is a most significant fact as indicating the intention to transfer title, it is not conclusive, and where a check is accepted as a particular form of cash payment and is dishonored, the seller can resort to his original claim, on the ground that there has been a defeasance of the condition on which it was taken, and it is apparent where check was demanded at time of delivery that the sale was one for cash.

4. Sales ⟸222—An attaching creditor has no greater rights in personal property than his debtor.

Where title to personal property did not pass to a buyer on delivery because the check for the purchase price was dishonored, the attaching creditor of the buyer has no right superior to his debtor, and the original seller is entitled to the property or proceeds as against the attaching creditor.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action in interpleader against J. Jacobsen and another, D. A. Taylor and Arthur Rosecrans, individually and as copartners under the firm name and style of Taylor & Rosecrans, and the Western Meat Company. From a judgment for last-named defendant, Taylor and Rosecrans appeal. Reversed.

Tum Suden & Tum Suden, of San Francisco, for appellants.

Lilienthal, McKinstry & Raymond, Sullivan & Sullivan, and Theo. J. Roche, all of San Francisco, for respondent.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District while acting as Justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court:

This is an appeal from a judgment in favor of the defendant Western Meat Company, and against the defendants Taylor & Rosecrans, in an action in interpleader.

Briefly the facts of the case are these: Taylor & Rosecrans, at the time the transaction here involved took place, were copartners engaged in the live stock business in the state of Idaho, as also was the defendant Jacobsen, their respective places of business, however, not being in the same locality. Shortly before the 10th day of June, 1915, Jacobsen, by telephone, purchased from Taylor & Rosecrans three carloads of hogs at an agreed price, the hogs to be delivered at a certain place in Idaho, where Jacobsen or his agent was to receive them and make payment therefor by check. Accordingly the hogs were delivered and a check for $3,490.98 was given in payment by Jacobsen's agent, the delivery of the check taking place at midnight on said June 10th. Before noon of the following day it was deposited for collection with the firm's bank at Burley, Idaho. It reached the bank in Idaho Falls on which it was drawn three days later, i. e., Monday, June 14th, when payment was refused for lack of funds. As is apparent, Saturday afternoon and Sunday falling within these three days, the actual business time comprehended within said period of three days was but a day and a half. There being no evidence in the record to the contrary, we will presume that the check was presented for payment in the ordinary course of business. On the 10th day of June, when the check was delivered, Jacobsen's bank balance was $1,733.37; on the next day, June 11th, Friday, said balance was increased to about $5,000; on Saturday, June 12th, it had been reduced to about $4,000, and on Monday, when the check was presented for payment, said balance was $1,341.57. Jacobsen had no arrangement with the bank for credit or overdraft.

Shortly after the purchase of the hogs by Jacobsen he disappeared. Commencing with June 14th many checks drawn by him were, when presented at the bank, dishonored. In the meantime Jacobsen had shipped the hogs to the plaintiff, which in turn disposed of them in San Francisco, and the fund involved in this litigation is part of the sum realized by the plaintiff from their sale. While there is some dispute on the subject, nevertheless it fairly appears from the record, not only that defendants

Digitized by Google

Taylor & Rosecrans, upon learning of the dishonor of the check, demanded the fund from the plaintiff under a claim of ownership, but also that the respondent, Western Meat Company, a creditor of Jacobsen, at about the same time commenced an action against him and levied an attachment on this fund. The plaintiff being thus confronted with two conflicting claims, commenced this action in interpleader against the partnership, Jacobsen, and the Western Meat Company. Jacobsen defaulted, and judgment went for the Western Meat Company as against Taylor & Rosecrans, who have appealed.

[1] The appellants contend that Jacobsen, having obtained delivery of the hogs by means of a worthless check, was guilty of fraud, and that therefore the sale was void, both as to Jacobsen and his attaching creditor. It is true, as contended by the appellants, that the issuance by Jacobsen of this check, payment of which was refused for lack of funds, coupled with his unexplained disappearance, is some evidence of fraud. It appears, however, that after the issuance of the check, and before its presentation for payment three business days later, Jacobsen, on two of those days, had more than sufficient money on deposit to meet the check. This circumstance, with the presumption of innocence and fair dealing, furnish some foundation for the finding of the trial court against fraud, so that, in view of what may thus be regarded as a conflict of evidence, we are not at liberty to disturb this finding.

There are several technical points made by the appellants in support of their appeal; but, as we have concluded that the judgment must be reversed upon the main ground urged, it will be unnecessary to discuss these. We are thus brought to the consideration of the principal question involved, viz. whether or not title to the hogs passed at the time of the delivery by Jacobsen's agent of the check. We are of the opinion that this question must be answered in the negative, and, consequently, that the appellants are entitled to the fund as against Jacobsen's attaching creditor, the Western Meat Company.

[2-4] Whether or not title to personal property passes through a sale thereof at the time of its delivery depends upon the intention of the parties as shown by all the facts and circumstances of the case, so that the question is ordinarily one of fact for the jury, or for the court when sitting without a jury. Where, however, the facts bearing upon the question of intent are undisputed, only a question of law is presented. Here the evidence shows without conflict that Jacobsen was to pay for the hogs upon delivery by check; and it is argued by the respondent that accordingly, a check having been given and received in payment for the hogs, title to the animals passed to the buyer notwithstanding that upon due presentation the check was dishonored. This argument is supported by reference to cases holding that parties may agree to accept a check or bill or note as absolute payment for goods sold, in which case title to the goods will pass upon such acceptance irrespective of whether the paper is honored upon due presentation or not. We think, however, that the facts of this case do not bring it within the principle referred to, for it is quite apparent that the requirement of the vendor that a check should be given by the buyer upon the delivery of the hogs was intended as the equivalent of an insistence upon payment on delivery; in other words, that it was not a sale on credit, nor for the check as such, but that delivery of the animals and payment for them, though such payment might be made by check, were to be simultaneous, and the transaction was understood by the vendee in this sense. The legal situation thus arising can logically be no different from one where the terms of the sale are cash on delivery and a check is accepted by the vendor. In such case it is held that the acceptance of the check is no waiver of immediate payment; and, although delivery is made of the goods upon receipt of the check, title thereto does not pass as between the parties unless, upon due presentation, the check is paid.

"A check is accepted as a particular form of cash payment, and if dishonored the vendor may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken." Benjamin on Sales (7th Ed.) pp. 755–772.

"If the sale is for cash, and the check of the buyer is taken, this will operate as no more than a conditional payment, as well as a conditional delivery; and if upon due presentation of the check it is dishonored the vendor may retake possession of the goods." 23 R. C. L. p. 1448.

"While a delivery is perhaps the most significant fact as indicating an intention to transfer the title, it is not conclusive, and, notwithstanding there has been a delivery, the property will not pass if it appears that such was the intention of the parties, as when payment is made a condition precedent to the passing of the property." 35 Cyc. 308.

"The title will not pass until payment if by the terms of the contract such payment is a condition precedent, or if it otherwise appears that such was the intention of the parties, unless the condition as to payment is waived." Id. 322.

"The condition as to payment or security is one which may be waived by the seller, in which case title to the goods sold will vest in the buyer although the condition has not been performed. * * * Whether the delivery is conditional or unconditional depends primarily upon the intention of the parties as shown by all the facts and circumstances of the case, and so it is ordinarily a question of fact for the jury.

Digitized by Google

If the sale is for cash, the mere acceptance of a check does not constitute absolute payment or waiver of the condition as to payment. Where the seller delivers the goods conditionally and without any intention of waiving payment or security, the property does not pass; and in order to render the delivery conditional within the application of this rule it is not necessary that there should be any express declaration to that effect, but it is sufficient if it appears that such was the understanding of the parties, or that the delivery was made in the expectation of immediate payment, the question being primarily one of intention, as shown by all the facts and circumstances of the case. * * * So if the seller delivers on an understanding, express or implied, that he is to receive immediate payment or security he may reclaim the goods, or if he delivers on payment by check instead of cash, and the check is dishonored, he may reclaim the property." Id. pp. 327, 328.

In effect, this sale was for cash as distinguished from a sale on credit, payment to be made, as is customary in similar commercial transactions, by check, and as it was not agreed that the check was to be received as absolute payment, and the delivery of the goods also was conditional, and the check, upon due presentation was dishonored, title to the hogs remained in the seller. In Johnson, etc., Co. v. Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615, it is held that a check given for the purchase price does not constitute payment until the money is actually received by the vendor, unless it is otherwise expressly agreed. In Nat. Bank v. Chicago, etc., Ry., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566, it is held that where goods are sold for cash on delivery, and payment is made by check, such check is, in fact, payment only when the cash is received on it, and that there is no presumption that a creditor takes a check in payment from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Such payment is only conditional, or a means of obtaining the money. So, in Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527, it is held that payment by check is a mere mode of making a cash payment; that it is conditional only; and if the check, upon due presentation, is dishonored, the vendor may retake the goods from the purchaser.

There is nothing in this record indicating that the original sellers intended to accept Jacobsen's check as absolute payment. True, they were to accept a check in payment for the hogs, but this is the usual method in cash transactions of any magnitude, and it is employed as a matter of convenience, and to obviate the necessity of handling and transporting large sums of money with its attendant risks. In the case of Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 Pac. 28, it is said that the language of the manager of the plaintiff bank in stating that a check which was subsequently dishonored was accepted in payment of the debt sued upon should not be construed as signifying anything more than the provisional or conditional payment presumed by law, and is no evidence of absolute payment.

The title to the hogs, therefore, as between the parties to the sale having remained in the original sellers, it follows, we have no doubt, that the fund in the hands of the plaintiff, the purchaser from Jacobsen, constituting part of the purchase price, belongs to the original sellers, Taylor & Rosecrans; and we also entertain no doubt that so far as the attaching creditor is concerned it has no better right to the fund than Jacobsen himself. Ward v. Waterman, 85 Cal. 491, 508, 24 Pac. 930.

It follows that the judgment should be reversed; and it is so ordered.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, LENNON, SLOANE, and LAWLOR, JJ., concur.

PEOPLE ex rel. MASTICK et ux. v. LAKE COUNTY WATER DIST. et al. (S. F. 8850.)

(Supreme Court of California. June 11, 1920.)

1. Waters and water courses ⇐216—Act providing for water districts and for inclusion of lands without notice not unconstitutional.

If act providing for creation of water districts authorized inclusion in district by supervisors of lands not included within boundaries defined by any noticed petition, without consent of owners and without notice or opportunity to them to be heard, the act would not thereby violate any constitutional guarantee.

2. Waters and water courses ⇐226—Act for organization of water districts precludes inclusion of land not within boundaries shown in petition.

St. 1913, p. 1049, providing for the incorporation of county water districts, precludes the inclusion by the supervisors of land not included within the district as shown by petition initiating the proceeding, published notice of proposed presentation of which is required, except when such inclusion is had on application of the owner of the land.

3. Waters and water courses ⇐226—Act for incorporation of water districts permits supervisors to exclude lands within proposed district to extent stated.

St. 1913, p. 1049, providing for the incorporation of county water districts (section 3), *held* to mean that solely with regard to territory described in the petition the supervisors shall make such changes in the proposed bound-

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

ary as may be deemed advisable, provided that they may not exclude from the district as proposed by the petition any territory to be benefited, in their judgment, or allow to remain therein any lands which will not be so benefited, except that on application or with consent of owner of land outside the proposed district they may in their discretion add such land.

4. Waters and water courses ⟸226 — Water district to which lands other than shown in petition were added not properly organized.

Lake county water district, to whose territory, as shown by original petition, the board of supervisors added 50,000 acres separated from the district by high mountains, increasing its area by approximately one-third, this not on application of any owner of such added land, *held* not organized in compliance with St. 1913, p. 1049.

In Bank.

Appeal from Superior Court, Lake County; Emmet Seawell, Judge.

Proceeding in quo warranto by the People of the State of California, on the relation of George H. Mastick, and Lizzie Mastick, his wife, against the Lake County Water District and others. From judgment for defendants, plaintiffs appeal. Reversed.

U. S. Webb, Atty. Gen., and Alan C. Van Fleet, of San Francisco, for appellants.

H. E. Witherspoon, of Lakeport, for respondents.

ANGELLOTTI, C. J. This is a proceeding in quo warranto against the Lake county water district and its directors to have it adjudged that all proceedings had relative to the formation of such district are void, and that the district be dissolved and restrained from acting as a corporation and exercising the franchise of a corporation, and for such other relief as may be meet and proper. Judgment was given decreeing the district to be a legally created, acting, and existing county water district of the state of California, duly organized and incorporated under the act relative to such districts, approved June 10, 1913, and, in effect, denying the relators all relief. We have here an appeal by plaintiffs from such judgment.

Two principal claims are made by appellants; one being that there was such a material and substantial departure by the board of supervisors from the provisions of the act in the matter of inclusion in the proposed district of lands not within the boundaries of the district, as set forth in the original petition as to render the whole proceeding void; and the other being that if the act purported to authorize the course followed in this matter it is in violation of rights guaranteed relators by both federal and state Constitutions.

The act (Stats. 1913, p. 1049) is one providing for the incorporation, organization, and powers of county water districts. It provides explicitly how such a district may be brought into existence. By its terms:

"The people of any county, * * * or portion of a county, * * * having a population of not less than one thousand inhabitants, may organize a county water district under the provisions of this act by proceeding as herein provided." Section 2.

The proceeding for the creation of such a district must be inaugurated by the presentation to the board of supervisors of the county at a regular meeting of a petition signed by "registered voters within the boundaries of the proposed water district, equal in number to at least ten per centum of the number of votes cast in said proposed county water district for the office of Governor" at the last general election. The petition must "set forth and describe the proposed boundaries of such water district, and shall pray that the same be incorporated" under the provisions of the act. The text of the petition must be published in a newspaper or newspapers printed and published in the county, together with a notice stating the time of the meeting of the board of supervisors at which the same will be presented and considered, for at least two weeks before the time at which the same is to be presented; the publication showing the names of at least five of the signers and the number of signatures attached. The published notice must also state that at the time stated "all persons interested therein may then appear and be heard." At such time the board of supervisors shall hear the petition and those appearing thereon and may adjourn such hearing from time to time, not exceeding four weeks in all. Then follow the provisions here directly involved, which are as follows:

"On the final hearing said board shall make such changes in the proposed boundaries as may be deemed advisable and shall define and establish such boundaries. But said board shall not modify said boundaries so as to exclude from such proposed district any territory which would be benefited by the formation of such district; nor shall any lands which will not, in the judgment of said board, be benefited by such district, by means of any of said systems of works, be included within such proposed district. Any person whose lands are benefited by such district may upon his application, in the discretion of said board, have such lands included within said proposed district."

Upon the final determination of the boundaries of the district the board must give notice of an election to be held in the proposed water district for the purpose of determining whether the same shall be incorporated. If a majority of the votes in each municipal corporation or part thereof includ-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

ed in the district, and also in the unincorporated territory included therein, be in favor of such incorporation, the board shall make an order declaring the territory duly organized as a county water district. On this a certificate of incorporation is issued by the secretary of state, and thenceforth the district is deemed incorporated. The board's finding in favor of the genuineness and sufficiency of the petition and notice is final and conclusive against all persons except the state upon suit commenced by the Attorney General within one year after the order of the board declaring the district organized. (This suit was so commenced.) The district is governed by its own board of directors selected in the mode provided in the act. It is clothed with all the powers appropriate to the acquirement and operation, as a business, of a water system which is primarily for the benefit of the inhabitants and property in the district, and water of which, when there is a surplus, may be sold outside the district. In aid of its purposes it may issue bonds, the principal and interest thereof to be paid by the district. The express intention of the act is to require all operating expenses, as well as expense of repairs and depreciation of works and interest on bonded debt and, "so far as possible," principal of bonded debt as it falls due, to be paid from the revenues of the district, the directors being commanded to fix such rates for water as will enable this to be done; but it is expressly provided that if, from any cause, the revenues are inadequate to pay such interest or principal, the directors shall furnish to the board of supervisors and county auditor an estimate of the minimum amount of money required, and the board must levy a tax on all property in the territory comprising the district to raise the amount. This tax constitutes a lien on all the property in such territory, having the same force and effect as other liens for taxes.

The original petition presented in this manner, referred to as the Maher petition, was for the organization and incorporation as a county water district of certain territory described therein, constituting the central part of Lake county, surrounding Clear Lake, the waters of which, its tributaries, and other sources of water within the contemplated district it was proposed to use. It was signed by the requisite proportion of voters of the proposed district, and notice of the proposed presentation of the petitions and the time thereof was duly published, as required by the act. The matter came on for hearing as noticed. While the matter was pending before the board of supervisors two other petitions, with an aggregate of 73 "registered voters in a part of Lake county that was not included in the proposed water district," were presented, one known as the Akin petition and the other as the Herrick petition. These petitions asked that there be included in the proposed water district all that part of the county south of the district as originally proposed, the additional territory comprising, it is said, 50,000 acres, and increasing the area of the proposed district approximately one-third. All of this additional territory is separated from the lands described in the Maher petition "by high mountains." Of this additional territory the relators own 4,412.81 acres. No notice was ever published of the proposal to present or the presentation of either the Akin or Herrick petitions. Neither of the relators signed any of the petitions, or received notice "of any kind or character whatsoever of the proceedings or any part thereof," or "had an opportunity to be heard before the board of supervisors of said county as to whether or not the" additional territory "should be included within" the district, or "to be heard at all on the matter of the formation of the" district. The board included the additional territory in the district, and at the special election held thereafter within the district as finally fixed by the board a majority of the votes cast were in favor of the incorporation of the district. It may be noted that the report of the vote by precincts contained in the record indicates that the vote in the additional territory was heavily against the proposition. The board then made its order declaring the district, as enlarged by the additional territory, duly organized and on January 15, 1916, the certificate of the secretary of state was issued. This action was commenced within three months thereafter.

[1] It may be conceded solely for the purposes of this decision that, assuming that the act authorized the inclusion in the proposed district by the board of supervisors of lands not included within the boundaries defined by any noticed petition, without the consent of the owners of such land, and without any notice to them or opportunity to them to be heard before the board upon the question of the propriety of including their land in the proposed district, there would be nothing therein opposed to any constitutional guaranty, and this upon the theory that the steps provided for the organization of such a district are simply for the creation of a public corporation to be invested with certain public duties which it is to exercise in behalf of the state and which do not directly affect private property. See Henshaw v. Foster, 176 Cal. 507, 513, 515, 169 Pac. 82. So conceding, it would, however, seem most reasonable, in view of the provisions of the act, that every property owner whose property is proposed to be included should have some sort of notice and opportunity to be heard on that question. What we have said as to the act shows that all the property in such a district is practically pledged to the proper operation of the district and the discharge of all its obligations, financial and otherwise. The hear-

Digitized by Google

ing before the board of supervisors prior to the final fixing of the boundaries provided by the act is the only opportunity afforded a property owner to show that his property, as to which it is proposed to create this obligation, would be in no way benefited by such district. That he should have such an opportunity was doubtless one of the main objects for the notice of hearing provided by the act.

[2] Although the precise question appears never to have been decided by this court in any other way than as dictum, we are of the opinion that the act, reasonably construed, precludes the inclusion by the supervisors in such a district of land not included within the boundaries of the district as set forth in the petition initiating the proceeding, and of the proposed presentation of which published notice is required, except when such inclusion is had upon the application of the owner thereof. The petition is one by voters of the territory described therein, asking that such territory be incorporated as such a district. The proceeding is one directed exclusively to that particular territory, to determine whether it shall be constituted such a water district. No suggestion of the possible inclusion of land not part of this territory is provided for, either in petition or the notice. It apparently concerns, in so far as the enforced inclusion of their land is concerned, only those within the proposed district as the same is described in the petition and notice. It is in the light of this fact, together with the provisions as to notice, as well as in the light of what immediately follows, that we must read the provision that—

"On the final hearing said board shall make such changes in the proposed boundaries as may be deemed advisable and shall define and establish such boundaries."

This is immediately followed by the provision that in any such change the boundaries shall not be modified so as to exclude from the proposed district any territory which would be benefited by the formation of the district. Then follows the provision that no land which will not, in the judgment of the board, be benefited by such district by means of any of said system of works, be included in such district. Then follows the independent separate provision that—

"Any person whose lands are benefited by such district may upon his application, in the discretion of said board, have such lands included within said proposed district."

There is no express provision for the addition to the proposed district of land not included within the boundaries given by the petition other than the one just quoted, which makes the application of the owner a prerequisite to such action by the board. It is to be noted, too, that this provision is entirely superfluous if the board, by virtue of the previous provisions, already has the power to add such land to the district without the application or consent of the owner.

[3] We are of the opinion that, taken altogether, these provisions of section 3 of the act mean simply that solely with regard to the territory described in the petition the board of supervisors "shall make such changes in the proposed boundaries as may be deemed advisable," provided that they may not exclude from the district as proposed by the petition any territory which, in their judgment, will be benefited by the formation of the district, or allow to remain therein any lands which, in their judgment, will not be so benefited, except that on the application or with the consent of the owner of land outside the proposed district, which will be benefited by the district, they may, in their discretion, add such land to the proposed district. The meaning might perhaps have been more clearly expressed, but this, we think, was the evident intent. Although in no way necessary to the discussion, this court in Central Irrigation District v. De Lappe, 79 Cal. 351, 360, 21 Pac. 825, 828, in considering a provision of the so-called Wright Irrigation District Law (Stats. 1887, p. 29), in all material respects the same as the one here involved, said:

"It is to be observed that no power is given to the board to include lands which are not included by the petition, except upon request of the owner."

It was held in that case that there was nothing in the law requiring such request to be in writing. A similar provision contained in the irrigation district act of March 31, 1897 (Stats. 1897, p. 254), as amended March 26, 1911 (Stats. 1911, p. 510), was referred to in Imperial Water Co. v. Supervisors (certiorari), 162 Cal. 14, 25, 26, 120 Pac. 780, where it was claimed the order of the board of supervisors was void because it included certain tracts of land not within the boundaries described in the petition. The order was silent upon the question whether the owners of such land applied to have them made part of the district. It was said that the plaintiff was in no way interested in such land, and that "they comprise a very small proportion of the district as finally established." It was said that "whatever the rights of the owners thereof [the land therein] may be, the consideration thereof is immaterial to the present case," in that the plaintiff in that proceeding had "no right to invoke aid from them and no right to represent them here," and that "the lands comprise so insignificant a portion of the district that the exclusion thereof from the legal boundaries would not be sufficient to nullify the order providing for the organization of the district."

[4] This action is one contemplated by the act, an action seasonably commenced by the people of the state on the relation of own-

Digitized by Google

ers whose land has been improperly included in the district. The territory added by the board, as we have seen, comprised some 50,000 acres, separated from the proposed district "by high mountains," and increasing the area of the district approximately one-third. It is not made to appear that a single owner of any of this 50,000 acres of land asked that his land be included in the district, the only request in the matter being that of certain "registered voters" of portions of Lake county not included in the proposed water district. Certainly it cannot fairly be said that the departure from the law in the matter of the organization of this district, as we read it, was not a very substantial one. It seems to us to be such that it may not fairly be held that the district was organized in accord with the provisions of the act, substantial compliance with which is essential.

The judgment is reversed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.

CALIFORNIA NAT. SUPPLY CO. v. FLACK et al. (L. A. 6060.)

(Supreme Court of California. June 9, 1920.)

1. **Corporations ⟸426(7)—Payment on note a ratification of its unauthorized execution.**

A payment on a note by a corporation was a ratification of the note's unauthorized execution by a corporate officer.

2. **Corporations ⟸592 — Proclamation unnecessary to dissolution for nonpayment of license and franchise tax.**

A corporation which fails to pay license and franchise tax becomes defunct, under St. 1915, pp. 425, 426, §§ 7, 10, 12, and St. 1913, p. 7, § 24, because of the nonpayment, and not by proclamation of the Governor.

3. **Corporations ⟸630(6)—Judgment against defunct corporation void.**

A judgment rendered against a defunct corporation, in an action brought after the forfeiture of its charter by reason of failure to pay license and franchise taxes, is void.

Department 2.

Appeal from Superior Court, Los Angeles County, Fred H. Taft, Judge.

Action by the California National Supply Company against C. L. Flack and J. H. Lindsey, as trustees for the Gate City Oil Company, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Dockweiler & Mott and Albert M. Cross, all of Los Angeles, for appellants.

Flint & Jutten and H. S. MacKay, Jr., all of Los Angeles, for respondent.

WILBUR, J. This is an action brought upon a promissory note executed on behalf of the corporation by the president and secretary of the Gate City Oil Company to recover from the directors of that corporation, acting as trustees, after the forfeiture of the corporate charter for nonpayment of the license and franchise tax. The plaintiff recovered judgment and two of the defendants appeal.

The note sued on was given in renewal of notes executed for the purchase price of supplies furnished by the plaintiff to the defunct corporation. Only two points are presented on the appeal: First, that the court erred in refusing to permit evidence of the lack of authority of the president and secretary to execute the note in question; second, that an action had been previously brought upon the same note against the Gate City Oil Company, and that the judgment therein obtained against that company for the amount thereof was a bar to this action.

[1-3] As to the first point, it is sufficient to say that it is admitted that several months after the execution of the note the corporation paid $250 on account thereof. Such payment constituted a ratification thereof, and therefore the question of the previous authority on the part of the president and secretary to execute the same becomes immaterial. 10 Cyc. 1081. The second point depends upon the legal effect of the failure to pay the corporate taxes. The statutes of 1915 provide that the failure to pay the corporate license tax ipso facto terminates the corporate existence and that the forfeiture occurs on the Saturday preceding the first Monday in March (i. e., March 4, 1916) at 6 o'clock p. m. Stats. 1915, §§ 7, 10, 12, pp. 422, 425. See Rossi v. Caire, 174 Cal. 74, 81, 161 Pac. 1161; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 648, 103 Pac. 341; Lewis v. Curry, 156 Cal. 93, 96, 103 Pac. 493; Newhall v. Western Zinc Mining Co., 164 Cal. 380, 128 Pac. 1040. The provision requiring the Governor to issue a proclamation of such default and forfeiture is not contained in the license tax law, but in the law taxing corporate franchises (Stats. 1913, p. 7, § 24) and only applies to forfeitures for the nonpayment of the taxes on franchises. In either event the dissolution of the corporation is effected by operation of law, because of such nonpayment, and not by proclamation.

The case of Kehrlein-Swinerton Const. Co. v. Rapken, 30 Cal. App. 11, 156 Pac. 972, relied upon by appellant to establish the necessity of the Governor's proclamation to establish or create the forfeiture of the charter, has no application to the facts here, for that decision construed the act of 1905, which provided that the forfeiture occurred 60 days after the proclamation (Stats. 1905, p. 493, § 6), and hence properly held that proof of the

Digitized by Google

proclamation was an essential element in establishing such forfeiture. Therefore, the prior action upon the note, begun March 10, 1916, was not saved by the proviso of the statute permitting the prosecution to judgment of actions pending at the time of forfeiture (Stats. 1915, p. 427, § 13), notwithstanding the fact that the Governor's proclamation was not made until March 28, 1916.

A judgment rendered against a defunct corporation in an action brought after the forfeiture of its charter is void. Crossman v. Vivienda Water Co., 150 Cal. 575, 585, 89 Pac. 335; Lowe v. Superior Court, 165 Cal. 708, 712, 134 Pac. 190; Newhall v. Western Zinc Min. Co., supra. The prior judgment, therefore, was not a bar to the present action.

The judgment is affirmed.

We concur: SLOANE, J.; LENNON, J.

JOHNSON v. MONSON et al. (S. F. 8798.)

(Supreme Court of California. June 11, 1920.)

1. Master and servant ⟹305—Assault, though made in violation of orders, actionable.

A saloonkeeper is liable for an assault on a patron by a bartender, authorized to maintain order, though the assault was made in violation of express orders not to use physical force.

2. Master and servant ⟹302(3) — Assault, though malicious and willful, actionable.

A saloonkeeper is liable for an assault on a customer by his bartender, committed in the course of keeping the saloon in order, even though the assault was malicious and willful.

3. Master and servant ⟹302(3)—Assault held within statutory phrase "including wrongful acts."

The words "including wrongful acts," in Civ. Code, § 2338, relating to liability of master for acts of agent, do not refer back to the word "negligence," and such statute renders a master liable to a third person for an assault by an employé in the course of his employment, even though not ratified by him, under section 2339.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Edward Johnson against Oscar Monson and Charles Longren. Judgment for plaintiff, and defendant Monson appeals. Affirmed.

Leon Samuels, Joseph L. Taaffe, and Chas. J. McDonnell, all of San Francisco, for appellant.

E. B. Mering and M. J. Gillespie, both of San Francisco, for respondent.

OLNEY, J. This is an appeal by the defendant Monson from a judgment against him and the other defendant Longren jointly for $1,500, as damages suffered by the plaintiff because of a personal assault upon him by the defendant Longren. The facts, as they appear from the findings, are that Monson was the owner of a saloon in San Francisco, and employed Longren as bartender. The latter's duties were to manage the saloon, dispense liquors, and maintain order. The evening of March 17, 1917, the plaintiff was in the saloon, somewhat intoxicated, noisy, and engaging in verbal controversies with other patrons, but not quarrelsome or threatening physical violence. The bartender, Longren, told him to stop his noise, and, upon his failing to do so, assaulted him, inflicting personal injuries, to the plaintiff's actual damage in the amount of $1,500. No punitive damages were allowed. The trial court also found that the defendant Monson, the owner of the saloon, did not know of the assault until some days later, and did not authorize it, but did ratify it by retaining the bartender in his employ.

[1] The findings are not attacked, with the exception of the finding as to ratification. This is attacked, and practically the entire discussion on appeal is concerned with the matter of Monson's ratification of the act of his bartender. But the discussion is beside the mark. It is immaterial whether there was any ratification by Monson or not. The other facts found, whose support by the evidence is not questioned, are sufficient to sustain the judgment. This is true, although it is found that Monson did not authorize the assault or know anything about it at the time. It would, in fact, make no difference if the assault had been in violation of express orders to the bartender not to use physical violence on customers. The question is not one of authority as between the principal and the agent. As between them, it may well be that the agent's tort against a third person is without authority or is directly contrary to express orders. But the principal is nevertheless liable for the tort of the agent, provided it be committed by him within the scope of his employment. That the assault in this case was committed within the scope of the bartender's employment is plain. To be sure there is nothing to show that he was authorized or employed to commit assaults, but it is found that he was authorized to maintain order in the saloon, and the assault was committed in the course of his keeping order.

The illustrations of this principle are exceedingly numerous and familiar. For example, if some firm employing delivery trucks should expressly instruct its truck drivers not to exceed the legal speed limits under any circumstances, but one of them, in the

Digitized by Google

course of his employment, did exceed the speed limit, and as a result of so doing injured some third person, the employer is responsible. The principle is stated thus in Otis Elevator Co. v. First National Bank, 163 Cal. 31, 39, 124 Pac. 704, 707 (41 L. R. A. [N. S.] 529).

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business. Story on Agency, § 452; Shearman & Redfield on Negligence, § 65; Civ. Code, § 2338."

[2] The situation is not changed by the fact that the court finds the assault to have been malicious and willful. Under some circumstances the malicious or willful character of the agent's act is material in determining whether or not the act was committed in the course of his employment. If, for example, in the present case, the question had been presented as to whether the assault on the plaintiff had been committed in the course of keeping order in the saloon, or as part of an altercation purely personal to the bartender and the plaintiff, for which the principal would be in no wise responsible, the willful and malicious character of the assault would have some weight as showing that it was purely personal to the participants. But if it appear that the tort was in fact committed by the agent in the course of his employment, the employer is not relieved of his necessary responsibility by its malicious or willful character. In the present case it appears plainly that the assault was committed by the bartender as a means to compel the plaintiff to cease the noise he was making in the saloon; that is, as a means of performing the bartender's duty of keeping order.

[3] The only difficulty in the case arises from the somewhat ambiguous wording of section 2338 of the Civil Code, which reads:

"Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

This is followed by section 2339, which reads:

"A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service."

A casual reading of section 2338 might give the impression that the words "including wrongful acts" refer back to the word "negligence," so that the only wrongful acts of an agent for which the principal is declared to be responsible are wrongful acts of negligence. The present assault was, of course, not such an act. But this construction would take away all meaning from the words "wrongful acts," since all wrongful acts of negligence are fully covered by the previous expression "negligence." Furthermore, such a construction would mean that by the Code section it was intended, for no apparent reason, to change a universal and elementary rule of the law of principal and agent, and one essentially just. Every presumption must be against such a construction. It does no violence to the language of the section to hold that the word "including" is used in a conjunctive sense, as the equivalent of such expressions as "and also" or "as well as." So construed, effect is given to all the language of the section, and it is made to conform to what should be the law, and is, so far as we are aware, universally the law elsewhere. As so construed, the present case comes directly within it.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

PEOPLE v. MAJORS. (Cr. 705.)

(District Court of Appeal, Second District, Division 1. California. May 5, 1920. Rehearing Denied June 1, 1920; Hearing Denied by Supreme Court July 1, 1920.)

1. Burglary ⟸42(3)—Evidence held to sustain conviction.

In prosecution for burglary, evidence that defendant had possession of the stolen property, and that he had sold the property under a false name and for a grossly inadequate price *held* sufficient, in absence of an explanation, to sustain conviction.

2. Witnesses ⟸255(3)—Use of memorandum by witness to refresh memory as to dates and other details not error.

In prosecution for burglary, where a jeweler testified principally from memory as to buying the stolen property from defendant, his use of a memorandum made by him at the time of the transaction to refresh his memory concerning dates and other details *held* not error.

3. Criminal law ⟸418(1)—Testimony as to conversation in defendant's presence held admissible.

In a prosecution for burglary, testimony by jeweler who had purchased stolen property from defendant, as to a conversation with third person who accompanied defendant at the time, in the presence of defendant, *held* admissible.

Digitized by Google

4. Criminal law ⟸1170½(5) — Exclusion of cross-examination held harmless, in view of sufficiency of evidence.

In prosecution for burglary, where the unexplained evidence as to defendant's possession and sale of stolen property was sufficient to sustain conviction, court's refusal to permit defendant to examine jeweler, who had testified to buying property from defendant, concerning a visit made by defendant to jeweler's place of business after defendant had been charged with the crime, if error, *held* harmless.

5. Criminal law ⟸1169(1)—Admission of testimony held harmless, in view of sufficiency of evidence.

In prosecution for burglary, where unexplained testimony as to defendant's possession and sale of stolen property was sufficient to sustain conviction, the admission of testimony as to investigations made concerning place where defendant lived, if error, *held* harmless.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

A. R. Majors was convicted of burglary. From judgment of conviction and from order denying motion for new trial, he appeals. Affirmed.

Paul W. Schenck and Frank Dominguez, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

CONREY, P. J. [1] The defendant, having been convicted of the crime of burglary, appeals from the judgment, and from the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to sustain the verdict, in this, that there is no evidence that the defendant committed the crime. That burglary was committed at the time and place alleged in the house of one George B. Varnum, is not now disputed. One of the articles stolen on that occasion was a pair of binocular glasses. The burglary occurred on the 11th day of February, 1919. One Levy, a jeweler, testified that on the 27th day of February, 1919, he bought those glasses from the defendant, who then and there signed the name B. F. Strong on a memorandum of the sale, in the book kept by Levy. The witness Murphy, one of the officers who arrested defendant, testified that when arrested the defendant said that his name was James Wilson. A handwriting expert, whose testimony remains uncontradicted testified that the signature B. F. Strong, on Levy's book, was written by the same person who signed another document, whereon it was shown that the defendant had signed the name James Wilson. The sale made by defendant to Levy, of the binocular glasses and other jewelry, brought defendant only $10 for the lot. The glasses alone were worth $60. Conceding that mere possession by defendant of the stolen property after the time of the burglary would not be sufficient to warrant his conviction, it seems clear that such possession, taken together with his sale of the property, under a false name and for a grossly inadequate price, in the absence of any explanation—and none appears—are circumstances quite sufficient to sustain the verdict. People v. Lang, 142 Cal. 482, 76 Pac. 232.

[2, 3] It is contended that the trial court erred in permitting the witness Levy to testify from a private record kept by that witness, without first compelling the prosecution to lay the proper foundation; and in permitting the prosecution to prove by the same witness certain conversations had with and purchases made from one Soulard on February 26th, in the presence of the defendant. The memorandum from which Levy testified was shown to have been made by him at about the same time when the transactions occurred. He testified principally from memory, but used the memorandum to refresh his memory concerning dates and perhaps as to some other details. We think that the court did not err either in this matter or in allowing the testimony as to conversations and transactions between Levy and Soulard in the presence of the defendant. The sales made by the defendant to Levy on the 27th day of February occurred in the presence of Soulard. On the preceding day these two men had made the first of their two joint visits to Levy, and on this first occasion certain articles of jewelry were sold to Levy by Soulard in the presence of the defendant. Some of the articles sold by Soulard were a part of the loot which had been taken from the Varnum house on February 11th.

[4, 5] The remaining matters complained of by appellant are that the court erred in refusing to allow the defendant to examine the witness Levy concerning a visit made by the defendant to Levy's place of business after the defendant had been charged with this crime; and in permitting the witness Wood to testify concerning the result of certain investigations made by him as to where the defendant lived. In view of the conclusion at which we have arrived concerning the matters previously discussed, it is unnecessary to enter further into the record concerning these two last assignments of error. They are not of sufficient weight and importance to affect the result of the case, or to enable us to say that there has been any miscarriage of justice.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

Digitized by Google

MUTCH v. LONG BEACH IMP. CO. et al. (Civ. 2677.)

(District Court of Appeal, Second District, Division 2, California. April 30, 1920.)

1. Replevin ⟹82—Damages allowed to person deprived of use of automobile held excessive.

While the amount to be allowed one deprived of the use of an automobile is to be determined according to the market value of the use of the property, it is the net usable value, less the expense of keeping up the property, which may be recovered, and in determining the value of the use care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself, and hence a judgment for $1,500 in a claim and delivery case, involving an automobile worth $400, was clearly excessive, and cannot be sustained, in view of Civ. Code, § 3359.

2. Attachment ⟹296—Sheriff not liable for detention of automobile until after notice of third party claim.

Where no third party claim was made to the sheriff as provided by Code Civ. Proc. § 689, for more than 8 months after the levy of an attachment upon an automobile, the sheriff was at least not liable for the detention of the property for the period prior to the notice of claim.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Mary E. Mutch against the Long Beach Improvement Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Bowen & Baillie, of Los Angeles, for appellants.

Denio & Hart, of Long Beach, for respondent.

SLOANE, J. In an action in which the defendant, Long Beach Improvement Company, was plaintiff and John B. Mutch, the husband of plaintiff in this action, was defendant, the sheriff of the county of Los Angeles levied an attachment upon an automobile as the property of said John B. Mutch. The property was taken on attachment on February 19, 1916. Subsequently the plaintiff here claimed to be the owner of the automobile, and made demand upon the defendant, Long Beach Improvement Company, for its possession. She made no third party affidavit of ownership nor demand upon the sheriff, under section 689 of the Code of Civil Procedure, until October 16, 1916, more than eight months after the levy. On November 26, 1916, this action of claim and delivery was brought to recover possession of the automobile and damages for its detention. During the pendency of the suit the automobile was delivered to the plaintiff, and thereafter judgment was given, determining the question of ownership in plaintiff's favor and awarding her damages for the taking and detention in the sum of $1,500.65 against both defendants. The defendants appeal from the judgment on the judgment roll and a bill of exceptions. The main contention of appellants is that the evidence does not support the findings and judgment in the admeasurement and award of damages.

The items of damages going to make up the amount of the judgment consist of the sums of $1,297.50, for the rental value of the car from February 19, 1916, the date of the attachment, until October 17, 1917, the date of its redelivery to plaintiff—a period of 86½ weeks, at $15 per week—and $203.15 for loss of tools and appliances belonging to the car, cost of cleaning the car after its recovery, and depreciation of its value during its detention. The undisputed testimony fixes the value of the car at the time it was taken on attachment at $400. Plaintiff gets her car back, with $203.15 for its depreciation during its detention, and with over three times its market value for damages from being deprived of its use for about 20 months.

[1] Appellants interpose various objections to the measure of damages adopted by the trial court. Without discussing them in detail, we think it is sufficient to say that one thus deprived of the use of an automobile cannot recover the gross rental value of a fully equipped and maintained car, free from all expense of maintenance, repairs, and natural wear and tear, such as a rented car would naturally be subject to. It must be apparent at once that there is something wrong with a scale of damages that allows three times as much for the detention of an article from the possession of the owner for a period of two years as could have been recovered if the trespasser had completely smashed it up and destroyed it in the first instance. In this case the automobile was in use by the plaintiff as a pleasure car, and after its taking was not in use during its detention. But neither the fact that the plaintiff was not using the car for business nor the defendants' using it at all, would absolve the defendants from compensating the plaintiff for any detriment she actually sustained by its wrongful taking and detention; but it would be against conscience to permit a recovery so out of proportion to the value of the thing involved as appears here. Section 3359 of the Civil Code provides that "damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." While the amount to be allowed is to be determined according to the market value of

Digitized by Google

the use of the property, it is the net usable value, less the expense of keeping up the property which may be recovered. In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself; otherwise the result is not for compensation for use, but punishment for a wrong in a case where exemplary damages as such would not be allowed. So, where damages allowed for the detention of property for less than a year were more than twice the value of the property, it was held that such damages were grossly excessive. 23 R. C. L. 913; Armstrong v. Philadelphia, 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917B, 1082; Ann. Cas. 1914A, 381; Romberg v. Hughes, 18 Neb. 579, 26 N. W. 351.

[2] Attention has been called to the fact that no third party claim was made to the sheriff, as provided by section 689 of the Code of Civil Procedure, for more than 8 months after the levy of the attachment. This fact would in any event absolve the sheriff from liability for the detention of plaintiff's property for the period prior to the notice of claim. It is expressly declared by section 689 that the sheriff is not liable for damages for the taking or keeping of such property to any such third person unless such claim is made. Code Civ. Proc. § 689; Killey v. Scannell, 12 Cal. 73; Fuller Desk Co. v. McDade, 113 Cal. 360, 363, 45 Pac. 694.

Judgment reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

WILMOT v. MOODY et al.
(Civ. 3234; L. A. 5829.)

(District Court of Appeal, First District, Division 1, California. April 19, 1920. Opinion of Supreme Court in Bank Denying Rehearing June 18, 1920.)

1. Attorney and client ⟸109—Attorney of executrix not liable for permitting statute to run against note of estate taken by her in informal division.

Where executrix and others interested in estate without order of court divided the property by deeds and assignments, and executrix got a note as part of her share, and the property was taken from the hands and control of the attorneys for the executrix, the executrix could not recover amount of note from the attorneys by reason of collection of the note becoming barred by limitations six months after the division.

2. Appeal and error ⟸1011(1)—Findings on conflicting evidence not disturbed.

Findings of the trial court based on squarely conflicting evidence cannot be interfered with on appeal.

3. Limitation of actions ⟸100(8)—Cause of action on fraudulent statement barred.

False representation by attorney of executrix on borrowing money from her that the note given therefor was secured by mortgage, and that the mortgage was "in the bank," did not postpone the running of the three-year statute of limitations, the executrix having the same means of discovering the falsity of the statement at the time it was made as she ultimately employed to that end; there being no proof of any affirmative action on the part of the attorney to prevent her employing such means at any time.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Iva N. Ricker Wilmot, as executrix of the estate of Samuel M. Ricker, deceased, against Elmer I. Moody and C. M. Simpson, individually and as partners. Judgment for defendants, and plaintiff appealed. Judgment affirmed in District Court of Appeal, and hearing denied in Supreme Court.

J. H. Merriam, and Merriam, Rinehart & Merriam, all of Pasadena, for appellant.

Ticknor & Carter, Hahn & Hahn and Simpson & Simpson, all of Pasadena, and Elmer I. Moody, of Los Angeles, for respondents.

RICHARDS, J. The plaintiff, as the executrix of the estate of Samuel M. Ricker, deceased, brought this action against the defendants as the members of a copartnership engaged in the practice of law, and who had been employed by her as such to advise and assist her in the probate of the will of the deceased and the administration of his estate, to recover the sum of $2,000.

The complaint contained two counts, the first of which was based upon allegations of negligence, in that the defendants allowed the statute of limitations to run against a promissory note for $1,000, executed by one Sylvester M. Rice, and being part of the assets of the estate, so that the amount of the note was lost. The burden of the second count was that the defendants had persuaded and induced the plaintiff, as such executrix, to loan to Elmer I. Moody, one of their number, the sum of $1,000 upon his promissory note, representing that the note would be secured by a mortgage on real property of greater value than the amount of the loan; that after the making of said loan and the acceptance by the plaintiff of said note of $1,000 executed by Moody, the defendants represented to her that a mortgage securing the same had in fact been executed and was "in the bank," together with a certificate of title relating thereto, whereas in truth no such mortgage had been or ever was executed, and that as the result of this transaction the estate was damaged in the amount of said loan. Follow-

Digitized by Google

ing these averments of the second count and based thereon is an allegation that by reason of the fraudulent representations, facts, and circumstances therein set forth, the defendants fraudulently disposed of the money, goods, chattels, and effects of the estate. Judgment was prayed against the defendants for the sum of $2,000.

The answer of the defendants denied the material allegations of the complaint, and also pleaded certain special defenses to be hereafter referred to, and in support thereof introduced evidence at the trial that as to the cause of action contained in said first count the plaintiff and her brother and sister, being legatees of the entire estate and entitled to have distributed to them the whole thereof, had by agreement among themselves, and more than one year after the death of the decedent, their legacies being then due and payable, divided among them the personal property of the estate, and had executed and delivered to one another quitclaim deeds to the real property thereof without waiting for formal distribution by order of the probate court, and that the plaintiff under such division had received the Rice note as part of her share of said estate. That at said time the defendants, who had theretofore had possession of the securities belonging to the estate, delivered all of them to the plaintiff and her colegatees, and which delivery occurred about six months before the Rice note became barred by the statute of limitations. That the defendants, through Elmer I. Moody (who, of the members of the partnership, attended exclusively to the affairs of the estate), shortly before the date when said note became outlawed, advised and warned the plaintiff to take steps before said date should arrive to have the same collected or renewed, but which advice and warning were not heeded.

As a further defense to this cause of action it was alleged that the plaintiff, suing as executrix of the estate, was not the real party in interest, and that the cause of action, if any, was barred by sections 337 to 340, inclusive, of the Code of Civil Procedure limiting the time for the commencement of actions.

As to the second count, the answer of the defendants denied that they persuaded or induced the plaintiff to make said loan to Moody, or that they made any representations that the loan, if made, would be secured by mortgage, or after it was made, that a mortgage securing it had been executed and deposited in a bank, and alleged that the loan was made to Moody individually upon the understanding that it was not to be secured by a mortgage or otherwise.

As to this note also the defendants introduced evidence at the trial that it formed part of the assets of the estate divided among the legatees in the same manner already detailed, and was the property of the legatee to whom in such division it had been assigned.

As to this count of the complaint also the answer of the defendants set forth that the plaintiff, as executrix of said estate, was not the real party in interest, and that the cause of action, if any, was barred by the same sections of the Code of Civil Procedure as pleaded to the first cause of action.

The court made findings in favor of the defendants on both counts of the complaint, setting forth in great detail the facts that it determined had been established by the evidence, and also found in favor of the defendants upon their pleas of the statute of limitations, and that the plaintiff was not the real party in interest. Judgment in favor of the defendants followed accordingly.

The main attack upon the judgment is that the findings are not supported by the evidence, and it is also urged that certain findings are inconsistent with each other, and that the decision is against law. It may be stated at once that while the evidence in the case upon the facts which determined the question of the right of the plaintiff to relief against the defendants was squarely conflicting, there is ample evidence which, if accepted as true by the court, supports its judgment both on the merits and on the bar of the statute. It shows generally that the defendants were employed by the plaintiff to render services as attorneys at law in the probate of the will and administration of the estate of her testator, the defendant Moody, however, attending to this work exclusive of his codefendants. The papers concerning the estate were delivered to him, including the notes and mortgages, and during the time he held them and until the division of the estate among the legatees he attended to renewals of notes or their collection and such matters, and prepared the necessary documents in connection therewith. At the time of such division, however, the securities of the estate, including the Rice note and mortgage, were delivered to the plaintiff or to her colegatees, and they thereafter exercised control over their respective portions thereof.

[1] In such a situation it cannot, of course, be contended that the defendants, as attorneys for the executrix, had any further concern with them, and if by oversight or neglect the plaintiff—to whose share in the division the Rice note and mortgage fell—allowed the statute of limitations to bar an action upon them, such fact, unfortunate though it be, cannot give rise to a claim for damages against the defendants, or either of them. And if this be true, the question of the bar of the statute becomes immaterial, but the court found this also in the defendants' favor.

[2] The same conflict in the evidence prevents a review by this court of the finding in favor of the defendants on the second count.

Digitized by Google

It was testified to squarely by Moody that the loan was made to him upon his personal note upon the understanding that no security was to be given. This testimony found some support in the physical circumstances of the transaction, and such conflict as there was in the evidence having been resolved in favor of the defendants, this court will not disturb the finding of the trial court.

[3] Moreover, this count of the complaint was founded upon alleged negligence and fraud on the part of the defendants. The negligence, if any, occurred in 1911, and the action was commenced in 1917. The fraud is charged to consist in the representation that the defendant Moody would execute a mortgage to secure his note. Assuming, contrary to the court's finding, that such representation was made, it was made some six years before the commencement of the action. It is sought to avoid the three-year limitation against the action, however, by charging a further false representation on the part of the defendants, namely, that such mortgage had in fact been executed as promised, and was "in the bank," by which plaintiff was lulled into a sense of security. In view of the finding of the court that none of these representations were made, it seems useless to discuss the sufficiency of an averment and proof of such a representation as last made to postpone the setting in motion of the statute of limitations against the fraud by which the loan is charged to have been obtained. Assuming such representation to have been made, the plaintiff had the same means of discovering its falsity at the time it was made as she ultimately employed to that end, and there is no proof of any affirmative action on the part of the defendants to prevent her employing such means at any time. It would seem that the making of such a representation, though false, would not postpone the operation of the statute. Simpson v. Dalziel, 135 Cal. 599, 67 Pac. 1080.

We find no ground for the reversal of the judgment in other points urged by the appellant.

Judgment affirmed.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, we desire to say that we regard the last two sentences of the opinion of the District Court of Appeal as not in any way essential to a disposition of the appeal, and that our denial of the application is not to be taken as an expression or intimation of opinion as to the correctness thereof.

The application for a hearing in this court is denied.

All concur, except WILBUR, J.

MORTGAGE SECURITIES CO. OF CALIFORNIA v. PFAFFMAN. (Civ. 2833.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1920. Hearing Denied by Supreme Court July 1, 1920.)

1. **Appeal and error ⟸1208(8)—Delivery of possession of personalty held not to deprive defendant of right to judgment for restitution upon retrial after reversal.**

In an action for possession of automobile, the mere delivery of automobile to plaintiff, for whom judgment had been rendered pending appeal did not deprive defendant, where no stay bond had been executed, of right to judgment for restitution of the property on retrial following reversal, even though no order of execution was issued.

2. **Appeal and error ⟸460(1)—Defendant appealing held required to deliver possession of personalty on demand, where no stay bond executed.**

On defendant's appeal from judgment for plaintiff in an action for possession of automobile, where no stay bond has been executed, defendant is required to deliver automobile to plaintiff on plaintiff's demand.

3. **Appeal and error ⟸1011(1)—Conflict in evidence for trial court.**

A conflict in the evidence was for the trial court to settle.

4. **Appeal and error ⟸1071(6) — Failure to make finding held immaterial.**

In an action for possession of automobile by mortgagee against repairman claiming lien under Civ. Code, § 3051, court's failure to make finding as to nonpayment of mortgage debt was immaterial, since the repairman's lien was superior to that of the mortgage lien, so as to entitle repairman to judgment, even though mortgage debt had not been paid.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Mortgage Securities Company of California against F. W. Pfaffman. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 177 Cal. 109, 169 Pac. 1033, L. R. A. 1918D, 118.

Tobias R. Archer, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the defendant. The action was brought by the plaintiff to obtain possession of a certain automobile. In the original com-

Digitized by Google

plaint filed it was alleged that the plaintiff acquired a lien upon the automobile by reason of a certain chattel mortgage executed by the Chatts. The terms of that mortgage provided that in the event the mortgagors failed to pay the amount of the mortgage debt, plaintiff might take possession of the automobile and proceed to sell the same in the manner provided by law; further, that at the time suit was brought the said debt had matured and remained unpaid. Defendant answered, and asserted, in brief, that the automobile had been delivered into his possession by the Chatts, and that, at the request of the latter, repairs had been made upon the machine aggregating in value the sum of $349.40, of which sum nothing had been paid but $10, and that the defendant claimed right to the possession and the lien given him by section 3051 of the Civil Code. The cause was tried, and the court determined that the lien of the chattel mortgage was superior to the lien of the repairman, and gave judgment to the plaintiff for recovery of the automobile. An appeal was taken to this court, where the judgment was affirmed. A rehearing was granted by the Supreme Court and a reversal of the judgment entered by the trial court was ordered; it being last determined that the lien of a repairman is superior to that of a mortgagee. Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 Pac. 1033, L. R. A. 1918D, 118. Before the second trial was had, which resulted in the judgment here appealed from, plaintiff filed a supplemental complaint, alleging, in effect, that subsequent to the first trial the controversy had been settled by the voluntary delivery of the automobile by the defendant to the plaintiff; further, that after obtaining such possession the plaintiff had proceeded to sell the machine after the giving of the usual notices. An answer was filed to this supplemental complaint, which raised an issue as to the settlement having been made of the controversy. The second trial was proceeded with, evidence heard, findings made, and judgment entered. As to the matter concerning the delivery of the automobile by the defendant to the plaintiff, the court determined the facts as follows:

"That at the institution of this suit the defendant refused to deliver to the plaintiff the said automobile, claiming his right to retain the same under section 3051 of the Civil Code of the state of California, and that the above cause first came on for trial in the month of February, 1917, resulting in a judgment for plaintiff, from which an appeal was taken by the defendant to the Supreme Court of the state of California, which afterwards reversed said decision, and that pending said appeal, to wit, on or about June 29, 1917, the defendant delivered to the plaintiff the said automobile after demand had been made therefor by the plaintiff under its judgment rendered in said cause tried in February, 1917, and in pursuance of said demand, the defendant delivered said automobile to the plaintiff, and that no bond was made pending the appeal of said action, but that no consideration or nothing of value whatever was paid or agreed to be paid to the defendant for the delivery of said automobile to the plaintiff, and the said delivery was made in pursuance of the demand by the plaintiff by its duly authorized officer, and that the value of said automobile is the sum of $595. That defendant, from the institution of said action up until said June 29, 1917, continued in possession of said automobile, and it is not true that the defendant at any time, as alleged in the complaint, wrongfully or unlawfully detained said automobile, and it is not true that the plaintiff was entitled to the possession thereof."

The conclusions of law embrace the statement that—

"Defendant did not waive his rights herein by the delivery of said automobile to the plaintiff or its agent."

[1-3] The chief contention made by appellant is that the findings of the court against the allegations of the supplemental complaint are not sustained by the evidence; that is, that the evidence showed a voluntary delivery of the automobile by the defendant to the plaintiff, with intent to satisfy the judgment first rendered by the court and to make a settlement of the controversy. That the mere delivery of the automobile to the plaintiff pending the appeal did not deprive the defendant of the right to have a judgment for restitution of the property upon retrial seems very clear. No stay bond was given, and the plaintiff without doubt had the right, pending an appeal under such circumstances, to require the property to be delivered to it in compliance with the terms of the judgment. The fact that no order or execution was issued upon the judgment does not change the situation, for the law imposed the duty upon the defendant, where execution was not stayed, to deliver the machine to plaintiff upon its demand. In the case of Warner Bros. Co. v. Freud, 131 Cal. 639, 63 Pac. 1017, 82 Am. St. Rep. 400, that question is considered and the court quotes with approval from Freeman on Judgments, § 480a, as follows:

"One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is, that though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal."

The assertion of appellant that the evidence showed that the automobile was delivered by the defendant to it with the full intent to satisfy the judgment and settle the controversy, is borne out only by the evidence offered on

Digitized by Google

behalf of the plaintiff. There was other evidence to the contrary submitted by the defendant and a conflict resulted, which, of course, was for the trial court to settle. The testimony of defendant's witnesses on this point, if credited by the trial judge, as we must assume it was, is amply sufficient to sustain the findings adverted to.

[4] A second point made by the appellant is that the court failed to find upon a material issue tendered by the pleadings, to wit, as to the nonpayment of the mortgage debt. It is true that the findings did not cover that matter, but in view of the fact that the trial court properly determined, under the decision of the Supreme Court in the case, the lien of a materialman to be superior to that of a mortgagee, such finding, if made, would not have indicated any different judgment than that entered. The omission, therefore, must be considered here as an immaterial one. There is evidence shown in the record establishing the value of the automobile and the amount of the lien charges held by the defendant against it.

We find no error justifying the claim for reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

PEOPLE v. WON LEE WING. (Cr. 501.)

(District Court of Appeal, Third District, California. May 3, 1920.)

Criminal law ⟸1182—Conviction affirmed on conclusive evidence and fair trial.

Where the evidence is overwhelming and conclusive as to the guilt of an appellant, and it appears that his rights were all safeguarded by the lower court and that he had a fair trial, a judgment of conviction will be affirmed.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Won Lee Wing was convicted of assault with a deadly weapon, and he appeals. Affirmed.

George E. Foote, of Sacramento, and J. W. Mento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was charged with the crime of assault with a deadly weapon with intent to commit murder, and he was convicted of assault with a deadly weapon. No argument has been made in this court in his behalf, his counsel concluding, no doubt, in view of the record, that any discussion would be useless. The evidence is overwhelming and conclusive as to his guilt. Indeed, he was greatly favored by the jury in rendering a verdict for the lesser offense. His rights were all safeguarded by the lower court and he had a fair trial.

No reason exists why the verdict should be disturbed, and the judgment is therefore affirmed.

HUGHES et al. v. SCOTT et al. (Civ. 3319.)

(District Court of Appeal, First District, Division 1, California. April 30, 1920.)

1. Deeds ⟸133(1)—Present interest in property conveyed.

Under a deed making a gift of a life estate in property to L., and providing "In the event of the death of said grantee herein said real property to revert to A., my daughter, and to her heirs and assigns, and in the event of the death of said A. before the death of said grantee herein then said property to revert to the heirs of said grantee," and "to have and to hold," etc., "unto the said party of the second part during his lifetime and as hereinbefore set forth," there was a present disposition of the reversion in such property to A.

2. Deeds ⟸90—All parts must be considered together.

All parts of a deed must be considered together and be so construed as to give effect and meaning to every part thereof if possible, under Civ. Code, § 1641.

3. Deeds ⟸93—Intention of parties to be ascertained.

The primary object of all interpretation of conveyances is to ascertain and carry out the intention of the parties thereto, under Civ. Code, § 1636.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Anita I. Hughes and others against Alice Scott and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Robert R. Syer and Owen D. Richardson, both of San Jose, for appellants.

C. L. Witten, of San Jose, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action to quiet title. The facts of the case are undisputed, and are briefly these: Michael Hughes was in his lifetime the owner of the premises in question. He had a son, William I. Hughes, who was the father of the plaintiffs herein, and a daughter, Alice Scott, who is one of the defendants, and he left surviving him his widow, Annie Hughes, another of said defendants. On February 6, 1917, Michael Hughes made a gift deed of the premises in question to his grandson by another child, Leo C. Matthews, granting to the

Digitized by Google

latter a life estate in said property. Following the words of said grant the deed contained this clause:

"In the event of the death of said grantee herein said real property to revert to Alice Scott, my daughter, and to her heirs and assigns, and in the event of the death of said Alice Scott before the death of said grantee herein then said property to revert to the heirs of said grantee."

The habendum clause read as follows:

"To have and to hold all and singular the said premises, together with the appurtenances and privileges thereunto incident unto the said party of the second part during his lifetime and as hereinbefore set forth."

After the death of Michael Hughes this action was commenced by the plaintiffs as his children and heirs to establish and quiet their title to their alleged interest in said property. To the amended complaint filed herein the defendants interposed a demurrer which the trial court sustained, and upon failure or refusal of the plaintiffs to amend judgment was entered in the defendants' favor, from which judgment this appeal is taken.

[1-3] The sole contention of the appellants is that by the clause above quoted from said deed no present interest in said property was conveyed either to Alice Scott or to the heirs of Leo C. Matthews, the grantee named in said deed. The only authority cited by the appellants in support of this contention is the case of McGarrigle v. Roman Catholic Orphan Asylum, etc., 145 Cal. 694, 79 Pac. 447, 1 L. R. A. (N. S.) 315, 104 Am. St. Rep. 84. We think, however, that a clear distinction can be drawn between said case and the case at bar. In that case, after the grant of a life estate in the premises therein involved, the conveyance proceeded with these words:

"It is the purpose of the party of the first part by this deed that, after the death of the party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco."

The Supreme Court held that this clause contained no operative words of grant and amounted to nothing more than an expression of the grantor's purpose in relation to the future disposition of the property, and hence was inoperative to pass a reversionary interest therein. The cases which are cited in the opinion in that case as sustaining this view are found upon examination to be all cases wherein it was clearly the intent of the grantor that the conveyance of such interest should not take effect until after the grantor's death, and hence was void as testamentary in character. In the case at bar, however, the clause of the deed in question does contain words and phrases which are in the nature of operative words of grant, such as these: That in the event of the death of the grantee in said deed the said real property should "revert to Alice Scott, my daughter, and to her heirs and assigns," and also the clause providing that in the event of the death of said Alice Scott before the death of said grantee said real property should "revert to the heirs of said grantee." In the habendum clause of said deed there is also an expression indicating the intent of the grantor to make a present disposition of the reversion in said property. It is a well-established rule of construction that all parts of a deed must be considered together and so construed as to give effect and meaning to every part thereof if possible. Civ. Code, § 1641. It is also well settled that the primary object of all interpretation of conveyances is to ascertain and carry out the intention of the parties thereto. Civ. Code, § 1636; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896.

The case last cited strongly resembles the case at bar in respect to the language of the conveyance involved, since after the grant of a life estate in the property the deed there in question proceeded to state "and upon and at the time of her death the title to all of said property shall pass to and be vested in" certain specified persons. This court construed said deed as conveying a life estate to the immediate grantee named therein with remainder over to the other persons to whom by the terms of said deed the said property was to pass upon the termination of the life estate. In so deciding, this court cited with approval the cases of Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049, Burnett v. Piercy, supra, Henderson v. Mack, 82 Ky. 379, Carson v. McCaslin, 60 Ind. 335, and Caldwell v. Hammons, 40 Ga. 342, in each of which the terms of the grant and reversion were similar to those in the conveyance in question here. These cases indicate what we think is the better rule to be applied to the construction of the clauses in the deed here under review, and in accordance therewith we are of the opinion that the trial court was not in error in sustaining the defendants' demurrer to the plaintiffs' amended complaint.

This being so, the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

Digitized by Google

WILLITS v. HELMER et al. (Civ. 3306.)

(District Court of Appeal, First District, Division 1, California. May 1, 1920.)

1. Evidence ⟸589—Court properly disregarded defendants' testimony where surrounded with elements of uncertainty and suspicion.

In an action to declare a trust in land, court *held* justified in disregarding testimony of defendants that they had property of their own, where such testimony was surrounded with elements of uncertainty, improbability, and suspicion.

2. Appeal and error ⟸1078(4)—Appellate court will not search record for grounds of alleged errors.

Claims of error in refusing to grant motions to dismiss as to a certain defendant and to grant such defendant's motion for a nonsuit will not be considered, where neither argument nor authority nor any reference to the evidence whatever is urged in support, as the court cannot be expected to search the record for grounds of such alleged errors.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by M. L. Willits, by guardian ad litem, against Emma L. Helmer, also known as E. L. Helmer, Bertha Helmer, and others. M. L. Willits dying after the institution of the action, suit was continued in the name of the administrator of his estate, H. G. Willits. From an adverse judgment, the last-named defendant appeals. Affirmed.

Griffith Jones and John J. Craig, both of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

RICHARDS, J. This action was instituted during the lifetime of one M. L. Willits, now deceased, through his guardian ad litem to have it determined that the defendants held certain real property which, it was alleged, had been purchased with funds belonging to the plaintiff, to have a trust thereon declared in his favor, and to also obtain an accounting for certain other moneys and property alleged to have been received by certain of the defendants from said plaintiff under the circumstances set forth at length in the complaint. Shortly after the institution of the action M. L. Willits died, and the suit was continued in the name of the administrator of his estate. Upon the trial of the cause the court made its findings and conclusions of law in the plaintiff's favor, and judgment was accordingly rendered, establishing such trust and directing such accounting. The defendant Bertha Helmer appeals.

[1] The facts of the case, briefly stated, are these: The defendant Emma L. Helmer, daughter of the appellant herein, became acquainted with said M. L. Willits during the year 1911 at Clinton, Iowa, and in the month of November of that year the said M. L. Willits came with the Helmer family to San Diego, Cal., and thereafter was an inmate of the family up to a short while before his death. Willits at the time of his arrival in California was well along in years and had considerable means in the form of money and also in the form of a valuable piece of property in Illinois, a portion of which latter property he sold in the year 1912 for the sum of $14,000, and the remainder of which he conveyed to the defendant Emma L. Helmer by a deed executed in April, 1914, but which was not recorded until after his death. It is alleged in the complaint, and found by the court, that between the date of the arrival of said M. L. Willits in California and the latter part of the year 1914, the said Emma L. Helmer obtained from him sums of money at various times aggregating in all about $20,000, and that she also obtained from him the deed to the farm in Illinois, through undue influence and while he was of unsound mind. It is also alleged in the complaint, and found by the trial court, that a large part of the money thus obtained from him was invested by said Emma L. Helmer in those certain pieces of real estate which are sought to be impressed with a trust. The findings of the trial court are quite full and detailed with respect to the history of the relation between M. L. Willits and the Helmer family from the year 1911 to 1914. The appellant does not in the main attack these findings in such a way as to require us to go into a detailed consideration of the question as to whether they are sustained by the evidence in the case. The chief contention of the appellant seems to be that the evidence is insufficient to justify that portion of finding 4, wherein the trial court, dealing with the question as to whether the real properties purchased by the defendant Emma L. Helmer were bought with money received from said Willits, or were purchased, as the defendants claimed, with money belonging to Emma L. Helmer and Bertha Helmer before they came to California, stated in said finding "that the said Emma L. Helmer and the said Bertha Helmer had no property of any substantial value." It is true that both of these defendants testified that Emma L. Helmer had approximately the sum of $1,200 in her possession when she came to California, and that her mother, Bertha Helmer, had at the same time the sum of about $9,000 in money, and that these moneys had been invested in some real estate; but an examination of the record shows that this testimony on the part of said defendants was so surrounded with the elements of uncertainty, improbability, and suspicion as to have entirely justified the trial court in disregarding it.

Digitized by Google

Upon the question of the undue influence exercised by the Helmers over said Willits it is not necessary to set forth in detail the history of that branch of the case, since the Supreme Court of this state in the Matter of the Estate of M. L. Willits, deceased, 175 Cal. 173, 165 Pac. 537, has fully reviewed the identical evidence which was introduced in that case and also in this one, in dealing with the relations between the parties and the extent of the undue influence which was exercised by Emma L. Helmer over said Willits in procuring a will to be executed by him in her favor; and in concluding such review the court quite aptly says:

"It would be a serious reflection upon the intelligence of the profession if space should be given to a discussion of the sufficiency or insufficiency of this evidence to support the verdict. It speaks so positively and convincingly as to require no comment."

[2] As to the other points made by the appellant herein they require no extended consideration. The appellant urges as errors of law occurring at the trial and excepted to by the defendants the alleged failure of the court "to grant defendant Bertha Helmer's motion to dismiss said action as to said defendant," and also "the court's failure to grant defendants' motion for a nonsuit"; but neither argument nor authority, nor any reference to the evidence whatsoever, is urged in support of either of these contentions, and this court cannot be expected to search the record for grounds of such alleged errors which the appellant has altogether failed to urge.

Judgment affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

WILLIAMSON v. HARDY. (Civ. 3312.)

(District Court of Appeal, First District, Division 1, California. May 6, 1920.)

1. Trial ⟸108½—Asking jurors as a body whether interested in company indemnifying defendant not error.

In an action for damages for personal injuries, that plaintiff asked the jurors as a body whether or not they were "owners of stock in the Western Indemnity Company, a corporation," could not, standing alone, be *held* to furnish a basis for reversal; the indemnity company, surety for the defendant, not being a party.

2. Trial ⟸127—Statement of plaintiff's counsel concerning surety for defendant in negligence case not error.

In a negligence case, where plaintiff's counsel, during the trial, when a question arose with regard to the production of certain X-ray photographs which were in the possession of the physician of a surety company indemnifying defendant, not a party to the action, referred to such fact, there was no error justifying a reversal of the case, where the court instructed the jury to disregard the remarks.

3. Evidence ⟸471(13)—Testimony as to actions and conduct of injured person admissible.

In an action for personal injuries, court did not err in permitting witnesses for plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and a half; the witnesses merely testifying to matters of personal observation and not undertaking to testify as to any conclusions drawn by them therefrom as to the seriousness of her injury.

4. Negligence ⟸136(15)—Care as to meat market customer slipping on floor held for jury.

In an action for injuries from slipping upon the floor of defendant's meat market, whether defendant was negligent in permitting a piece of oiled paper, made slippery by the adhesion to it of scraps of fresh meat, to be lying on the floor where customers were required to walk, *held* for the jury.

5. Trial ⟸295(1)—Instructions to be considered as a whole.

Where the instructions are full and fair upon the whole, criticism aimed at particular and isolated portions is without merit.

Appeal from Superior Court, San Diego County; Franklin J. Cole, Judge.

Action by Agnes Williamson against Charles S. Hardy. Judgment for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, and Eugene Daney, of San Diego, for appellant.

Crouch & Chambers, of San Diego, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff for damages arising out of injuries sustained by her through having slipped and fallen upon the floor of the defendant's meat market in the city of San Diego, her said fall having been occasioned, according to plaintiff's averments, by the slippery and unsafe condition of said floor.

[1, 2] The case was tried before a jury, and the first contention of the appellant is that during the proceedings for obtaining the jury, and also upon several occasions during the trial of the cause, counsel for plaintiff were guilty of misconduct in seeking to bring before the jury the fact that the action was being defended by a surety company which, though not a party to the action, was the insurer of the defendant against claims for damages. As to the alleged misconduct of counsel for the plaintiff during the process of procuring the jury, it is conceded by counsel

Digitized by Google

for the appellant that it is not error to inquire of the jurors if they are stockholders or interested in a certain surety company. It would seem, therefore, that the question which was put to the jurors as a body to the point whether or not they were "the owners of stock in the Western Indemnity Company, a corporation," by counsel for the plaintiff, cannot, standing alone, be held to furnish a basis for the appellant's claim. But the appellant insists that upon several occasions during the trial counsel for plaintiff persisted in making statements in the presence of the jury regarding the surety company in question which, taken in connection with the question asked upon their voir dire examination, showed a persistent intent to impress the jury with the fact that the action was being defended by said surety company. Upon an examination of the record in this regard we fail to find a sufficient basis for this claim. It is true that at one time during the trial some question arose with regard to the production of certain X-ray photographs which were in the possession of the physician of the surety company, and this led counsel for the plaintiff to refer to that fact; but we find in that connection that the court instructed the jury to disregard the remarks of counsel for plaintiff in that respect, and we can find no reason in the record for assuming that the jury disregarded that instruction. Nor do we feel that plaintiff's counsel were so far guilty of willful misconduct in connection with that episode as to justify a reversal of the case.

[3] The appellant's second contention is that the trial court committed error in permitting several witnesses who were called by the plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and a half or so thereafter. An inspection of the record discloses that these several witnesses merely testified to matters of personal observation, and did not undertake to testify as to any conclusions drawn by them therefrom as to the seriousness of her preceding injuries. It requires no citation of authority to sustain the view that evidence of this kind is admissible, and that objections thereto go not to the admissibility of such evidence but as to its weight; and as to the weight of such evidence the jury was the sole judge.

[4] The appellant's third contention is that upon all of the evidence in the case the court should have granted the defendant's request for a directed verdict. There is no merit in this contention. Taking the plaintiff's positive testimony that she slipped and fell upon the floor of the defendant's market through having stepped upon a piece of oiled paper made slippery by the adhesion to it of scraps of fresh meat, it was a question for the jury to determine whether or not the defendant was negligent in permitting such a substance to be lying upon the floor of his market where customers were wont and were required to walk while making their purchases therein.

[5] Finally, the appellant objects to the alleged error of the court in the giving and refusal of certain instructions. The defendant's requested instructions which the court refused to give were those which would have required the jury to bring a directed verdict in the defendant's favor, and as to these, as already stated, there was no error. As to the instructions which the court gave upon the general phases of the case, we find that upon the whole they are quite full and fair, and are not subject to the criticism which the appellant aims at particular and isolated portions of said instructions, and hence that appellant's final contention in this regard is without merit.

No errors appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

Ex parte SANDERS. (Cr. 911.)

(District Court of Appeal, First District, Division 2. California. May 5, 1920.)

1. Prisons ⟸15—Credits for good conduct forfeited for crime while upon parole.

One on parole is constructively a prisoner, and has the civil status of a prisoner; and, where he violates the conditions of his parole, the board of prison directors may forfeit his credits for good conduct which had already been earned, under Pen. Code, § 1588.

2. Forgery ⟸5—Implies evil intent.

The crime of forgery implies an evil intent; the two being inseparable.

3. Prisons ⟸15—Credits which might be earned in future may be forfeited.

Pen. Code, § 1588, gives the board of prison directors power to forfeit a prisoner's credits for good conduct which might be earned in the future.

Application by Russell Sanders for writ of habeas corpus, prayed to be directed to the Warden of San Quentin Prison, to secure release on ground of illegal detention. Writ denied.

Russell Sanders, in pro. per.

U. S. Webb, Atty. Gen. and John H. Riordan, Deputy Atty. Gen., for respondent.

LANGDON, P. J. The petitioner applied for a writ of habeas corpus, alleging that he was illegally restrained of his liberty by the warden of the state penitentiary. Upon the hearing, it appeared that the petitioner, as prisoner No. 30164, was received at San Quen-

Digitized by Google

tin Prison, December 21, 1916, from Los Angeles county, for the crime of forgery, under sentence to serve a term of 4 years and 6 months. On this term he was allowed the credits provided for under section 1588 of the Penal Code and the allowance of said credits reduced the term to a net sentence of 3 years, 3 months, and 15 days, entitling him to discharge under that judgment and commitment on April 6, 1920. On that date, April 6, 1920, he was discharged as convict No. 30164, but has since been held in prison by virtue of another judgment and commitment under which he was received in prison on April 6, 1913, as prisoner No. 26423 from the county of Santa Barbara, for the crime of forgery under the sentence of 8 years. The sentence imposed in Los Angeles county in 1916 was imposed to run concurrently with the first term, and was imposed while the petitioner was on parole.

On June 30, 1916, the petitioner, while serving the 8-year sentence, was released on parole. On December 16, 1916, the state board of prison directors ordered the parole of the petitioner revoked. Thereafter he was carried as a parole violator until he was returned to the prison on December 21, 1916, at which time he was received, as before stated, from Los Angeles county on a judgment of conviction of a similar crime.

On January 27, 1917, the board of prison directors heard charges preferred by the state parole officer, charging the petitioner with a violation of his parole. The prisoner was called before the board, and the charge explained to him, and he admitted it to be true. The board of prison directors thereupon adopted a resolution, ordering forfeiture of all credits earned or to be earned by petitioner on the sentence he was serving when he was paroled, as a result of which order petitioner is required to serve the 8-year sentence which he began serving on April 6, 1913. This 8-year term, with the 5 days lost from December 16, 1916, the day his parole was revoked, until December 21, 1916, the day he was returned to prison, requires his being held in custody until April 11, 1921.

[1] The petitioner's position is that the board of prison directors had no power to forfeit his credits for good conduct which had already been earned on his first sentence and which would thereafter be earned by him on said sentence because of the commission of the second crime while upon parole. While the petitioner was on parole, he was constructively a prisoner; he had the civil status of a prisoner. Section 1588, Penal Code, provides that "every convict who shall have no infraction of the rules and regulations of the prison, or laws of the state, recorded against him * * * shall be allowed from his term" certain credits. Said section also provides that—

"Each convict shall be held entitled to these deductions, unless the board of directors shall find that for misconduct or other cause he should not receive them."

The section also provides that—

"If any convict * * * in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct before the commission of such offense, or that, under this section, he may earn in the future, or shall forfeit such part of such deductions as to the board of directors may seem just."

The "ticket of leave" under which the prisoner was released from the prison set forth the conditions which must be observed by the paroled prisoner under penalty of being returned to prison. These conditions include, of course, an observance of all the laws of the state. The prisoner violated a condition of his parole, and in doing so he violated a prison regulation. Having violated a law of the state during the period of his sentence, he forfeited his right to the credits for good conduct.

[2] The minutes of the board of prison directors show that the petitioner was brought before the board, and the charge of forgery explained to him, which he admitted, whereupon, by resolution of said board, his credits, past and future, were forfeited. Petitioner urges that he was not charged with evil intent. The crime itself implies an evil intent; the two are inseparable.

[3] The petitioner argues that as a matter of public policy, section 1588, Penal Code, should be so construed as to give to the board of directors no power to forfeit credits which might be earned in the future, as such a procedure leaves a prisoner without hope and without incentive to good conduct. This is indeed unfortunate, but there are numerous considerations of public policy connected with the question, one of the most important being that paroled prisoners shall not violate their paroles. For the purpose of accomplishing this result, it is desirable that the board have power to inflict such penalties as will act as a deterrent. There is no doubt that under the powers given the board by section 1588, Penal Code, if petitioner had broken a law of the state while actually confined in the penitentiary, the board would have had the power to forfeit his credits, past and future, upon the term he was then serving. He cannot be in a better position by reason of the fact that at the time of his offense he was being extended special privileges by the board under its powers to parole prisoners. The writ is denied, and the prisoner is remanded to the custody of the warden of the state penitentiary.

We concur: BRITTAIN, J.; NOURSE, J.

Digitized by Google

Ex parte GOTTSCHALK. (Cr. 513.)

(District Court of Appeal, Third District, California. April 30, 1920.)

1. Criminal law ⟸258(4) — Cannot change judgment to defendant's prejudice after commencement of execution of sentence.

An order, after defendant was taken into custody under a judgment giving him the option of avoiding the imprisonment by payment of the fine, which withdrew the option and directed imprisonment of defendant, changed the judgment to the defendant's prejudice after the beginning of the sentence, though the original order required payment of the fine forthwith, and was beyond the power of the justice of the peace.

2. Habeas corpus ⟸92(1)—Statement of case on appeal from justice can be considered on habeas corpus after new trial was denied.

The statement of the case by the justice of the peace on appeal to the superior court is part of the judgment record in the superior court, and, if new trial is denied, that statement can be considered on habeas corpus proceedings in the Court of Appeals to determine whether the justice court exceeded its jurisdiction.

Application by William Gottschalk for writ of habeas corpus, to be directed to the sheriff of Yolo County to secure release of custody under a commitment of a justice of the peace. Petitioner discharged.

Edward J. Lynch, of San Francisco, and C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PREWETT, Presiding Judge pro tem. This is an application for a writ of habeas corpus. It appears from the statement of the facts accompanying the petition that one J. H. Anderson labored as a dredgerman for the Dutton Dredging Company from 12 o'clock noon on April 30th, until about 7 a. m. on the seventh day of May. His working hours were so disposed that he worked 24 hours in each 3 days, not working, however, the same number of hours each day. Up to 12 o'clock noon on May 6th he had worked 48 hours. His only work during the seventh 24 hours was from midnight until 7 a. m. on May 7th, when he voluntarily quit work. This lacks 1 hour of being 7 full days. The company paid him for 7 days and 1 hour in conformity with his claim that he worked on the last day until 9 a. m. The check which he received was for $26.30, which overpaid him in the sum of about 20 cents. He claimed that he should have received about $3 more, but his own figures do not justify this claim.

At the time that he quit work the foreman made out and delivered to him a time check for $26.30, which check he accepted without making any claim that the amount was too small. With reference to this time check he testified as follows:

"I told him [the foreman] that I would call at the office of the company in San Francisco and collect the money. Afterwards I changed my mind, and went to Sacramento instead. I did not tell the foreman that I had gone to Sacramento until several days later. The day after going to Sacramento I sent my time check to the Dredgermen's Union in San Francisco, and left it there for collection. I received the check for $26.30 about the same day that I swore to the complaint."

The time check was not presented to the company until about May 21st, and it was paid to the Dredgermen's Union on May 22d. The money did not reach the complainant until the following day. The defendant himself resides in San Francisco, and he did not have any dealings directly with Anderson. The latter did not at any time notify the company that he wanted any new provision to be made about the payment of the time check. The justice of the peace found the defendant guilty, and pronounced judgment.

[1] The judgment, as originally entered, gave the defendant the option of avoiding the imprisonment by the payment of the fine. Later, however, the justice entered an order, purporting to withdraw the option and directing the imprisonment of the defendant. This order was made after the defendant was taken into custody. It is true that the order directed that the fine be paid "forthwith," but all fines are payable forthwith, and the use of that word added nothing to the legal effect of the judgment. It is held in Ex parte Sullivan, 3 Cal. App. 193, 84 Pac. 781, that a justice of the peace has no power, after the commencement of the execution of a judgment to vary its terms adversely to the defendant.

The petitioner is discharged.

HART, J. I concur in the judgment, but am of the opinion that one point not considered in the main opinion should be given some notice.

[2] At the oral argument and in the briefs, the question whether, upon habeas corpus, this court may, in a case cognizable in justices' or police courts, examine the facts as embraced in the statement on appeal to the superior court was discussed and vigorously affirmed by the petitioner, and likewise denied by the Attorney General.

Section 1468 of the Penal Code, which is embraced within the chapter and title of the Penal Code regulating the matter of appeals in misdemeanor cases from justices' and police courts, provides:

"The appeal to the superior court from the judgment of a justice's or police court is heard

Digitized by Google

upon a statement of the case settled by the justice or police judge, embodying such rulings of the court as are excepted to, which statement must be filed with and settled by the court within ten days after filing notice of appeal."

I am of the opinion that the statement on appeal from a justice's or police court to the superior court in criminal cases, the triable jurisdiction of which is in the first-named courts, constitutes a part of the judgment roll or judgment record of the case in the superior court, where a new trial is denied. I am therefore of the opinion that, upon habeas corpus, in a criminal case so appealed to the superior court, where a new trial has been denied, it is competent and proper for this court to look into the facts as they are presented in the statement on appeal to the superior court for the purpose of aiding us in the determination of the question whether the justice's court exceeded its jurisdiction in the pronouncement of judgment of imprisonment. I do not herein intend to intimate how far this or the superior court would be permitted to go in this respect in a proceeding on habeas corpus where, upon a judgment of conviction and sentence in the justice's or police court, there has been no appeal to the superior court and the petition for the writ is based entirely on the proceedings in the said inferior court.

It follows that, in this case, this court was legally authorized to examine the facts contained in the statement on appeal to the superior court, and that for the reason stated in the main opinion the petitioner is entitled to his discharge.

I concur: BURNETT, J.

WILKINSON v. ROHRER et al. (Civ. 3093.)

(District Court of Appeal, Second District, Division 1, California. May 5, 1920.)

Municipal corporations ⇐705(11)—Negligence of plaintiff which did not contribute to the accident no ground for denying recovery.

Although plaintiff, in turning off at an intersecting street, passed to the left of the center in violation of the Motor Vehicle Law, such negligence will not bar recovery where, after he had passed the corner and was on the right side of the street, he was struck by defendant's car proceeding at an excessive rate of speed on the wrong side of the street; plaintiff's original negligence not being the proximate cause.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by J. C. Wilkinson against Ralph G. Rohrer and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Shreve & Shreve and Ralph F. Twombly, both of San Diego, for appellants.

Heskett & Sample, of San Diego, for respondent.

SHAW, J. In a collision between the automobile of plaintiff and that of defendants, the car of the former was damaged, for the recovery of which he brought this action, and obtained a judgment for $290, from which defendants have appealed.

Among other defenses interposed by defendants was that of contributory negligence of plaintiff, as to which the court made an adverse finding, and the sole ground here urged for a reversal is that this finding is not supported by the evidence.

It appears from the evidence that plaintiff was driving his car east on Bush street in the city of San Diego and, upon arriving at the intersection of Goldfinch street, which runs north and south, he turned into the same, going north. In making the turn he, instead of going to the right of the center of the intersection of the two streets, as required by the Motor Vehicle Act, entered Goldfinch street, passing to the left of said center, thus "cutting the corner." At the same time defendants were, on Goldfinch street, approaching from the north, driving their car southerly on the left-hand side of the street at a speed of some 40 miles per hour, all in violation of the provisions of the Motor Vehicle Act (St. 1919, c. 147). The collision of the two cars occurred at a point in Goldfinch street about 20 feet north of the north line of Bush street and on the east side of the center of Goldfinch street.

That plaintiff was guilty of negligence by reason of the line of travel followed in turning from Bush street into Goldfinch street may be admitted. But such fact will not bar his recovery, unless it be made to appear that such negligence was a part of the efficient cause of the collision; that is, there must have been a causal connection between his negligence in so doing and the injury complained of. At the time when the collision occurred, as shown by the record, plaintiff was driving his car upon the right-hand side of the center of the street, where he was entitled to travel, and the fact that in reaching such position he had negligently cut across the corner of the intersecting street was not a contributing cause of the collision, but, as appears from the evidence, wholly disconnected therefrom. Clearly he was where he had a right to be and where, but for the fact that defendants were on the wrong side of the street and traveling at an unlawful rate of speed, the collision would not have occurred.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

HILL v. MOORE et al. (Civ. 3083.)

(District Court of Appeal, Second District, Division 1, California. May 3, 1920.)

1. Pleading ⟸345(1)—Court erred in rendering judgment for plaintiff on the pleadings in action on note where answer alleged payment.

In action on note, where answer alleged that the principal and interest had been fully paid, court erred in entering judgment on the pleadings; such payment constituting a sufficient defense.

2. Pleading ⟸350(3)—Affirmative allegations of answer deemed true on motion for judgment on pleadings.

Matters affirmatively set up in the answer must, on plaintiff's motion for judgment on the pleadings, be deemed true.

3. Bills and notes ⟸432—Transfer of leasehold interest in consideration of release from note precluded recovery thereon.

Where purchasers of lease who had executed note as part of the purchase price transferred their interest in the lease to third person in consideration of seller releasing them from the note, seller could not recover on note.

Appeal from Superior Court, Imperial County; E. A. Luce, Judge.

Action by M. G. Hill against M. Moore and another. Judgment for plaintiff, and defendants appeal. Reversed.

Conkling & Brown, of El Centro, for appellants.

Dan V. Noland, of Los Angeles, and J. S. Larew, of El Centro, for respondent.

SHAW, J. Appeal by defendants from a judgment entered against them upon the pleadings.

The action was upon a promissory note for $600, the making of which is admitted. Defendants in their answer not only denied the allegation of the complaint "that no part of the principal sum, nor interest, or attorney's fee therein provided has been paid," but affirmatively alleged that the whole thereof has been fully paid, and denied "that the whole thereof, or any part thereof, is now due or owing or unpaid," and as a further defense alleged that the note in question was given as a part of the consideration in the purchase of a lease of real estate transferred by plaintiff to defendants, and that thereafter defendants sold and assigned their interest in the said lease and the crops growing upon the demised premises to F. M. Griffith and H. W. Thompson, and that, as a part of the consideration for the sale and transfer thereof so made, plaintiff at the time agreed with defendants that they should be released from the payment of said $600 note, which should be returned to them.

[1-3] It thus appears the answer not only contained an express denial of the material allegation contained in the complaint as to nonpayment, but specifically alleged that the entire amount of principal and interest due upon the note had been fully paid. This alone constituted a sufficient defense to the allegations of the complaint. Moreover, the matters affirmatively set up in the answer must, under the motion for judgment upon the pleadings, be deemed to be true. McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Bradford Investment Co. v. Joost, 117 Cal. 211, 48 Pac. 1083. And, since it is alleged that a part of the consideration for defendants' transfer and assignment of the lease was plaintiff's agreement to release them from the payment of the note, proof of such fact would constitute a sufficient defense to plaintiff's right to recover on the note.

That the court erred in granting plaintiff's motion for judgment on the pleadings, followed by entry of the judgment therein, admits of no possible question.

The judgment is therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

STERN, Superintendent of Banks, v. SUNSET ROAD OIL CO. et al. (Civ. 3196.)

(District Court of Appeal, First District, Division 1, California. May 3, 1920.)

1. Sales ⟸62 — Divisibility of contract dependent not only on number and separability of items, but upon object and intention.

A contract to supply a railroad company with oil and two supplemental agreements *held* not to be a divisible contract to furnish oil on the one hand for storage and on the other for current use; divisibility depending not alone upon the multiplicity or separability of items, but upon the parties' intention and the contract's object.

2. Set-off and counterclaim ⟸49(1)—Recoupment proper where cause of action on assigned demands, and defendant's right against assignor originated in same indivisible contract.

Where plaintiff's cause of action on assigned demands for the delivery of current use oil to defendant and defendant's right to recoup on account of money advanced to plaintiff's assignor grew out of the same subject-matter and same indivisible contract, recoupment was proper.

3. Set-off and counterclaim ⟸50 — Assignee held to take subject to debtor's right of recoupment.

Where an oil company contracted to furnish oil for a railroad company and by supplemental agreement the latter advanced the former money for development, and the former assigned demands on the latter to plaintiff,

Digitized by Google

and after notice of assignment committed a breach of contract, the defendant railroad company could recoup for money advanced to assignor in assignee's action begun after the breach, although assignee did not have notice of advance of development money, since assignee took subject to the equities and defenses covered by the entire indivisible contract and with knowledge of defendant's common-law right of recoupment.

4. Set-off and counterclaim ⟸50—"Set-off" distinguished from "recoupment" as respects assignor's breach of contract after assignment.

A "set-off" is a creation of statute, while a "recoupment" existed at common law; the former applies to different contracts, while the latter flows from the same contract which forms the foundation of plaintiff's claim,, and where plaintiff's right is by assignment, if assignor's breach occurred prior to notice, defendant would have the right to set off (Code Civ. Proc. § 368), but, if subsequent, he would not, while in recoupment the time of breach would be immaterial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recoupment; Set-Off.]

5. Set-off and counterclaim ⟸21 — Party to contract held not estopped to assert recoupment against assignee.

Where assignor contracted to furnish oil to defendant railroad company and assigned demands to a bank to which the defendant made some payments, defendant was not estopped to recoup for money advanced to assignor previous to assignment which it failed to inform assignee about, since the evidence does not show assignee informed defendant it had or would advance money, and defendant could assume it was fully informed, since its director was a general manager of assignor.

6. Estoppel ⟸95—Where party failed to perform obligation to disclose facts, there can be no estoppel.

Where party claiming estoppel is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself, there is no estoppel.

7. Estoppel ⟸95—Silence will not estop where there is no duty to speak.

It must be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party sought to be estopped, amounting to intentional deceit or gross negligence, and silence, to constitute estoppel, must be willful or culpable, and result in another placing himself in an unfavorable position on the faith in or understanding of a fact, which the person remaining silent can contradict, but silence will not estop where there is no duty to speak.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Kern Valley Bank against the Sunset Road Oil Company and the San Pedro, Los Angeles & Salt Lake Railroad Company, in which W. R. Williams, as Superintendent of Banks, and later his successor in office, Charles F. Stern, were each in turn substituted as plaintiff. The Oil Company defaulted, and from a judgment for plaintiff against the defendant Railroad Company, the latter appeals. Reversed.

Dana T. Smith, of Salt Lake City, Utah, and E. E. Bennett and A. S. Halsted, both of Los Angeles, for appellant.

Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, and Raymond Benjamin, of San Francisco, for respondent.

KNIGHT, Judge pro tem. This action was originally commenced by the Kern Valley Bank. Prior to trial W. R. Williams, superintendent of banks, was substituted as plaintiff; he then having charge of the affairs of said Kern Valley Bank for the purposes of liquidation. Later Williams was succeeded as superintendent of banks by Charles F. Stern, and the latter was thereupon substituted as plaintiff and respondent. The action concerns the sale and delivery of oil. Judgment was rendered in favor of plaintiff and against defendant San Pedro, Los Angeles & Salt Lake Railroad Company for the sum of $8,926.35, plus $5,908.25 interest, from which judgment said defendant railroad company appeals.

The facts are substantially without conflict, and are as follows: On July 1, 1907, defendant Sunset Road Oil Company, a corporation, and its subsidiary corporation, Operators' Oil Company, contracted in writing with the defendant San Pedro, Los Angeles & Salt Lake Railroad Company to sell and deliver to the latter all oil required for the use of said railroad company for a period of five years, 200,000 barrels of which was to be stored prior to January 1, 1908, and the remainder to be delivered to and used by said railroad company for current use. Payments were to be made not later than the 15th of each calendar month for all deliveries made during the preceding calendar month. Said contract also contained provisions relating to the character of oil, the temperature deductions, etc. Later said contract was supplemented by two other agreements, the first of which is not material here. The second was executed February 4, 1908, and by proper recitals was made a part of the original contract. The two important features of the second supplemental agreement were: First, the postponement of the date for the commencement of the delivery of the storage oil until April 1, 1908, deliveries to be made thereafter daily at the rate of not less than three or more than ten carloads per day until the full amount of said storage oil was delivered; secondly, the acknowledgment by said oil companies of the payment to them by said railroad company of the sum of $60,000 on account of future deliveries of storage oil.

Digitized by Google

It was also provided in said second supplemental agreement that all payments for current use oil delivered after April 1, 1908, should be paid for in accordance with the provisions of the original agreement—that is, not later than the 15th of each calendar month.

On April 8, 1908, said oil companies assigned the payments due them under said contract to the Kern Valley Bank, in consideration for which said bank agreed to and afterwards did advance to said oil companies the sum of 25 cents a barrel on all oil shipped to said railroad company. At the time of said assignment said bank had no knowledge of the existence of said second supplemental agreement, nor of the payment to said oil companies by said railroad company of said sum of $60,000; its knowledge of the transaction between said oil companies and said railroad company being confined to the contents of the original agreement. Notice of said assignment was given to said railroad company by means of a letter, written on April 8, 1908, by the representative of said oil companies to said railroad company, in the form following:

"Please pay to the Kern Valley Bank of Bakersfield, California, at due dates, the proceeds of all oil heretofore shipped to you by us and that may be hereafter so shipped, terms our contract with you. This order to remain in full force and effect until revoked by us with the consent of said Kern Valley Bank. Please make formal acknowledgment of the within order to the Kern Valley Bank and oblige."

Said railroad company replied by letter to said notice, and, after acknowledging receipt of said letter of April 8th, stated:

"I am returning this order herewith under advice of our Legal Department, for necessary correction. We cannot accept any orders for 'future payments'; in other words, a separate order should be given covering each month's voucher, and sufficient identification carried in the order with reference to your invoices as to distinctly identify the payments. * * * If you will kindly arrange to take action as suggested above, I will in the meantime issue instructions that vouchers be rendered to your company for payment through the Kern Valley Bank. In the meantime please let me have corrected order covering payment for month of April, and let future orders come in as suggested."

Said railroad company received no notice whatever from said bank concerning said assignment, nor did it have knowledge at any time of the existence of the agreement made by the bank with said oil companies, or of the advancements made or to be made by said bank of 25 cents a barrel on all oil shipped to said railroad company.

On April 15 and 16, 1908, said railroad company paid to said bank, on invoices for oil, duly assigned to said bank by having stamped twice thereon the words "Payable to the Kern Valley Bank, Bakersfield," the sums of $1,634.78 and $2,685.07, respectively, which payments were in full for all current use oil delivered prior to March 31, 1908. On May 22, 1908, said bank made demand upon said railroad company for payment of oil delivered subsequent to April 11, 1908, to which said railroad company replied by letter on May 28, 1908, to the effect that said oil companies had defaulted in their contract, and that there was nothing due said oil companies.

On November 5, 1910, this action was commenced for an accounting, to ascertain the amount of oil delivered under said contract, and to obtain a judgment against said railroad company for the amount of oil delivered, and also to obtain a judgment against the defendant Sunset Road Oil Company for the difference between the amount found to be due from said railroad company and the amount advanced by said bank to said oil companies. Said oil companies delivered no storage oil whatever, nor did they deliver current use oil of the quality or in the quantity required, said railroad company being obliged to purchase 75 per cent. of its current use oil from outside sources. Neither did said oil companies ever repay to said railroad company any part of said sum of $60,000, but against that sum said railroad company has allowed a credit of $10,905.23 for current use oil delivered subsequent to April 1, 1908, and for which no payment had been made.

The complaint alleges, on information and belief, that the total value of the oil delivered to said railroad company subsequent to April 11, 1908, was approximately $15,000, of which said bank advanced the sum of $14,125, and that $4,309 has been paid, leaving a balance due of $11,000, or thereabouts. The defendant Sunset Road Oil Company defaulted. The defendant railroad company answered by joining issue as to the value of the total shipments of oil, the amount claimed to have been advanced by said bank to said oil companies, and the assignment to said bank. It denied that it had received notice of said assignment, as alleged in the complaint, or that it had accepted or agreed to accept the same, or that it had made any payments pursuant to said assignment, but admitted that it had made payments to said bank for oil shipped prior to April 1, 1908. As a special defense it was averred that said oil companies had defaulted in the performance of their contract, by reason of which nothing was due or payable to said oil companies subsequent to April 1, 1908, at which time it was alleged said oil companies were, and that they still are, indebted to said railroad company, in excess of the sum of $40,000; in other words, the answer sets up, in addition to other defenses, its right to recoupment under the terms of said original and supplemental agreements. The trial court found that said railroad company, by reason of its conduct at the time of and subsequent to the

Digitized by Google

notice of assignment, was estopped from urging its defense of recoupment, and judgment was entered in favor of plaintiff.

Two principal questions are presented by the appeal: First, whether or not appellant may recoup itself against plaintiff to the extent of its claim against plaintiff's assignor, occasioned by the total failure of said assignor to deliver storage oil paid for in full; and, second, if it may so recoup itself, whether or not, under the facts shown by the record, appellant is estopped by reason of its conduct from urging that defense.

[1, 2] The availability of the defense of recoupment depends primarily upon the nature of the contract. If, as contended by appellant, it is an entire contract, and not a divisible one, it is quite clear that it is a proper case for recoupment. This proposition is not seriously disputed. Respondent argues that the contract is a divisible one, not that the original and the two supplemental agreements do not constitute one contract, but that the contract covers two separate obligations, distinct from each other, viz. an agreement to deliver storage oil, and an agreement to deliver current use oil, and that, since the storage oil was paid for in advance, such payment cannot now be used as the foundation for recoupment in the matter of the delivery of and the payment for the current use oil.

We are of the opinion that the terms of the contract and the circumstances of its execution do not support this view. The divisibility of the contract does not alone depend upon the multiplicity or the separability of the items therein, but upon the intention of the parties and the object of the contract. If it was the intention of the parties to treat the contract as an entire contract, and it appears that their engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed, it is not a divisible contract, and the contracting parties will not be allowed, under those circumstances, to perform part of the contract and default in its other parts without being held answerable for the performance of the entire contract. Parsons on Contracts, vol. 2 (9th Ed.) p. 517; Page on Contracts, vol. 3, p. 2289; 6 Rul. Case Law, 858; 13 Corp. Jur. 562.

The evidence here shows that the defendant railroad company was in need of oil to operate its railroad. It was not in the business of buying and selling oil. The oil contracted for was purchased for its own use and consumption. It was necessary that it should be continuously supplied with oil for its immediate and future use. A supply of current use oil without a supply of storage oil would have been of little value. Both were necessary to the successful operation of its railroad business. At the time of the execution of the contract the oil fields belonging to said oil companies were apparently new and undeveloped. Money was needed for their development. In order to secure the required supply of oil, either for current use or for storage, it was necessary for said railroad company to finance such development. This it did by advancing $60,000 to said oil companies. This sum was not advanced for the development of storage oil exclusively, nor for the development of current use oil alone, but it was advanced for the development of the production of both. It was paid for the purpose of facilitating such development, so as to insure a steady flow of current use oil as well as an accumulation of storage oil. The fact that it was agreed that said $60,000 should be applied as payment for storage oil is immaterial. It was advanced for the purpose of developing the oil properties of said oil companies, so that both oil for current use and storage oil might be produced. It is not reasonable to suppose that said railroad company would have advanced the sum of $60,000 without feeling assured that it was going to be furnished with current use oil during the five-year period covered by the contract, as well as with the storage oil. On the other hand, it is apparent that said oil companies would not have taken a contract to furnish current use oil alone at the price agreed upon without the privilege of also furnishing the additional 200,000 barrels of storage oil. Nor would they have entered into the second supplemental agreement to furnish the current use oil if said $60,000 had not been advanced. It will thus be seen that the obligations of the contract to furnish storage oil and current use oil cannot be separated. The contract provided that "all oil required to be used during said term (five years) by the buyer for all its purposes," etc., should be furnished. These reasons make it plain to us that the intention of the parties was to treat the contract as a whole, and that the payment of said sum of $60,000 was made and accepted by the parties accordingly.

We have then a case where the cause of action of the plaintiff on the assigned demands for the delivery of current use oil, and the right of the defendant to recoup on account of the $60,000 advanced to plaintiff's assignor for development purposes, grew out of and had their origin in the same subject-matter and in the same contract. Under such circumstances recoupment was proper. American Bridge Co. v. City of Boston, 202 Mass. 374, 88 N. E. 1089; Rockwell v. Daniels, 4 Wis. 432; Newfoundland v. Newfoundland Railway Co., 13 Law Rep. App. Cas. 199; Salt Fork Coal Co. v. Eldridge Coal Co., 170 Ill. App. 268; Seibert v. Dunn, 216 N. Y. 237, 110 N. E. 447; 34 Cyc. pp. 623, 625, 643, 376, 695.

In respondent's brief numerous authorities are cited on this point. It is unnecessary to discuss them, however, more than to say that they are based upon the theory that the con-

Digitized by Google

tracts under consideration in those cases were divisible, which, as we have seen, is not the case here.

[3, 4] The exact time when said oil companies breached their contract, whether it was prior or subsequent to the notice of assignment, can make no difference so far as the application of the doctrine of recoupment is concerned. If we were here dealing with the question of set-off instead of that of recoupment, a different rule would doubtless prevail. There is a marked difference between the two doctrines. The chief distinctions are that the former is a creation of statute, while the latter existed at common law, and that the former is applicable when there are different contracts, while the latter flows from the same contract as that which forms the foundation of plaintiff's claim. If the breach here occurred prior to the notice of assignment, there would be no question but that the assignee took the rights of the assignor subject to all equities, set-offs, and other defenses then existing. Section 368, Code Civ. Proc. A complete breach did not occur, however, until the last days of April or early in May, 1908, which was subsequent to the notice of assignment. In the contract it was provided that deliveries of storage oil should commence on April 1, 1908, and that the failure by the sellers to load cars for more than 10 consecutive days should not be considered a breach of said agreement, but that, in case of such failure to load the same, the party in default should be required to fully make up the deficiency within 20 days, which allowed said oil companies until the end of April before they were completely in default. During the last days of April or early in May, however, the representatives of the railroad company called personally on the representatives of the oil companies to ascertain what said oil companies intended to do about fulfilling their contract, at which time the representatives of the oil companies stated:

"We can't furnish the oil either in the quantity or quality stated in the contract, and we will have to quit—throw it up."

This constituted a complete breach of the contract, and it having occurred subsequent to the notice of assignment, and the action of the assignee having been commenced subsequent to such breach, the railroad company was given the right to recoup as against plaintiff's assignor to the extent of its claim arising because of such breach.

This rule of law is best illustrated by the case of American Bridge Co. of N. Y. et al. v. City of Boston, supra, wherein a contractor, on April 10, 1902, assigned certain payments due him to a bank, notice of which assignment was given on November 14, 1902. A few days subsequent to the notice of assignment the assignor abandoned the contract. Action was brought on the assignment in October, 1906. The defendant pleaded recoupment on account of the damage suffered by reason of the breach of the contract. It was held that, although the breach occurred subsequent to the notice of assignment, recoupment was a proper defense. The decision in that case is based upon the ground that the right of the defendant to claim damages for the nonperformance of the contract existed at the time of the making of the contract, at the time of assignment, and at the time of the notice of assignment, and that the assignees knew it, and they also knew it would become available to the defendant the moment the assignor should commit a breach. It is further stated in the opinion in that case that, even if the sums sued upon were due at the time of the notice of assignment, still, if the action was brought by the assignor after default, there could be no doubt that the defendant would have the right to recoup damages suffered by such default, the court saying:

"And the assignees who seek to enforce this claim can stand in no better position in this respect than the assignor. The defendant is simply trying to enforce a right existing under the contract at the time of the notice, a right of which the assignees had knowledge; and, since they have delayed suit for these sums until after default, the defendant may recoup against them as it could have recouped against the assignor."

Neither is the situation changed by the fact that the bank did not know of the existence of the second supplemental agreement at the time of said assignment. As assignee it took subject to all equities and defenses between the original parties to the agreement existing at the time of the assignment. Those rights were not confined to those parts of the contract known to the assignee, but they embraced the equities and defenses covered by the entire contract. Fleming v. Law, 163 Cal. 227, 124 Pac. 1018; San Jose Ranch Co. v. San Jose Land Co., 132 Cal. 582, 64 Pac. 1097; 5 Corp. Jur. 963, note 28.

[5] In view of the authorities above cited it is our opinion that appellant should not have been deprived of its right to recoup, unless it was estopped from doing so by its acts and conduct.

The facts upon which the doctrine of estoppel was applied against appellant have already been related in the first part of this opinion. In this respect it is contended by respondent that on April 8, 1908, when appellant was notified of the assignment to the bank, appellant should have notified the bank that it had a claim, or intended to make a claim, against said oil companies because of the payment of said sum of $60,000; that instead of doing so it sent the assignment back to the oil companies for corrections as to the form of the assignment, and with instructions as to how the assignment should be drawn in the future; that the bank thereafter, acting in pursuance of these instructions, pre-

Digitized by Google

sented future assignments to appellant, which appellant accepted, and on April 15 and 16, 1908, made payments to the bank for current use oil in the aggregate sum of $4,328.85. From these facts respondent argues that the bank was lulled into a state of financial security and encouraged to make the advances to said oil companies.

The weakness of respondent's whole contention is, however, that the bank did nothing and said nothing which would indicate to appellant that it had advanced or intended to advance to said oil companies any money on its shipments of oil. Appellant was in total ignorance of that fact. Respondent claims that that part of the oil companies' letter of April 8, 1908, wherein it was stated, "This order to remain in full force and effect until revoked by us with the consent of said Kern Valley Bank," was of itself sufficient notice that the rights of the bank were absolute. While the language quoted may have indicated in a vague fashion that the bank had some interest in said payments which could not be canceled without its consent, the letter does not carry the effect contended for by respondent. On the contrary the letter as a whole appears to be only a direction to make payments to said bank, without disclosing any interest which the bank may have had. It does not even state in positive terms that an assignment had been actually made, and there is nothing contained in the letter from which it can even be inferred that the bank was making advances to said oil companies on shipments of oil to appellant. If any assignment can be inferred from said letter at all, it could with more assurance be assumed therefrom that the assignment was made in satisfaction of or to apply upon a past indebtedness, or that it should apply upon some particular trust, or that the bank was acting as a depositary for said oil companies merely for the purpose of receiving the funds. The fact that appellant did not assume the burden of fully informing said bank of the extent of its dealings with said oil companies does not create the barrier of an estoppel. It had the right to assume that the bank was fully informed as to the second supplemental agreement and of the payment of said sum of $60,000, when it is taken into consideration that one of the directors of said bank was the general manager of one of said oil companies and the president of the other during all of these transactions. Before respondent can successfully urge estoppel, it must be shown that respondent was not only destitute of knowledge of the real facts, but that it was without convenient or ready means of acquiring such knowledge. Murphy v. Clayton, 113 Cal. 153, 45 Pac. 267; Huse v. Den, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232; 16 Cyc. 738.

[6, 7] No estoppel arises where a party setting it up is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself. 16 Cyc. 741. It is plain to be seen that, had said bank made such inquiries as the law enjoined upon it to make prior to or at the time of said assignment, the present controversy would not have arisen. Nor does the fact of the payments by said railroad company to said bank on April 15 and 16, 1908, justify an estoppel. Those payments covered deliveries of current use oil made prior to April 1, 1908, which was eight days prior to the so-called notice of assignment. In order to constitute an estoppel it must be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party sought to be estopped. There must be an intentional deceit or gross negligence shown (Lackmann v. Kearney, 142 Cal. 112, 75 Pac. 668), and if silence is relied upon to constitute the estoppel, such silence must be willful or culpable and result in another placing himself in an unfavorable position on the faith in or understanding of a fact which the person remaining silent can contradict (Eltinge v. Santos, 171 Cal. 278, 152 Pac. 915, Ann. Cas. 1917A, 1143). But where there is no duty to speak mere silence will not create an equitable estoppel. Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

Under the facts above related, and in view of the authorities cited, it is our opinion that the doctrine of equitable estoppel does not apply.

Judgment reversed.

We concur: WASTE, P. J.; RICHARDS, J.

PEOPLE v. BICKERSTAFF. (Cr. 493.)

(District Court of Appeal, Third District, California. April 3, 1920. Opinion of Supreme Court, In Bank, Denying Hearing June 2, 1920.)

1. Intoxicating liquors ⇐134—Sale of beer containing less than 1 per cent. alcohol no crime.

Sale of beer containing less than 1 per cent. of alcohol was not prohibited by the Wyllie Act.

2. Criminal law ⇐789(3)—Instruction as to reasonable doubt of alcoholic content erroneously refused.

In a prosecution under the Wyllie Act, court erred in refusing to instruct, "If you have any reasonable doubt as to whether the beverage sold was alcoholic within the meaning of the Wyllie Act, you will return a verdict of not guilty," and "in determining the quantity of alcohol therein you are to give the defendant the benefit of every reasonable doubt, if any you have. You are to consider and weigh care-

Digitized by Google

fully all of the evidence in the case; and, if you cannot say that you are satisfied beyond all reasonable doubt and to a moral certainty that said beverage contained 1 per cent. or more, by volume, of alcohol, you will find the defendant not guilty."

3. Intoxicating liquors ⟸131—Lack of knowledge of volume of alcohol in beer no defense under Wyllie Act.

It is no defense in a prosecution under the Wyllie Act for selling beer containing 1 per cent. or more of alcohol, that defendant did not know the liquor sold by him contained the prohibited amount of alcohol.

4. Criminal law ⟸330, 561(1)—Burden on state to prove guilt beyond reasonable doubt.

A defendant in a criminal case is never required or expected to prove his innocence, but the burden is on the prosecution to prove the defendant guilty of the crime with which he is charged, and to prove every fact essential to constitute that crime beyond all reasonable doubt and to a moral certainty; and, if the jury cannot say, after a careful consideration of all of the evidence in the case, that the guilt of the defendant has thereby been established beyond all reasonable doubt and to a moral certainty, it is its sworn duty to acquit the defendant.

5. Criminal law ⟸834(5)—Requested instruction as to embodying rule as to reasonable doubt should have been given without modification.

Where defendant requested the court to instruct: "That under the law no jury should, nor has the right to, convict the defendant of a crime upon mere suspicion, however strong (nor simply because there may be a preponderance of all of the evidence in the case against him), nor merely because there is or may be strong reason to suspect that he is guilty (but before a jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt)"—court erred in modifying the instructions by striking out the words inclosed in parentheses.

6. Criminal law ⟸834(5)—Requested instruction embodying rule as to reasonable doubt should have been given without modification.

Where accused requested court to instruct: "That mere probabilities are not sufficient to warrant a conviction (nor is it sufficient that a greater weight of evidence supports the allegation of the information, if it does), nor is it sufficient upon the doctrine of chances that it is more probable that the defendant is guilty. (To warrant a conviction of the defendant he must be proven to be guilty clearly and conclusively beyond all reasonable doubt, so that there is no reasonable theory upon which he can be innocent when all of the case is considered together)"—court erred in modifying the instruction by striking out the words included in parentheses.

7. Criminal law ⟸782(1)—Defendant entitled to instructions as to conditions of evidence requiring acquittal.

Accused is entitled to instructions telling the jury in clear language the conditions of the evidence that would make it their duty to acquit.

On Consideration in Supreme Court of Petition for Hearing.

8. Criminal law ⟸806(3)—Court should not repeat instructions.

Trial judge should take care to give to the jury once and in clear language every principle of law applicable to the particular case; and, when he has done this he is not required to repeat any of them, no matter how many separate instructions are asked which may include them, and such is true with regard to instructions relating to the presumption of innocence, reasonable doubt, and the degree of proof required of the prosecution.

9. Criminal law ⟸789(9)—Instruction on reasonable doubt not erroneous.

An instruction that reasonable doubt "is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon the testimony, reason, and common sense, and which leaves the mind in such a state that you cannot say that you feel fully and entirely satisfied of the defendant's guilt. In other words, it is that state of mind, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are to act conscientiously upon it"—although not as full and clear as the instruction usually given, was not erroneous.

10. Criminal law ⟸789(2)—Courts should adhere to precedents in framing instructions on reasonable doubt.

Trial judges should adhere to the well-established precedents in framing or approving instructions on the subject of reasonable doubt, and should avoid any attempt to frame new definitions of the term.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

J. A. Bickerstaff was convicted of selling alcoholic liquor in no-license territory and appeals. Reversed in District Court of Appeals and hearing denied in Supreme Court.

P. H. Ryan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

ELLISON, Presiding Judge pro tem. An information was filed against the defendant in the superior court of the county of Humboldt, state of California, wherein he was accused of the crime of selling alcoholic liquors in no-license territory, the particular allegation being "that heretofore, to wit, on the 29th day of July, A. D. 1919, the said J. A. Bickerstaff within the boundary of said 'no-license' territory, in supervisorial district No. 2, at and in the county of Humboldt,

Digitized by Google

state of California, did willfully, knowingly, and unlawfully sell, furnish, distribute and give away alcoholic liquors, to wit, beer and which was not so mixed with other drugs as to prevent its use as a beverage, to one William McKay." After trial had the defendant was convicted, and from the judgment pronounced upon the verdict he prosecutes this appeal.

The appellant calls attention to many matters occurring during the trial which he claims were error and prejudicial to his rights. We deem it not necessary to state all of them, and in deciding the case shall only discuss those that seem to be of the most importance.

The prosecution was had under the so-called Wyllie Act (St. 1911, p. 599). In construing said act the court determined that it prohibited the sale of beer regardless of the amount of alcohol contained in it, and regardless of whether it contained any alcohol at all, or not. Thus, in one instruction the jury were informed:

"I charge you that if you find from the evidence beyond a reasonable doubt that at the time and place set forth in the information, the defendant did sell, furnish, or give to William McKay beer or any other malt liquor, then I instruct you that it is not necessary that you should find that said beer or other malt liquor contained 1 per cent. or more, by volume of alcohol or that you should find that it contained any alcohol at all, but it is enough if you find beyond a reasonable doubt that the defendant did at the time and place set forth in the information sell, furnish, or give to said William McKay beer or malt liquor to warrant you in bringing in a verdict of guilty."

The jury were given other instructions along the same lines. This was manifestly error, and in direct contradiction to the decisions of the higher courts of this state heretofore rendered.

The case of People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121, involved the construction of the meaning of this particular part of the Wyllie Local Option Law. In fact, it is known that the district attorney of Colusa county purposely framed his information in that case for the purpose of getting a direct decision of the higher courts as to whether the selling of beer of less than 1 per cent. by volume of alcohol was a crime or not, and in filing his information, in order that the matter might be squarely presented to the courts uninfluenced by any and all other considerations, he inserted in his information that the liquors sold by the defendant in that case were malt liquors containing less than 1 per cent. by volume of alcohol. And it was his argument in that case that the statute made the selling of malt liquors, regardless of the amount of alcohol contained in them, a crime, and that the words "any other liquor or mixture * * * which contains one per cent. by volume, or more, of alcohol" were not intended to and did not qualify the previous words, "spirituous, vinous and malt liquors." In deciding the case against the contention of the district attorney, the court used, among other expressions, the following:

"In the case of People v. Mueller, No. 231 (18 Cal. App. Dec., p. 220), this court was called upon to consider the propositions above stated, and we there expressed the opinion that, while in charging the offense of selling or keeping for sale spirituous, vinous or malt liquors, it was not necessary to allege that such liquors contained the amount of alcohol specified in section 21, a conviction could not be sustained under such an indictment unless such liquors were shown to be intoxicating. This conclusion was reached mainly from the proposition, declared in the opinion in said case, that the terms 'spirituous,' 'vinous,' and 'malt,' as generically designating certain kinds of liquors, must have been used by the Legislature in their popular sense—that is to say, that they were used to describe, generically, those alcoholic liquors commonly known as 'spirituous,' 'vinous,' and 'malt,' and which, it is known, will produce intoxication. * * * We are still of the opinion, however, that the Legislature did not intend to make it unlawful for one to engage in the business of selling nonintoxicating liquors. In other words, it is not reasonable to suppose that it was the legislative intent to contraband the traffic in spirituous, vinous, or malt liquors possessing no intoxicating quality. To the contrary, it seems very clear, when we consider the ultimate object of the Local Option Law, that the Legislature thus aimed the shafts of its denunciation solely against any liquors the use of which would produce intoxication, and that, by specifying the quantity of alcohol which, when used in liquors, would bring them within the condemnation of the statute, it intended to and did establish a test applicable to all liquors the sale of which was designed by the statute to be prohibited in any territory to which the law might appropriately be made applicable. This conclusion is arrived at by a view of section 21 of the act by the light of the rule of construction, ejusdem generis, above referred to. In its practical application, this rule simply means that 'general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general.' * * * Or, as this maxim was stated by Lord Tenterden * * *: 'Where a statute or other document enumerates several classes or persons of things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated.' This rule of construction is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. It must yield to another salutary rule of construction, viz. that every part of a statute should, if possible, be upheld and given its appropriate force. * * * But, in this case,

Digitized by Google

since it is plainly manifest, as stated, that the purpose of the Local Option Law is to suppress drunkenness and consequently the traffic in intoxicating liquors in those subdivisions where its operation is properly and legally invoked, the rule of ejusdem generis may be applied to the construction of section 21 without doing violence to or rendering inoperative any part of said section or of the law. Indeed, a construction of section 21 by the light of that doctrine will manifestly lead to the upholding of all the provisions of the law agreeably to the evident legislative design at the bottom of its enactment."

After decision by the appellate court in this case, a petition to have the case heard in the Supreme Court was denied. In denying it the Supreme Court necessarily approved of the disposition made of the case by the appellate court, because, as stated, the case presented no question for the consideration of either court other than the construction of this particular section of the Wyllie Local Option Law.

[1, 2] The giving of the instruction by the court, telling the jury that the amount of alcohol contained in the beer alleged to have been sold was entirely immaterial was error which necessitates a reversal of the judgment. On this feature of the case the defendant presented certain instructions, and asked that they be given to the jury, but the request was refused. Said instructions were in harmony with the decisions of the courts of this state, and should have been given. Among them was the instruction numbered 17, which reads as follows:

"If you have any reasonable doubt as to whether the beverage sold was alcoholic within the meaning of the Wyllie Act you will return a verdict of not guilty, and in this connection I charge you that alcoholic liquor as used in the Wyllis Act means liquor which contains 1 per cent. by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage."

Also instruction 18, which reads as follows:

"I charge you that if the beverage which defendant sold to McKay contained less than the 1 per cent. by volume, of alcohol, it was not unlawful to sell the same, and in determining the quantity of alcohol therein you are to give the defendant the benefit of every reasonable doubt, if any you have. You are to consider and weigh carefully all of the evidence in the case, and if you cannot say that you are satisfied beyond all reasonable doubt and to a moral certainty that said beverage contained 1 per cent. or more, by volume, of alcohol, you will find the defendant not guilty."

These instructions contained a clear and accurate statement of the law and of the rights of the defendant, and it is beyond controversy that he was entitled to have them read to the jury upon the trial of his case.

As the case may be tried again, some other matters are presented that should be considered. It was the claim of the defendant that at the time he sold the beer he honestly believed and had a right to believe, that it contained less than 1 per cent. by volume of alcohol, and asked that the case be submitted to the jury upon that theory, and asked for a direct instruction to the jury that, if they believed that the defendant acted in good faith in selling the beer and in the belief that it contained less than 1 per cent. by volume of alcohol, he should be acquitted. The court refused to give this instruction, and its action is assigned as error.

In the case of People v. Pera, 36 Cal. App. 292, 171 Pac. 1091, a similar question was raised, and it was decided against the contention of the appellant therein. In that case it was said:

"It is complained that the court erred, and thus seriously prejudiced the rights of the accused by instructing the jury that it was not necessary to the consummation of a crime of the character of the one with which the defendant is here charged that there should exist and be shown an intent to commit the act, and that, therefore, all that the jury were required to find, to reach a verdict of guilty, was that the defendant kept a place of public resort for the purpose of selling and distributing alcoholic liquors within no-license territory—that the specific intent with which the act was done was immaterial. We think the rule as declared by the instruction is correct, in so far as it relates to a case of this character. The decisions appear to be quite uniform upon the proposition that where, in invoking and applying the police power, the Legislature has prohibited certain acts and denounced them as criminal, the mere commission of such acts, regardless of the intent with which they were committed, is sufficient to constitute the crime so denounced. There are, perhaps, certain exceptions to this rule, as, for instance, where the statute itself uses language in describing or defining the crime indicating that scienter or a specific intent to do the act was essential to constitute it a crime. But particularly in cases interdicting the traffic in intoxicating liquors the rule generally is that the mere commission of the act is sufficient to consummate the offense, and in the present case the law authorizing the establishment of 'no-license territories' uses no language indicating an intention in the Legislature to make the intent with which the act of keeping a resort for the purpose of selling intoxicating liquors is committed an ingredient of the offense. In Commonwealth v. Holstein, 132 Pa. St. 357 (19 Atl. 273), the court, having before it a case in which the defendant had been convicted of the unlawful sale of alcoholic liquor, said: 'It is not necessary to sustain a conviction for selling intoxicating liquors under the act of 1887 for the commonwealth to prove a criminal intent. It is enough to show the sale, when the defendant may, if he can, shield himself behind a license. If the sale is contrary to law, the intent has nothing to do with it. A contrary ruling would fritter away the act of 1887, and conviction under it would be rare.'"

Digitized by Google

And in the case of People v. Allen, reported in 37 Cal. App. at page 180, 174 Pac. at page 374, the case of People v. Pera, 36 Cal. App. 292, 171 Pac. 1091, is referred to and approved, and it is added:

"Section 13 of the act of April 4, 1911 (Stats. 1911, p. 599), provides as follows: 'It shall be unlawful for any person * * * within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof.' (Nothing in said section 16 has reference to the facts in this case.) Plainly the rule applies in cases arising under this section, as it did in People v. Pera, which arose under the same statute though for a different offense."

[3] Under those decisions it must be held that it is the law in this state that the selling of alcoholic liquors containing 1 per cent. or more by volume of alcohol in no-license territory is forbidden, and that it is not a defense for the defendant to prove that he did not know the liquor sold by him contained the prohibited amount of alcohol.

We think the court erred in not giving some of the instructions asked by the defendant's counsel and in giving other instructions than those above referred to.

Upon the question of reasonable doubt the court instructed the jury as follows:

"As the term 'reasonable doubt' is used a number of times in the instructions given, you will bear in mind that it is always used in the same sense. It is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon the testimony, reason, and common sense, and which leaves the mind in such a state that you cannot say that you feel fully and entirely satisfied of the defendant's guilt. In other words, it is that state of mind, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are to act conscientiously upon it."

An instruction, telling the jury that a fair doubt can be based upon reason and common sense, has been repeatedly condemned by the Supreme Court of this state. The latter part of the instruction is in approved language, but the first part weakens its force and effect.

In People v. Paulsell, 115 Cal. at page 12, 46 Pac. at page 734, it is said:

"If experimental departures from the well-established language sanctioned by all courts upon the subject of reasonable doubt are to be here allowed, and each trial court is to venture upon unusual language to express the idea contained in language so often approved, we will be afloat upon a new and unknown sea, and complications will arise in every criminal case coming here which will be very difficult to unravel. In the present case, it is sufficient to say that the court introduced the new and unused phrase 'common sense,' and told the jury that the doubt must be based upon that. Counsel for appellant argues—after giving some of the definitions of common sense to be found in the dictionaries—that this language is merely the equivalent of saying that a jury should convict if they are satisfied of the guilt of the defendant to such a certainty as would influence their minds in the important affairs of life, which was held to be unsound by this court in People v. Brannon, 47 Cal. 96; People v. Ah Sing, 51 Cal. 372, and People v. Bemmerly, 87 Cal. 121. It is sufficient to say, however, that the phrase 'common sense' is about as uncertain as any phrase in the language. When one speaks of common sense, he generally means his own common sense; and there is no warrant for the unnecessary use of such a term when there is apt language to express the idea of reasonable doubt which has been frequently approved and pointed out as the language proper to be used. For this reason the judgment must be reversed."

We hold that it was error to give the instruction as to reasonable doubt, modified by the expression that it must be based upon reason and common sense.

In the same connection, attention is called to the very plain and explicit instruction asked by the defendant, numbered 6, and which was refused by the court. It reads as follows:

"By reasonable doubt is meant that state of the case which, after an entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the guilt of the defendant."

This was a clear statement of the law, and should have been given as requested.

[4] We think also defendant's instruction numbered 5 should have been given. It reads as follows:

"A defendant in a criminal case is never required or expected to prove his innocence, but the burden is on the prosecution to prove the defendant guilty of the crime with which he is charged, and to prove every fact essential to constitute that crime, beyond all reasonable doubt and to a moral certainty; and, if the jury cannot say, after a careful consideration of all of the evidence in this case, that the guilt of the defendant has thereby been established beyond all reasonable doubt and to a moral certainty, it is their sworn duty to acquit the defendant."

We find in the instructions of the court which were given no explicit, clear statement of the defendant's rights as embodied in this proposed instruction.

[5] Also, instruction 8, asked by the defendant, should have been given. It reads as follows:

Digitized by Google

"The court instructs you that under the law no jury should, nor has it the right to, convict the defendant of a crime upon mere suspicion, however strong (nor simply because there may be a preponderance of all of the evidence in the case against him), nor merely because there is or may be strong reason to suspect that he is guilty (but before a jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt)."

The court modified the above instruction by striking out the words inclosed in parentheses, and, as thus modified, gave it to the jury. We think the defendant was entitled to have the instruction read to the jury as presented. It contained an accurate statement of the law and his rights, and he was entitled to have it presented to the jury.

[6] The defendant asked for instruction No. 12, which reads as follows:

"I further instruct you that mere probabilities are not sufficient to warrant a conviction (nor is it sufficient that a greater weight of evidence supports the allegations of the information, if it does), nor is it sufficient upon the doctrine of chances that it is more probable that the defendant is guilty. (To warrant a conviction of the defendant he must be proven to be guilty clearly and conclusively beyond all reasonable doubt, so that there is no reasonable theory upon which he can be innocent when all of the case is considered together.)"

The court struck out all of said instructions embraced within the parentheses, and, as thus modified, gave it to the jury. As asked, it contained a correct statement of the law, and the defendant was entitled to have it given to the jury.

[7] We are of the opinion that the law, as stated in these requested instructions was not covered by the instructions given. The defendant was entitled to instructions telling the jury in clear language the conditions of the evidence that would make it their duty to acquit him.

Some other matters are referred to by defendant's counsel as having occurred at the trial, especially in the impanelment of the jury, which he claims were prejudicial to the defendant's rights, but, as it is not probable that the same incidents will be repeated upon the second trial, we deem it unnecessary in disposing of the case to enter into a discussion as to what effect, if any, such incidents had upon his rights.

For the reasons stated, the judgment is reversed, and the cause remanded for a new trial.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. [8] The petition for a rehearing is denied. We think it necessary to say, however, that we do not approve of all that is said in the opinion of the District Court of Appeal on the subject of the instructions given and refused. The opinion appears to approve the pernicious practice, sometimes indulged in by the trial courts, of repeating over and over again instructions couched in varying language, but embodying the same principle of law. This is especially prevalent with regard to instructions relating to the presumption of innocence, reasonable doubt, and the degree of proof required of the prosecution. Repetitions of this character are not necessary, and should be avoided as far as possible. Several of the instructions criticized in this case were given, in effect, in other instructions, using somewhat different forms of expression, but having the same meaning. The trial judge should take care to give to the jury, once and in clear language, every principle of law applicable to the particular case. When he has done this, he is not required to repeat any of them, no matter how many separate instructions are asked which may include them. Such continual repetition tends to give undue emphasis to the particular point to which they may relate, and operates to confuse the jury in their consideration of the evidence.

[9, 10] The instruction defining reasonable doubt, criticized in People v. Paulsell, 115 Cal. 12, 46 Pac. 734, was approved in People v. White, 116 Cal. 17, 47 Pac. 771, and in People v. Shaughnessy, 110 Cal. 604, 43 Pac. 2. The instruction given on that subject in the present case is not substantially different from that under consideration in the three cases just cited, and we think it should not be considered erroneous, although it is not as full and possibly not as clear as the instruction usually given. We fully approve what is said in the Paulsell Case, to the effect that trial judges should adhere to the well-established precedents in framing or approving instructions on the subject of reasonable doubt, and should avoid any attempt to frame new definitions of the term.

All concur.

Digitized by Google

PEOPLE v. T. WAH HING. (Cr. 503.)

(District Court of Appeal, Third District, California. May 3, 1920. Hearing Denied by Supreme Court July 1, 1920.)

1. **Statutes ⟸114(4)—Title of state Medical Practice Act held sufficiently comprehensive to include punishment for practicing without a certificate.**

Title of state Medical Practice Act, reading "An act to regulate the examination of applicants for license, and the practice of those licensed to treat diseases, * * * to establish a board of medical examiners * * * and to repeal an act entitled 'An act for the regulation of practice of medicine,'" etc., *held* sufficiently comprehensive to include provisions as to punishment of a person holding himself out as entitled to practice medicine without a certificate under section 17, and therefore not violative of Const. art. 4, § 24.

2. **Physicians and surgeons ⟸6(9)—Information charging practice of medicine without a certificate held sufficient.**

Information charging that defendant "did then and there willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted * * * without having at the time of so doing a valid unrevoked certificate from the state medical examiners of the state of California" *held* sufficient in prosecution for violation of Medical Practice Act, § 17, as against contention that it did not give the name of any patient or disease treated or the mode or system of treatment practiced.

3. **Physicians and surgeons ⟸6(10)—Evidence held to sustain conviction for practicing without a certificate.**

In prosecution for practicing medicine without a certificate in violation of Medical Practice Act, § 17, evidence *held* to sustain conviction.

4. **Physicians and surgeons ⟸6(10)—Burden of proving possession of certificate entitling him to practice medicine is on defendant.**

In prosecution for practicing medicine without a certificate in violation of Medical Practice Act, § 17, the state by proving that defendant practiced medicine established a prima facie case shifting the burden on defendant of proving that he had the necessary certificate; such fact being within defendant's knowledge.

5. **Criminal law ⟸789(17) — Instruction on reasonable doubt held not erroneous.**

Instruction: "The term 'reasonable doubt' as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence in the case. It does not mean a doubt which may arise from some mere whim or vagary or from any groundless surmise or guess"—*held* not erroneous.

6. **Criminal law ⟸90(3)—Police court of Sacramento held not to have jurisdiction of prosecution for violation of state Medical Practice Act.**

Charter of City of Sacramento, § 164, subd. 1, giving police court of such city jurisdiction "of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California," did not give such police court jurisdiction over prosecution for violation of the state Medical Practice Act, since the charter provision merely confers on such court, as to misdemeanors committed within the limits of the city under the general laws of the state, concurrent jurisdiction with justices' court of Sacramento county, and does not confer jurisdiction where the maximum penalty is by fine exceeding $500 or imprisonment exceeding six months; such charter provision neither superseding nor conflicting with Pen. Code, § 1425, as to jurisdiction of justices' courts.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

T. Wah Hing was convicted of practicing medicine without a certificate, and from judgment of conviction and from order denying motion for new trial, he appeals. Affirmed.

T. H. Christiansen, Robert B. McMillan, S. Luke Howe, C. E. McLaughlin, and C. P. McLaughlin, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. Defendant was charged by an information filed in the superior court of Sacramento county with a violation of section 17 of the state Medical Practice Act, approved June 2, 1913 (Stats. 1913, p. 722). The information alleges that:

"The said T. Wah Hing on the ——— day of August, 1919, at the county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted in the state of California, without having at the time of so doing a valid unrevoked certificate from the state board of medical examiners of the state of California."

The defendant was tried and convicted and prosecutes this appeal from the judgment and the order denying his motion for a new trial.

[1] The defendant attacks the constitutionality of the law on the ground that the title of the act is not sufficiently comprehensive to include the matters contained in said section 17. A similar objection was raised to the title of this act in People v. Jordan, 172 Cal. 391, 156 Pac. 451, and was decided adversely to appellant's contention. In that case it was contended that the title of the Medical Practice Act violated the provisions of section 24 of article 4 of the Constitution, in that the title was not sufficiently expressive of its contents. The court, in passing upon this contention, said:

Digitized by Google

"It is first contended that the title of the act is not sufficiently expressive of its contents, and that section 24 of article 4 of the Constitution is violated thereby. Analyzed further, the contention is that the title of the act does not suggest a purpose of the Legislature to regulate the business or practice of those who engage in healing or treating the sick or deformed, but to regulate only the matter of the examination of those who chose to apply for certificates, which documents are to merely certify that the holders thereof have been duly examined and licensed. This contention, if it were conceded to be well founded, would result in a construction to be given to the act which would permit all persons whomsoever to practice medicine, or any mode or system of healing, without being licensed, and would make the matter of procuring a license or certificate merely optional. Admittedly the body of the act is broad and comprehensive enough to regulate the practice of all persons who shall engage in the business of treating the sick or deformed. * * * A liberal rule of construction has been adopted, however, in the interest of protecting meritorious legislation from being declared void through inartificially constructed titles. 'The main object of this provision is to prevent legislators and the public from being intrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. * * * It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents.' Abeel v. Clark, 84 Cal. 226 (24 Pac. 383). * * * To our minds, by the title of the act here being considered, wherein it set forth the purpose to regulate the examination of applicants for license to treat the sick or deformed, there is suggested at once that the state has proposed to require examinations to be made and licenses to be issued to persons who shall engage in that business. The prohibition that persons not so licensed shall be denied the right to practice seems pertinent and germane to the subject expressed in the title. Several of the illustrative cases given in Ex parte Liddell, 93 Cal. 633 (29 Pac. 261), are directly in point.

"Our conclusion on this branch of the case is that the objection as stated in the briefs that the title of the act is not sufficient in its expression of the purposes declared in the body of the act itself is without merit."

[2] The defendant claims that the information is insufficient in that it "does not conform to the sections of the Penal Code (sections 950, 952) requiring clearness and certainty in charging crime"; that it does not give the name of any patient, or disease treated, the mode or system of treatment practiced, but "charges that defendant practiced, attempted to practice, and held himself out as practicing a mode or system of healing the sick and afflicted."

The information in this case is substantially the same as the information that was before the Supreme Court in People v. Ratledge, 172 Cal. 401, 156 Pac. 455, and which the court held sufficiently charged a violation of section 17 of the said Medical Practice Act. The court said:

"The information is attacked upon the ground that it charges 'the crime of practicing medicine without a certificate from the medical board,' the contention being that no such crime is denounced by the law. It is true that the statute does not contain the quoted words, but clearly they are used merely for purposes of general description of the offense as they are followed by the averment that the crime was 'committed as follows: That the said T. F. Ratledge on the 30th day of October, 1914, at, and in the county of Los Angeles, state of California, did willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid, unrevoked certificate authorizing him to practice a system or mode of treating the sick and afflicted in this state from the board of medical examiners of the state of California.' This sufficiently charges a violation of section 17 of the Medical Practice Act (Stats. 1913, p. 734), and is not open to the criticism that it seeks to impute many offenses to defendant because any one of the acts or omissions averred and conjunctively pleaded would suffice as the basis of an information. [Citing cases.] This information does not fall within the rule declared in People v. Plath, 166 Cal. 227 (135 Pac. 954)."

It is argued on behalf of appellant that the evidence is insufficient to justify the verdict. It appears from the record that on the 13th day of August, 1919, one Mrs. Francis Sweeney, who was then employed by the state board of medical examiners, called at the office of the defendant in Sacramento and asked him if he was Dr. T. Wah Hing, to which defendant replied that he was. She told him that she was afflicted with nervousness and not able to sleep. He felt her pulse, said he would give her some medicine to cure her, and gave her a package of herbs, giving directions as to their use and charged her $3.50, which she paid. She then left his office and returned shortly after with one Edward P. Morse, then a special agent of the state board of medical examiners. The defendant stated to said Morse that he had treated Mrs. Sweeney for nervousness and prescribed medicine for her and had charged her $3.50. He told Morse that he was a regular practicing physician, and had been for 20 years in Sacramento; that he treated any kind of a case; that he gave internal and external remedies. He took Morse to his drug store in the rear of this office, where there was a large assortment of herbs and drugs. He also exhibited to Morse a record of his patients showing various names and dates, and amounts against those names. There was also introduced in evidence a card which reads:

"Telephone Main 725. Dr. T. Wah Hing, Chinese Physician and Surgeon, also Eye, Ear, Nose and Throat. Office 725 J Street, Sacra-

Digitized by Google

mento, Cal. Office Hours, 9 to 11 a. m., 1 to 3, 7 to 9 p. m."

This card was handed to Mr. Morse by the defendant.

[3] This evidence is ample and sufficient to sustain the conviction of the defendant, and in addition to the foregoing there was other and additional evidence which tends strongly to support the verdict.

The defendant claims that the judgment should be reversed for the reason that no proof was offered showing that the defendant did not, at the time charged in the information have a valid, unrevoked certificate from the state board of medical examiners. A similar question was before the Supreme Court in People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402. In that case the defendant was charged by information with the crime of willfully and unlawfully practicing medicine without having first procured a certificate to so practice as required by law. At the trial uncontradicted evidence was introduced showing that defendant had been practicing medicine, but no evidence was introduced on either side showing, or tending to show, that defendant had not a certificate to so practice as required by law. The court instructed the jury, in effect, that the burden was upon the defendant to establish that he had a certificate to practice medicine as provided by law, and if he failed to prove that he had such certificate, then it must be taken as true that he had not procured a certificate to so practice medicine.

[4] The court, in sustaining this instruction, among other things, said:

"Mr. Greenleaf, in his work on Evidence, vol. 1, § 79, under the heading 'Negative Allegations,' says: 'But when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.' * * *

"In 1 Jones' Law of Evidence, § 179, under the heading 'Burden as to Particular Facts Lying Peculiarly Within Knowledge of a Party,' is is said: 'This is often illustrated in prosecutions for selling liquors or doing other acts without the license required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and, if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him; but the greater number of authorities hold that where a license would be a complete defense the burden is upon the defendant to prove the fact so clearly within his own knowledge.' * * *

"We think the rule upon this subject generally recognized and followed the correct one, and therefore conclude that the court did not err in giving the instruction complained of, and that the verdict was justified by the evidence."

[5] Complaint is made that the court erred in its instructions upon the doctrine of reasonable doubt. After fully instructing the jury on this subject in the oft-approved language of Chief Justice Shaw, the court gave the following instruction, which the defendant claims is error:

"The term reasonable doubt as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence of the case. It does not mean a doubt which may arise from some mere whim or vagary or from any groundless surmise or guess."

A similar instruction to this was held by this court not to be erroneous in the case of people v. Del Cerro, 9 Cal. App. 764, 100 Pac. 887, and the court there said "that, rightly understood, the instruction is in reality within the definition of the doctrine of reasonable doubt as given by Chief Justice Shaw."

Other objections are based upon the modification and the refusal of certain instructions. We have examined these objections, and, without entering upon a discussion of them in detail, we think it is sufficient to say that they are without merit. The jury was very fully and fairly instructed by the court.

Finally, the appellant claims that under the charter of the city of Sacramento, ratified by the Legislature in 1911 (Stats. 1911, Extra Session, p. 305), the police court of said city has jurisdiction over all misdemeanors, no matter what may be the amount of the fine or the length of imprisonment. This contention of appellant is based on the first subdivision of section 164 of the said charter, which provides as follows:

"Said police court shall have jurisdiction: (1) Of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California."

[6] We cannot agree with appellant in this contention. It is nowhere provided in said charter that the police court of the city of Sacramento shall have jurisdiction of misdemeanors where the maximum penalty is by fine exceeding $500, or imprisonment exceeding six months.

This court held in the Matter of the Application of Yee Kim Mah, 31 Cal. App. 196, 159 Pac. 1060, that—

The provisions of said charter creating a police court in the city of Sacramento did not

Digitized by Google

"confer upon the court so established exclusive jurisdiction of all simple misdemeanors committed within the limits of the city. The word 'exclusive' is nowhere used in those provisions. It is obvious to our minds that the most that was intended by those provisions of the charter, so far as are concerned misdemeanors committed under the general laws of the state, is that the police court of said city shall have concurrent jurisdiction with the justices' courts of the county of such misdemeanors when they are committed within the limits of said city."

It is obvious from the foregoing that the jurisdiction of the said police court as to misdemeanors committed under the general laws of the state is the same as the justices' courts of Sacramento county. There is no provision of said charter that supersedes or that is in conflict with or repugnant to any of the provisions of sections 1425 of the Penal Code.

The judgment and order appealed from are affirmed.

We concur: HART, J.; BURNETT, J.

LARAMIE GROCERY CO. v. BELL.
(No. 843.)

(Supreme Court of Wyoming. July 7, 1920.)

Appeal and error ⟸635(2)—Where record showed no judgment rendered, writ of error dismissed.

Where the record showed that court rendered judgment for plaintiff on first cause of action and recited that, to the findings and judgment upon the second and third causes of action, plaintiff excepted, but failed to show that any judgment had been rendered or entered against plaintiff on such causes, *held* that, where sufficient time had elapsed to correct the error, if any, writ of error will be dismissed.

Error to District Court, Albany County; V. J. Tidball, Judge.

Action by the Laramie Grocery Company against Clara Bell, as administratrix of the estate of Edwin J. Bell. Judgment in part for plaintiff, and plaintiff brings error. Writ dismissed.

Heard on motions to strike the bill of exceptions and to return the bill to the district court for correction and amendment.

Gibson & Sullivan, of Laramie, for plaintiff in error.

N. E. Corthell and C. P. Arnold, both of Laramie, for defendant in error.

POTTER, J. This case was brought to this court on error for the review of a judgment alleged by the petition in error to have been recovered against the plaintiff in error by the defendant in error upon the second and third causes of action set out in the petition of plaintiff in error in a certain action brought by it against the defendant in error in the district court. The case was heard in this court in January, 1918, upon two motions by the defendant in error, one to strike the bill of exceptions, and the other to return the bill to the district court for correction and amendment of a certain recital to the effect that it contains all the evidence relating to certain negotiations, contracts, and statements of account. But after the hearing we discovered, upon an examination of the record, that, according to the showing thereby, no judgment had been rendered or entered upon the said second and third causes of action, or either of them.

The attention of counsel for the respective parties was thereupon called to the showing made by the record as to the alleged judgment, making a decision upon the motions presented improper unless and until the record might be amended to show the rendition of the judgment complained of. Sufficient time having long since elapsed for any such correction if it might properly be made and upon sufficient grounds, and, nothing having been done to change or add to the record here, we see no reason for further continuing the case upon the docket of this court.

The judgment shown by the record here recites that the court "doth now find generally for the plaintiff and against the defendant upon the first cause of action, and for the defendant and against the plaintiff upon the second and third causes of action respectively," and it then further states:

"It is therefore considered and adjudged by the court that the plaintiff, the Laramie Grocery Company, a corporation, do have and recover from the defendant, Clara Bell, as administratrix of the estate of Edwin J. Bell, deceased, defendant, upon the first cause of action, the sum of $532.18, together with the costs of this action, taxed at the sum of $6, and that the said administratrix pay the said amount in due course of administration so ascertained to be due to the plaintiff from the defendant, and to said findings and judgment upon the second and third causes of action plaintiff excepts."

The judgment clearly shows the finding for the defendant upon the second and third causes of action, but, apparently through inadvertence, it fails to include an order for a recovery thereon, although it recites that plaintiff excepts to the findings and judgment upon said causes of action. Since plaintiff in error complains only of a judgment which does not appear by the record to have been rendered or entered, the questions presented as to the bill of exceptions are immaterial, and for the reasons stated we think the proceeding

Digitized by Google

in error should be dismissed. It will be so ordered.

Dismissed.

BEARD, C. J., and BLYDENBURGH, J., concur.

BOARD OF COM'RS OF OURAY COUNTY v. BOARD OF COM'RS OF SAN JUAN COUNTY. (No. 9420.)

(Supreme Court of Colorado. June 7, 1920.)

1. **Appeal and error ⟸1017—Finding of fact of the trial court is conclusive, though part of testimony was heard by referee.**

The appellate court will not sift and weigh the evidence, but where there is some competent evidence in support will accept the trial court's findings of fact just as a verdict, where some of the evidence was heard before the court, though part was heard before a referee.

2. **Appeal and error ⟸1008(1)—Where court, with consent of parties, viewed disputed boundaries, his finding is entitled to additional weight.**

In an action involving the location of a boundary between two counties fixed by Gen. Laws 1877, § 385, where the trial judge, who was familiar with the locality, with consent of the parties, viewed the disputed boundaries, his finding is entitled to additional weight in the appellate court.

In Banc.

Error to District Court, San Juan County; Jesse C. Wiley, Judge.

Action by the Board of Commissioners of the County of Ouray against the Board of Commissioners of the County of San Juan. Judgment for defendant, and plaintiff brings error. Affirmed.

Carl J. Sigfried, of Ouray (William A. Reef, of Denver, of counsel), for plaintiff in error.

W. A. Way, of Silverton (Russell & Reese, of Durango, of counsel), for defendant in error.

BAILEY, J. This action was begun in April, 1907, to determine the boundary line between the counties of Ouray and San Juan. The trial court found in favor of the latter county, and the cause was brought here for review. Judgment was reversed and the cause remanded for a new trial. 58 Colo. 67, 143 Pac. 841. Upon the second trial judgment was again entered for San Juan County, and the cause is once more here upon writ of error.

The boundary in dispute was fixed by the General Laws of 1877, § 385, as follows:

"Commencing at a point on the boundary line between the Counties of Hinsdale and San Juan, due east of the junction of Mineral Creek and the main branch of the Uncompahgre River; thence due west through said junction to the summit of the divide between Red Mountain Valley and Poughkeepsie Gulch."

The question of fact determined in the former action, and by this one as well, is whether the stream designated by the State Engineer is the Mineral Creek mentioned in the statute. As was stated in our former opinion, supra:

"The contention is not as to any ambiguity in the language of the statute, but as to where the junction of Mineral Creek and the main branch of the Uncompahgre River is."

[1] It appears that some of the evidence upon which the judgment rests was taken before a referee, and therefore it is contended that the rule that a judgment will not be disturbed on review, if there is competent evidence to support it, is not here involved because the trial judge had no opportunity to hear the witnesses, and observe their demeanor upon the witness stand. The record discloses, however, that some of the testimony was given before the trial court, and as to those witnesses opportunity was given to judge of their credibility by their manner of testifying, and their appearance on the stand. In Bugh v. Rominger, 15 Colo. 452, 24 Pac. 1046, the case was not tried wholly before a referee, but, as here, testimony adduced upon a former trial was introduced, and likewise additional testimony by parol. In declaring that this circumstance made it unnecessary for the appellate court to sift and weigh the evidence, it was said:

"It is clear, therefore, that the case does not come within the principle announced in Sieber v. Frink, 7 Colo. 152, wherein it is declared to be the duty of the Appellate Court to sift * * * the evidence with a view to a just determination of the controversy, but rather within the general principle which has been repeatedly announced, that this court will neither disturb the verdict of the jury nor the finding of a trial court, unless it is well satisfied that the judgment or the verdict is so unsupported by the evidence as to be against its manifest weight, or the record compels the conclusion that the verdict or judgment was the result of those influences, motives or considerations which the law does not permit to control the findings of either court or jury."

A like rule was announced and approved in McDonald v. Wirt, 38 Colo. 84, 88 Pac. 179.

[2] Moreover it appears from the record that the trial judge was familiar with the country involved in the dispute. That prior to making findings and the entering of the decree he viewed the locality in question with the knowledge and consent of both parties, and with attorneys representing both sides participating therein. Under these circumstances it cannot be said that the trial court is no better able to pass upon the evidence than is this court.

Digitized by Google

In any event we have carefully read and considered the record and find that the preponderance of evidence is in support of the findings of the judge of the District Court and of the decree there rendered. Upon the first trial of this cause the judge reached the same conclusion on the facts as was reached in the trial of which this proceeding is in review. Upon the record there appearing to be no reversible error the decree of the trial court should be and hereby is affirmed.

Judgment affirmed.

TELLER, J., not participating.

GREENLEES v. CHEZIK. (No. 9832.)

(Supreme Court of Colorado. June 7, 1920.)

1. Bills and notes ⇐475—Plea of payment admits the original liability.

A plea of payment admits the original liability on negotiable instruments.

2. Pleading ⇐36(3)—Admission of plea of payment cannot be contradicted by party making it.

Admission of plea of payment cannot be contradicted by party making it.

3. Bills and notes ⇐474—Payment and plea thereof is recognition of execution, delivery, and consideration.

Payment of negotiable paper, and a plea thereof, is the most solemn recognition of execution, delivery, and consideration, and one so pleading is, in the absence of fraud and duress, estopped to deny the admission.

4. Bills and notes ⇐65—Delivery of a note to enable the payee to use proceeds gives power to negotiate.

Delivery of a note under an agreement that the payee should transfer lots to the maker at a uniform price, although they were to be purchased from various owners, gave the payee the right to negotiate the note, which was for a large amount.

5. Bills and notes ⇐351—Transferee after maturity bound by payment.

One who acquired title after maturity, where payment had been made to the original payee, is bound by payment.

6. Appeal and error ⇐1011(1)—Finding on conflicting evidence not disturbed.

Finding of the trial court on conflicting evidence will not be disturbed by the appellate court.

7. Estoppel ⇐72—Where agent of maker was guilty of fraud in negotiating note, loss should fall on maker.

Where one to whom a maker intrusted the possession of a note was guilty of fraud in negotiating note, the loss should fall on the maker who made the fraud possible rather than a bona fide holder who paid good and adequate consideration.

8. New trial ⇐104(1)—Cumulative evidence is insufficient to justify.

Cumulative evidence is insufficient to justify new trial.

9. New trial ⇐102(7)—Not granted on account of public records of which party was charged with knowledge.

Alleged newly discovered evidence, consisting of public records of which a party had presumptive knowledge and of which by the exercise of diligence he might have had actual knowledge, etc., will not warrant new trial.

Department 1.

Error to District Court, Pueblo County; S. D. Trimble, Judge.

Action by J. A. Chezik against J. R. Greenlees. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. T. McCorkle and S. S. Packard, both of Pueblo, for plaintiff in error.

Benjamin F. Koperlik, of Pueblo, for defendant in error.

BURKE, J. Plaintiff in error, J. R. Greenlees, executed and delivered to one Mrs. Louise Wiley his promissory note for $1,750. Mrs. Wiley negotiated this note to defendant in error, J. A. Chezik. Chezik brought suit thereon against Greenlees and recovered judgment. From that judgment this writ is prosecuted and the cause is now before us on application for supersedeas. Extended briefs have been filed, and no reason appears why the cause should not now be finally disposed of. The validity of the judgment in question depends upon certain defenses to this note, but two of which demand consideration.

[1, 2] It is asserted that delivery of the note to Wiley was conditional, the condition being that it should be used only for the purchase of lots in the city of Pueblo, which were to pass to Greenlees under a contract which he had with Wiley; that this condition was never fulfilled; and that Chezik took the note with full knowledge of these facts; hence his title is invalid. It is clear that the lots mentioned were to be purchased from different owners at different prices and transferred to Greenlees at a uniform price of $40 each. It is therefore apparent that the delivery of the note to Wiley carried with it the right of negotiation, without which it would have been valueless. Moreover it is alleged, and undisputed, that this note was paid by Greenlees to Wiley, without cancellation or delivery. A plea of payment admits the original liability. Mohr et al. v. Barnes, 4 Colo. 350. Such admission by plea cannot be contradicted by the party making it. Harvey et al. v. D. & R. G. R. R. Co., 56 Colo. 570–572, 139 Pac. 1098; Hamilton v. Moore, 4 Watts & S. (Pa.) 570.

[3] Payment by the maker of negotiable paper, and plea thereof, is the most sol-

Digitized by Google

emn recognition of execution, delivery, and consideration, and these things he is thereby estopped to deny. Such estoppel might, of course, be removed by evidence of fraud, duress, etc., but this record discloses no such evidence.

[4] Much space is devoted in these briefs to a ruling on the evidence of an attorney who testified that he advised Chezik of the conditions under which Wiley received the note. This testimony the trial court finally excluded on the ground that it was a confidential communication made by the attorney to Chezik in the course of professional employment. The confidential nature of the communication, as well as the employment, are denied and argued at length. Both become immaterial in view of what has already been said of the implied authority to Wiley to negotiate the note and Greenlees' recognition of her title by payment.

[5, 6] The second defense is that Chezik took title to this note after maturity, in which event he would, of course, be bound by the payment, irrespective of knowledge. On this subject the trial court found for defendant in error on conflicting evidence, and the rule is well established that such a finding will not be disturbed here. Sayre v. Leonard, 57 Colo. 116–119, 140 Pac. 196; Hallack et al. v. Stockdale et al., 14 Colo. 198–200, 23 Pac. 340; County Com'rs v. Bd. Co. Com'rs, No. 9420, 190 Pac. 666, this day decided.

[7] Greenlees left this note in the hands of Wiley from March 14, 1914, and it was not due until eight months from that date. He thus put it in her power to negotiate it regardless of the conditions under which it was delivered and so defraud either the purchaser or the maker. Chezik not only paid a good and valuable consideration for the note but an adequate consideration. As between Greenlees and Chezik, the loss which must now be sustained through the bad faith of Wiley must fall upon Greenlees, whose fault made it possible to perpetrate the fraud. Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182, 72 Pac. 873.

[8] Plaintiff in error filed a motion for a new trial, which was overruled. The only ground of this motion requiring our consideration is that of newly discovered evidence. The evidence, however, is merely cumulative, and is insufficient to justify the motion. Martin v. Hazzard Powder Co., 2 Colo. 596–600.

[9] Moreover it consists of public records of which Greenlees had presumptive knowledge, and of which, by the exercise of diligence during the trial, he might have had actual knowledge. 29 Cyc. 885; Weimer v. Lowery, 11 Cal. 104–113.

For the foregoing reasons the supersedeas is denied and the judgment affirmed.

GARRIGUES, C. J., and TELLER, J., concur.

FOWLER, County Superintendent of Public Instruction, et al. v. PARK et al. (No. 10977.)

(Supreme Court of Oklahoma. June 15, 1920.)

(Syllabus by the Court.)

Injunction ⟸78—Quo warranto ⟸8—Quo warranto held proper to test validity of organization of consolidated school district; injunction inapplicable.

After a municipal corporation, such as a consolidated school district, has been organized, quo warranto is the proper remedy to determine the question of its legal existence or the validity of its organization. The courts are without power so to do by injunction, or to restrain existing officers from exercising their proper functions.

Appeal from Superior Court, Pottawatomie County; Leander G. Pitman, Judge.

Action by Ed Park and others against H. M. Fowler, County Superintendent of Public Instruction, and others, for an injunction. Judgment for plaintiffs, and defendants appeal. Reversed and remanded, with instructions to dismiss.

Joe M. Adams and W. L. Chapman, both of Shawnee, for plaintiffs in error.

Lydick & Arrington and Goode & Dierker, all of Shawnee, for defendants in error.

McNEILL, J. This action was commenced in the district court of Pottawatomie county by Ed Park, as plaintiff, against H. M. Fowler, county superintendent of public instruction, as defendant, to enjoin the said county superintendent from declaring a consolidated school district organized and declaring three school districts disorganized. The petition alleged that Ed Park is an elector and taxpayer of school district No. 113 of Pottawatomie county, and the defendant H. M. Fowler is superintendent of public instruction of said county; that certain petitions claiming to be signed by the electors of school districts Nos. 113, 22 and 25 of said county, had been filed with the county superintendent, asking that the election be called for the purpose of voting on the question of whether said three school districts should be consolidated into one consolidated school district. Numerous allegations were made that the petitions were not properly signed, and that the district comprised less than 25 square miles, and had an assessed valuation of less than $500,000. Plaintiff alleged that an election had been held, and that the people of the district had voted to consolidate said districts, and the county superintendent was about to declare the consolidated district organized, and the three districts disorganized. Plaintiff alleges that the county superintendent was without juris-

Digitized by Google

diction to call the election, and all the proceedings thereunder were void, and plaintiff asked that the county superintendent be enjoined from taking any further steps in declaring the district consolidated, or in dissolving the old school districts.

On the same date the petition was filed the county judge issued a restraining order, enjoining the county superintendent from further proceeding in the organizing of the new district and from dissolving the old districts, and made said order effective until June 17, 1918, at 10 a. m., at which time the order provided the injunction was to be set for hearing before the district judge, and the restraining order should be effective upon plaintiff giving a bond in the sum of $500.

To this petition, a demurrer was filed. Thereafter the case was transferred to the superior court, and an amended and supplemental petition was filed, setting forth that the county superintendent had made an order dissolving the old school districts, and had organized a consolidated district, and that R. L. Chancellor, N. G. McCarter, and J. V. Howell were officers of the new district, and that said directors had called an election for the 8th day of August to vote an extra levy to conduct school in said consolidated district. School District No. 113 filed a plea of intervention in the case, and was made a party plaintiff, and Messrs. Chancellor, McCarter, and Howell, the officers of the new district, were made parties defendant. The proceedings sought to enjoin the officers of the consolidated school district upon the amended and supplemental petition from performing the proper functions of their offices, as officers of the consolidated school district, and to declare the consolidated school district disorganized. To this petition the defendants demurred for the reason the amended supplemental petition did not state facts sufficient to constitute a cause of action, and that the petition shows that plaintiff had no interest in said suit sufficient to maintain said cause of action. The demurrers were overruled, and the defendants filed their answer, and the case was tried to the court, and the judgment rendered for the plaintiff. The court rendered judgment, declaring the order of the county superintendent disorganizing school districts Nos. 113, 22, and 25 void, and the order organizing the said districts into a consolidated district null and void, and enjoined the directors of the consolidated district from acting as directors of said school district, and enjoining the county superintendent from making any further orders in reference to the organization and disorganization of said districts.

For reversal of said cause, plaintiff in error contends: First, that the court erred in overruling the demurrer of plaintiff in error to the petition of defendants in error, for the reason the amended and supplemental petition failed to state facts sufficient to constitute a cause of action in favor of plaintiffs Ed Park or school district No. 113 and against the defendants, and failed to show any actionable right in either of said plaintiffs. It is further contended that the court erred in rendering judgment in favor of plaintiff and against the defendants, for the reason the evidence was insufficient to support said judgment.

On the trial of the case, the plaintiffs produced the county superintendent, who testified that he had made an order consolidating said school districts, and the order was introduced in evidence, dated July 28, 1918, which order disclosed that the three defendants McCarter, Chancellor, and Howell were the officers of said consolidated school district. The evidence introduced on behalf of the plaintiffs was an attack on the sufficiency of the petition filed with the county superintendent, prior to his calling the election, and the question as to the assessed valuation of the school district.

As to whether the petition stated a cause of action in favor of plaintiffs Ed Park and school district No. 113, this court has passed upon the identical question here presented in the case of Earlboro Tp. v. Howard, 47 Okl. 455, 149 Pac. 136, where the court stated as follows:

"After a municipal township has been organized, quo warranto is the proper remedy to determine the question of its legal existence or the validity of its organization. The courts are without power so to do by injunction, or to restrain existing officers from exercising their proper functions."

In the case of Stiles, Treasurer, v. City of Guthrie, 3 Okl. 39, 41 Pac. 388, we held:

"When considering this question, however, as applied to the right of a private citizen to maintain an action where his own separate and distinctively private interests are not involved, the Supreme Court of Kansas has uniformly held, under our Code, that a private person cannot, by virtue of being a citizen and taxpayer, maintain an action against public officers where the act complained of affects only the interests of the public in general, and not those of a private person in particular."

Such was the holding of this court in the case of Thompson v. Haskell, 24 Okl. 76, 107 Pac. 700; State v. Armstrong, 27 Okl. 810, 117 Pac. 332; Armstrong v. State, 29 Okl. 161, 116 Pac. 770, Ann. Cas. 1913A, 565, where the court stated as follows:

"If the action be for usurping a franchise by a corporation, it should be against the corporation, but, if for usurping the franchise to be a corporation, it should be against the particular persons guilty of the usurpation by assuming to act in a corporate capacity, and not against the corporation as such."

Digitized by Google

See, also, Smith v. State, 47 Okl. 682, 149 Pac. 884. The rule is stated in 32 Cyc. 1415, as follows:

"In the absence of statutory provision to the contrary, quo warranto proceedings are held to be the only proper remedy in cases in which they are available. Thus they are held to be the exclusive method of questioning the legality of the organization or a change in the territory of the quasi public corporation, such as a school district, or a drainage district, or of determining the right to hold and exercise a judicial or other public office, or to enforce the forfeiture of a corporate franchise, to attack the validity of the organization of a corporation or to try title to an office therein, and when the remedy by quo warranto is available, it is held that there is no concurrent remedy in equity unless by virtue of statutory provision."

32 Cyc. 1424, states as follows:

"Quo warranto is the proper, and in the absence of statute the exclusive, proceeding to determine the question of the legal existence or validity of the organization of a municipal corporation, such as a city or village, a township or a school district, and in such proceedings it may be shown that the incorporation is void because of fraud in securing the charter or in the organization of the municipality."

The only relief sought by the amended and supplemental petition was to test and determine the validity of the organization of the consolidated school district. Following the cases heretofore cited, the petition failed to state facts sufficient to constitute a cause of action in favor of the plaintiffs, and the demurrer to the amended and supplemental petition should have been sustained, unless it can be said that by reason of the allegations in the petition that the superintendent of public instruction executed the order consolidating the new school district and dissolving the old district, when he was enjoined from so doing by a restraining order, and said orders were made in violation of said injunction and by reason of said allegation, the same stated a cause of action. Counsel for defendants in error do not brief the case upon this theory. These allegations might be sufficient to state a cause of action in favor of the plaintiffs. Conceding the same does, still the judgment would have to be reversed for the reason there was no evidence to support this allegation in the petition. The order of the county court, dated June 12th, which enjoined the superintendent of public instruction from organizing the consolidated school district and from disorganizing the old school district was made effective until the 17th day of June. The record does not disclose that this order was ever extended in force and effect after the 17th day of June, and no contention is made in the brief that the same was ever so extended. The case is tried on the theory the petition stated a cause of action by reason of the other allegations contained in said petition. The only evidence introduced was upon the question of irregularities of the proceedings in organizing said consolidated school district.

The defendant in error relies upon the cases of Board of Education of City of Pond Creek v. Boyer, 5 Okl. 225, 47 Pac. 1090, School District No. 44, Caddo County, v. Turner, 13 Okl. 71, 73 Pac. 952, and Cleveland v. School District No. 71, Grady County, 51 Okl. 69, 151 Pac. 577, but these cases are not in point. An examination of each of those cases discloses that the proceedings were to enjoin the officials from doing a particular act, and it was not the purpose of those cases to test the validity or regularity of the organization of the municipal organization. The only purpose of the proceeding in this case was to determine the question of the legal existence of the consolidated school district, and the proper proceeding to determine this question is by quo warranto, and such a proceeding cannot be maintained on behalf of a private individual by injunction.

For the reasons stated, the judgment of the court is reversed and remanded, with instructions to dismiss the plaintiffs' petition.

RAINEY, C. J., and HARRISON, KANE, PITCHFORD, and JOHNSON, JJ., concur.

COLLINS et al. v. INDUSTRIAL SAV. SOC. et al. (No. 9149.)

(Supreme Court of Oklahoma. May 25, 1920. Rehearing Denied June 29, 1920.)

(Syllabus by the Court.)

Jury ⟸14(4)—Where, in foreclosure, personal judgment is sought, defendant entitled to jury.

Under section 4993, Rev. Laws 1910, in a foreclosure proceeding, where a personal judgment for money is sought by plaintiff against defendant, the defendant is entitled to a jury trial, unless a jury is waived or a reference ordered.

Error from District Court, Canadian County; Edward Dewes Oldfield, Judge.

Suit by the Industrial Savings Society against Estella Collins, and others. Judgment was rendered against defendants Collins, in favor of plaintiff and certain codefendants, and defendants Collins bring error, in so far as relief was awarded to plaintiff. Reversed and remanded.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

W. M. Wallace, of El Reno, for plaintiffs in error.

Fogg & Bennett, of El Reno, for defendants in error.

BAILEY, J. On the 25th day of July, 1916, suit was commenced in the district court of Canadian county by the Industrial Savings Society as plaintiff against Estella Collins, George E. Collins, El Reno State Bank, El Reno Mill & Elevator Company, and Ella K. Holt, as defendants. The material allegations of plaintiff's petition are:

That on or about the 27th day of May, 1911, the defendant Estella Collins purchased of plaintiff 20 shares of its class D capital stock, of the matured value of $50 per share; that thereafter the said Estella Collins and her husband, George E. Collins, borrowed from said plaintiff the sum of $1,000, and that said defendants Estella Collins and George E. Collins executed and delivered to plaintiff a certain bond, conditioned that the said defendants would do and perform all things required of them to be done under the terms and conditions of said bond; and that such defendants would make payments required under the terms of said bond until the shares of stock matured or reached the par value of $50 per share, or until the said Estella Collins had made 94 monthly payments in the sum of $15.30 each. To secure the payment of said sums, and as a part of the same transaction, the said Estella Collins and George E. Collins executed their certain mortgage, dated June 1, 1911, mortgaging to the said Industrial Savings Society certain real estate located in the city of El Reno.

It is further alleged that the defendants Estella Collins and George E. Collins had defaulted in the payment provided for in said bond, and that the entire sum to be paid, under the terms and condition of said bond, was due, it is alleged that said Industrial Savings Society had paid the sum of $18 for insurance upon the property mortgaged by said defendants Estella Collins and George E. Collins, and that the said defendant in error was entitled to recover of said plaintiffs in error the sum of $651.48, together with the sum of $65.14 as attorney's fees. The El Reno State Bank, El Reno Mill & Elevator Company, and Ella K. Holt are alleged to claim some right, title, and interest in and to the property mortgaged to the said Industrial Savings Society, and judgment is prayed against plaintiffs in error in the amount and sums above alleged, and for judgment against the defendants El Reno State Bank, El Reno Mill & Elevator Company, and Ella K. Holt, adjudging that the claims of the said El Reno State Bank, El Reno Mill & Elevator Company, and Ella K. Holt are subordinate and inferior to the rights, claims, and interest of said defendant in error.

The El Reno State Bank, El Reno Mill & Elevator Company, and Ella K. Holt, the defendants, answering, alleged certain rights, title, and interest in and to the land and premises upon which foreclosure was sought to be had, but admitted that such interest was inferior to the claims of said Industrial Savings Society. The defendants Estella Collins and George E. Collins answered, and, after a general denial, admitted the execution of the bond and mortgage sued on, but alleged that the said Industrial Savings Society is a building and loan association, and that at the time said loan was had and secured said society did not comply with the laws of the state of Oklahoma relative to competitive bidding, and that at the time such loan was made that the agent of said Industrial Savings Society required, received, and collected an additional sum as commission for making and securing said loan, and that such loan was illegal and usurious. The borrowing defendants further alleged that they had made 50 monthly payments, of the total sum of $765, together with a further sum of $17.45, wrongfully charged and received by defendant in error, at the time said loan was made, and by cross-petition defendants Estella Collins and George E. Collins charged defendants in error with unlawfully and willfully taking, receiving, reserving, and charging interest in excess of that allowed by law, and praying judgment against said defendants in error in the sum of $830, together with attorney's fees thereon.

At the trial of the cause, after the introduction of the evidence ssubmitted, the court discharged the jury and rendered judgment against the defendants Estella Collins and George E. Collins, and also rendered judgment in favor of the El Reno State Bank, El Reno Mill & Elevator Company, and Ella K. Holt as against the said Estella Collins and George E. Collins. To the rendition of judgment in favor of the El Reno State Bank, El Reno Mill & Elevator Company, and Ella K. Holt against the said Estella Collins and George E. Collins, no exceptions were taken or reserved, and no appeal has been prosecuted to this court from such judgment of th trial court; the appeal here being only fr the judgment of the court as it relate effects the judgment rendered on be the Industrial Savings Society, an plaintiffs in error, Estella Collins E. Collins.

Under our view of this cas signment of error necessary is plaintiffs in error's which is as follows:

"The court erred in refusing to submit th tion of the jury."

As set forth fendant in e judgment sum of $ for certa

with a foreclosure of the mortgage sued on. In their answer plaintiffs in error, after a general denial, admitted a balance due to the defendant in error on the bond in the sum of $219.55, and by way of cross-petition sought to recover of defendant in error usurious interest alleged to amount to the sum of $830, together with attorney's fees.

As noted above, the jury was duly and regularly impaneled, but after the introduction of evidence in the case the court discharged the jury from the further consideration of the case, and proceeded to render judgment in favor of the defendant in error, and against the plaintiffs in error in the principal sum of $616.09, and for judgment foreclosing the mortgage held by defendants in error, and directing the sale of the property in the manner prescribed by law. This, then, was an action instituted by the defendant in error for the recovery of money and for the foreclosure of his mortgage. The pleadings in the case are sufficient to admit the rendition of a personal judgment against plaintiffs in error (Foote v. Sprague, 13 Kan. 155; Lichty v. McMartin, 11 Kan. 565; 2 Jones on Mortgages [7th Ed.] par. 1336), and the judgment rendered is a personal judgment for the debt. Section 4993, Rev. Laws 1910, is as follows:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

This section of the statute has been repeatedly construed by this court. In Maas v. Dunmyer, 21 Okl. 434, 96 Pac. 591, this court, after referring to the Kansas cases construing this identical statute, says:

"The effect of the rule established in all of those cases is that in a foreclosure proceeding, where personal judgment for money is sought by plaintiff against defendant, the defendant is entitled to a jury trial, and that the equitable action of foreclosure is in such case converted into a legal action."

And in the case of McCoy v. McCoy, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146, the court, in considering the statute above quoted, and speaking through Harrison, C., says:

"These statutes, viewed in the light of the authorities above cited, are susceptible of but one logical construction, viz. that all issues of fact, arising in actions for the recovery of money or for the recovery of specific real or personal property, shall be tried by a jury, unless a jury is waived or a reference ordered. They are mandatory both in meaning and language, and to refuse a jury in such cases would constitute reversible error."

The cases above cited have been followed and approved by numerous cases from this court. See, also, Brewer v. Martin, 40 Okl. 350, 138 Pac. 166; Avery v. Hays, 160 Pac. 712. And it may be observed that we are not concerned here with cases where the pleadings admit or the evidence establishes the right to recover the amount claimed to be due, and nothing is left in controversy, but the right to foreclose the mortgage and to subject the property mortgaged to the payment of the amount admitted to be due; and likewise we may suggest that the answer or cross-petition did not present equitable issues for determination.

Plaintiffs in error, having demanded a jury and properly, saved their exceptions to the action of the trial court in excusing and discharging the jury, and having the right, under the authorities cited, to have the issues properly submitted to the jury, this court is of the opinion that the trial court committed reversible error, and the cause is therefore reversed and remanded for a new trial.

RAINEY, C. J., and HARRISON, McNEILL, JOHNSON, and RAMSEY, JJ., concur.

SOUTHWESTERN SURETY INS. CO. v. MARLOW et al. (No. 9532.)

(Supreme Court of Oklahoma. June 8, 1920.)

(Syllabus by the Court.)

1. Principal and agent ⇐99—Principal is bound by the apparent authority of his agent.

A principal is bound by the apparent, as well as by the actual or express, authority given its general agent, where third persons have in good faith acted and relied thereon.

2. Principal and surety ⇐55—Provision in power of attorney authorizing agent to execute bonds held not a restriction.

The Southwestern Surety Insurance Company appointed Schuyler as its agent of Stephens county to execute guardian and administrator bonds in a sum not in excess of $10,000. The power of attorney appointing said agent contained the provision that the bond should be accompanied with a joint control agreement. *Held*, that such provision in the power of attorney requiring the bond to be accompanied with a joint control agreement cannot be construed to limit the authority of the agent or make said agent a special agent, but must be construed as being a condition subsequent, and simply defining the duties of the agent.

3. Banks and banking ⇐119 — Agreement as to deposit will be enforced so long as third persons are not prejudiced.

A bank deposit may be subject to any agreement which the depositor and the bank may make with respect to it, so long as the rights of third persons are not injuriously affected.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

4. Banks and banking ⇐154(6)—Burden of proving that bank which paid out funds on orders of guardian was guilty of misappropriations held upon surety company.

Where a surety company which is liable for defalcation of a guardian by reason of being a surety on the guardian's bond brings an action against a bank where the guardian had deposited the funds of his wards, upon the theory that the bank had wrongfully paid out the funds deposited therein, and upon the trial the court found upon sufficient evidence that the funds were paid out according to written instructions from the guardian, and there is no evidence that the bank received any benefit from any of the funds withdrawn, *held*, the bank having paid out said funds according to the orders of the guardian, in order for the surety company to be prejudiced by reason of such payments it was incumbent upon the surety company to prove that the payments complained of amounted to a misappropriation of the funds, and were not used for the benefit of the minors and were not legal charges against said estate.

5. Appeal and error ⇐1010(1)—Verdict supported by any evidence will not be disturbed.

Where there is any evidence reasonably tending to support the verdict of the jury or the judgment of the court in an action of purely legal cognizance, the same will not be set aside on appeal on the ground that it is contrary to the evidence.

Appeal from District Court, Stephens County; Cham Jones, Judge.

Action by Ether Muncus Marlow and others by their legal guardian, T. B. Reeder, against the Southwestern Surety Insurance Company and another. The insurance company caused the First National Bank of Duncan to be made a party defendant and filed a cross-petition against it. There was a judgment for plaintiffs and in favor of the bank, and the insurance company appeals. Affirmed.

Bond & Kolb and J. M. Sandlin, both of Duncan, for plaintiff in error.

Womack & Brown, of Duncan, for First Nat. Bank of Duncan.

T. B. Reeder, of Duncan, for Ether Muncus Marlow and others.

McNEILL, J. This action was instituted to collect upon a guardianship bond executed by Lillie M. Muncus, née Marlow, as guardian of her minor children, principal, and the Southwestern Surety Insurance Company as surety. The surety company by motion obtained an order from the district court making the First National Bank of Duncan a party defendant, and then filed a cross-petition against the bank, asking judgment against the bank for whatever sum, if any, might be recovered by the plaintiffs against the surety company on the guardianship bond, for the reason that certain trust funds were deposited by the guardian in said bank and paid out wrongfully and fraudulently by said bank, which, in collusion with George W. Marlow, permitted Marlow to check out said funds. A jury was waived and the case was tried to the court.

[1, 2] There was a judgment in favor of the plaintiffs and against the surety company in the sum of $1,000, and upon the cross-petition of the surety company against the First National Bank of Duncan the court found the issues in favor of the bank and dismissed the cross-petition of the Southwestern Surety Insurance Company. From said judgments the surety company has appealed to this court. For reversal of the judgment of the minors against the surety company, it is contended by the plaintiff in error that the bond was executed by P. H. Schuyler, purporting to be the agent of the plaintiff in error; being the contention of the plaintiff in error that Schuyler was only a special agent with limited authority and authorized to execute bonds only in cases where same were accompanied with a "joint control agreement"; being contended that this authority or power was delegated him by written authority. To support this contention the plaintiff in error introduced a copy of the power of attorney of the South-Western Surety Insurance Company, which read as follows:

"Does hereby nominate, constitute, and appoint P. H. Schuyler, of Duncan, Okla., its true and lawful agent and attorney in fact, to make, execute, seal, and deliver for and on its behalf as surety and as its act and deed any and all bonds to be filed in the county court of Stephens county, state of Oklahoma, for guardians, administrators, executors, or curator, said bond not to exceed the sum of $10,000, and where accompanied by joint control agreement, and the execution and acknowledgment of said bond by the said P. H. Schuyler, Duncan, Okla."

The original power of attorney was not introduced in evidence, but it is contended that this was a copy of the power of attorney appointing Schuyler, although the power of attorney was not filed in the county court of Stephens county nor filed any place for record.

On the trial of the case the plaintiff in error produced Mr. Billingsley, the agent of the company, to explain what was meant by "joint control agreement," who testified as follows:

"A. It is an agreement executed by the principal, in this case it would be the guardian or the principal, the guardian together with the bank designated by the guardian, that no funds will be paid out of said bank except upon the check of the guardian properly countersigned by the agent of the company, that to be accepted and agreed to by the bank who is designated as the depository."

Digitized by Google

It is the contention of the plaintiff in error that the agent Schuyler was required to enter into a joint control agreement with the guardian and some bank, wherein it would be agreed between them that the funds of the guardian should be deposited in said bank and not be checked out of said bank unless the checks were countersigned by the agent of the company, and this was a condition precedent before he was authorized to sign said bond, and this made Schuyler a special agent instead of a general agent. With this contention we cannot agree, first, for the reason that the power of attorney was never filed, nor notice of the contents of the same brought to the county court's attention, but, on the contrary, the evidence disclosed that Schuyler had executed numerous guardian bonds for the company in Stephens county, and therefore was holding himself out and acting as general agent for the company. The general rule is that the principal is bound by the apparent, as well as the actual or express, authority given its general agent. The company having delegated to Mr. Schuyler the apparent authority to execute guardian bonds, and he having acted as such agent in executing numerous bonds of like character, the court had a right to presume that in the execution of this bond, being a bond of like character as other bonds he had executed without any objection from the company, he was acting within the apparent scope of his authority. This court, in the case of National Surety Co. v. Miozrany, 53 Okl. 322, 156 Pac. 651, stated as follows:

"A principal is bound by the apparent, as well as by actual or express, authority given its general agent, where third persons have in good faith acted and relied thereon."

Nor can we agree with the contention of counsel for plaintiff in error that the court, in accepting the bond, was obliged to ascertain whether the agent and the guardian and some bank had entered into a joint control agreement. Section 1344, Revised Laws 1910, provides for surety companies executing bonds in judicial proceedings and provides for the court approving the same when executed by said companies. Section 1346, Revised Laws 1910, provides how such contracts shall be construed. Section 1350, Revised Laws 1910, provides when the company shall be estopped of denying liability. The joint control agreement was not a condition precedent to the execution of a bond, but was only a condition subsequent that the company required of the agent—that after he executed a bond he make a contract and agreement with the surety company and with some bank or third party. The court in approving the bond was not obliged to ascertain whether said joint control agreement had been made, nor would the court be required to pass upon the legality of said agreement, nor would said provision in said power of attorney be a condition precedent any more than a provision that the agent should report and return the premiums collected for said bonds to the company. The agent would be bound by these conditions, but third persons would not. Section 6532, Revised Laws 1910, provides the conditions that are to be written into guardians' bonds. The authority to execute such bonds by a surety company having been fixed by statute, and the construction upon the bond being defined by the statute, and the surety's liability being defined by statute, the conditions of the bond having been defined by the statute, the surety company could not, in appointing its agent, impose upon the court, before approving the bond, any additional obligations than those imposed by statute.

The execution of the joint control agreement was a duty imposed upon the agent for the protection of the surety company, and that was the way it desired to control its dealings with the guardian, and the requirement could not be construed to limit the authority of the agent nor make the agent a special agent with limited authority in so far as third persons are concerned.

The next question presented by the plaintiff in error is that the court erred in failing to render judgment in favor of the plaintiff in error and against the defendant the First National Bank of Duncan. The assignment of error simply presents the question as to the sufficiency of the evidence to support the judgment of the court.

[3-5] In determining whether the court committed error, the case, being an action for money judgment, was an action triable before a jury, and the force and effect to be given the judgment of the trial court on appeal is stated in the case of Sallisaw v. Chappelle, 171 Pac. 22:

"Where there is any evidence reasonably tending to support the verdict of the jury or the judgment of the court in an action of purely legal cognizance, the same will not be set aside on appeal on the ground that it is contrary to the evidence."

The testimony disclosed about the following state of acts: There were two accounts carried in the First National Bank of Duncan, one in the name of Lillian N. Marlow, guardian of Ollie Lee Muncus, and one as guardian of Estella D. Muncus. Mrs. Marlow testified that she did not deposit the money in the bank, nor did she ever sign any checks drawn on said accounts except one check payable to a doctor. Most of this money was paid out either by checks or orders during a period of three years. The record disclosed that the bank paid one or two checks that were payable to G. W. Marlow and signed as follows: "Ollie Lee Muncus, by G. W. Marlow." The record further disclosed that there were some three or four charges made against said accounts of the

Digitized by Google

minors for a certain amount of money and credited to the account of Mrs. Marlow. These charges consisted of a couple of $100 charges and one $200 charge.

The defendant bank offered evidence to contradict the testimony of Mrs. Marlow. The cashier testified that the charges made against the guardianship account by the bank and credited to the account of Mr. Marlow were made with the knowledge and by the authority of Mrs. Marlow, and that she knew of said facts. In regard to the checks paid by the bank where the minor's name was signed by Mr. Marlow and the checks charged to the guardianship account, the bank produced a written order signed by Mrs. Marlow dated the same day the money was deposited in the bank, authorizing the bank to charge said checks to the guardianship account when signed by Mr. Marlow. The cashier who identified Mrs. Marlow's signature testified that she had signed numerous checks drawn on said bank that had been charged to said account. All of the canceled checks were not introduced in evidence. It appears that most of them had been lost or mislaid by Mr. or Mrs. Marlow, and only a few of the same were produced and appear in the record. Among the checks produced one appears to have been made payable to the county treasurer and a couple made payable to Mr. Marlow and some to other and different parties. The cashier testified that both accounts had been balanced approximately every 30 days, and the canceled checks or statement showing the charges made against said accounts for which Marlow was given credit had been returned to Mrs. Marlow, and during the three years the accounts were carried in said bank she never made any complaint regarding the same.

Upon this state of facts the court found the issues in favor of the bank and against the surety company. If the bank is liable we must determine upon what theory a liability would exist. The rule is stated in the note of L. R. A. 1915C, p. 519, as follows:

"There are three ways in which a bank may incur liability and be compelled to make good deposits that have been misappropriated by the fiduciary: (1) By a violation on its part of the contract, express or implied, between it and the owner of the fund. The reason for the bank's liability is based upon the general principle that the bank cannot discharge its obligation to a depositor except by payment in strict conformity to the contract of deposit. (2) By appropriating the fund, either with or without the fiduciary's consent, to the payment of the latter's debt to the bank. The reason for the bank's liability is based upon the general theory that the owner of a fund may follow it into the hands of and recover it from any person who has not innocently given value therefor. The action for money had and received is an appropriate form of action in this class of cases. (3) By assisting the fiduciary to accomplish the misappropriation, the bank having knowledge, actual or constructive, that the fraud is being or about to be perpetrated by the fiduciary. The reason for the bank's liability is that it knowingly makes itself a party to a fraud, and must make good the loss that results from the misappropriation."

We will now discuss the cases under the three classifications set out above:

First. Did the bank violate the contract, express or implied, between it and Mrs. Marlow in honoring checks without authority from Mrs. Marlow and in making certain charges against the accounts? The authorities are all uniform that as between the bank and a general depositor the relation of debtor and creditor exists, irrespective of whether the deposit is that of a trust fund or the individual property of the depositor. As to how the bank may pay out said funds or discharge said indebtedness, the rule is stated in 7 Corpus Juris, p. 642, as follows:

"A bank deposit may be subject to any agreement which the depositor and the bank may make with respect to it, so long as the rights of third persons are not injuriously affected."

3 R. C. L. p. 540, states the rule as follows:

"A bank or banker cannot charge the depositor with any payments, except such as are made in conformity with his orders; for the relation of a bank and its depositors is one simply of debtor and creditor."

See, also, Shopert v. Indiana National Bank, 41 Ind. App. 474, 83 N. E. 515; Morse on Banks and Banking (5th Ed.) vol. 1.

As to whether the bank paid out said funds according to the order of Mrs. Marlow was a question of fact to be determined by the court under all of the evidence in the case. The evidence upon this question was conflicting. Mrs. Marlow testified that she never deposited the money and never had signed any checks, except one, but admitted signing the order which authorized the bank to pay said checks, although she stated that she did not know exactly what the order contained. The evidence upon behalf of the bank was that numerous checks were signed by her. The cashier testified that the money was paid out and those items charged to these accounts as authorized by her and with her knowledge and consent. In view of the fact that the evidence is conflicting upon this question, we cannot say there is no evidence reasonably tending to support the finding of the court upon this question.

It might be suggested, although the case is not briefed on this theory, that the general rule that the bank may pay out the funds deposited according to the contract between the bank and the depositor is not applicable, for the reason that the rights of a third person intervened. This would, perhaps, be true if there were any evidence that the

Digitized by Google

items charged to the accounts or the checks signed by Mr. Marlow were not used for the benefit of the minors, or that the same were not in payment of legal charges against the estate of the minors. As to whether particular items were misappropriated by Marlow or whether they were used to pay the legitimate claims against the estate of the minors does not appear. For all we know, these claims might have been for clothing or educating the minors or some legitimate expense. The surety company could not claim it was prejudiced by the payment unless the evidence disclosed that funds derived from these charges and checks were misappropriated, and there is no evidence of this kind and character in the record. The fact that these checks were payable to Mr. Marlow, although signed by him, is not sufficient evidence that the funds were to be wrongfully appropriated. Such is the holding in the case of Town of Eastchester v. Mt. Vernon Trust Co., 173 App. Div. 482, 159 N. Y. Supp. 289, as follows:

"Where a town supervisor deposited town funds in bank under an arrangement whereby they might be withdrawn for town purposes by check or draft containing the signature of the supervisor as such, when such supervisor presented such a check, payable to his own order, the bank was not called upon at its peril to delay payment, interrogate the supervisor as to his purposed use of the funds, or suspend payment pending investigation, since, when a check in the form justified by the contract between the parties is presented by a depositor of trust money, the debtor owes no duty on behalf of the beneficiary to scrutinize the demand, or be circumspect, lest his customer is betraying his trust."

See Central Nat. Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. See American Nat. Bank of Stigler v. Funk, 172 Pac. 1078, L. R. A. 1918F, 1137. There is sufficient evidence in the record to support the finding that the checks paid by the bank were authorized by Mrs. Marlow.

The second classification, as stated above, is a bank liable for appropriating trust funds, either with or without the fiduciary's consent, in payment of the latter's debt to the bank. There is no evidence that the bank would be liable by reason of facts and conditions existing under this subdivision, for the reason there is no evidence that either Mr. or Mrs. Marlow used any of said funds for the payment of any indebtedness due or owing to the bank; therefore no liability would exist under this subdivision.

Under the third classification, the question presented: Is the bank liable by reason of assisting the fiduciary to accomplish the misappropriation, the bank having knowledge, actual or constructive, that a fraud was being, or about to be, perpetrated by the fiduciary? Upon this question the authorities are not in harmony. There is a line of cases holding that no liability exists against the bank in paying out trust funds deposited in said bank when paid according to the order or checks of the depositor, unless the bank received some benefit from the misappropriation of the trust funds, or unless the facts and circumstances were such as to amount to fraud and collusion between the depositor and the bank. The cases that follow and support this theory are as follows: Goodwin v. American Nat. Bank, 48 Conn. 550; Munnerlyn v. Augusta Savings Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; Town of Eastchester v. Mt. Vernon Trust Co., 173 App. Div. 482, 159 N. Y. Supp. 289; Interstate National Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; United States Fidelity & Guaranty Co. v. Adoue & Loblt, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667; Bank of Hartford v. McDonald, 107 Ark. 232, 154 S. W. 512; State v. Calcasieu Nat. Bank, 132 La. 879, 61 South. 857; United States Fidelity & Guaranty Co. v. First Nat. Bank of Monrovia, 18 Cal. App. 437, 123 Pac. 352; Newmark Grain Co. v. Merchants' Nat. Bank of Los Angeles, 166 Cal. 203, 135 Pac. 958.

In Morse on Banks and Banking, on pages 589 and 590, it is stated as follows:

"Supposing that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a check for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the check, for if he did so he would be making himself a party to an inquiry as between his customer and a third person."

In discussing the cases holding to the contrary, on page 591, it is stated as follows:

"But on scrutinizing the cases cited it will be found that participation in the profits of the fraud is, generally speaking, an element in the case; and a mere reason to believe that the trustees were misapplying the assets will not make the banker liable; for this would be to make every trustee accountable for his conduct in the trust to every agent whom he happened to employ, and would carry the principle of constructive trust to an inconvenient, and indeed to an impracticable, length."

The three leading cases holding to the contrary, that the bank may be liable if it has notice that the trustee intended to misappropriate the funds, although the funds are paid out according to the contract with the depositor and the bank, where the bank received no benefit from the transaction, are the cases of Duckett v. Nat. Mechanic's Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518, and Lowndes v. Nat. Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408.

Digitized by Google

An examination of each of these three cases discloses that the deposit in each instance was a trust fund, and there were numerous items and numerous checks involved, and the accounts extended over a period of several years. In each of the above cases the court held the bank liable for those checks or that portion of the trust fund that was used by the depositor to pay his individual indebtedness to the bank, upon the theory that the bank had received the benefits therefor in each instance. The court announced the rule that if the bank had notice that the funds were to be misappropriated by the trustee the bank would be liable by honoring checks. However, in each case the court held in favor of the bank as to the checks that were cashed by the depositor and the funds drawn out and misappropriated by him. While these cases announce the rule that the bank was liable if it honors checks with notice that the funds were to be misappropriated, still the court in each case found the proof of notice was not sufficient.

Justice Thomas, speaking for the New York Court of Appeals in the case of Town of Eastchester v. Mt. Vernon Trust Co., in commenting on the case of Allen v. Puritan Trust Co., stated as follows:

"It is true that the decision as to the later checks was based on the master's finding that the circumstances begot suspicion, but did not inform the depositary of the purpose to misappropriate. However, it is noticeable that the depositor had drawn from the trust account to replenish his personal account to meet overdrafts during a period of two years. It illustrates how far the court would carry the rule that a banker is not bound to supervise the disposition of trust moneys drawn by a depositor in form indicating personal use."

Counsel for plaintiff in error rely upon the case of U. S. Fidelity & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667, but that case does not support their contention, as the court held that the bank was liable only for the funds paid to it by the depositor out of the trust funds. The case of Duckett v. Nat. Mechanic's Bank, supra, which they relied upon, announced the rule supporting their contention, but the court in that case held the facts were not sufficient to make the bank liable, although the facts as to notice were stronger, in our opinion, than in the case at bar.

It will be unnecessary for us to decide which rule or which line of cases this court will follow, as plaintiff in error, in our judgment, would not be entitled to recover under either theory:

First. For the reason there is no evidence in the case at bar that the funds derived from any particular checks or the charges complained of were misappropriated and were not in payment of proper charges against the minors' estate, nor does the evidence disclose that the minors did not receive the benefit from the items complained of. It might be contended that the order of the county court settling the account of the guardian determined this matter, but an examination of the account discloses that no one appeared, and the court found the guardian liable for just what money she received.

Second. If we weigh the evidence in the case, and give it the same weight as the cases which announce the rule that the bank is liable for honoring checks if the bank had notice that the funds would be misappropriated, although the bank received no benefit from the misapproriation, the facts and circumstances are not as strong as the facts were in those cases where the court held the bank would be liable, but found the facts were not sufficient to justify the court in holding that the bank had notice or sufficient knowledge to put it upon inquiry, and therefore the bank was not liable. We therefore conclude that there was sufficient evidence to support the judgment of the court. The surety company offered to prove, in regard to the order signed by Mrs. Marlow authorizing the bank to charge checks to the guardianship account, that she did not understand that the same included anything but charging checks to her private account. But in this we think there was no error, as such fact would not be binding upon the bank unless the company offered to prove that the bank knew of said fact.

For the reasons stated, the judgment of the trial court is affirmed.

RAINEY, C. J., concurs in conclusion.

HARRISON, V. C. J., and PITCHFORD, JOHNSON, and BAILEY, JJ., concur.

Digitized by Google

SWAN et al. v. DUNCAN et al. (No. 10182.)

(Supreme Court of Oklahoma. June 8, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸1009(4)—Decree not disturbed unless clearly against evidence.

In equity proceedings the judgment of the trial court will not be disturbed where it is not clearly against the weight of the evidence.

2. Appeal and error ⟸1170(7)—Exclusion of evidence held not prejudicial where not affecting result.

Certain evidence offered by the plaintiffs and excluded by the court after a case was reopened for further evidence examined, and the action of the trial court in excluding the same *held* not to be prejudicial error.

3. Appeal and error ⟸1170(7)—Unless prejudicial, error in rulings on evidence no ground for reversal.

Under section 6005, Rev. Laws 1910, any error in the admission or rejection of evidence is not grounds for reversal, unless this court, after an examination of the entire record, finds that the error complained of has probably resulted in a miscarriage of justice.

4. Appeal and error ⟸977(1)—New trial ⟸6, 108(1)—Motion addressed to discretion of trial court; newly discovered evidence which would not change result not ground for.

A party is not entitled to a new trial on the ground of newly discovered evidence where such evidence, if admitted, would not change the result of the trial. Such a motion is addressed to the sound discretion of the trial court, and, where the record does not show an abuse of discretion, the trial court's action thereon will not be disturbed by this court.

Error from District Court, Caddo County; Will Linn, Judge.

Action by J. D. Swan and another against I. M. Duncan and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

F. E. Riddle, of Tulsa, and Harry Hammerly, of Chickasha, for plaintiffs in error.

Bond, Melton & Melton, of Chickasha, for defendants in error.

RAINEY, C. J. This action was filed in the district court of Caddo County by J. D. Swan and Laura T. Swan against I. M. Duncan and the Keechi Oil & Gas Company to cancel an oil and gas lease on a tract of land which the plaintiffs, as lessors, executed to the defendant I. M. Duncan, and which was by him assigned to the Keechi Oil & Gas Company.

The only provision of the lease material to a consideration of the case is as follows:

"Second party agrees to commence operation of drilling a well within ninety days from the date of this lease, in the vicinity of Cement, Oklahoma, to a depth of three thousand feet, if oil is not found at a lesser depth, and continue operations until well is completed, as above specified."

The grounds alleged for the cancellation of said lease, as pleaded by plaintiffs in their petition, are that the defendants failed to comply with the above provision by starting a well within 90 days, and that after drilling operations were commenced the defendants did not continue drilling operations until a well was completed according to said provision.

Another alleged ground for cancellation was that the lease contained a surrender clause which, under the law, had the effect of giving the plaintiffs the right to surrender and cancel the same. This claim was based upon the decision in Brown v. Wilson, 58 Okl. 392, 160 Pac. 94, L. R. A. 1917B, 1184, which has since been overruled, and the point has been abandoned in this court.

The cause was tried to the court without a jury resulting in a finding that the defendants had complied with all the provisions of said lease, and judgment was rendered for them accordingly. The plaintiffs, as plaintiffs in error, have appealed from said judgment, assigning numerous errors, only three of which are argued in the brief.

[1] Under the first proposition it is asserted that the judgment of the trial court is clearly against the weight of the evidence on the issue as to whether a test well was commenced within 90 days. The evidence on this issue is conflicting, but we have weighed it under the rule announced in this jurisdiction in a long line of cases, and from our examination thereof are convinced that the judgment in this respect is not only not clearly against the weight of the evidence, but is amply supported by the evidence. Schock et al. v. Fish, 45 Okl. 12, 144 Pac. 584; Crump v. Lanham, 168 Pac. 43.

It is conceded that the test well was not drilled to a depth of 3,000 feet within a year, but an examination of the evidence further shows that early in December, 1916, an oil sand was struck at a depth of about 1,500 feet, and, as stated in Wooten v. Lackey et al., 191 Pac. 1037, this day decided, this well flowed and was pumped for some time thereafter. After this oil sand was struck, and lessees had considerable difficulty with the well, and it later produced oil in small quantities only, but we are thoroughly satisfied from the evidence that the test well disclosed the presence of oil in paying quantities, as was contemplated by the parties. The obvious purpose of the provision for the test well was to explore the unknown and undeveloped territory around Cement, with a view of opening a field in case oil or gas was found, and thereby inducing further de-

Digitized by Google

velopment in that vicinity. This was the only benefit that would probably accrue to the plaintiffs, since the agreement did not obligate the lessees to drill on plaintiffs' land, and they had no financial interest in the amount of oil produced. The test well did, in fact, reveal that oil existed in quantities at the depth where this oil sand was struck, and resulted in further drilling in that vicinity. After a careful examination of all the evidence in the record we cannot say that the judgment of the trial court is clearly against the weight of the evidence on this issue. This is the same conclusion reached in Wooten v. Lackey, 191 Pac. 1037, this day decided, and Day v. Keechi Oil & Gas Co., 180 Pac. 366, wherein the same question was presented.

[2-4] After the case was closed the court, at the request of the plaintiffs, reopened it, and permitted the plaintiffs to offer additional testimony, but complaint is made that at said hearing the court sustained objections to some of the testimony offered by the plaintiffs. Among other things, plaintiffs sought to show that some time after oil was struck at a depth of 1,500 feet defendants entered into a contract to have the well deepened, and plaintiffs contend that this was very material testimony on the question as to whether or not the test well had been completed. We do not think the court erred in sustaining the objection to the offered testimony on the question of deeper drilling. Oil had been found at a depth of 1,500 feet, and the well completed, according to the evidence, but, owing to some trouble with the hole, the exact nature of which is unknown to us, it had ceased to flow or produce oil in the quantities as at first indicated, but we cannot perceive how the fact that deeper drilling was contracted for with an object of finding a more prolinc sand would be material evidence against defendants on the question of whether oil was struck and the well completed at a lesser depth.

From an examination of the entire record we are convinced that the rejection of the other evidence, if the same were admissible, did not result in a miscarriage of justice. We are therefore not authorized to reverse the cause on this ground under section 6005, Rev. Laws 1910, and numerous decisions of this court. Democrat Printing Co. v. Johnson, 175 Pac. 737.

The fourth and last proposition urged by plaintiffs in their brief is that the court erred in refusing to grant plaintiffs a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence, as set forth in said motion, was that since the trial of the action the test well had been abandoned. If this evidence had been introduced, we think, under the circumstances of the case, the judgment would and should have been the same. It is well settled in this jurisdiction that a party is not entitled to a new trial on the ground of newly discovered evidence where said evidence, if admitted, would not have changed the result of the trial. Vickers v. Phillips Carey Co., 49 Okl. 231, 151 Pac. 1023, L. R. A. 1916C, 1155. Motions of this character are addressed to the sound discretion of the trial court, and, where the record does not show an abuse of discretion in this respect, the court's action thereon will not be disturbed by this court. Jones v. Oklahoma Planing Mill & Mfg. Co., 47 Okl. 477, 147 Pac. 999.

We find no reversible error in the record, and the judgment is therefore affirmed.

KANE, HARRISON, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

CHAMPLIN v. CARTER. (No. 10945.)

(Supreme Court of Oklahoma. June 8, 1920.)

(Syllabus by the Court.)

1. **Taxation ⟸453—Taxpayer complaining of state auditor's correction of assessment has an appeal.**

The remedy of an income taxpayer, complaining at the action of the state auditor in revising, adjusting, and correcting his income tax assessment, is by appeal to the district court.

2. **Mandamus ⟸71, 72—Taxation ⟸497—Lies to compel ministerial duties; does not lie to control discretion; correction of income tax cannot be compelled by mandamus.**

A writ of mandamus may lawfully issue, from a court having jurisdiction, to compel an executive officer to perform a mere ministerial duty, which does not call for the exercise of his judgment or discretion, but which the law gives him the power and imposes on him the duty to do; but it may not lawfully issue to command or control the executive officer in the discharge of those of his duties which involve the exercise of his judgment and discretion in the construction of the law, or in determining the existence and effect of the facts.

3. **Mandamus ⟸3(2), 10—Writ does not lie where there is a plain and adequate remedy at law.**

The writ of mandamus will not be issued in any case where there is a plain and adequate remedy in the ordinary course of law, and where the duty or right sought to be enforced by such writ is not clear and indisputable.

Original action for mandamus by H. H. Champlin against Frank C. Carter. Writ denied, and action dismissed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

Harry O. Glasser, of Enid, for plaintiff.
S. P. Freeling, Atty. Gen., for defendant.

RAINEY, C. J. This is an original action instituted in this court for a writ of mandamus to compel the state auditor to accept a certain sum in full settlement of the income tax due to the state of Oklahoma by the plaintiff. Plaintiff filed his income tax return with the auditor, as provided by law for the year 1918, deducting from his gross income a sum for depletion, based, as he alleges, upon the actual depletion of the oil and gas property from which the income is derived, and the state auditor refused to approve the return so filed, and presented to plaintiff for his signature an amended return, limiting the amount of deduction for depletion or exhaustion of the property to 5 per centum of the gross output of oil and gas.

Plaintiff contends that he is entitled to claim and receive as a deduction from his gross income a depletion allowance on his oil properties sufficient to return his invested capital during the life of his leases, taking into consideration the general history of oil fields and wells as to the life of their production. The refusal of the state auditor to allow such depletion is based upon his construction of the statute (section 6, c. 164, Sess. Laws 1915), which is as follows:

"A reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment, in the business not to exceed in the case of mines, five per centum of the gross value, at the mine, of the output for the year for which the compensation is made, but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is, or has been, made: Provided, that no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate."

The auditor takes the position that he is only authorized under the above statute to deduct for exhaustion, wear, and tear or depletion of the oil and gas property a sum not to exceed 5 per centum of the gross output of the property for the year for which the taxes are returned.

[3] The first question raised by the auditor's answer to the alternative writ is whether the plaintiff has an adequate remedy at law. This presents the question of jurisdiction of this court to issue the writ. If petitioner has such remedy this suit must fail, as the court will not take jurisdiction of a proceeding to control by mandamus the official acts of an officer where the party complaining against such officer has a plain and adequate remedy at law. Section 4908, Rev. Laws 1910; Ex parte Oklahoma, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431; Guthrie v. Stewart, 45 Okl. 603, 146 Pac. 585.

[1, 2] In the case of City of Guthrie v. Stewart, last cited, where a writ of mandamus was sought to compel the county treasurer to pay over to the city of Guthrie the penalties and interest accruing upon delinquent taxes due the city, the court said:

"We do not deem it necessary to pass upon the question as to whether the plaintiff in error is entitled to the interest and penalties claimed by it, for the reason that in our judgment the right is not so clear and free from doubt as to justify resort to mandamus proceedings. In Bayard v. White, 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116, the rule with reference to the issuance of this writ is stated by the Supreme Court as follows:

" 'The writ of mandamus is a remedy to compel the performance of a duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. Knox County v. Aspinwall, 24 How. 377, 383 (16 L. Ed. 735). Both requisites must concur in every case.'

"In Stearns, Mayor, et al. v. State ex rel., 23 Okl. 462, 100 Pac. 909, Mr. Justice Hayes states the rule as follows:

" 'That mandamus will lie to compel a ministerial officer to discharge a duty or to compel other officers to perform a duty purely ministerial is too well settled to require discussion or the citation of authorities. * * * He must show: (1) The legal right to have the act done which he seeks to coerce the respondent to do; (2) that it is a plain, legal duty of respondent to do that which petitioner seeks to have done, and that respondent is without discretion to perform or refuse to perform such duty; (3) that the writ will afford him an availing remedy, and that he has no other plain, speedy, adequate remedy. Spelling's Extraordinary Relief, par. 1369.' "

In the case of Berryhill v. Carter, 76 Okl. 248, 185 Pac. 93, in denying an original application in this court for a writ of certiorari to review the action of the state auditor in correcting and adjusting an income tax assessment, this court, in an opinion written by Mr. Justice Higgins, quoting from and construing section 9, c. 164, Sess. Laws 1915, which defines the authority and duties of the state auditor with reference to revision and correction of income tax assessments, which also provides that the remedy and proceedings before the auditor shall be the same as provided for reviewing assessments by the county equalization board, in connection with section 2 of subd. B, art. 1, c. 107, Sess. Laws 1915, which defines the procedure necessary to review the action of county boards of equalization, held:

"We find all that is required of an aggrieved income taxpayer is to file in the district court a transcript of the record as made before the auditor, where all matters complained of may be reviewed and adjusted to the extent justice may demand."

Digitized by Google

In the syllabus to the same case, the court said:

"The remedy of an income taxpayer aggrieved at the action of the state auditor in adjusting and correcting an income tax assessment is by appeal to the district court, and not by writ of certiorari to the Supreme Court."

Such remedy is a plain, speedy, and adequate remedy by which the petitioner herein had the right to determine the questions here presented.

Before the writ of mandamus should issue in any case, it must be shown that the duty sought to be enforced is clear and indisputable. The right which plaintiff seeks to enforce here by mandamus does not appear to be clear and free from doubt.

The auditor of this state is a part of the executive branch of government, invested, under and by virtue of section 9, c. 164, Sess. Laws 1915, with the exercise of judgment and discretion in adjusting and correcting income tax assessments, and his action and decision in such matters is quasi judicial in its nature, from which an appeal lies, as heretofore said. Therefore his action will not be controlled by mandamus, and this is true where there are no controverted facts. Lovett v. Lankford, 47 Okl. 12, 145 Pac. 767; Norris et al. v. Cross, Secy. of State, 25 Okl. 287, 105 Pac. 1000; Kimberlin v. Comm. Five Civilized Tribes, 104 Fed. 653, 44 C. C. A. 109; United States ex rel. Dunlap v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354.

In the case of Norris et al. v. Cross, supra, this court, speaking through Mr. Justice Hayes, said:

"It is not within the scope of a mandamus proceeding to coerce an executive officer in the discharge of a duty involving the exercise of judgment or discretion, or the exercise of judicial or quasi judicial power, further than to direct him to act. The court cannot supplant him in the determination of questions of fact or of law required by the statute to be determined by him, nor direct in whose favor his decision shall be."

The auditor being vested with the exercise of discretion and judgment in the determination of the question which plaintiff seeks to review here by mandamus, and the right to the relief sought not being clear and undisputable, and plaintiff having a plain, speedy, and adequate remedy in the ordinary course of law, this court cannot control by mandamus the action of such officer.

Petition for writ of mandamus will be denied and the action dismissed.

HARRISON, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

PETTIS v. JOHNSTON. (No. 9546.)

(Supreme Court of Oklahoma. June 1, 1920.)

(Syllabus by the Court.)

1. **Pleading ⟸216(2)—On general demurrer allegations must be construed with attached exhibits.**

The allegations of a pleading challenged by general demurrer must be construed in connection with the exhibits attached thereto. (See paragraph 11, opinion.)

2. **Judgment ⟸497(2)—Recital of service of process in a judgment is not conclusive.**

The recital of service of process in a judgment is not conclusive where it is positively contradicted by, and in irreconcilable conflict with, the judgment roll, but resort to the record to impeach such recital of service in the judgment means an inspection of the entire record—the judgment roll. (See paragraph 11, opinion.)

3. **Judgment ⟸495(2) — Every intendment will be indulged to support a judgment collaterally attacked.**

In support of a judgment collaterally attacked, every intendment will be indulged to uphold and support it; if the judgment thus assailed contains no recital of service of process, and the record is barren of evidence of the issuance and service of process, then the service of process will be presumed; and this presumption of service stands until overcome by evidence to the contrary. (See paragraph 11, opinion.)

4. **Judgment ⟸497(2)—Where judgment roll shows service of process in a particular way no different service will be presumed.**

If it appear positively from the judgment roll that process was served in a particular mode, no other and different service will be presumed; that is to say, where the record itself explicitly and positively shows a particular kind of service, and is in irreconcilable conflict with any reasonable presumption of other service, then the character of service disclosed by the record is the one upon which the jurisdiction of the court must depend. (See paragraph 11, opinion.)

5. **Judgment ⟸162(3)—Relief based on extrinsic evidence may be had against a judgment rendered without service of process.**

Relief based on extrinsic evidence may be had against a judgment rendered without service of process, under the third subdivision of section 5267, Rev. Laws 1910, empowering the court to vacate or modify its own judgments or orders at or after the term at which such judgment or order was made, on account of "irregularity in obtaining a judgment or order." (See paragraph 2, opinion.)

6. **Judgment ⟸153(1) — Motion to vacate judgment for want of service of process must be presented within three years.**

If it be necessary to resort to extrinsic evidence to show the invalidity of a judgment for want of service of process, the motion to

Digitized by Google

vacate must be presented within three years following the rendition of the judgment or order, as provided for in section 5274, Rev. Laws 1910. (See paragraph 2, opinion.)

7. Judgment ⟸407(2)—Motion for vacation of judgment rendered without service of process is exclusive of relief in equity.

The remedy provided by the third subdivision of section 5267, Rev. Laws 1910, for vacating a judgment rendered without personal or constructive service of process, is exclusive of relief in equity during the three years following the rendition of the judgment, unless there be special reasons in the particular case why the statutory remedy is inadequate. (See paragraph 2, opinion.)

8. Judgment ⟸162(3)—Extrinsic evidence is admissible to contradict return of service and recital thereof in the judgment.

Extrinsic evidence—evidence dehors the judgment roll—is admissible to contradict the officer's return of service and the recital of service in the judgment. (See paragraph 2, opinion.)

9. Judgment ⟸145(2)—On motion to vacate for want of service, meritorious defense need not be shown.

It is unnecessary for the motion to vacate, based on extrinsic evidence of no service of process, to show a meritorious defense to plaintiff's suit. (See paragraph 2, opinion.)

10. Judgment ⟸386(3)—Judgment void on its face may be vacated by court rendering it on motion within or after three years.

A judgment which is void upon its face, and requires only an inspection of the judgment roll to demonstrate its want of validity, is a "dead limb upon the judicial tree, which may be lopped off at any time"; it can bear no fruit to the plaintiff, but is a constant menace to the defendant, and may be vacated by the court rendering it "at any time on motion of a party or any person affected thereby," either before or after the expiration of three years from the rendition of such void judgment. Such motion is unhampered by a limitation of time. (See paragraph 3, opinion.)

11. Judgment ⟸386(3)—Is void on its face when its invalidity is shown by judgment roll; "judgment void on face."

A judgment is void on its face when its invalidity is affirmatively disclosed by an inspection of the judgment roll, but it is not void, in the legal sense, for the want of jurisdiction, unless its invalidity appears on the face of the record. Edwards v. Smith, 42 Okl. 544, 142 Pac. 302, followed. (See paragraph 3, opinion.)

12. Judgment ⟸379(1), 396—Meritorious defense is not necessary on motion to vacate a judgment void on its face, and vacation must be unconditional.

It is not necessary to show a meritorious defense in support of a motion to vacate a judgment void on its face; nor can the court impose any conditions for vacating it. (See paragraph 3, opinion.)

13. Judgment ⟸407(6)—Party without notice of default judgment in time to file a motion to vacate it may have its enforcement restrained.

When it clearly appears that a party not served with process, against whom a default judgment, valid on its face, has been taken, had no notice or knowledge of such judgment until after three years from its rendition, or in too short a time before the three years expired to file a motion to vacate, such party may file a bill in equity against the plaintiff to evade, nullify, or restrain the enforcement of such judgment. (See paragraph 4, opinion.)

14. Judgment ⟸447(1)—Plaintiff suing in equity to show invalidity of judgment for want of jurisdiction must show a meritorious defense.

An attack in equity, based upon evidence dehors the record, to show the invalidity of a judgment for want of jurisdiction over the party complaining, must be accompanied by a showing that such plaintiff in equity has a meritorious defense to the action upon which the judgment complained of was rendered; and this is true whether the suit is commenced in equity before or after the expiration of three years from the rendition of such judgment. (See paragraph 5, opinion.)

15. Judgment ⟸465—Court may impose conditions on granting relief against a judgment not void on its face.

A court of equity may impose such conditions to the granting of relief against a judgment not void on its face as appear equitable under the circumstances of each particular case, and also as provided for by section 5272, Rev. Laws 1910. (See paragraph 5, opinion.)

16. Judgment ⟸499—Officer's sworn return and judgment's recital of service cannot be set aside except on the most convincing evidence.

Sound public policy, the stability of solemn judgments of courts, and the security of litigants, demand that neither the officer's sworn return, nor the recital of service in the judgment based thereon, shall be set aside or contradicted except upon the most clear, cogent, and convincing evidence. (See paragraph 7, opinion.)

17. Judgment ⟸469—Judicial sales ⟸54—Bona fide purchaser will not be prejudiced by vacation of judgment not void on its face.

The rights of bona fide purchasers of property sold under the authority of a judgment not void on its face will not be affected or prejudiced by either the vacation of such judgment by the court rendering it, or a decree in equity, annulling, evading, or restraining its further enforcement, although extrinsic evidence would show that the court had no jurisdiction for want of service of process on defendant therein. (See paragraph 6, opinion.)

18. Judicial sales ⟸53—One is not a bona fide purchaser under a judgment for him based on a false return.

A plaintiff, though without knowledge of the falsity of the officer's return of service of process, is not a bona fide purchaser of property sold under the authority of a judgment

Digitized by Google

for him based upon a false return. (See paragraph 6, opinion.)

19. Judgment ⟸153(1)—Judgment valid on its face, rendered without service or appearance, may not be vacated at any time on motion.

This court declines to follow or adhere to those decisions holding that a judgment valid on its face, rendered without service of process or appearance of defendant, may be vacated at any time on motion. (See paragraph 2, opinion.)

20. Homestead ⟸1, 115(3)—Partition ⟸12(3)—Nature and incidents of homestead interest stated; homestead interest cannot be partitioned.

The homestead interest is jointly vested in the husband and wife for the benefit of themselves and family, without regard to which spouse owns the title to the land; the homestead interest is a creature of the Constitution and statutes, nothing like it being known at common law; it is a special and peculiar interest in real estate; it is not a mere inchoate interest in either spouse, to become vested upon the death of the other; this joint right is paramount to the individual rights of either, and, being incapable of division and partition between husband and wife, it cleaves and adheres so closely to the title to the land itself that it cannot be dissociated therefrom by a mortgage foreclosure sale under a court decree to which either husband or wife is not a party. (See paragraph 9, opinion.)

21. Homestead ⟸115(3)—Wife owning homestead in fee may attack a judgment foreclosing a mortgage because husband was not a party.

The wife, the owner of the homestead in fee, may assail the validity of a decree and judgment foreclosing a homestead mortgage on the ground that the husband, though not the owner of the title to the land, was not made a party to the foreclosure proceedings. (See paragraph 9, opinion.)

22. Homestead ⟸115(3), 121—Foreclosure judgment is void where husband was not a party to foreclosure suit; sale of homestead under foreclosure without making husband a party void.

If it be found upon an inspection of the judgment roll in a proceeding to foreclose a mortgage executed by husband and wife on the family homestead that the husband was not a party to such foreclosure proceeding, the foreclosure judgment is void, although the wife is the owner of the fee title in the homestead and a party to the foreclosure suit. A sale under such foreclosure judgment is void, and will not operate to divest the wife of the title to the land, nor in any way affect the homestead interest of either the husband or wife therein. (See paragraph 9, opinion.)

23. Mortgages ⟸383—Action to foreclose real estate mortgage is a "proceeding in rem."

An action to foreclose a real estate mortgage is a proceeding in rem. (See paragraphs 11 and 13, opinion.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Rem.]

24. Mortgages ⟸440—Petition against nonresident mortgagor to foreclose may supply defects in affidavit for publication and in notice.

The petition filed against a nonresident mortgagor to foreclose a real estate mortgage is the initial link in the chain of proceedings necessary to obtain service of process by publication under section 4722, Rev. Laws 1910, and as such initial link may be resorted to for the purpose of supplying defects and omissions in the affidavit for publication and the publication notice. (See paragraphs 11 and 13, opinion.)

25. Mortgages ⟸440—Omission to describe land in affidavit for publication in foreclosure action against nonresident is not fatal on collateral attack.

In an action in rem (in this case a real estate mortgage foreclosure) under sections 4671 and 4722, R. L. 1910, against a nonresident, the omission to describe the land in the affidavit for publication is not fatal on collateral attack. Ballew v. Young, 24 Okl. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084, City National Bank v. Sparks, 50 Okl. 648, 151 Pac. 225, and other attachment cases distinguished in the opinion. (See paragraphs 11 and 13, opinion.)

26. Process ⟸96(4)—Affidavit for service by publication alleging defendant's nonresidence and inability to serve is sufficient.

An affidavit for service by publication, alleging that the defendant is a nonresident of the state, and that plaintiff is unable to secure service of summons in Oklahoma, is sufficient without the additional allegation that plaintiff exercised diligence to obtain personal service. (See paragraph 12, opinion.)

27. Judgment ⟸17(2)—Defects in publication notice held not fatal to judgment on collateral attack.

The failure of the publication notice to describe the land involved in an action in rem, or to state that the mortgage to be foreclosed is a real estate mortgage, or to state the amount of the note or debt secured by the mortgage, is not fatal to the judgment on collateral attack. (See paragraph 13, opinion.)

28. Judgment ⟸17(2)—Publication of notice stating in general terms the nature of the judgment sought, supports judgment when collaterally attacked.

In a proceeding in rem the publication notice may state briefly and in general terms the nature of the judgment plaintiff seeks, and on collateral attack the publication notice, containing material elements required by the statute, will be treated as sufficient if that which is uncertain and omitted therefrom may be made certain by reference to the affidavit for publication or the plaintiff's original petition. (See paragraph 13, opinion.)

29. Judgment ⟸497(3)—Judgment in mortgage foreclosure, on publication notice adjudged sufficient, will not be held invalid in a collateral proceeding, if calling for "construction"; "jurisdiction."

The authority to hear and determine a case is jurisdiction to try and decide all the ques-

Digitized by Google

tions involved in the controversy, including the power to pass upon the sufficiency of the service of process; and, in the exercise of its jurisdiction to foreclose mortgages, the district court must pass first upon the sufficiency of constructive service against a nonresident defendant, and, if the district court in the exercise of this jurisdiction adjudges the affidavit for publication and the publication notice sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding, if there be enough in the affidavit and publication notice to call for construction, and construction means the application of the law to the facts stated. (See paragraph 13, opinion.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Construction; Jurisdiction.]

30. Judgment ⟸17(2)—Jurisdiction to foreclose a mortgage includes power to pass on sufficiency of steps to invoke jurisdiction.

The filing of the petition to foreclose a mortgage, the affidavit for publication, and the publication notice, put in motion the jurisdiction of the court, and the jurisdiction thus invoked includes the power to pass upon the sufficiency of the steps taken by the plaintiff to invoke its jurisdiction. (See paragraphs 11 and 13, opinion.)

31. Judgment ⟸17(3)—Valid personal judgment cannot be rendered against nonresident on publication.

A valid personal judgment cannot be rendered against a nonresident based on service by publication. (See paragraphs 11 and 13, opinion.)

32. Judgment ⟸486(1)—Successful collateral attack merely avoids or evades a judgment.

A successful collateral attack on a judgment does not operate to reverse, set aside, or vacate such judgment; the judgment is merely avoided or evaded. (See paragraph 10, opinion.)

33. Judgment ⟸278—Record preserved on order of court to make record held equivalent to the "judgment roll" at common law.

A record preserved under the provisions of sections 5144 to 5146, inclusive, Rev. Laws 1910, directing the clerk upon order of the court to make a complete record of every cause as soon as it is finally determined, same to contain "the petition, the process, the return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court," is equivalent to the judgment roll at common law, which signified a roll of parchment upon which the proceedings and transactions of a court were entered by its officers, and which was then deposited in the court's treasury in perpetuam rei memoriam. (See paragraph 14, opinion.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment Roll.]

34. Judicial sales ⟸16—Selling officer can sell only on terms provided for by decree and the law in force.

An officer selling property under a court decree can sell such property on such terms, and such terms only, as are provided by the decree and the law in force governing such sale, which is incorporated into and made a part of the decree, and an officer has no authority to sell on credit, or to accept in payment of the bid anything other than lawful money, unless otherwise expressly authorized by the decree or the law in force governing such sale. (See paragraph 15, opinion.)

Rainey, C. J., dissenting in part.

(Additional Syllabus by Editorial Staff.)

35. Judgment ⟸518—"Collateral attack" defined.

A "collateral attack" on a judicial proceeding is an attempt to avoid, defeat, or evade it or to deny its force and effect in some manner other than by appeal, writ of error, certiorari, or motion for a new trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Collateral Attack.]

Error from District Court, Carter County; W. F. Freeman, Judge.

Suit by E. B. Johnston against Becky Pettis, commenced before a justice of the peace, and, under the statute, certified and transmitted to the district court. Judgment for plaintiff and defendant brings error. Reversed and remanded, with directions.

Johnston, plaintiff below, defendant in error, commenced this suit before a justice of the peace against Becky Pettis, plaintiff in error, to recover a money judgment for rent and to foreclose a landlord's lien on defendant's cotton crop. Among other things in defendant's answer to plaintiff's bill of particulars, she denied plaintiff's ownership of the land described, and averred that she is the owner and in possession of the same; that the land was allotted to her as a Chickasaw freedwoman, and that she is now and has been in continuous possession as such allottee, and that it was and is the family homestead; averred that in April, 1912, the Farmers' Loan & Security Company commenced an action in the district court of Carter county against her and her husband, Isaac Leonard, to foreclose a mortgage executed by them on said land; that a foreclosure judgment was rendered finding defendant and Isaac Leonard were husband and wife, and under that foreclosure judgment the land was sold on May 3, 1913, to Cochran for $300, and the sale confirmed; that the sheriff executed a deed to Cochran, who then conveyed the land to plaintiff, Johnston. Defendant attaches to her answer, as an exhibit thereto, a transcript of all the proceedings in the mortgage foreclosure case, and alleges that no process was ever served on her, although she admits the record shows to the contrary; that her husband, Isaac Leonard, was not served with any summons; that the attempted service of

Digitized by Google

summons on him by publication was void, and that her husband was not a party to said foreclosure action; further that the purchaser at the foreclosure sale never paid the consideration, and got his deed by fraud. Under the authority of section 5357, R. L. 1910, construed in Ewers v. Kilgore, 38 Okl. 196, 130 Pac. 938, this case was certified and transmitted to the district court, where the plaintiff filed a demurrer to the defendant's answer. The court sustained the demurrer to all that part of defendant's answer alleging that no process was served on her in the foreclosure case; that no process, actual or constructive, was served on her husband in the foreclosure case; and that the purchaser's deed was void because he failed to pay the consideration. Upon a trial of the case judgment was rendered in favor of the plaintiff, and defendant on her appeal to this court assigns as error the action of the district court in sustaining plaintiff's demurrer to her answer.

Guy H. Sigler, of Ardmore, for plaintiff in error.

J. T. Wheeler, of Wynnewood, for defendant in error.

RAMSEY, J. (after stating the facts as above). The transcript of the record in the foreclosure proceedings attached to defendant's answer contains a summons, showing thereon the officer's return of personal service on defendant; also the foreclosure judgment contains a recital of service of summons on defendant.

[1-4] 1. The first question is, Can the recital in the forclosure judgment of personal service of process on defendant be contradicted by extrinsic evidence—evidence dehors the record? 23 Cyc. 1086, says that the great majority of the decisions sustain the rule that the recitals of service of process in a domestic judgment on which its jurisdiction is founded import absolute verity, and cannot be contradicted or disproved in a collateral proceeding by any extrinsic evidence; citing a long list of state and federal cases. Black on Judgments (2d Ed.) vol. 1, § 273, referring to domestic judgments, says that "the great majority of the decisions hold that if the record shows the facts necessary to confer jurisdiction, or recites that jurisdiction did in fact attach, its averments are final and conclusive in every collateral proceeding and cannot be contradicted by any extraneous evidence." 23 Cyc. 1087, and Black on judgments (2d Ed.) vol. 1, § 275, say that in other jurisdictions, Arkansas, Georgia, Minnesota, Mississippi, Nebraska, New York, Ohio, Wisconsin, Illinois, Tennessee, and Colorado, the record does not import uncontrollable verity when the want of jurisdiction is alleged, and that it is permissible to controvert the recitals of the record on this point by evidence aliunde, and always open to a party to contest the jurisdiction by producing other parts of the record which positively contradict the recitals of the judgment. One of the ablest decisions discussing the admissibility of extrinsic evidence to contradict recitals of service in a judgment is Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; also the dissenting opinion of Judge Valliant in Smoot v. Judd, 184 Mo. 586, 83 S. W. 507. See, also, State Ins. Co. v. Waterhouse, 78 Iowa, 674, 43 N. W. 611.

This court in Ray v. Harrison, 32 Okl. 17, 121 Pac. 633, Ann. Cas. 1914A, 413, sustained the admissibility of extrinsic evidence to contradict an officer's return of personal service, and likewise reaffirmed that doctrine in Jones v. Jones, 57 Okl. 442, 154 Pac. 1136. In neither of those cases, however, does it appear that the judgment involved contained any recitation of service. In Bruno v. Getzelman, 173 Pac. 850, the plaintiffs commenced an action in ejectment to recover 80 acres of land, and sought to set aside two mortgage forclosure judgments on the ground that process had not been served in either case. This court said that "an adjudication of the jurisdictional facts in a domestic judgment is conclusive in a collateral proceeding attacking such judgment by attempting to again put such facts in issue," and cited Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815; Daugherty v. Feland, 59 Okl. 122, 157 Pac. 1144; Continental Gin Co. v. DeBord, 34 Okl. 66, 123 Pac. 159. No reference was made to Ray v. Harrison, supra, or Jones v. Jones, supra.

In Griffin v. Culp, 174 Pac. 495, this court said that, "in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction cannot be shown by extrinsic evidence in a collateral attack, but may be shown on a direct attack," and sustained the admissibilty of extrinsic evidence to prove that a false return was part of a fraudulent scheme to confer jurisdiction on the court. Of course, extrinsic evidence is admissible in equity to show that the recital of service in the judgment was based upon a fraudulent return, where the plaintiff procured the false return or took a judgment upon it with knowledge that it was false, as held by the Missouri Supreme Court in Smoot v. Judd, 184 Mo. 508, 83 S. W. 481; New River Mineral Co. v. Seeley, 120 Fed. 193, 56 C. C. A. 505; Knox County v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586; Walker v. Robbins, 14 How. (U. S.) 584, 14 L. Ed. 552; Miedreich v. Lauenstein, 232 U. S. 237, 34 Sup. Ct. 309, 58 L. Ed. 584; Caulk v. Lowe, 178 Pac. 101.

In Crist v. Crosby, 11 Okl. 635, 69 Pac. 885, the court held that "when the judgment of a court of record contains a finding that due personal service was made upon the defendant," it is conclusive and cannot be questioned in an injunction action; and said that the

Digitized by Google

"finding and adjudication are prima facie evidence of due and legal service of summons, and the presumption thus raised cannot be overcome by an allegation of the fact that the summons was not served until four days after the judgment was rendered," and further, that "no one can contradict that which the record actually avers, and were not this the rule the greatest confusion would prevail. There would be but little, if any, solemnity to the judgment of the court, and a great multiplicity of suits would be the rule."

In Lausten v. Union National Bank, 173 Pac. 823, it is held that the truth of the affidavit upon which publication service is based is immaterial "until challenged in some recognized legal proceeding for the vacation of valid judgments," and that the affidavit being sufficient on its face, whether true or false, the judgment was regular and valid on its face.

In Wheatland Grain & Lumber Co. v. Dowden, 26 Okl. 441, 110 Pac. 898, some of the defendants were not served with summons, but an attorney employed to represent part of the defendants entered an appearance for all the defendants, but failed to file any pleadings for those defendants for whom he was not attorney, and judgment was entered by default against them. They filed a motion to vacate the judgment on the ground that the attorney had no authority to represent them. This court held that parol evidence was admissible to show that the attorney had no authority, and ordered the judgment vacated, saying that it was not necessary for the defendants not served with process to show that they had a meritorious defense, and announced in the syllabus that "a void judgment may be vacated at any time on motion by a party or other person affected thereby without setting up a meritorious defense."

In Continental Gin Co. v. De Bord, 34 Okl. 66, 123 Pac. 159, it is held that the finding of the court whose judgment was assailed that "the defendant appeared in person and by his attorney" cannot be impeached. That case is hardly in point here, because a finding by the court that the defendant appeared in person is a judicial finding, based on physical facts under the eye of the court, and obviously cannot be impeached. Thus, in Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520, Judge Dillon said that a finding by a court that the defendant appeared by a certain attorney could be impeached by showing the attorney had no authority, but said:

"Had the entry been that L. P. Perry came personally into court and waived process, it could not have been controverted. But the appearance by counsel, who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained."

Thus, in Blyth & Fargo Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027, the court held that the recital that defendant appeared by an attorney is conclusive of the appearance of the attorney, but not conclusive of the attorney's authority, and if he had no authority then the judgment would be set aside.

In Rice v. Woolery, 38 Okl. 199, 132 Pac. 817, the first paragraph of the syllabus says:

"The judgment or decree of a domestic court of general jurisdiction, reciting that the defendant was duly served with summons for more than 41 days prior to the date of the trial, by publication of the warning order as required by law, is conclusive on collateral attack, and cannot be contradicted by extrinsic proof."

That decision was on demurrer to an answer averring that the publication notice against a nonresident was not for a sufficient length of time. The answer to which the demurrer was sustained appears, from the statement of the case by Justice Dunn, to have merely alleged "that the publication had was not sufficient in law to give the court jurisdiction of the person of the defendant Farris Rice or the estate sought to be affected; that the notice of publication was not for the statutory time before answer day." An analysis of that case shows the admissibility of extrinsic evidence to contradict the record was not involved; Justice Dunn merely held the recital of service was a conclusive adjudication of the sufficiency of the publication proceedings.

In Rice v. Theimer, 45 Okl. 618, 146 Pac. 702, the fifth paragraph of the syllabus by the court says:

"Where the order of the probate court in appointing a guardian recited in the order of appointment that notice was given as required by Rev. Laws 1910, § 6522, the same is conclusive on collateral attack."

That was a litigation between third parties for the specific performance of a contract, incidentally involving the validity of a judicial decree. The issue arose over the question as to whether or not the plaintiff tendered a merchantable title. It was not a suit in equity for relief against the judgment on the ground that it was obtained without the service of process, nor was it a motion to vacate the judgment under subdivision 3 of section 5267, R. L. 1910, hereinafter discussed.

In Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815, it is said that—

"An adjudication of the jurisdictional facts in a domestic judgment is conclusive in a collateral proceeding attacking such judgment by attempting to again put such facts in issue."

That was a suit in the district court to set aside the judgment. It was expressly agreed that the purchasers of the land involved had paid a valuable consideration therefor, without notice of the plaintiff's claim that the former judgment was void.

Digitized by Google

The record in the former judgment showed service.

From an examination of a great number of authorities, including text-writers and adjudicated cases, we find on one side the majority of decisions holding the recitation of service in a domestic judgment cannot be collaterally contradicted by extrinsic evidence, although such recital of service may be overcome by other parts of the judgment roll in irreconcilable conflict therewith. In such cases, the judgment or decree is sustained, not because a judgment rendered without notice and without service is good, but because the law does not permit the introduction of evidence to overthrow that which, for reasons of public policy, it treats as absolute verity. Black on Judgments, vol. 1, § 273. Lancaster v. Wilson, 27 Grat. (Va.) 629, states the reasoning of that line of decisions about as clearly as any we have examined. The Virginia court says that if judgments were always open to collateral attack they would—

"no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain, and a cloud would rest upon every title."

The common-law authorities proceeded from the earliest times to hold that the memorials of courts import the most absolute and uncontrollable verity; that the records always speak the truth, and cannot be contradicted except by their own inspection. That holding no doubt originated largely from a fetish reverence for the common-law courts. The judgment roll at common law was as a physical fact a judgment roll—the proceedings from the beginning to the end were originally transcribed on a roll of parchment. As new steps were taken in the case, further entries were made upon this roll. But the judicial records in America are not kept and preserved with that great care and caution displayed by the old common-law courts in England. On that side of the question we find the federal cases: Walker v. Robbins, 14 How. 584, 14 L. Ed. 552; Knox County v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586; Miedreich v. Lauenstein, 232 U. S. 236, 34 Sup. Ct. 309, 58 L. Ed. 584; Foster v. Givens, 67 Fed. 684, 14 C. C. A. 625; Bigelow v. Chatterton, 51 Fed. 614, 2 C. C. A. 402; Walker v. Cronkite (C. C.) 40 Fed. 133; Lathrop v. Stewart, 14 Fed. Cas. p. 1185, No. 8112; Sargeant v. Indiana State Bank, 21 Fed. Cas. p. 491, No. 12360. One wishing to pursue this line of cases should examine Smoot v. Judd, 184 Mo. 508, 83 S. W. 481, as well as the cases cited in 23 Cyc. 1086, and Black on Judgments (2d Ed.) vol. 1, § 273. But it is unnecessary to examine and cite all the cases discussing this question. We have stated the theory upon which they rest, to wit, that public policy demands that the solemn judgments of courts of general jurisdiction shall not be made to depend for their stability and permanency upon any other evidence than the written monuments of their jurisdiction preserved in the judgment roll itself.

With profound deference to the distinguished courts on that side of the line, and with solemn realization of the great public importance of the question, and the possible consequences of admitting extrinsic evidence to impeach the solemn judgments of courts, let us turn to the other line of cases, not for the purpose of compiling them numerically, but for the purpose of examining the reasons upon which they base their holding to the contrary. Black on Judgments (2d Ed.) vol. 1, § 276, states the reasons underlying the opposing line of authorities with such force and vigor that we quote it here. Black says:

"First, there is the question of natural justice to the individual. To suffer a man to be condemned unheard, to permit him to be deprived of his property or his rights by proceedings of which he had no notice or in which he had no opportunity to be heard, is repugnant to every sentiment of fairness and right dealing, as well as wholly alien to the spirit of our jurisprudence. To sacrifice the individual to the welfare of the community is no doubt a very high principle of political ethics, but it is scarcely at home in the body of our law, except in matters of police. On the contrary, it is the guarantee which the law gives of the inviolability of every man's rights and estate that constitutes its best title to the respect and confidence of the people. True, it is said that a defendant who is injured by the rendition of a judgment against him without jurisdiction of his person may procure its reversal in an appellate court, or move to vacate it in the court which rendered it, or go to equity with an application for an injunction. But this is no adequate safeguard. These remedies are often illusory. For it is very possible that he may remain entirely ignorant of the adjudication against him until long after his rights are irrevocably lost. In the second place, if the court had no jurisdiction, its proceedings are void; and if the action of the court was void, its memorial of that action is no record. This argument is put in a very clear light in an early New York case, where the learned judge, speaking of an alleged record, used the following language: 'It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one

Digitized by Google

exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiffs, in effect, declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging want of jurisdiction.' "

Certainly in a nation composed of 48 states, and a superstate, the federal government, each with a Constitution solemnly guaranteeing the right to life, liberty, and the pursuit of happiness, a citizen's rights should never be foreclosed by a judgment without notice and without a hearing. Is it true that solemn acts of state Legislatures and the federal Congress can be stricken down by judicial decrees because they conflict with constitutional limitations prohibiting the taking of property without due process of law, and yet a citizen's savings of a lifetime can be impounded under an execution on a judgment of which he was wholly ignorant and had no opportunity to resist? To illustrate: A citizen by hard labor and economy has laid up enough to keep away the wolf in old age; realizing the inability of the government to wholly protect him from thieves, burglars, and highwaymen, he can lock his crib, bolt his doors, and arm himself to resist personal violence, yet he is utterly helpless to defend his rights against a judgment based upon a false return of an officer of the law; he has been taught from early childhood that neither his liberty nor property can be taken from him under the sanction of a judicial decree until he shall have had an opportunity to resist in a neutral forum the demands and claims of those who seek to despoil him, yet he is suddenly awakened to find the sale of all his property under an execution cannot be restrained, because public policy demands that he must be sacrificed upon the altar of the uncontrovertable verity and sanctity of a judicial decree of which he had no knowledge and no means to resist. We cannot bring ourselves to the point of unqualifiedly adopting a rule in this state which closes the door of hope and shuts out the light of truth. We prefer to go with Illinois, Mississippi, Arkansas, Tennessee, Alabama, Iowa, New York, Colorado, Texas, and other states, and along with the great text-writers on Judgments and Equity Jurisprudence. As said by Lord Coke, a judgment ought to be "the very voice of law and right."

Fortified with the safeguards hereinafter defined, we believe the ends of public policy will be fully satisfied and the ends of justice met by admitting extrinsic evidence to contradict the officer's return of service and the recital in a judgment of service, when the facts and circumstances clearly, cogently, and satisfactorily demonstrate that it would be unconscionable to permit a judgment to stand against a party who had no notice of the suit and no opportunity to defend his rights.

Without undertaking to harmonize the decisions of this court, the conflict being more apparent than real, we now lay down the following as the correct rules in this state, to wit:

[5-9, 19] 2. Relief based on evidence dehors the record may be had against a judgment rendered without service of process, under the third subdivision of section 5267, R. L. 1910, empowering the court to vacate or modify its own judgments or orders at or after the term at which such judgment or order was made, on account of "irregularity in obtaining a judgment or order." Such motion, under section 5274, R. L. 1910, must be presented within three years after the rendition of the judgment or order. Canadian & A. Mortg. & Tr. Co. v. Clarita Land & Inv. Co., 140 Cal. 672, 74 Pac. 301; People ex rel. v. Temple, 103 Cal. 447, 37 Pac. 414; Scott v. Hanford, 37 Wash. 5, 79 Pac. 481; Kohn v. Haas, 95 Ala. 478, 12 South. 577; State v. District Court, 38 Mont. 166, 99 Pac. 291, 35 L. R. A. (N. S.) 1098, 129 Am. St. Rep. 636; Johnson v. Johnson, 40 Ala. 247; Wheatland Grain & Lumber Co. v. Dowden, 26 Okl. 441, 110 Pac. 898; Nicoll v. Midland Sav. & Loan Co., 21 Okl. 591, 96 Pac. 744; Baker v. Stonebraker, 32 Okl. 88, 121 Pac. 255; Richardson v. Howard, 51 Okl. 240, 151 Pac. 887; Frost v. Akin, 60 Okl. 174, 159 Pac. 752; Harding v. Gillett, 25 Okl. 199, 107 Pac. 665; Ozark Marble Co. v. Still, 24 Okl. 559, 103 Pac. 586; Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Hanson v. Wolcott, 19 Kan. 207; Leforce v. Haynes, 25 Okl. 190, 105 Pac. 644; First Nat. Bank v. Grimes Dry Goods Co., 45 Kan. 510, 26 Pac. 56. If it be necessary to resort to extrinsic evidence to show the invalidity of a judgment, the motion to vacate must be presented within the three years following the rendition of the judgment or order, otherwise every judgment valid upon the face of the record will depend for its perpetuity

Digitized by Google

upon the frail memory of man. We refuse to follow those cases apparently holding that a judgment rendered without service of process, though valid on its face, may be vacated at any time upon motion. Those cases fail to distinguish between judgments valid on their face and those void on their face. See Edwards v. Smith, 42 Okl. 544, 142 Pac. 302, correctly holding that "a judgment is not void in the legal sense for want of jurisdiction, unless its invalidity and want of jurisdiction appear on the record; it is voidable merely."

This statutory remedy during the three years following the rendition of the judgment is exclusive of relief in equity unless there be special reasons in the particular case why the statutory remedy is inadequate. Frost v. Akin, 60 Okl. 174, 159 Pac. 752; 15 Standard Proc. p. 277; Crist v. Cosby, 11 Okl. 635, 69 Pac. 885; State v. District Court, 38 Mont. 166, 99 Pac. 291, 35 L. R. A. (N. S.) 1098, 129 Am. St. Rep. 636; Harris v. Smiley, 86 Okl. 89, 128 Pac. 276; Gale Mfg. Co. v. Sleeper, 70 Kan. 806, 79 Pac. 648.

Extrinsic evidence is admissible to contradict the officer's return of service, and to show that process was not served on defendant. Wheatland Grain & Lumber Co. v. Dowden, 26 Okl. 441, 110 Pac. 898; First National Bank v. Grimes Dry Goods Co., 45 Kan. 510, 26 Pac. 56; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Blyth & Fargo Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027; People ex rel. v. Temple, 103 Cal. 447, 37 Pac. 414; Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; Vilas v. Plattsburgh & Montreal R. R. Co., 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771; Taylor v. Granite State Provident Ass'n, 136 N. Y. 343, 32 N. E. 992, 32 Am. St. Rep. 749; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Parker v. Spencer, 61 Tex. 155; Scott v. Hanford, 37 Wash. 5, 79 Pac. 481; Griffin v. Culp, 174 Pac. 495; Hanson v. Wolcott, 19 Kan. 207; Savings Bank, etc., v. Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498. And it is unnecessary for the motion to vacate to be supported by an answer showing a meritorious defense. Wheatland Grain & Lumber Co. v. Dowden, 26 Okl. 441, 110 Pac. 898; Ozark Marble Co. v. Still, 24 Okl. 559, 103 Pac. 586; Leforce v. Haymes, 25 Okl. 190, 105 Pac. 644; Hanson v. Wolcott, 19 Kan. 207; Savings Bank, etc., v. Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498; Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198.

A plaintiff, to reassure himself of actual personal service, when defendant fails to enter his appearance under the first summons returned by the officer as served, may have another summons issued and returned by a different member of the sheriff's deputies before proceeding to take a default judgment, and by this means put into the record cumulative evidence of service.

[10-12] 3. As said in People v. Greene, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448, "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant." Under the clause of section 5274, R. L. 1910, providing that "a void judgment may be vacated at any time on motion of a party, or any person affected thereby," a judgment void upon its face may be vacated at any time by the court rendering such judgment (Arnold v. Joines, 50 Okl. 4, 150 Pac. 130); and as said in Gille v. Emmons, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 600, "the court was [is] not hampered by a limitation of time." A judgment is void on its face when it so appears by an inspection of the judgment roll, but will not be held void on its face unless the record thereof affirmatively shows the court was without jurisdiction to render it. Canadian & A. Mortg. & Tr. Co. v. Clarita Land & Inv. Co., 140 Cal. 672, 74 Pac. 301; People ex rel. v. Temple, 103 Cal. 447, 37 Pac. 414; Whitney v. Daggett, 108 Cal. 232, 41 Pac. 471; People v. Davis, 143 Cal. 673, 77 Pac. 651; State v. District Court, 38 Mont. 166, 99 Pac. 291, 35 L. R. A. (N. S.) 1098, 129 Am. St. Rep. 636; Scott v. Hanford, 37 Wash. 5, 79 Pac. 481; White v. Ladd, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732; Baker v. Stonebraker, 32 Okl. 88, 121 Pac. 255; Anglea v. McMaster, 17 Okl. 501, 87 Pac. 660; Spaulding & Co. v. Chapin, 37 Cal. App. 573, 174 Pac. 334. A judgment void on its face may be vacated upon motion, no matter what length of time has interposed since its rendition; neither is it necessary for the movant to show any meritorious defense, nor can the court impose any conditions for vacating it. See long list of cases in annotation to Furman v. Furman, 60 Am. St. Rep. 642-643; Blyth & Fargo Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027; Harris v. Hardeman, 14 How. 337, 14 L. Ed. 444; Condit v. Condit, 168 Pac. 456.

[13] 4. When it clearly appears that a party not served with process, against whom a default judgment, valid on its face, has been taken, had no notice or knowledge of such judgment until after three years from its rendition (15 Standard Ency. of Proc. p. 275), or in too short a time before the three years expired to file a motion to vacate, he may file a suit in equity against the plaintiff to enjoin the enforcement of such judgment. We are referring to a case where extrinsic evidence is relied upon to show no service of summons, provided the ultimate relief is not barred by some other statute of limitations,

Digitized by Google

if any, a question which we are not now considering.

23 Cyc. 996, says:

"Equity may vacate or enjoin a judgment in an action of which defendant had no legal notice, the trial court assuming jurisdiction on the strength of a false return of service of process by the sheriff or other officer. Earlier decisions holding that the party's only remedy was by an action against the officer are inconsistent with the modern rules."

The law is thus stated in Freeman on Judgments (4th Ed.) § 495:

"A judgment pronounced without service of process, actual or constructive, and without the defendant's knowledge that a court had been asked to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs, and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues after full opportunity has been given to those who seek to sustain as well as those who seek to avoid the judgment. If at such trial it satisfactorily appears that the defendant was not summoned and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, *no matter what jurisdictional recitals it contains.*" (Italics ours.)

In 1 Black on Judgments, § 377, the law is thus stated:

"Equity may vacate or enjoin the judgment of a court of law when it is shown to be unjust, and that the court rendering it never had jurisdiction of the person of the defendant, although assuming it in consequence of a false return of service of the sheriff or other officer."

Pomeroy's Equity Jurisprudence (4th Ed.) vol. 5, § 2084, says:

"In many cases courts of equity will interfere to prevent injustice when a court of law has acted without jurisdiction. This interference is based on the inequitable results which follow, *and frequently is wholly independent of any wrong on the part of the prevailing party. One of the commonest illustrations is found in cases where no jurisdiction has been obtained because there has been no service of summons or process.* The rule seems to be that where the failure to serve a party results in his inability to answer relief will be granted. On the point as to whether a meritorious defense must be shown the courts are divided. The question is discussed more at length in a subsequent paragraph. The defect in service may not be apparent on the record, or, again, the record itself may show the want of jurisdiction. In the former case the question arises as to whether a return can be attacked. It was formerly held by common-law courts that their judgments purported absolute verity. If the jurisdiction of the court depended upon the false return of an officer to the service of process, the party injured could maintain an action against the officer, but he could not be relieved from the judgment. *The modern equity cases have greatly ameliorated this harsh doctrine, and it can be safely stated that the general rule, by the weight of authority, is that a return may be attacked in an action to set aside the judgment.* The justice of this rule requires no argument. The remedy at law against an officer is at best of a very doubtful character, and in many cases damages, if recovered, are a wholly inadequate remedy; for example, where the action is for the recovery of land. Some courts, however, have laid down the rule that an officer's return cannot be attacked unless it is willfully false and has been procured by the plaintiff at law. The effect of this is to make the basis of the equity action fraud by the plaintiff at law. The injured party must, if no fraud be shown, depend upon his remedy against the officer. It is everywhere held, however, that the officer's return is prima facie evidence of regularity. The court in a default judgment must find that there has been due service. This finding will be presumed to be correct. Therefore, in order to impeach it, clear and satisfactory evidence must be produced." (Italics ours.)

A careful examination of the text-writers and cases convinces us that the decided weight of authority supports the view that modern equity will grant relief from such a judgment. See Little Rock & Ft. Smith Ry. Co. v. Wells, 61 Ark. 354, 33 S. W. 208, 30 L. R. A. 560, 54 Am. St. Rep. 216, and long annotation; 15 Standard Proc. p. 296; 2 Story, Eq. Jur. § 887; Am. & Eng. Ency. of Law (2d Ed.) vol. 16, p. 388; High on Inj. vol. 1, § 222; Joyce on Inj. vol. 1, §§ 631–633; People ex rel. v. Temple, 103 Cal. 447 37 Pac. 414; Black on Judg. (2d Ed.) vol. 1, §§ 348 and 376–377, etc.; Great West Min. Co. v. Mining Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Johnson v. Gregory & Co., 4 Wash. 109, 29 Pac. 831, 31 Am. St. Rep. 907; Nat. Metal Co. v. Greene Consol. Co., 11 Ariz. 108, 89 Pac. 535, 9 L. R. A. (N. S.) 1062; Huntington v. Crouter, 33 Or. 408, 54 Pac. 208, 72 Am. St. Rep. 726; Hilt v. Heimberger, 235 Ill. 235, 85 N. E. 304; Hamblen v. Knight, 60 Tex. 36; Larr v. Stein, 97 Neb. 488, 150 N. W. 655; Campbell Pt. Press & Mfg. Co. v. Marden, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Duncan v. Gerdine, 59 Miss. 550; Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798; Vaule v. Miller, 69 Minn. 440, 72 N. W. 452. See, also, long list of cases cited by Judge Valliant in his dissenting opinion in Smoot v. Judd, 184 Mo. 586, 83 S. W. 518.

[14, 15] 5. The right to appeal to equity being based on inadequacy of legal remedies (Frost v. Akin, 60 Okl. 174, 159 Pac. 752), we think it just that a defendant seeking relief in a court of equity from a judgment obtained without service of process should be required to show a good defense to the action. That is, where the defendant seeks

Digitized by Google

to show by extrinsic evidence—evidence dehors the record in which the judgment was rendered—that no process was served on him, he must show in his bill in equity that he had a good defense against the plaintiff's claim upon which the judgment at law or in equity was based. There is a conflict of authority on this question, but we agree with that line of cases holding that a good defense must be shown in order to avoid a default judgment when equity is applied to for relief. 23 Cyc. p. 994; Pomeroy's Eq. Jur. (4th Ed.) vol. 5, § 2088; Brandt v. Little, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213; Black on Judgments (2d Ed.) vol. 1, §§ 376-377; 15 Standard Proc. pp. 262, 268, 270, 271, and long list of cases; Prudential Casualty Co. v. Kerr (Ala.) 80 South. 97; Newman v. Taylor, 69 Miss. 670, 13 South. 831; Anderson v. Oldham, 82 Tex. 228, 18 S. W. 557; Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054.

Pomeroy, supra, says that in cases where the attack in equity is on the ground that the judgment was rendered without jurisdiction because there was no service of summons, "the prevailing view is that even there a good defense on the merits must be shown." Not only must the party against whom the default judgment has been taken without service of summons, when he relies upon extrinsic evidence—evidence dehors the judgment roll—to prove the want of jurisdiction, show a meritorious defense, but he must not be guilty of laches or negligence. Annotations in 60 Am. St. Rep. 640; Nat. Metal Co. v. Greene Consol. Co., 9 L. R. A. (N. S.) 1062; Fox v. Robbins (Tex. Civ. App.) 62 S. W. 815; Ind. L. & Tr. Co. v. Owen, 162 Pac. 818; Harrison v. Hargrove, 109 N. C. 346, 13 S. E. 939. When such party applies to equity he must offer to do equity, and where there has been a long lapse of time, and it appears that the innocent plaintiff in the default judgment case is placed at disadvantage on account of the delay, the court may weigh the corresponding equities between the parties; and, if it appears that the cause of action of the plaintiff to the default judgment is barred by the statute of limitations, a court of equity may require the defendant to the default judgment to waive the plea of the statute of limitations, so that the parties may proceed as nearly as possible to litigate the issues as of the date of the original action in which the default judgment was rendered, or he may be required to pay the judgment in advance. 15 Standard Proc. p. 272. It is well settled that a court of equity will administer such relief as the exigencies of the particular case demand, and that "its modes of relief are not fixed and rigid. It can mold its remedies to meet the conditions with which it has to deal, the jurisdiction of equity being the whole domain of conscience, limited by legislative enactment only." Graselli Chemical Co. v. Ætna Explosives Co., 252 Fed. 456, 164 C. C. A. 380; Bloomquist v. Farson, 222 N. Y. 375, 118 N. E. 855; Thatcher v. Thatcher, 117 Me. 331, 104 Atl. 515; Earle v. American Sugar Refining Co., 74 N. J. Eq. 751, 71 Atl. 391; Story's Eq. Jur. (14th Ed.) vol. 1, § 578; and a court of equity may impose all the conditions provided for by section 5272, R. L. 1910.

[17, 18] 6. We reaffirm the doctrine of Edwards v. Smith, 42 Okl. 544, 142 Pac. 302, holding that "a judgment is not void in the legal sense for want of jurisdiction, unless its invalidity and want of jurisdiction appear on the record; it is voidable merely." This is a sound doctrine, well supported by the text-writers and adjudicated cases. While extrinsic evidence—evidence dehors the record—is admissible, either in support of a motion to vacate a judgment filed within three years after its rendition, or in support of a bill in equity filed at any time, to contradict the officer's return of service or the recital of service of process in the judgment, nevertheless such judgment, if valid on its face, is not legally void in the sense that it cannot be the basis of the right and title of a bona fide purchaser of property sold under the authority of such judgment. In Smoot v. Judd, 184 Mo. 508, 83 S. W. 481, the court, in an elaborate opinion holding that public policy excludes the introduction of extrinsic evidence to impeach the officer's return of service or contradict the recital of service in the judgment, also held that the plaintiff's title as purchaser at a sheriff's sale of the defendant's property on an execution based on such judgment was valid—that the purchasing plaintiff was an innocent party because he had no knowledge of the falsity of the officer's return. We disagree with that conclusion. Courts were made primarily for plaintiffs and not for defendants, and, in a certain qualified sense, the plaintiff is sponsor for the errors and irregularities committed by a court acting as his agent to enforce his rights. It is the plaintiff's business to see that process is in fact served, and, while he has the right to rely on the machinery furnished by law for service, he, and not defendant, must suffer if the machinery he puts in motion does not work safely. Where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must suffer. Nat. Safe. Dep. Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241. Whether or not the plaintiff had any notice or knowledge of the falsity of the return of service, he can never occupy the position of bona fide purchaser under a judicial sale in a proceeding instituted by him. Arnold v. Joines, 50 Okl. 4, 150 Pac. 130; Hubbard v. Ogden, 22 Kan. 671.

In Smoot v. Judd, supra, it is said that it would be a fraud for the plaintiff, though ignorant of the falsity of the officer's return of service at the time of its return, to take a default judgment against the defendant

Digitized by Google

with knowledge of its falsity at the time the judgment was rendered, and that under such a state of facts the defendant could have relief in equity. There is a very narrow margin between the plaintiff who claims the fruits of a judgment based on a false return of service and a plaintiff who obtains a default judgment with knowledge of the falsity of the officer's return. In the absence of the most extraordinary circumstances appealing strongly to the conscience of the chancellor, we will not permit a plaintiff in this state to hold onto a judgment based upon a false return of an officer. But as said in Boone v. Chiles, 10 Pet. 210, 9 L. Ed. 388, "Bona fide purchasers are its [equity court's] most especial favorites." Bona fide purchasers of property sold under a judgment not void on its face, as herein defined, will be protected against either a motion to vacate or a bill in equity to annul or evade such judgment, although extrinsic evidence would show that the officer's return of service of summons was false, or that the recital of service of process in the judgment was untrue. As pointed out, those courts excluding extrinsic evidence to show want of jurisdiction for lack of service of process do so not because a judgment without service is good, but because public policy will not permit the introduction of extrinsic evidence to overcome that which it treats as absolute verity. While we do not subscribe to the doctrine that public policy closes the door absolutely and at all times against the introduction of extrinsic evidence to impeach the officer's return of service, or the recital of service in the judgment, we do hold that public policy shuts the door against such extraneous evidence when to admit it will strike down the rights of innocent third parties. A purchaser who is not a party to the proceedings is not bound to look beyond the judgment, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. If the jurisdiction has been improvidently exercised, it is not to be corrected at the expense of one who had the right to rely upon the order of the court as an authority emanating from a competent source. Section 5176, R. L. 1910, providing that if any judgment, "in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers," while not exactly applicable to a case like this, is a statutory expression of the public policy of this state. If the purchaser under such judgment, not void on its face, had no notice of the falsity of the officer's return or the recital of service in the judgment, and pays a valuable consideration, relying upon the face of the record, his rights are superior to the defendant's. See Harrison v. Hargrave, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781; Sutton v. Schonwald, 86 N. C. 198, 41 Am. Rep. 455; Davis v. Dresback, 81 Ill. 393; Dunklin v. Wilson, 64 Ala. 162; Wilson v. Hoffman (N. J. Ch.) 50 Atl. 592; Fox v. Robbins (Tex. Civ. App.) 62 S. W. 815; Cassidy v. Automatic Time-Stamp Co., 185 Ill. 431, 56 N. E. 1116; Reeve v. Kennedy, 43 Cal. 643, 650; Stokes v. Geddes, 46 Cal. 17; Friebe v. Elder, 181 Ind. 597, 105 N. E. 151; Hilt v. Heimberger, 235 Ill. 235, 85 N. E. 304; McCormick v. McClure, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441; Taylor v. Boyd, 3 Ohio, 337, 17 Am. Dec. 603; Gould v. Sternberg, 128 Ill. 510, 21 N. E. 628, 15 Am. St. Rep. 138; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Hudepohl v. Liberty Hill Water Co., 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149; Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350. In Ray v. Harrison, 32 Okl. 17, 121 Pac. 633, Ann. Cas. 1914A, 413, the plaintiffs were purchasers under the execution sale. Subsequently one of the plaintiffs conveyed his interest to Harrison, but he does not appear to have interposed a plea of bona fide purchaser. Neither was the question of bona fide purchaser discussed in Jones v. Jones, 57 Okl. 442, 154 Pac. 1136.

[18] 7. Sound public policy, the stability of solemn judgments of courts, and the security of litigants, demand that neither the officer's sworn return, nor the recital of service in the judgment based thereon, shall be set aside or contradicted except upon the most satisfactory evidence. The evidence must be clear, cogent, and convincing, and, as said in Kochman v. O'Neill, 202 Ill. 110, 66 N. E. 1047, "Every presumption in favor of the return is indulged, and it will not be set aside upon the uncorroborated testimony of the party upon whom service purports to have been made." Nor can the officer making the return upon which the judgment was rendered contradict it. Duncan v. Gerdine, 59 Miss. 550. As said in Randall v. Collins, 58 Tex. 231, "It is not like an ordinary issue of fact, to be determined by a mere preponderance of testimony." See, also, Quarles v. Hiern, 70 Miss. 891, 14 South. 23; Hunt v. Childress, 5 Lea. (Tenn.) 247; U. S. v. Gayle (D. C.) 45 Fed. 107; Driver v. Cobb, 1 Tenn. Ch. 490; Ray v. Harrison, 32 Okl. 17, 121 Pac. 633, Ann. Cas. 1914A, p. 443; Jones v. Jones, 57 Okl. 442, 154 Pac. 1136; also annotations in 124 Am. St. Rep., beginning on page 770. See, also, Kemper v. Jordon, 7 Tex. Civ. App. 275, 26 S. W. 870, and Becker v. Becker, (Tex. Civ. App.) 218 S. W. 542, holding the testimony of the officer must be met by the oath of two witnesses, or of at least one with strong corroborating circumstances.

[20-22] 8. Defendant, however, insists that the foreclosure judgment is void on its face because her husband, Isaac Leonard, was not a party to that suit; that the land involved was the family homestead, and that the husband was an indispensable party to the foreclosure action, and without him before the court the foreclosure judgment and sale thereunder are void. If it appears from

Digitized by Google

an inspection of the judgment roll in the foreclosure case that Isaac Leonard, the husband, was not a party, then the judgment, so far as he is concerned, is a void judgment, within the meaning of section 5274, R. L. 1910, and may be set aside or ignored at any time.

9. Before we can consider the question as to whether or not the husband was a party to that case by service of process, either actual or constructive, it is necessary to decide whether or not the wife, the owner of the homestead in fee, can raise that question. Section 2 of article 12, Williams' Oklahoma Constitution, exempts the family homestead from forced sale "for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon." The same section of the Constitution prohibits alienation of the homestead "without the consent of his or her spouse, given in such manner as may be prescribed by law"; providing, however, that the homestead may be mortgaged by the husband and wife joining therein, and that it may be sold on foreclosure to satisfy such a mortgage. Section 1143, R. L. 1910, provides that "no mortgage * * * shall be valid unless in writing and subscribed by both husband and wife." In Whelan v. Adams, 44 Okl. 696, 145 Pac. 1158, L. R. A. 1915D, 551, this court said: "It must be remembered that it [meaning the homestead] is not the homestead of the husband alone, though the title be in his name; it is the homestead of the family, made so by the Constitution."

In Gooch v. Gooch, 38 Okl. 300, 133 Pac. 242, 47 L. R. A. (N. S.) 480, this court said "the homestead of the family may consist of more than one tract of land, and may be owned by either the husband of by the wife, or by both jointly, or one tract be owned by one and another tract owned by the other, so long as the aggregate number of acres occupied as a home shall not exceed 160 acres"; and in that case cited approvingly Ehrck v. Ehrck, 106 Iowa, 614, 76 N. W. 793, 68 Am. St. Rep. 330, wherein the court held that, although the homestead had been set apart out of the property of the wife, the husband nevertheless had full right to live upon and cultivate the homestead, although the wife chose to live apart from the husband, and that so long as the wife elected to live elsewhere she was not entitled to any benefit from the homestead, the husband being entitled to occupy and enjoy the same.

Alton Mercantile Co. v. Spindel, 42 Okl. 210, 140 Pac. 1168, holds that "the homestead is for the benefit of the entire family, and such joint interest is to be regarded as paramount to the rights of any individual member thereof," and that "no act or omission on the part of the husband, without the consent of his spouse, can result in an abandonment of the homestead by the family."

Thus the homestead interest is jointly vested in husband and wife, although the title to the land may be entirely in one spouse; the homestead interest is a creature of the Constitution and statutes, nothing like it being known at common law; it is a special and peculiar interest in real estate, and has been variously characterized by different courts as an exemption, a fee, a freehold estate, or a life estate, but we deem it unnecessary to define it with precision in this case. 21 Cyc. 460. It survives the death of either or both the husband and wife. Union Trust Co. v. Cox, 55 Okl. 68, 155 Pac. 206, L. R. A. 1917C, 856. It is a right jointly vested in the husband and wife for the benefit of themselves and family. The mortgage executed by defendant and her husband would have been utterly void (Whelan v. Adams, 44 Okl. 696, 145 Pac. 1158, L. R. A. 1915D, 551), unless the husband had joined in its execution, although he may have been living separate and apart from the defendant, and may have abandoned her without justifiable cause. If the husband was not a party to the forclosure proceedings, he would not be bound by the foreclosure decree (Shanks v. Norton, 191 Pac. 170, decided by this court May 11, 1920), and his homestead rights in the land would remain unimpaired. He would have the right to continue to occupy and enjoy the land as the homestead, and that right to continuous occupancy and enjoyment carries with it the right to have his family reside with him on the homestead. This means that the husband has the right to have his wife live with him on the homestead, as a part of the family, and likewise the wife has the right to reside with the husband on the homestead. A sale of the homestead under a mortgage foreclosure decree against one of the spouses cannot operate to force a separation between husband and wife. We know of no legal proceeding for the partition of the homestead right between husband and wife—a partition of this peculiar estate, interest, or right known as a homestead. If the husband was not a party to the foreclosure proceedings, the wife has a right to continue in possession of the land, without regard to whether or not her title as the owner of the land was divested by sale under the foreclosure proceedings. The husband's interest in the homestead, the title to the land being in the wife, is not a mere inchoate one, to become vested after her death, that may be disposed of by judicial sale under a foreclosure action against the wife, but the occupation of it as a home gives the husband a right therein without any further act on his part, or any one for him, which cannot without joint consent be divested. If the husband had been a party defendant in the foreclosure case, he might have denied the execution of the mortgage, might have denied that he executed it, or pleaded payment of the debt, or made some other

Digitized by Google

valid defense. If he had not executed the mortgage, or if his name had been forged thereto, the mortgage would have been void as to both husband and wife. If the husband was not a party to the foreclosure proceedings, his homestead rights remain unimpaired, and the wife, by virtue of the husband's homestead interest, has the right to remain in possession of the land without the necessity of paying rent to the purchaser under the foreclosure sale, or his assigns, and may question the jurisdiction of the court on this ground.

This peculiar interest, denominated homestead, cleaves and adheres so closely to the title to the land itself that it cannot be divorced therefrom by a mortgage foreclosure sale under a court decree to which either husband or wife is not a party. If both husband and wife are not made parties, the judgment and sale are utterly void and the purchaser takes no title. Of course, the children are not necessary parties so long as the husband or wife is the head of the family, because the children are represented by the father and mother, and their interest may be extinguished by abandonment, or a deed executed by the father and mother without their consent. We realize there is a conflict of authority on this question, but our decision as above outlined is the logical sequence of joint ownership of the homestead right. These conclusions are supported by the following authorities: Hefner v. Urton, 71 Cal. 479, 12 Pac. 486; Willis v. Whitead, 59 Kan. 221, 52 Pac. 445; Hofman v. Demple, 53 Kan. 792, 37 Pac. 976; Brackett v. Banegas, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 164; Chase v. Abbott, 20 Iowa, 154; Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; Larson v. Reynolds, 13 Iowa, 579, 81 Am. Dec. 444; Jones on Mortgages (7th Ed.) vol. 2, § 1423; 21 Cyc. 556; Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 245; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

[32, 35] 10. The assault made by the defendant, Becky Pettis, on the judgment in the foreclosure proceedings in the district court is a collateral attack. A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law; that is, in some other way than by appeal, writ of error, certiorari, or motion for a new trial. We are not attempting to name all the methods falling within the scope of a direct attack, but in this case the judgment in the foreclosure proceedings is not assailed by any method prescribed by law for correcting erroneous judgments. A successful collateral attack on a judgment does not operate to set aside or vacate such judgment—the judgment is merely avoided or evaded. Morrill v. Morrill, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95. Where a judgment forms a link in a litigant's chain of title, and the opposing party, plaintiff or defendant, in his pleadings, or by objecting to its introduction in evidence, assails its validity for defects in the record on which the judgment is based, the attack is collateral and not direct. 23 Cyc. 1063–1064, and authorities; also Bruno v. Getzelman, 173 Pac. 850, and 15 Standard Proc. p. 389. A judgment is good against collateral attack unless it is absolutely void for want of jurisdiction in the court rendering the judgment to decide any of the questions. Van Fleet on Col. Attack, § 16; Moffer v. Jones, 169 Pac. 652. That the attack made on the judgment in the foreclosure proceedings is collateral as settled by the decisions in Griffin v. Culp, 174 Pac. 495; Continental Gin Co. v. De Bord, 34 Okl. 66, 123 Pac. 159; Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815; Rice v. Theimer, 45 Okl. 618, 146 Pac. 702; Rice v. Woolery, 38 Okl. 199, 132 Pac. 817; Edwards v. Smith, 42 Okl. 544, 142 Pac. 302; Cushing v. Cummings, 179 Pac. 762; Bruno v. Getzelman, 173 Pac. 850; 15 Standard Proc. P. 282.

[23-31] 11. Having held that defendant had the right to question the jurisdiction of the court to render the foreclosure judgment against her husband, we will dispose of that question. Defendant avers that no summons was served on her husband, and that the attempted service of summons by publication was void. In the default foreclosure judgment it is recited that Isaac Leonard, "Having been duly summoned as by law required, came not, but wholly made default." Is this finding of service on Isaac Leonard conclusive against collateral attack? The foreclosure judgment does not recite personal service of summons on Isaac Leonard, but defendant attached to her answer in this case what she alleges to be a "true and correct copy of all the proceedings in said cause (meaning the foreclosure case), and makes same a part of this answer." The sufficiency of the answer will be tested by its averments construed in connection with the facts disclosed in the transcript attached thereto as an exhibit. Southern Surety Co. v. Municipal Excavator Co., 160 Pac. 617, L. R. A. 1917B, 558; Davis v. Board of Com., 58 Okl. 77.[1] There being no clear and unequivocal recital in the foreclosure judgment that summons was served personally on Isaac Leonard, we may readily resort to the entire record in the foreclosure case for the purpose of ascertaining what kind of service of process, if any, was had on Isaac Leonard. The plaintiff's demurrer admits the allegations in the answer, and on the demurrer we will treat the transcript of the record in the foreclosure case as equivalent to the judgment roll substantially provided for by section 5146, R. L. 1910. The recital of

[1] 158 Pac. 294.

Digitized by Google

service in a judgment is not conclusive where it is positively contradicted by, and in irreconcilable conflict with, the record—the judgment roll. Black on Judgments, vol. 1, § 273. Resort to the record to impeach a recital in the judgment attacked means a resort to the entire record—the judgment roll. Core v. Smith, 23 Okl. 909, 102 Pac. 114; Towne v. Milner, 31 Kan. 207, 1 Pac. 613; Head v. Daniels, 38 Kan. 1, 15 Pac. 911; Ogden v. Walters, 12 Kan. 282. In support of a judgment collaterally attacked, every intendment will be indulged to uphold and support it. If the judgment thus assailed contains no recital of service of process, and the record is barren of evidence of the issuance and service of process, then the service of process will be presumed, and this presumption of service stands until overcome by evidence to the contrary. Black on Judgments, vol. 1, § 271; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Carey v. Reeves, 32 Kan. 723, 5 Pac. 22; Head v. Daniels, 38 Kan. 12, 15 Pac. 911; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Mulvey v. Gibbons, 87 Ill. 367; Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Iiams v. Root, 22 Tex. Civ. App. 413, 55 S. W. 411. But if it appear positively that process was served in a particular mode, no other and different service will be presumed—that is to say, where the record itself explicitly and positively shows a particular kind of service, and is in irreconcilable conflict with any reasonable presumption of other service, then the character of service disclosed by the record is the one upon which the jurisdiction of the court must depend. This subject is fully discussed in Coit v. Haven, supra, and Black on Judgments, vol. 1, §§ 270 to 281, inclusive. See, also, Bank v. Richardson, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664. The record in the foreclosure case shows a summons issued for Isaac Leonard; that on the same day the officer made return of no service the attorney for the plaintiff in the mortgage foreclosure case made and filed the following affidavit:

"Affidavit to Obtain Service by Publication.

"State of Oklahoma, Carter County—ss.:

"In the District Court Within and for the County and State Aforesaid.

"The Farmers' Loan and Security Company, Plaintiff, v. Becky Leonard and Isaac Leonard, Defendant.

"Affidavit to Obtain Service by Publication.

"W. T. Roberts, being duly sworn according to law, says that he is the attorney for abovenamed plaintiff, and that on the 19th day of April, 1912, said plaintiff filed in said district court a petition against said defendants Becky Leonard and Isaac Leonard, showing that therefore the said defendants were indebted to plaintiff one note in the sum of $200.00 and interest; that said indebtedness is secured by mortgage lien on certain real estate therein described.

"Affiant further says that this action is brought for debt and foreclosure of mortgage lien.

"Affiant further says that the said defendant Isaac Leonard is a nonresident of the state of Oklahoma, and that the service of summons cannot be made on the said defendant Isaac Leonard within the said state of Oklahoma, and that the said plaintiff wish to obtain service on said defendant by publication; and further affiant saith not.

"W. T. Roberts, Atty. for Plaintiff.

"Subscribed and sworn in my presence and sworn to before me this 27th day of April, A. D. 1912.

"S. F. Haynie, Clerk,
"[Seal.] By S. M. Parker, Deputy.
"Affidavit to obtain service by publication.
"Filed Apr. 27, 1912.
"S. F. Haynie, Clerk District Court."

We conclude that the only service on Isaac Leonard and the service referred to by the court in the foreclosure decree was the service by publication, there being no express recitation in the foreclosure decree that personal service of summons was had on Isaac Leonard. The publication notice is as follows:

"Notice for Publication.

"State of Oklahoma, Carter County. In the District Court.

"The Farmers' Loan and Security Co., Plaintiff, v. Becky Leonard and Isaac Leonard, Defendants. No. 1408.

"Said defendant Isaac Leonard will take notice that he has been sued in the above-named court upon debt and foreclosure of mortgage, and must answer the petition filed herein by said plaintiff on or before the 13th day of June, A. D. 1912, or said petition will be taken as true, and a judgment for said plaintiff in said action for foreclosure of mortgage will be rendered accordingly.

"Dated this 27th day of April, 1912.
"W. T. Roberts, Attorney for Plaintiff.
"Attest: S. F. Haynie, District Clerk,
"[Seal.] By S. M. Parker, Deputy."

Defendant assails the validity of the constructive service on the following grounds: (1) That the affidavit for publication did not describe the land involved; (2) that the affidavit did not state, generally or specifically, that the plaintiff exercised any diligence to obtain service of summons on Isaac Leonard in the state of Oklahoma; (3) that the publication notice neither described the land nor stated the nature of the plaintiff's claim. The three years allowed by section 4728, R. L. 1910, for Isaac Leonard to have the judgment opened expired before this suit was commenced.

(A) Was it necessary to describe the land in the affidavit for publication? Defendant relies upon Ballew v. Young, 24 Okl. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084, and

Digitized by Google

City National Bank v. Sparks, 50 Okl. 648, 151 Pac. 225. Those were attachment cases in which a third party was permitted to intervene and assail the validity of the proceedings on the ground that the affidavit for publication failed to describe the property, and failed to show diligence to serve personal process in Oklahoma, and also on the ground that the publication notice failed to describe the property. This court held that the assault of the interveners on the proceedings was a collateral attack, and that the judgment in each case was void because the affidavit did not describe the property attached, and the publication notice failed to state inferentially the nature of the judgment sought by the plaintiff. Those decisions have no application to a mortgage foreclosure case.

Section 4722, R. L. 1910, with sections 4671 and 4672 read therein, authorizes service by publication in either of the following cases: (1) "For the recovery of real property, or of any estate or interest therein, or the determination in any form of any such right or interest"; (2) for the partition of real property; (3) for the sale of real property under a mortgage, lien, or other incumbrance or charge; (4) to quiet title, to establish a trust in, remove a cloud on, set aside a conveyance of, or to enforce or set aside an agreement to convey real property; (5) in actions to establish or set aside a will; (6) in actions to obtain a divorce; (7) *"in actions brought against a nonresident of the state, or a foreign corporation, having in this state property or debts owing them, sought to be taken by any of the provisional remedies, or to be appropriated in any way"*; (8) in actions which relate to, or the subject of which is, real or *personal property* in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation; (9) in actions where the defendant, being a resident of Oklahoma, has departed with the intent to delay or defraud his creditors, or to avoid service of summons, or conceals himself with like intent.

These sections of the statute authorize service on nonresidents by publication in the first eight of the above actions, but no personal judgment can be rendered upon service by publication (Continental Gin Co. v. Arnold, 167 Pac. 613, L. R. A. 1918B, 511; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; 12 Ency. Pl. & Pr. 144; 17 Ency. Pl. & Pr. 35); and no personal judgment can be given against a nonresident mortgagor on service by publication (Jones on Mortgages [7th Ed.] § 1716; Wood v. Stanberry, 21 Ohio St. 142; and 9 Ency. Pl. & Pr. 487).

"Actions brought against a nonresident of the state, or a foreign corporation, having in this state property or debts owing them, sought to be taken by any of the provisional remedies, or to be appropriated in any way" (No. 7 above), must be supported by an attachment or garnishment authorized by article 9, Code of Civil Procedure, or other provisional remedy impounding the nonresident's property, because in that class of cases the court's jurisdiction depends on a seisure of the nonresident's property. Waldock v. Atkins, 60 Okl. 38, 158 Pac. 587; Pennoyer v. Neff, supra. Article 9 of the Code of Civil Procedure authorizes the plaintiff, in a civil action on a money demand, to attach a nonresident's property in this state. Such plaintiff must make an affidavit stating the nature of his claim, that it is just, the amount he believes he ought to recover, and that the defendant is a nonresident of the state. That is the attachment affidavit. He may then get service on the nonresident by publication, provided he makes the affidavit provided for by section 4723, R. L. 1910, and gives the notice required by section 4725. The plaintiff's petition in an attachment case is not required to describe any property of the nonresident; he may sue on a promissory note or an open account, and his petition is good without any reference to the property of the defendant. Actions mentioned in No. 7, italicized above, are distinguished from actions in rem. Actions for the recovery of real property, etc., for the partition of real property, for the sale of real property under a mortgage, lien, or other incumbrance, and actions to quiet title, establish a trust, remove a cloud on, set aside a conveyance of, or to enforce or set aside an agreement to convey, real property, are actions in rem (Robinson v. Kind, 23 Nev. 330, 47 Pac. 1, 977; Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; Gould v. Garrison, 48 Ill. 258; 17 Ency. Pl. & Pr. 119); and a real estate mortgage may be foreclosed without a personal judgment for the mortgage indebtedness (Echols v. Reeburgh, 161 Pac. 1065; Tracey v. Crepin, 40 Okl. 297, 138 Pac. 142; First National Bank v. Colonial Trust Co., 167 Pac. 985). In actions not in rem, but on a money demand against nonresidents, the order of attachment issues upon the affidavit provided for by section 4813, R. L. 1910, and the property must be seized before the court acquires any jurisdiction. Waldock v. Atkins, 60 Okl. 38, 158 Pac. 587. The seizure of the nonresident's property in the ordinary action to collect a note or open account or other money demand is the basis of the court's jurisdiction, and the defendant served by publication is only bound by the judgment to the extent of the property levied on. 17 Ency. Pl. & Pr. 43–44. The affidavit for publication is distinct and separate from the affidavit for the order of attachment, and, while there is nothing in our statutes

Digitized by Google

expressly requiring the affidavit for publication to describe the property, it is essential that such affidavit refer, directly or inferentially, to one or more of the causes of action designated in section 4722; and where neither the affidavit for an attachment nor the plaintiff's petition describes (or is required to describe) any property of the nonresident, then it is reasonable to hold that the affidavit for publication in an attachment case should contain some description of the property impounded, as held in Ballew v. Young and City Nat. Bank v. Sparks. In actions not in rem, but on a money demand against a nonresident, there is nothing in the proceedings to advise him what property plaintiff is subjecting to his demand, unless the affidavit for publication or publication notice gives him this information. The attachment affidavit does not necessarily describe it. For this reason it is held in attachment cases that the affidavit for publication and publication notice should contain some description of the property seized, so the court's jurisdiction will affirmatively appear on the face of the record, especially so because the seizure of the property is the basis of the court's jurisdiction. But in a proceeding in rem—that is, to foreclose a real estate mortgage—the plaintiff's petition describes the property and is the initial basis of the court's jurisdiction. There being nothing in the statute expressly requiring either the affidavit for publication or the publication notice to describe the property sought to be reached by the plaintiff in a proceeding in rem, we find no reason why we should read into the statute any such requirement, especially on a collateral attack.

The Kansas Supreme Court in Allison v. Whitaker, 81 Kan. 706, 106 Pac. 1050, said that "the statute providing for service of summons by publication * * * does not require that either the affidavit or notice shall contain a description of the land," in an action to quiet title; and in Sharp v. McColm, 79 Kan. 772, 101 Pac. 659, said: "An affidavit for service by publication is not designed to convey any information to the defendant to be served;" that "its purpose is to bring upon the record the statutory foundation for the publication of a notice." That was a mortgage foreclosure case, and the affidavit was construed with reference to the petition to foreclose the mortgage. The court also stated: "When the affidavit in question disclosed that the action was one to foreclose a real estate mortgage, and to sell land under such mortgage, a sufficient basis for publication was established." In that case the land was misdescribed in the affidavit for publication, and, inasmuch as an exhibit to the petition described the land accurately, it was held that the failure to describe the land in the affidavit was not jurisdictional. In actions in rem—suits to foreclose mortgages, clear title to real estate, etc.—the Kansas Supreme Court holds in a number of cases that the affidavit for service by publication is sufficient against collateral attack without any description of the land. Sharp v. McColm, 79 Kan. 772, 101 Pac. 659; Allison v. Whitaker, 81 Kan. 706, 106 Pac. 1050; Ennis v. Grimes, 80 Kan. 429, 102 Pac. 454; Douglass v. Lieberman, 9 Kan. App. 45, 57 Pac. 254; Pierce v. Butters, 21 Kan. 125; Shippen v. Kimball, 47 Kan. 173, 27 Pac. 813.

The affidavit assailed in this case states that defendants are indebted to plaintiff in the sum of $200 and interest, as shown by a promissory note executed by defendants; that plaintiff therein had filed in the district court a petition against defendants showing said indebtedness; and that it was secured by a mortgage lien on certain real estate therein described. The petition to foreclose specifically describes the land, necessarily so, and also the debt secured by the mortgage, and prays for foreclosure and sale. All the possible defects in the affidavit are supplied by reference to the petition, and inasmuch as the affidavit expressly refers to the petition, which is also verified, we hold that the affidavit and petition should be construed together in a proceeding in rem against the nonresident; and especially is this true inasmuch as the affidavit is not published, and is not in an action in rem the initiatory step in the acquisition of jurisdiction. In Sharp v. McColm, supra, the defects in the affidavit were cured by reference to the petition and exhibits thereto. In Miller v. Eastman, 27 Neb. 408, 43 N. W. 179, defects in the affidavit for publication in an attachment suit were supplied by reference to the affidavit for attachment. The opinion in that case says:

"The court will look at the entire record, and, if it appear from all the affidavits before the court issuing the attachment that the essential facts to confer jurisdiction were duly sworn to therein, the judgment will not be declared void."

Also Jones v. Danforth, 71 Neb. 722, 99 N. W. 495; Bray v. Marshall, 75 Mo. 327.

12. Neither is the affidavit for publication defective because it fails to state that plaintiff exercised due diligence to obtain personal service in this state. An affidavit for service by publication alleging that the defendant is a nonresident of the state, and that plaintiff is unable to obtain service of summons in Oklahoma upon the defendant, is sufficient without the additional allegation that plaintiff exercised diligence to obtain personal service. City National Bank v. Sparks, 50 Okl. 648, 151 Pac. 225; Ballew v. Young, 24 Okl. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084; Continental Gin Co. v. Arnold, 167 Pac. 613, L. R. A. 1918B, 511; Wash-

Digitized by Google

burn v. Buchanan, 52 Kan. 417, 34 Pac. 1049; Harvey v. Harvey, 85 Kan. 689, 118 Pac. 1038; Coombs v. Crabtree, 105 Mo. 292, 16 S. W. 830; De Corvet v. Dolan, 7 Wash. 865, 35 Pac. 72, 1072; Furnish v. Mullan, 76 Cal. 646, 18 Pac. 854; Anderson v. Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

13. The failure of the publication notice to describe the land involved in an action in rem, or to state that the mortgage to be foreclosed is a real estate mortgage, or to state the amount of the note or debt secured by the mortgage, is not fatal on a collateral attack on the jurisdiction of the court in the foreclosure proceedings. There was a publication notice; that notice stated correctly the court in which the case was pending, the number of the case on the docket, the name of the plaintiff and the names of the defendants; that the plaintiff had sued the defendants "in the above-named court upon debt and foreclosure of mortgage," and must answer "the petition filed herein by said plaintiff on or before the 13th day of June, 1912, or said petition will be taken as true, and a judgment for said plaintiff in said action for foreclosure of mortgage will be rendered accordingly." We have already seen that a mortgage may be foreclosed in this state without any personal judgment for the mortgage indebtedness. Echols v. Reeburgh, 161 Pac. 1065; Tracey v. Crepin, 40 Okl. 297, 138 Pac. 142; First National Bank v. Colonial Trust Co., 167 Pac. 985. Under Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, and allied cases, no deficiency judgment can be rendered against a nonresident on constructive service of process. We have already seen that the foreclosure petition is the initiatory step in the acquisition of jurisdiction, that the affidavit for publication is the second step, and the publication notice is the third and last step required to confer jurisdiction. While it is true that section 4725, R. L. 1910, requires the publication notice to state the nature of the judgment which will be rendered, this may be stated briefly and in very general terms. As said by the court in Sharp v. McColm, 79 Kan. 772, 101 Pac. 660, "the nature of a judgment may be briefly stated in a few general terms, or the statement may be elaborated to cover every detail with the utmost certainty, including the description of real estate to be affected"; and, after reviewing former Kansas decisions, further stated: "From these decisions it is apparent that, in cases of collateral attack, the nature of the judgment required to be stated in the notice is its general nature, and not the precise character of all the minutiæ of its provisions," and "if the defendant be advised that land will be sold under a mortgage or under an attachment, or will be partitioned, or that the title to the land will be quieted, or the like, jurisdiction to proceed is complete," and "every subsequent act of the court taken pursuant to the petition is but the exercise of jurisdiction, which may extend to any tract of land made the subject of the action by the petition."

About the only difference between the publication notice in Sharp v. McColm and the one in this case is that the notice in the Kansas case stated that the petition was filed to foreclose a mortgage on real estate, while in this case the notice merely says "a mortgage," without specifying whether on real or personal property. But the notice in this case clearly referred to the petition filed to foreclose the mortgage, and the number of the foreclosure case in the district court of Carter county, and by that reference the notice was sufficient to warn the defendant that a mortgage foreclosure suit covering his property had been commenced against him in the district court of Carter county, Okl., in case No. 1408. On collateral attack we will treat the publication notice, containing material elements required by the statute, sufficient if that which is uncertain and omitted therefrom may be made certain by reference to the affidavit for publication or the original petition to foreclose the mortgage. We will apply the following principle announced by Van Fleet on Collateral Attack, § 774:

"The papers and entries in a judicial proceeding, from the summons or initiative paper to the final judgment or decree of confirmation, being one single instrument, in a collateral attack on account of a misdescription of land, the same rules are applied as in the construction of grants; and, if there are certain things which identify the corpus or thing intended to be affected or sold, the addition of a false or mistaken description will not vitiate it, as was expressly decided by the Supreme Court of Arkansas."

The doctrine above stated by Van Fleet was applied by the Kansas Supreme Court in Sharp v. McColm, supra, and Rogers v. Rogers, 93 Kan. 108, 143 Pac. 408. In a collateral attack based on defects in the publication notice, the failure to describe the land is not a fatal defect in a proceeding in rem against a nonresident. Allison v. Whitaker, 81 Kan. 706, 106 Pac. 1050; Schultz v. Stiner, 97 Kan. 555, 155 Pac. 1073; Sharp v. McColm, 79 Kan. 772, 101 Pac. 659; Doyle v. Hays Land & Inv. Co., 80 Kan. 209, 102 Pac. 496, 133 Am. St. Rep. 199; Garrett v. Struble, 57 Kan. 508, 46 Pac. 943.

The statute does not expressly require the publication notice to state the amount of the mortgage debt, but merely "the nature" of the judgment. The failure of the notice to state the amount of the mortgage note is not fatal on a collateral attack. Holland v. Adair, 55 Mo. 40. But there was a publication notice, and it did state material facts

Digitized by Google

There is a vast difference in the status of a judgment based upon no service of process and one based upon defects in the service of process. Defects in the service of process must be taken advantage of in direct proceedings, and furnish no ground for collateral attack on the judgment, especially where it appears that the court whose judgment is assailed decided that the service of process was sufficient. 19 Ency. Pl. & Pr. p. 704–707, inclusive; 17 Ency. Pl. & Pr. p. 120; Stevirmac Oil & Gas Co. v. Dittman, 245 U. S. 210, 38 Sup. Ct. 116, 62 L. Ed. 248.

The authority to hear and determine a case is jurisdiction to try and decide all the questions involved in the controversy, including the power to pass upon the sufficiency of the service of process. Quarl v. Abbott, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662. Jurisdiction to appoint an administrator of the estate of a living person (Griffith v. Frazier, 8 Cranch, 9, 3 L. Ed. 471), or condemn as a lawful prize a vessel that was never captured (Rose v. Himely, 4 Cranch, 241, 269, 2 L. Ed. 608), has never been conferred upon any court. But jurisdiction to base a mortgage foreclosure decree on constructive service of process against a nonresident is vested in the district courts of this state, and in the exercise of that jurisdiction those courts must pass first upon the sufficiency of the constructive service. The filing of the petition to foreclose, the affidavit for publication, and the publication notice set in motion the jurisdiction of the court, and the jurisdiction thus invoked includes the power to pass upon the sufficiency of the steps taken by the plaintiff to invoke its jurisdiction. If this be not true, then the division line between direct and collateral attack on judgments has been abolished. As said by Judge Sanborn in Foltz v. St. L. & S. F. Ry. Co., 60 Fed. 316, 8 C. C. A. 636, the "jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power," and "to determine every issue within the scope of its authority, according to its own view of the law and the evidence," and, "whether its decision is right or wrong," it "is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud."

The district court of Carter county in the foreclosure case had jurisdiction to decide whether or not the publication notice should be construed with reference to the affidavit for publication and the foreclosure petition —had jurisdiction to test the sufficiency of the publication notice according to the rules prescribed by the statutes of this state. Isaac Leonard is not now before the court in this case, and if the district court in the foreclosure case did not have jurisdiction to pass upon the sufficiency of the publication notice, because he was not personally summonsed, how can this court now have jurisdiction to pass upon the sufficiency of the notice? Some court must decide whether or not there was jurisdiction to render the foreclosure judgment, and the court rendering the judgment had jurisdiction to foreclose mortgages, and in exercising that jurisdiction it was absolutely necessary to pass on the sufficiency of the constructive service by publication.

In Garrett v. Struble, 57 Kan. 508, 46 Pac. 943, the Kansas Court held that if there was a total failure to state in the notice any material matter required by the statute, the service was void and subject to collateral attack, but, where there was not such an entire omission of material matter from the notice, the service is merely voidable. In Cushing v. Cummings, 179 Pac. 762, Justice Sharp held that "the attack being made in a collateral proceeding, though the notice was not complete, or although irregular or defective, will not have the effect of rendering the decree a nullity," and stated this rule is applicable to cases where the judgment is based on constructive service by publication, as well as in cases of personal service, and observed that "it has been said that good reason exists for being more liberal in cases of constructive notice than in those where the service is personal, for the defendants in the former class of cases are entitled, as of right, to open the judgment." In that case Justice Sharp cites, among other cases, Essig v. Lower, 120 Ind. 239, 21 N. E. 1090, which announces the proper rule. The Indiana court said:

"This is a collateral attack upon these decrees; and unless they are wholly void, the attack must fail though they may be erroneous. Had the court proceeded in these cases without any notice, then it would be clear that there was a want of jurisdiction; but it clearly appears, by the special finding, that there was some notice, and that such notice was based upon an affidavit. It became, therefore, a question to be determined by the courts in which these proceedings were pending as to whether such affidavits and notices were sufficient. The court having determined that question in favor of jurisdiction, such determination is conclusive as to all the parties when collaterally attacked."

Black on Judgments (2d Ed.) vol. 1, § 274, says:

"Where a statute confers general jurisdiction over a class of cases upon a particular tribunal, its decision upon the facts essential to the existence of jurisdiction in a particular case belonging to the class will be conclusive as against collateral attack. So when a notice which is defective, or the service of which is informal, has been adjudged sufficient, the judgment rendered thereunder will not be

Digitized by Google

held void in a collateral proceeding. And in case of an insufficient service of notice, if the court decides the question of jurisdiction erroneously, the judgment will be voidable, but binding until reserved on appeal. The determination of the question of the sufficiency of the affidavits presented to the court as proof of the service of a summons and the failure of the defendant to answer is a judicial determination of the question of jurisdiction, and therefore binding until set aside or reversed."

This is in accord with the prior decisions of this court in Rice v. Woolery, 38 Okl. 199, 132 Pac. 817; Continental Gin Co. v. De Bord, 34 Okl. 66, 123 Pac. 159; Rice v. Theimer, 45 Okl. 618, 146 Pac. 702; and Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815. See, also, Boswell v. Sharp, 15 Ohio, 447; Van Fleet on Col. Attack, § 388; Hotchkiss v. Cutting, 14 Minn. 537 (Gil. 408); 23 Cyc. 1088.

Of course a publication notice to one or more defendants named therein cannot be treated as any notice to other nonresident defendants not named therein.

The publication notice in this case named the parties correctly; it was a publication notice, though defective. The foreclosure decree adjudged the notice sufficient, and that adjudication cannot be impeached in a collateral proceeding if there be enough in the publication notice to call for construction, and construction means the application of the law to the facts stated. Hogue v. Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

[33] 14. On the demurrer to the answer we are treating the transcript of the record in the foreclosure case as the judgment roll, but whether it is such in fact may be disputed when this case comes for trial on the answer. The judgment roll at common law signified a roll of parchment upon which the proceedings and transactions of a court were entered by its officers, and it was then deposited in its treasury in prepetuam rei memoriam, but, since paper has universally supplied the place of parchment, the roll has fallen into disuse. The equivalent of the judgment roll, however, is provided for by sections 5144 to 5146, inclusive, R. L. 1910. Those sections direct the clerk, upon order of the court, to make a complete record of every case as soon as it is finally determined, such record to contain "the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court." When we have spoken in this opinion of a judgment void on its face, we mean a judgment whose invalidity is disclosed from an inspection of such a record—the judgment roll. See 14 Standard Proc. p. 744.

[34] 15. The judgment in the foreclosure case was entered on September 14, 1912, and this suit was commenced on October 18, 1916, more than three years after the rendition of the foreclosure judgment. The court sustained plaintiff's demurrer to that part of defendant's answer averring the deed executed by the sheriff to the purchaser at the foreclosure sale was void because, as averred, "said bid was never paid to the sheriff, never paid to the court clerk of this court, and that said judgment against the defendants in said case remains unsatisfied." If the purchaser at the foreclosure sale did not pay his bid, then he could not claim to be the equitable assignee of the mortgage, and the defendant owes him nothing. The mortgage foreclosure sale was for cash. An officer selling property under a decree can sell such property on such terms, and such terms only, as are provided by the decree and the law in force governing such sale, which is incorporated into and made a part of such decree, and the officer has no authority to sell on credit or to accept in payment of the bid anything other than lawful money, unless otherwise expressly authorized by the decree or the law in force governing such sales. As between the mortgagor and the purchaser who refuses to pay his bid at a cash sale, no title passes under a deed executed by the sheriff, and the mortgagor has a right to have the property resold to foreclose the mortgage. Hooper v. Castetter, 45 Neb. 67, 63 N. W. 135; International Mfg. Co. v. Brammer Mfg. Co., 138 Fed. 396, 71 C. C. A. 633; Phelps v. Jackson, 31 Ark. 272; Allison v. Crummey, 166 Pac. 691; Langley v. Ford, 171 Pac. 471; Glory v. Bagby, 188 Pac. 881.

Whether a deed executed by the sheriff and confirmed by the court is sufficient title to support a plea of bona fide purchaser filed by a vendee of the sheriff's vendee is a question upon which we express no opinion, as that point has not yet been raised in this case other than the defendant's allegation that plaintiff took said land subject to all defendant's defenses.

16. This cause is reversed and remanded to the district court, with directions to overrule plaintiff's demurrer to that part of defendant's answer alleging no summons was served on her in the foreclosure case, and alleging that Cochran, the purchaser at the sale, has not paid his bid, and to allow the parties to make up the issues in that court as a court of equity; relief to defendant being conditioned on her showing no laches or negligence in attacking the foreclosure judgment for want of service of process on her and according to the equitable principles herein laid down. She will be allowed to amend her answer to meet these requirements.

HARRISON, JOHNSON, McNEIL, HIGGINS, and BAILEY, JJ., concur.

RAINEY, C. J., dissents from that part of the opinion which holds extrinsic evidence

Digitized by Google

admissible to contradict the recital in the judgment of service of process, though no fraud is charged.

EVERIDGE v. STATE. (No. A-2981.)

(Criminal Court of Appeals of Oklahoma. June 24, 1920.)

(Syllabus by the Court.)

1. **Criminal law ⇐1169(7)—Error in admission of evidence where guilt otherwise established harmless.**

In a prosecution for murder committed for the purpose of robbery, *held*, the error, if any, in admitting evidence of statements made by a coconspirator, and codefendant the night after the robbery, the defendant not being present at the time, was harmless, where the other evidence in the case showed beyond a doubt that defendant participated in perpetrating the robbery and in committing the murder.

2. **Homicide ⇐250—Evidence held to sustain conviction.**

In a prosecution for murder, defendant having been convicted with imprisonment for life as the punishment, the evidence reviewed and defendant *held* justly convicted.

Appeal from District Court, Choctaw County; C. E. Dudley, Judge.

Earl Everidge was convicted of murder, and he appeals. Affirmed.

Plaintiff in error, Earl Everidge, and Edward Hembree and Floyd Aikens were charged jointly with the murder of P. H. Hearn, alleged to have been committed in Pushmatah county on the 16th day of September, 1915. A severance was granted; then upon the application of plaintiff in error, hereinafter referred to as the defendant, change of venue was granted and the case transferred to Choctaw county, where upon his trial the defendant was found guilty of murder and his punishment fixed at imprisonment for life. From the judgment rendered on the verdict he prosecutes this appeal.

The evidence shows that P. H. Hearn, the deceased, was an operator at the depot of the Frisco Railroad at Antlers, and on the morning of September 16, 1915, shortly after 3 o'clock, he was found by the conductor of an arriving train lying on a baggage truck at the station at Antlers, "bloody all over, his hair all matted, and his face battered up." He was unconscious and remained unconscious until he died on the 23d day of September, 1915.

Dr. W. W. Christian testified that he had practiced his profession 20 years, and was connected with the Paris, Tex., sanitarium, and went to Antlers after the deceased was injured to see him; that upon examination it was determined to remove him, and he was removed on the day he was injured, to said sanitarium, where, on the 23d day of September, 1915, at 2:30 he died; and that his death was caused by blows from a blunt instrument, which fractured his skull.

L. L. Ray testified that he was station agent of the Frisco Railroad at Antlers when the deceased was killed; that at about 3:20 a. m. of the morning of said killing he was called by phone and went immediately to said depot, and there saw Mr. Hearn lying on a table in the office in an unconscious condition; that he examined the cash drawer and found therein only 21 pennies; and that on the night of the homicide Mr. Brewner, another operator, was relieved by Mr. Hearn, to whom, as shown by the record in the handwriting of Mr. Brewner, which handwriting he identified, Brewner turned over $18.36, which was in silver dollars, half dollars, quarters, dimes, and pennies.

Jeff Sharp testified that he was phoned to come to the depot and upon his arrival called the sheriff, who came, and he and the sheriff made an investigation and did not find anything; that at about daylight he returned to the depot and made an examination, and found about 95 yards from the depot a hat and a piece of a gun; that the hat and piece of gun now exhibited to him was the hat and piece of gun that he found; that he also found in a little grove near where the hat and piece of gun was found where two horses and a mule had been hitched, and that he tracked them out to the main street and then back to where they went and came.

George Alexander testified that he knew the defendant and remembered the robbery of the depot at Antlers and the killing of the deceased in September, 1915; that on the night preceding the killing he saw the defendant a little after dark at Mrs. Piercy's, in Farris, from whom he borrowed a pistol, and that at the time he noticed the hat that the defendant had on, a brown hat; that the next day he saw the defendant again at Mrs. Piercy's the morning after the homicide, when he returned the pistol which he had borrowed and asked for some coffee, and at the time he looked like a man who had been on a big drunk, appeared to be nervous and looked like a man that had lost sleep; that he was acquainted with Edward Hembree, commonly called "Chock" Hembree, and with Floyd Aikens; that the night after the killing of the deceased he saw Floyd Aikens; that the witness was then asked if at the time he had any conversation with Floyd Aikens, to which question the defendant objected, the court overruled the objection, and the defendant excepted. The witness answered: That at the time named Floyd Aikens told witness that he (Aikens) and the defendant done the robbing and killing there

Digitized by Google

at Antlers; that he and defendant rode their respective horses and that Hembree rode old man Piercy's damned old mule; that he had that damned old pistol of Chock Hembree, the defendant had old lady Piercy's pistol, and Chock had Jim Jones' shotgun, which did the work; that they went down there and hitched their horses in the little grove and waited until the train ran, and then went in and done the work; that the damned old man knew Earl and he stayed where he could not be seen, and he (Aikens) and Chock went in and put their guns on this fellow through the window and told him to hold his hands up; that Earl came in and got the money, and that he had not seen him since and did not know how much he got; that the defendant told them to kill the deceased, and they took him off to the south end of the depot and across the railroad; that he did not know that Chock was going to hit the deceased, and that when Chock hit him the first lick deceased fell on his knees and Chock hit him again; that he (Aikens) told Chock not to hit him again, that he had already killed him, and that they got on their horses and rode out of town and overtook the defendant, who rode off and left them; "that Earl got every damned bit of the money, and if the son of a bitch didn't divvy up they were going to kill him;" that he did not see the defendant either at or about Farris in his usual haunts, Thursday, Friday, or Saturday after the robbery of the depot, that he had any recollection of.

"Thereupon the defendant asked the court 'to instruct the jury to wholly disregard that portion of the testimony of the witness George Alexander wherein he relates the conversation between himself and Floyd Aikens, wherein Floyd Aikens makes the statement to him as to the robbery and as to his participation in the robbery, for the reason that said statement was made in the absence of the defendant, Earl Everidge, is wholly hearsay, and for that reason is incompetent, irrelevant, and immaterial.'"

The court overruled the motion to strike, and the defendant excepted.

Jim Jones testified that in September, 1915, he lived in Farris, Okl.; that he was acquainted with Edward Hembree, commonly known as "Chock" Hembree; that he heard about the killing of Mr. Hearn; that the night before the homicide he loaned his single 12-gauge shotgun to Hembree for the purpose, as stated at the time by Hembree, for Earl Everidge to kill a dog with; that the next time he saw Hembree was the Saturday after the said homicide, when he asked him where his gun was, and Hembree replied at Earl Everidge's, and that he went up there to see about it, to get it, but did not succeed; that the gun now exhibited to him was the gun he loaned Hembree, but it was in a different condition when so loaned; that at that time the stock was not "busted." The defendant asked the court to instruct the jury not to consider the evidence of Jones in regard to the loan of the gun, which the court refused to do, and the defendant excepted.

Joe Whiteside testified that in September, 1915, he was living at Farris; that he was acquainted with the defendant; that he remembered hearing about the robbery of the Frisco Depot and the killing of Mr. Hearn on the morning of September 16, 1915; that he saw the defendant that morning; that he came to witness' home on horseback; that he was bareheaded, and he thought had his hat tied on his saddle; that the defendant came for the purpose of seeing if witness was going to Atoka; that defendant returned to his home, to which witness afterwards went, and when he got there defendant was changing his clothes, and witness saw on defendant's dresser some silver dollars, quarters, nickels, and dimes, and some pennies; that witness and defendant went to Atoka together, and on the way the defendant said he had about $18; that the defendant did not say anything to witness about where he and his horse had been the night before; that from Atoka that witness went to West Lehigh, and defendant said he was going to McAlester to see a girl; that the witness had been around with the defendant and that he did not know that he had ever seen him broke; that he had seen him with money lots of times; that it was not unusual for the defendant to ride around with his hat or cap tied to his saddle.

Joe Whiteside, recalled, testified that he was at Mrs. Knox's on the night of the 15th with the defendant and members of the Knox family; that the defendant stayed about an hour; that some one rode up to the gate and hollered, "Is Earl in there?" and defendant went out and returned, and went out again and did not return; that when going to Atoka he asked the defendant who it was that called him out and he said it was Chock or Aikens, one; that it was about 8 o'clock when some one came to the gate and asked for Earl, and that it was 15 or 17 miles from Farris to Antlers.

Mrs. Velva Smith testified that she was married, but that she was not married in September, 1915; that she lived in McAlester and was acquainted with the defendant, who paid attention to her, and that on a Friday in September, 1915, she saw him at the home of her aunt in McAlester; that in their conversation he said that a few nights ago he was in Antlers on Tuesday and on Wednesday night, and that he saw a man killed, whose name she understood to be "Herring," and that he was standing within ten feet of the man when he was killed. This witness further testified that at the time of his visit he looked like, and said, he had lost a great deal of sleep; that a little fair was going on at the time and the defendant had

Digitized by Google

a little change in his hand and said he had enough to go to the fair on; that before said visit she had been often with the defendant, but had not then seen him for several weeks. Hereupon the defendant admitted that at the dictation of her husband she had written Defendant's Exhibit E, which was admitted in evidence and is as follows:

"Wichita Falls, Texas, July 12, 1916.

"Moman Pruiett, Atty., Oklahoma City, Okl.—Dear Sir: My wife, Mrs. Velva Smith, formerly Miss Velvet Torbett, is under bond to appear before the district court at Hugo, on October 2, as a witness in the Earl Everidge murder case, and will appear there unless terms can be made satisfactory between you and I so it will pay me to do otherwise. I would like your advice on this matter either through the mail or by a private talk as soon as possible, that we can make our plans accordingly. Hoping that you will give this matter immediate attention, I remain,

"Yours truly, N. H. Smith.

"Address: N. H. Smith, 305 Lee Street, Witchita Falls."

Mrs. Mary A. Piercy testified that in September, 1915, she lived in Farris; that she was acquainted with the defendant, and saw him on the night of September 15, 1915, at which time she loaned him her six-shooter for the purpose, as stated by him at the time, to protect his mother's smokehouse; that the next time she saw him was at her home in Farris the next morning, when he returned her pistol and wanted a cup of coffee, which she gave him; that at the time he looked like some one who had been staying up all night; that she heard of the killing of deceased the day after it occurred, which was the same day that the defendant returned her pistol; that old man Piercy had a mule which she kept right there all the time; that she had loaned the gun to the defendant at different times.

Rufus O'Quinn testified that in 1915 he lived in Farris, Okl.; that he now resided in Tennessee, having left Farris in December of last year; that he knows and has known the defendant four or five years; that he knows Edward Hembree and Floyd Aikens; that he had known Hembree about five, and Aikens about three, years; that last year he was engaged in farming and working in the telephone office in Farris; that on a Tuesday night preceding the killing of the deceased he went out with Floyd Aikens, Chock Hembree, and the defendant, on horseback, he riding Piercy's mule and the others riding horses; that they road to Darwin Church, which is 6 miles out of Farris and 11 miles west of Antlers, arriving there about 9:30 or 10 o'clock, and found the church not lighted, and they went on down the road in the direction of Antlers and stopped at a cane mill about a mile from Darwin and about one-half of a mile off the road to Antlers, drank some cane juice, remained about 15 or 20 minutes, and left, going on about 2 miles and stopped, talked, and smoked and then went on in the direction of Antlers, and stopped at Uncle Dick Lock's fence, about three-quarters of a mile from Antlers, talked and smoked; it was suggested that they go into Antlers to get some tobacco, and the defendant, Aikens, and witness went to Antlers, to the street crossing, and then to the depot; that at the depot they saw the depot agent in his office and the other fellow was on the platform; they stopped about 10 feet from the depot, and Floyd Aikens and the defendant said they had come to rob the depot, and witness said he was not going to have anything to do with it, and advised them to put it off because they did not have sufficient arms, and they said they would study about it, and finally agreed to put it off; that while they were in Antlers and about 3 o'clock a. m. a train passed, and they remained there about 15 minutes; that the defendant then said he would "put it off if we would agree to come back the next night," to which Aikens agreed, and witness told them he would not have anything to do with it, and they said he (witness) was a "feather leg if I would not come back"; that they would come back any way; that they then returned to the horses and Chock Hembree, and the defendant remarked, "We got what we went for," and Aikens said, "No; we were just lying;" and they got on their horses and rode in the direction of Farris; that the next time he saw the defendant was at the phone office in Farris on the 15th of September, 1915; that Hembree and Aikens were present and asked witness if he was going back with them that night, to which he answered No, and they remarked they would go back and did not need him (the defendant objected to this evidence and moved to exclude the same, the court refused to exclude said evidence, and the defendant excepted); that the morning after the night of the homicide he saw Chock Hembree at the phone office in Farris, and he (Hembree) told him that they had robbed the depot and killed the agent; that they had hit him three times with a shotgun and punched him once (the defendant objected to the introduction of said evidence, the court overruled the objection, and the defendant excepted).

O'Quinn further testified that Hembree said that the defendant had the money and had run off with it; that about one hour after said conversation he had a second conversation with Chock Hembree in which Chock asked him "if he suspected anything by the mule being out," to which witness replied Yes, and Chock then said that he rode the mule to town, and when he brought him back that he just turned him out and did not feed him; that the said mule was the same mule that witness had ridden the night before in company with the defendant at Antlers; that the same evening he had a conversation with

Digitized by Google

Aikens, who told him to watch the mailman, to see what he had to say about it; that he had seen the gun which was in evidence; that he had hunted with it, and knew it and that it belonged to Jim Jones; that afterwards Chock asked him if he did not want to see the gun, and witness replied Yes, and Chock, at Bill Hembree's place, about one-half of a mile from Farris, showed him the gun and "the stock was busted, the beach off, and the barrel bent"; that, being shown the gun, Chock unbreached it and threw the parts about ten feet apart, and they returned to Farris; that he did not have any conversation with the defendant after the crime was committed in regard to it, and that at the time he had the conversations with Chock Hembree and Floyd Aikens in regard to said homicide the defendant was not present. The defendant objected to the introduction of said statements made to O'Quinn in the absence of the defendant, and also requested the court to withdraw said testimony from the jury. The court overruled said objection, and refused to withdraw said evidence from the jury, and the defendant excepted.

Wiley Smith testified that he heard of the robbery of the depot and the killing of Mr. Hearn the day after the tragedy; that on the Wednesday before the tragedy he met Chock Hembree, Floyd Aikens, and Rufus O'Quinn in the early morning, going in the direction of Farris, and the defendant about three miles from where he met the others, who was on horseback going in the direction of Farris.

Dell Wilson testified that he was sheriff of Pushmataha county; that he knew and had known the defendant six or seven years and that he had known the deceased about two years; that when he first heard of Mr. Hearn's death in Antlers he went to the depot and found the deceased lying on the table in the Frisco office unconscious, with several wounds around his head; that he made an examination and found, something like sunup, and about four telegraph poles from the depot, some blood, a piece of a gun, and some tracks where some horses had been hitched off the right of way about 30 or 40 yards from where he found the piece of the gun, which was the same piece as now exhibited to him; that he found the tracks of two horses and a mule, one of which was barefooted, the other had three shoes, and the mule was shod in front; that he followed the tracks from Antlers towards Farris as far as he could; that one of the horses went direct west and the other horse went north—went a mile west and turned north; that the defendant's home was on the road from Joe Whiteside's to Farris, and the direction the lone horse was traveling he would pass Joe Whiteside's in going down to Farris; that the first time after the said homicide that he saw Hembree and Aikens was about September 20; that he received a few days after the arrest of said defendants, at Amos Hembree's an uncle of Chock, in the Farris neighborhood, a part of a gun, and identified the part of said gun now exhibited to him as the same that had been delivered to him; that after he arrested the defendant he had a conversation with him as to his whereabouts on Tuesday night preceding the killing on Wednesday night. The defendant objected to the introduction of such conversation in evidence, the court overruled said objection, and the defendant excepted. The defendant, in reply to said question by the sheriff, said that on Tuesday night he came out to the sorghum mill, out east of Darwin a mile or so, with Rufus O'Quinn, Floyd Aikens, and Chock Hembree, and drank some sorghum juice, and his horse got loose and he did not get home until up in the day Wednesday; that he asked him where he was Wednesday night, and he said in Farris at Mr. Knox's and that he went home about 11:30, and that he borrowed a pistol from Mrs. Piercy because some one had been breaking into his smokehouse and he thought he would get him, and that he (defendant) went to bed Wednesday night about 11:30, got up next morning real early, and went to old lady Piercy's and got his breakfast, and the next morning he went to Atoka with Joe Whiteside, and from there to McAlester and from McAlester back to Atoka.

This witness further testified that the horse which he tracked on the north road was shod with two shoes on the front and one on the hind feet, and that the shoes on said horse were pretty near as wide across one way as another, and that you hardly ever see a horse's feet shaped that way, and would make a track you could tell from any other horse track; that a few days after the arrest of the defendant he (witness) noticed that the feet of the defendant's horse corresponded to the track that he had tracked, but that at the time he examined the feet of the defendant's horse the horse had been shod all around, and defendant said he had had him shod behind at Atoka; that he did not measure the tracks nor the hoof of the defendant's horse, and that he tracked said horse about nine miles from Antlers and lost it.

Joe Whiteside, recalled, testified that on Tuesday morning after the homicide Wednesday night the defendant told him that he (defendant) spent Wednesday night at Pat Taylor's and played poker with Pat Taylor and George Blaine, but did not say where he played poker. The defendant moved the court to direct a verdict of not guilty, which said motion for a directed verdict was denied, and the defendant excepted.

For the Defense.

A. L. Johnson testified that he resided at, and was the postmaster of, Farris, Okl.; knew the defendant since 1911 and his gen-

Digitized by Google

eral reputation in the community in which he lived as being a law-abiding citizen, and that it was good; that he remembered the incident in which the depot agent at Antlers was killed; and that before said homicide, but how long he was unable to say, he changed a $20 bill for the defendant.

Several other persons also testified to the previous good character of the defendant as a law-abiding citizen, and thereupon the state announced that it did not make any issue of the good reputation of this defendant up to the time of the killing.

Edgar Everidge testified that he was a brother of the defendant and 22 years old in November; that he remembered the killing of Pat Hearn, the depot agent; that on Monday, prior to the killing of Mr. Hearn, he was present and saw Mr. Johnson change a $20 bill for the defendant, giving him silver in change, and, while he did not know, he thought he also gave him some pennies.

Ethel Brown testified that she remembered about hearing of the death of the depot agent at Antlers, Okl., on September 16, 1915, at which time she was living at Farris, just west across the street from the phone office; that on the morning after the agent was killed she saw Rufus O'Quinn at Mrs. Piercy's between 6 and 7 o'clock, making up bread and had dough all over his hands; that she went over there to get water, and O'Quinn asked her to have a drink of beer, for which she thanked him and declined; that she did not see the defendant there; that the evening before she had seen Edward Hembree and the defendant over at Mrs. Piercy's.

Moman Pruiett, of Oklahoma City, S. E. Welch, of Antlers, and Baxter Taylor, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. (after stating the facts as above). [1] The only errors relied on in defendant's brief for a reversal of the judgment are as following:

(1) The admission, against the objection of the defendant, of the testimony of O'Quinn of the statements made to him by Chock Hembree, in the absence of the defendant and after the commission of the offenses charged, that the defendant was a coconspirator with said Hembree and Floyd Aikens in the robbery of the Frisco Depot at Antlers and the killing of the agent, and giving details of such robbery and murder. The admission, against the objection of defendant, of the testimony of ——— that Floyd Aikens, one of the codefendants, had, in the absence of the defendant and after the commission of the offenses charged, made to ———, that he (Hembree) and the defendant had robbed the Frisco Station at Antlers and killed the agent.

(2) Giving the jury the following instruction: "Where parties enter into a conspiracy for the purpose of committing a robbery and dividing the proceeds of such robbery among themselves, such conspiracy continues and such parties are responsible for the acts of their coconspirators incident to or growing out of such conspiracy and done in pursuance thereof, until they have divided the proceeds of such robbery."

The errors insisted upon by the defendant will be considered in the inverse order in which they are above stated.

The correctness of said instruction so seriously complained of by the defendant is not an open question in this jurisdiction, this court, in Holmes v. State, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 300, having approved an instruction in the identical language of the one complained of, which instruction was doubtless copied from Holmes v. State, supra.

In Grayson v. State, 12 Okl. Cr. 226, 154 Pac. 334, Judge Doyle, Presiding Judge, speaking for the court, approved the above-cited holding in Holmes v. State, supra, and says:

"And where a conspiracy embraces not merely a series of unlawful acts, but also extends to a division of the fruits and profits of such acts among the conspirators, anything said or done by them, although after the commission of the unlawful acts, but before a division of the profits of such acts, is admissible against all other conspirators" (citing Wishard v. State, 5 Okl. Cr. 610, 115 Pac. 796; State v. Pratt, 121 Mo. 560, 26 S. W. 556; Scott v. State, 30 Ala. 503).

In the case of Grayson v. State, Judge Doyle further says:

"The theory upon which such evidence is admissible is that the conspiracy does not terminate until there has been a division of its fruits and spoils" (citing People v. Opie, 123 Cal. 294, 55 Pac. 989; Wharton's Crim. Ev. [9th Ed.] 698).

Certainly a conspiracy to rob a cash drawer of a depot by three coconspirators authorized the jury to infer that such conspiracy also included a division of the money secured by such robbery.

[2] The evidence in this case entirely eliminating the statements respectively made by the codefendants Aikens and Hembree as to how said robbery and murder was committed and by whom, shows that there was conspiracy to rob the Frisco Depot at Antlers, and that in the furtherance of said conspiracy Mr. Hearn was most brutally murdered. This leaves but one question for determination: Was the defendant, a coconspirator in the commission of said crimes? The peculiar tracks of the defendant's horse being immediately after the commission of said crime found where the defendant's horse had been hitched near the scene of the tragedy, and tracked therefrom some ten miles, going in the direction of Farris, and the defendant seen early on the same morning of the murder going in the direction of Farris riding horseback; that the night of the homicide he borrowed a pistol, giving a false reason for borrowing it; that on the

Digitized by Google

night preceding the murder he was, in company with his codefendants Hembree and Aikens, riding horseback going in the direction of Antlers, and went within ten feet of the said depot and announced that he and others had come to rob the depot, and was dissuaded from so doing, and that he returned to Farris and the next day solicited the witness O'Quinn to join in the robbery, and when O'Quinn declined to join him and others in such robbery the defendant announced that they did not need O'Quinn and intended to rob the depot that night, which was in fact done; that about 8 o'clock of the night of the tragedy he was called out of a home by and went off with the caller, whom the defendant said afterwards was either Hembree or Aikens; that at about 7 o'clock of the morning of the tragedy, which was committed about four hours previous, which gave defendant ample time to come from Antlers, he appeared at Farris in a very nervous condition and looked like he had been up all night; that after the tragedy he was seen with money of the same denominations and kind of which the depot had been robbed; that the day after the murder he stated that he had about $18, the amount of which the depot had been robbed; his conflicting statements as to where he was the night said crimes were committed; the incriminating statements he made to the lady he visited at McAlester a few days after the tragedy, "that he was in Antlers at the time of the tragedy and saw a man killed there, and that he was within ten feet of the man when he was killed, and that the name of the man killed was Hearn"—clearly point to the defendant as an active agent in the commission of the homicide charged. And when to said evidence is added the fact that the defendant did not testify in his behalf, and did not offer evidence in his defense, except evidence of his previous good character, we are of the opinion that, excluding the entire evidence of the statements made respectively by Hembree and by Aikens as to how and by whom the deceased was killed, the guilt of the defendant is shown by legal evidence beyond a reasonable doubt.

The statements made by Hembree and Aikens respectively, and not made in the presence of the defendant, as to who committed the homicide charged, and the particulars thereof, including the statement that the defendant was a conspirator therein, were certainly not made in furtherance of the conspiracy to rob the depot of the Frisco Railroad at Antlers, were mere confessions on the part of Hembree and of Aikens, and such confessions were improperly admitted in evidence. But the evidence, eliminating therefrom the said confessions, showing that the defendant is guilty of the homicide charged, and, after an examination of the entire record, being unable to say that the admission of said confessions has probably caused a miscarriage of justice, or has deprived the defendant of some substantial constitutional or statutory right, we are without authority to reverse the judgment rendered, on account of the errors committed in admitting in evidence said confessions, being prohibited from so doing. Section 6005, Rev. Laws. If said confessions of Hembree and Aikens had been in furtherance of the conspiracy to rob the Frisco Depot at Antlers at the time charged in the information, the said conspiracy not having ended by reason of the fact that the proceeds of said robbery had not been divided among the conspirators, the admission of said confessions would have been free from error.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

LITTLE v. STATE. (No. A-3327.)

(Criminal Court of Appeals of Oklahoma. June 26, 1920.)

(Syllabus by Editorial Staff.)

Criminal law ⊂=595(4)—Denial of continuance for absence of witness held reversible error.

In the prosecution for unlawfully conveying intoxicating liquor, wherein affidavit for continuance alleged that one jointly indicted had pleaded guilty and served his sentence and was in Mexico and would not be available until May 1, 1918, and would testify that defendant, witness' employé, did not know that witness had put whisky in it, that witness had consented to a confiscation, and that former county attorney had agreed to dismiss defendant after witness had served his sentence, the denial of a continuance was reversible error.

Appeal from County Court, Cotton County; J. R. Norman, Judge.

S. R. Little was convicted of violating the prohibitory law, and he appeals. Reversed and remanded.

A. S. Wells, of Walters, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, S. R. Little, John Little, and E. G. Trimble were by information filed in the county court of Cotton county on the 11th day of May, 1916, jointly charged with a violation of the prohibitory law. Upon arraignment, John Little pleaded guilty and was sentenced to pay a fine of $100 and to be confined for 30 days in

Digitized by Google

the county jail. February 5, 1918, an amended information was filed charging that on the 11th day of May, 1916, plaintiff in error, S. R. Little, John Little, and E. G. Trimble did unlawfully convey intoxicating liquor, and on the same day plaintiff in error was arraigned and filed a demurrer to the amended information, which was overruled, and the case was called for trial. Thereupon plaintiff in error filed an affidavit for continuance on the ground that John Little, a material witness for this defendant, is now in Tampico, Mexico, working on a pipe line for the Prairie Pipe Line Company, under a contract for six months' employment, dating from November 1, 1917; that at the time he left for Tampico this cause was not set for trial; that affiant did not know of the intention of the said John Little to leave the United States, and immediately after he learned that John Little had left he communicated with him, and John Little wrote to affiant that he would return to the United States about May 1, 1918, and would be available as a witness at any time after May 1st; that said witness, if present, would testify that on the 11th day of May, 1916, the said John Little, E. G. Trimble, and this defendant were driving from Wichita Falls into Oklahoma City in a Ford car; that said defendant was in the employ of John Little and E. G. Trimble as driver of said car and for no other purpose; that said parties were at that time employed by the Gunsburg & Foreman Oil Company in making pipe line connections, and when they employed this defendant to drive them to Wichita Falls they said that their business was to procure parts and fittings for pipe lines from the supply houses in Wichita Falls; that John Little procured some whisky and beer at Wichita Falls and loaded the same into said car without the knowledge of this defendant; that this defendant did not examine the contents of said car and was not advised that there was any whisky in said car; that said John Little pleaded guilty to said offense and served the sentence imposed; that on account of conditions existing in Mexico it was impractical to attempt to take the deposition of said John Little. Affiant states that he can procure the attendance of said witness, and that said witness would testify as herein stated, and that he believes the same to be true; that said testimony is material to his defense, and said facts cannot be proved by any other witness. The motion for continuance was overruled, and exception allowed.

Proof was also offered by calling the former county attorney, who filed the original information as a witness, who testified that at the time John Little entered his plea of guilty and consented, as the owner of the car, that it be confiscated, he dismissed the case as to the defendant Trimble, and agreed to dismiss the case against plaintiff in error when John Little had served his sentence, and paid his fine; that he did not consult the court at the time of making this agreement.

The Attorney General has filed a confession of error which concludes as follows:

"We think that the defendant was entitled to a continuance in view of the nature of the case and the likelihood that the state's witnesses would have been available at some successive term of the court.

"Under the peculiar situation in this case, as just outlined, we do not think that the judgment should be permitted to stand; that the cause should be reversed, with instructions to give defendant a reasonable time in which to secure the attendance of his witnesses or to obtain their depositions."

In our opinion the confession of error is well founded and should be sustained. If what is alleged could be proved by the absent witness, it is of the most material character, and it is apparent that no diligence could have secured the presence of the absent witness when the case was called. The law does not require impossibilities. Because the court erred in overruling the defendant's motion for a continuance, the judgment will be reversed, and the cause remanded.

FRENCH et al. v. STATE. (No. A-3459.)

(Criminal Court of Appeals of Oklahoma. July 6, 1920.)

(Syllabus by the Court.)

1. **Indictment and information ⟸140(2)—Information amended by interlineation and reverified not open to motion to quash.**

An information, amended by interlineation and by leave of court, and properly reverified before the cause is called for trial, is not open to a motion to quash, although it is not shown upon the information that the complaining witness had been resworn thereto, if in truth and in fact said witness had been resworn thereto, and the court so found on competent and uncontradicted evidence upon the hearing of the motion to quash.

2. **Indictment and information ⟸161(2)—Information, amended merely by interlineation, need not be marked "refiled."**

It is not necessary to mark an information, amended merely by interlineation, "refiled."

3. **Indictment and information ⟸161(2)—Substantive amendment to information requires reverification.**

Where the amendment to an information in a misdemeanor case is one of substance, it is necessary that the same be reverified.

4. **Indictment and information ⟸161(3)—When information may be amended as to form only stated.**

Where the amendment to the information is one of form only, not changing the nature of

Digitized by Google

the charge to the material prejudice of defendant's rights, it may be made after plea entered, or after the cause is called for trial, or after the jury is impaneled.

Appeal from County Court, Tulsa County; W. B. Williams, Judge.

H. C. French and W. R. Sapp were convicted of unlawfully conveying intoxicating liquor, and they appeal. Affirmed.

Ed Crossland, of Tulsa, for plaintiffs in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. On the 8th day of February, 1918, the county attorney of Tulsa county, filed in the county court of said county an information against the above-named defendants, the charging part of which was as follows:

"Be it remembered that George E. Reeves, the duly qualified and acting county attorney for Tulsa county, Oklahoma, who prosecutes in the name and by the authority of the state of Oklahoma, comes now into the county court for Tulsa county, state of Oklahoma, on this the 8th day of February, A. D. 1918, and gives the court to understand and be informed that on the 29th day of May, A. D. 1917, in Tulsa county, state of Oklahoma, H. C. French and W. R. Sapp, late of said county, and within the jurisdiction of this court, did unlawfully and wrongfully convey intoxicating liquor, to wit, 500 half pints of whisky, and 6 gallons of alcohol, from a certain point, unknown to this affiant, to a certain point about two miles west of Collinsville, Okl., in the northeast part of Tulsa county, Okl., known as Horse Pen Bridge, in violation of the prohibitory liquor laws of the state of Oklahoma."

Said information was signed by George Reeves, County Attorney, and was verified as follows:

"State of Oklahoma, County of Tulsa—ss.:

"I, E. S. McQueen, being first duly sworn, upon oath depose and say that I have read the foregoing information, and know the contents thereof, that all the allegations therein contained are true. E. S. McQueen.

"Subscribed and sworn to before me this 8th day of February, A. D. 1918.

"Frank Ingraham."

Said information was indorsed on the back thereof as follows:

"No. 8593.

"State of Oklahoma v. H. C. French et al. Information for Conveying Intoxicating Liquor. In the County Court of Tulsa County.

"Filed Feb. 8, 1918. Frank Ingraham, Court Clerk.

"George E. Reeves, County Attorney of Tulsa County, Oklahoma."

Then followed the names of the state witnesses, with their post office addresses.

On the 8th day of February, 1918, warrants of arrest for each of the defendants were issued on said information and they were in due time brought into court, where, on the 8th day of March, 1918, they each pleaded "not guilty" to the charge, the cause was set for trial for the 11th day of March, 1918, and appearance bond of each defendant fixed in the sum of $1,000. On the 12th day of March, 1918, each defendant was released on bond, and also on said date the following proceedings were had in said cause:

"Permission granted to amend, reswear and refile information. Defendants plead not guilty. Objection to continuance. Continued for term on motion county attorney."

No further proceedings were had in said cause until the 19th day of June, 1918, when, after the defendants had announced ready for trial, the court granted the defendants permission to withdraw their pleas of "not guilty" and file a motion to quash the information, which was as follows:

"Comes now the defendant H. C. French and W. R. Sapp and move the court to quash and set aside the information herein, because same is not properly verified as required by law, not verified by the proper officer or any officer."

On the same date defendants filed a demurrer to the information "for the reason that the same does not state a public offense." Both the motion to quash the information and the demurrer thereto were overruled, and proper exception taken to such actions.

Thereafter defendants re-entered their pleas of "not guilty," and a jury was called, examined, accepted, and sworn to try the cause. Thereafter, when the first witness for the state was called to testify, counsel for the defendants interposed an objection to "the introduction of any testimony, for the reason that there is no information on file in this case. That the same was never verified by any officer authorized under the law to administer an oath. Further that at the last term of court the state was given leave to amend the information by interlineation and to have the same refiled, but that the same has never been refiled, and has never been verified in accordance with the orders of the court that the facts show it was 'subscribed and sworn to before me this 8th day of February, 1918. Frank Ingraham'—not shown that he is any officer, or anything, or holds any office, or any clerk or any one authorized to administer an oath." Thereupon, the court permitted the county attorney to introduce Mr. E. S. McQueen, the person who swore to the original information, who testified, over objection and exception by defendants' counsel, that on the 12th day of March, 1918, he had re-signed and had been resworn to the information which had been

Digitized by Google

amended by interlining the words "within the state of Oklahoma," between the words "certain point" and the words "unknown to this affiant." Thereupon the court found that the amended information had been re-signed and resworn to by the complaining witness, E. S. McQueen, on the 12th day of March, 1918, in conformity with the order of court made of that date, and the court then ordered the clerk to note upon the information the following:

"Re-signed and resworn to this 12th day of March, 1918."

—over the objection and exception of defendants' counsel. Thereupon, the following occurred:

"Mr. Crossland: It is shown at the bottom of the information, in writing, immediately under 'subscribed and sworn to before me,' to-wit: 'Refiled and resworn to this the 12th day of March, 1918. Frank Ingraham, Court Clerk, by R. L. Laws, Deputy.' That these words were in fact placed on this information on this the 19th day of June, 1918, after the jury had been sworn to try this case, and that in truth and in fact the said R. L. Laws did not, as a deputy ever reswear the said E. S. McQueen to the said information at any time, that on the 12th day of March, 1918, or at any time.

"The Court: The writing: 'Refiled and resworn to this the 12th day of March, 1918. Frank Ingraham, Court Clerk, by R. L. Laws, Deputy'—was placed on said information on the 19th day of June, 1918, at the order of the court for the purpose of carrying out a previously made order in reference to the reswearing and refiling of said information made by the then duly elected, qualified, and acting judge of said court, namely, H. L. Standeven, which said order is in words as follows, to wit: 'Permission granted to amend, reswear and refile' —it appearing to the court that said information was resworn to and re-signed by E. S. McQueen on the 12th day of March, 1918, at the time the order was made by the then trial judge, H. L. Standeven, in open court.

"Mr. Crossland: To which we object and except.

"Thereupon the court took an adjournment until 1:30 o'clock p. m. of the same day, to wit. June 19, 1918.

"1:30 p. m. June 19, 1918, court met pursuant to adjournment.

"Present: Same as before.

"(Out of the presence of the jury).

"The Court: The indorsement on the back of the information, to wit: 'Refiled, March 12, 1918. Frank Ingraham, Court Clerk, by R. L. Laws, Deputy'—was placed thereon after the jury was sworn to try the case, on this the 19th day of June, 1918.

"Mr. Crossland: To which the defendants object and except.

"The Court: The following was placed upon the information herein after the jury was sworn to try the case and upon request of the county attorney to have the information resworn to: The name of E. S. McQueen, the words, 'Subscribed and sworn to before me this the 19th day of June, 1918, W. B. Williams, County Judge.'

"Mr. Crossland: To which the defendants and each of them object and except."

The court has copied fully from the proceedings in this case preliminary to the taking of testimony for the reason that counsel now bases his entire contention for a reversal of this judgment on the ground that the trial court erred in overruling the motion to quash the information. At the time this motion was interposed, the original information had been amended merely by interlineation, as above indicated, and had been re-signed and resworn to, and the trial court made a finding, based upon evidence, that such action was taken on March 12, 1918, the day leave was granted to do so.

[2, 3] The fact that the amended information was not marked "refiled" did not in any way vitiate the amendment or the information. There was no necessity for refiling the information in the event the amendment by interlineation is either one of substance or of form merely. The cause had never been dismissed or the information stricken from the files. It remained in the files of the court during the entire proceeding, and the amendment did not have the effect of withdrawing it therefrom.

Where the amendment is one of substance, it is, however, necessary in a misdemeanor case that the information be reverified. Hazelton v. State, 8 Okl. Cr. 184, 126 Pac. 703.

The record shows, and the court so found, that the amended information had been reverified in this instance before the case was called for trial. That finding is binding on this court, in the absence of a contrary showing.

The amended information having been reverified before the cause was called for trial, the motion to quash was not well taken, and was properly overruled.

The amendment having been made after pleas of "not guilty" had been entered by each defendant, it is only necessary to determine whether the amendment worked any material prejudice to the rights of the defendants. Apparently not. The amendment in no way changed the nature of the offense. It merely made more specific the allegation as to the place from which the liquor was conveyed being "within the state of Oklahoma." Prior to the amendment, the information alleged that—

"In Tulsa county, state of Oklahoma, H. C. French and W. R. Sapp, late of said county, and within the jurisdiction of this court, did unlawfully and wrongfully convey intoxicating liquor, to wit, 500 half pints of whisky, and 6 gallons of alcohol from a certain point unknown to this affiant, to a certain point about two miles west of Collinsville, Okl., in the northeast part of Tulsa county, Okl."

Digitized by Google

[1] It is the opinion of this court that the original information sufficiently alleged the entire transaction to have taken place "in Tulsa county, state of Oklahoma," and that the amendment was merely one of form rather than substance, which could not have in any way prejudiced the material rights of the defendants, whether made before or after the cause was called for trial.

[4] Whether, therefore, the amendment be considered one of substance or only of form, there was no error in overruling the motion to quash, because, if one of substance, the amendment was made by leave of the court before the cause was called for trial, and was properly reverified before the trial; if one of form only (and this we think the amendment to be) it in no way changed the nature of the charge to the material prejudice of the defendants' rights, and if made after plea entered or after the cause was called for trial or after the jury was impaneled, there was no reversible error. Rollen v. State, 7 Okl. Cr. 673, 125 Pac. 1087; Hogue v. State, 9 Okl. Cr. 521, 132 Pac. 511.

Absolutely no defense was made to the charge, and the state's evidence clearly supports the accusation, the verdict and the judgment.

The conviction is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

RIPLEY v. STATE. (No. A-3363.)

(Criminal Court of Appeals of Oklahoma. June 26, 1920.)

(Syllabus by Editorial Staff.)

1. Criminal law ⇐93—Amended information for unlawfully conveying intoxicating liquors held to give superior court jurisdiction.

The filing of an information originally in the superior court of Creek county, charging the unlawful transportation of intoxicating liquors, amending an information also originally filed therein, gave that court jurisdiction of the subject-matter of the offense; that being a misdemeanor as to which the law gives that court jurisdiction, especially where the information alleged that the crime was committed in Creek county.

2. Criminal law ⇐98—Defendant's presence and plea of not guilty gives superior court jurisdiction of person.

The superior court of Creek county, having jurisdiction of the subject-matter on an information for unlawfully conveying intoxicating liquors in the county, acquired jurisdiction of defendant's person, where he was present in court both at the term at which conviction was had and also at a previous term of the court, and had entered a plea of not guilty.

Appeal from Superior Court, Creek County; G. R. Wilcox, Judge.

Jesse Ripley was convicted of the crime of conveying intoxicating liquors, and he appeals. Affirmed.

Asp, Snyder, Owen & Lybrand, of Oklahoma City, and R. B. Thompson, of Sapulpa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall and E. L. Fulton, Asst. Attys. Gen., for the State.

PER CURIAM. Jesse Ripley was convicted in the superior court of Creek county of the crime of conveying intoxicating liquors from one place within the state to another place therein on an amended information filed in said court by the county attorney of said county on the 22d day of November, 1917, charging the offense as committed on or about the 21st of May, 1917. The punishment imposed was a fine of $250 and imprisonment for a period of 90 days in the county jail.

The trial in which the conviction resulted was had on the 5th day of March, 1918, and it appears from the record that the defendant had at a previous term of the superior court been tried for the same offense. At both trials the defendant interposed a plea to the jurisdiction of the superior court over the subject-matter of the action. This plea was based on the proposition that the county attorney of Creek county had previously filed an information against the defendant, Ripley, in the county court of Creek county, charging this identical offense, and that the county court had transferred said cause to the superior court, but that the court clerk had failed to transfer the original information and other papers on file in said cause from the county court to the superior court. The plea is based upon the assumption that the defendant Ripley was tried upon an information transferred from the county court to the superior court, but the record does not support any such assumption.

[1] The record clearly discloses that the defendant was tried upon an amended information, filed originally in the superior court of Creek county, charging this offense, which information amended an information also originally filed in said court. The filing of such an information in said court gave the superior court jurisdiction of the subject-matter of the offense, the crime charged being a misdemeanor over which the law clothed the superior court of that county with jurisdiction, it being alleged in the information that the crime was committed in Creek county.

[2] It also appears that the superior court acquired jurisdiction of the person of the defendant in this cause. He was present in court, both at the term at which a conviction was had and also at a previous term of the

---

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

court, and had entered a plea of not guilty to the crime.

In Ex parte Ralph Brown, 3 Okl. Cr. 329, 105 Pac. 577, it is held:

"When there is jurisdiction of the party and of the offense for which he was tried, the decision of all other questions arising in the case is but an exercise of that jurisdiction."

This court is clearly convinced from an examination of the record that the superior court of Creek county had jurisdiction of the subject-matter of the offense charged in the information upon which the defendant was tried, and also jurisdiction over the person of the defendant, and that the plea interposed to the jurisdiction of the court over the subject-matter of the offense was not well taken, and was properly overruled, because the same was based upon the assumption that the superior court of Creek county was proceeding to try the defendant upon an information transferred from the county court of said county, when in truth and in fact the superior court of Creek county tried the defendant upon an information originally filed in said court charging this offense.

For reasons stated, the judgment of conviction is affirmed.

THOMAS v. STATE. (No. A-3484.)

(Criminal Court of Appeals of Oklahoma. July 6, 1920.)

(Syllabus by the Court.)

1. **Criminal law ⟸1180—Decision as to sufficiency of identical evidence, conclusive on second appeal.**

Where on a second appeal from a murder conviction the question of the sufficiency of the evidence is raised, and the evidence is substantially the same as adduced at a former trial, which evidence was held sufficient to sustain the conviction on the first appeal, no new question is raised on the second appeal.

2. **Criminal law ⟸261(2), 1141(1), 1180—Second arraignment and plea unnecessary after first trial; presumptions on appeal in favor of regularity of proceedings below; presumptions as to arraignment and plea below stated.**

All presumptions on appeal favor the regularity of the proceedings in the trial court. Where the record on a former appeal shows that the cause was tried in all respects as if a plea of "not guilty" had been entered by the defendant, and no contention was made either in the trial court or on appeal that there had been no arraignment of, and plea entered by, the defendant prior to that trial, the question of the arraignment and plea was waived by failure to raise it by timely objection, and the presumption will be indulged in a subsequent appeal that the defendant was either arraigned and pleaded "not guilty" or else waived arraignment and pleaded "not guilty" at some time prior to the first trial. Under such circumstances another arraignment and plea of "not guilty" were unnecessary, and it was not error for the trial court to deny defendant's motion for a formal arraignment prior to the retrial of the cause.

Appeal from District Court, Seminole County; J. W. Bolen, Judge.

Tom Thomas was convicted of murder, and he appeals. Affirmed.

Orwig & Moore, of Wewoka, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Seminole county, wherein the defendant was convicted of the crime of the murder of one George Gammill, and his punishment fixed at imprisonment in the state penitentiary for life.

This is the second appeal taken to this court in this action; a former conviction having been reversed on the 19th day of May, 1917, and the cause remanded to the trial court for a new trial.

The facts are fully stated in the former opinion, reported in 13 Okl. Cr. 414, 164 Pac. 995. We therefore deem it unnecessary to made a restatement of the case at this time, as the evidence is substantially the same as that adduced at the former trial.

[1] As in the former appeal, it is again contended that the evidence is insufficient to sustain the conviction.

This question was decided adversely to the contention of appellant's counsel in the first appeal, and it is only necessary to reiterate what was said in that opinion:

"There is evidence in the record fully sufficient to authorize the jury to conclude that the appellant was guilty."

[2] The only other question now urged as ground for reversal is the refusal of the trial court to arraign and permit the defendant to plead to the information on the retrial of the case.

The record of the minutes of the trial on a former appeal is silent as to whether or not the defendant was formally arraigned and entered a plea at any time prior to the trial. But that record disclosed, however, that the defendant was furnished with a copy of the information, together with a list of the witnesses to be used by the state in chief together with their post office addresses, as required by section 20, art. 2, Const., and that defendant therefore had knowledge of the contents of the information, and knew who would be called as witnesses in chief against him; that defendant was present in person at the trial, and announced ready for trial, and was

Digitized by Google

ably represented by counsel who assisted in the selection of the jury, and in the examination of the witnesses; that defendant not only introduced a number of witnesses in his own behalf, but also himself testified; that the county attorney, Mr. Hill, after the jury was sworn to try the cause, read the information and stated the plea of the defendant to be "not guilty," that Mr. Orwig then stated the case for the defendant; that evidence both for the state and the defendant was then introduced to the jury in proper order. The instructions of the court also stated the plea of the defendant to be "not guilty"; in fact, that the former trial proceeded to a conclusion on the theory that the defendant had pleaded "not guilty" to the charge, without any objection having been urged that there had been no arraignment or plea, and further it was not contended on appeal in the former hearing of this case in this court that there had been no arraignment of, and plea entered by, the defendant, and the judgment of conviction was reversed entirely on other grounds. The question of the arraignment and plea was waived by failure to raise it by timely objection in the former appeal.

The record on the former appeal clearly showing that the cause was tried in all respects as if a plea of "not guilty" had been entered by the defendant, it was immaterial that the record failed to show that he was formally arraigned.

In Sam Wood v. State, 4 Okl. Cr. 436, 112 Pac. 11, 45 L. R. A. (N. S.) 673, this court held:

"(a) Where the record is silent as to whether or not the defendant has been arraigned, but shows that the defendant appeared by counsel and announced ready for trial, participated in the selection of the jury and the examination of the witnesses, and further shows that the issues in the case were properly made up and submitted to the jury, it is too late after conviction for the defendant to object upon the ground that he was not arraigned.

"(b) Where the record is silent as to whether the defendant had been arraigned, but affirmatively shows that the defendant was accorded all the rights and privileges which the statute secures him by arraignment, this court will presume that the defendant was either arraigned or that he waived arraignment."

The foregoing decision met approval in the following cases: Spencer v. State, 5 Okl. Cr. 7, 113 Pac. 224; Ryan v. State, 8 Okl. Cr. 623, 129 Pac. 685. The latter case contains a lengthy and able discussion of the necessity of the record showing an arraignment and plea where the trial was conducted in all respects as if a plea of "not guilty" had been entered, and contains the citation of numerous authorities to the effect that the failure of the record to show an arraignment and plea under such circumstances does not constitute a fatal defect, but is a mere irregularity not involving a substantial right of the defendant.

Had this question, therefore, been presented in the former appeal, the decision would have been adverse to the appellant. Simpson v. State, 16 Okl. Cr. —, 185 Pac. 116. The presumption in such instance must be in favor of the regularity of the proceeding in the lower court, and that presumption will be indulged in this court in a subsequent appeal.

We must presume, therefore, that the defendant was either arraigned and pleaded "not guilty" to this charge, or else waived arraignment and pleaded "not guilty" at some time prior to the first trial. Under such circumstances, another arraignment and plea of "not guilty" were unnecessary. Levy v. State, 49 Ala. 390; Reynolds v. State, 34 Fla. 175, 16 South. 78; Bradham v. State, 41 Fla. 541, 26 South. 730; State v. Simms, 71 Mo. 538; State v. Tate, 156 Mo. 119, 56 S. W. 1099; People v. McElvaine, 125 N. Y. 596, 26 N. E. 929; Planck v. Bishop, 26 Neb. 589, 42 N. W. 723.

It was not error, therefore, for the trial court to deny defendant's motion for a formal arraignment prior to the retrial of the cause.

In this connection we desire to quote fully from the opinion delivered by Mr. Justice Day for the Supreme Court of the United States in Garland v. Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772, as follows:

"It is apparent that the accused was tried and convicted upon an information charging an offense against the law, that he had a jury trial, with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge against him and obtain an answer from him was fully subserved in this case, for the accused had taken objections to the second information and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the Supreme Court of Washington, following its former decisions, held that the failure to enter the plea had deprived the accused of no substantial right, and that, having failed to make objection upon that ground before trial, it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty without due process of law within the meaning of the Fourteenth Amendment of the Constitution.

"Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers v. Peck, 199 U. S. 425, 435 [50 L. Ed. 256, 260, 26 Sup. Ct. Rep. 87], and previous cases in this court there cited. Tried by this test, it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right or in any wise changed the course

Digitized by Google

of trial to his disadvantage. All requirements of due process of law in criminal trials in a state, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. The objection was merely a formal one, was not included in the general language in which the objection to the introduction of evidence was interposed before the trial, and was evidently reserved with a view to the use which is now made of it, in an attempt to gain a new trial for want of compliance with what in this case could have been no more than a mere formality.

"It is insisted, however, that this court, in the case of Crain v. United States, 162 U. S. 625 [40 L. Ed. 1097, 16 Sup. Ct. Rep. 952], held the contrary. In that case the question was specifically made as to the necessity of a plea before trial, duly entered of record. The learned justice who spoke for the majority of the court announced its conclusion approving a number of early cases in the state courts which had held that such form of arraignment entered of record was essential to a legal trial, and holding that in a federal court no valid trial could be had without the requisite arraignment and plea, and that such must be shown by the record of conviction. If a legal trial cannot be had without a plea to the indictment, duly entered of record before trial, it would follow that such omission in the present case requires a reversal of the judgment of conviction, because the prisoner has been deprived of due process of law.

"Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But, with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain Case, when he said (page 649):

" 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'

"Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain Case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed it is necessarily overruled."

The conclusion is reached, therefore, that where in a former trial the judgment of conviction is reversed on appeal, and the record indicates that a plea of "not guilty" had been entered, or where in such trial the parties proceed as if the defendant had been duly arraigned and had entered a formal plea of "not guilty," and where there was no objection made that the defendant had not been arraigned or had pleaded until after such judgment of conviction had been reversed on other grounds, that on a second appeal in such case the defendant will be presumed to have been duly arraigned and to have pleaded "not guilty" prior to the first appeal, and a subsequent arraignment and plea are unnecessary to join the issue in the last trial.

For reasons stated, the judgment of the district court of Seminole county rendered in this cause imposing imprisonment in the state penitentiary for life against the said Tom Thomas for the murder of George Gammill is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

BURT et al., Drainage Com'rs, v. STUART et al.

(Supreme Court of Idaho. June 11, 1920.)

Drains ⟸82(3)—Assessment not disturbed on appeal, because of conflict of evidence, where supported by evidence.

On an appeal in a proceeding under the drainage statute, as on other appeals, this court will not disturb the verdict of a jury or the judgment of a trial court because of conflict in the evidence, where there is sufficient proof, if uncontradicted, to sustain it.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Proceedings by C. L. Burt and others, Commissioners of Drainage District No. 1 of Canyon County, against W. S. Stuart and another, to assess benefits and damages in a drainage district. From a judgment assessing damages, defendants appeal. Affirmed.

John C. Rice, Rice & Thompson, and W. A. Stone, all of Caldwell, for appellants.

Harry S. Kessler, of Boise, for respondents.

Digitized by Google

McCARTHY, District Judge. The only question before this court is whether the evidence is sufficient to support the verdict of the jury assessing benefits to the lands of appellants, and assessing the damages of appellant W. S. Stuart. The general rule is that this court will not disturb the verdict of a jury or the judgment of a trial court because of conflict in the evidence, when there is sufficient proof, if uncontradicted, to sustain it. Raft River Land & Live Stock Co. v. Laird, 30 Idaho, 804, 168 Pac. 1074.

Counsel for appellants contend that this rule does not apply to this proceeding, because C. S. § 4515, provides that an appeal in a drainage case shall bring before the Supreme Court the propriety and justness of the amount of damages or assessments of benefits. We see nothing in this language to take such cases out of the general rule. Applying the general rule to the evidence, we conclude the evidence is sufficient to support the verdict.

The judgment of the district court is affirmed, and costs are awarded to respondents.

MORGAN, C. J., and BUDGE, J., concur.

CLIFFORD et al. v. LAKE.

(Supreme Court of Idaho. May 14, 1920.)

1. **Husband and wife ⇐262(1, 2)—Property acquired during coverture presumed community; burden of showing property so acquired to be separate property stated.**

All property acquired by either spouse during coverture is presumed to be community property, and the burden of proof rests upon the party who asserts it is separate property to show such fact by a preponderance of evidence.

2. **Husband and wife ⇐131(1)—Proof that separate property retains character after changes must be clear.**

The separate property of either spouse may undergo mutations and changes during the marriage relation, and still retain its separate character, yet the proof to trace and identify it in its changed condition must be clear and satisfactory.

3. **Appeal and error ⇐1011(1)—Judgment not disturbed because of conflict in evidence, where sustained by proof.**

An appellate court will not disturb the judgment of a trial court because of conflict in the evidence, where there is sufficient proof, if uncontradicted, to sustain it.

Appeal from District Court, Gem County; Ed. L. Bryan, Judge.

In the matter of the estate of Charles Williams, deceased. From a judgment approving and confirming an order of the probate court decreeing the assets of the estate to be community property, John P. Clifford and others, executors, appeal. Affirmed.

Finley Monroe, of Emmett, and Barber & Davison, of Boise, for appellants.

Thomas E. Buckner and W. C. Bicknell, both of Caldwell, for respondent.

REDDOCH, District Judge. The record shows that Charles Williams and Eliza B. Williams intermarried in Idaho in 1887. At the time of the marriage Charles Williams owned 120 acres of land near Treasureton, Idaho, a herd of cattle, and about 15 horses. The testimony on behalf of appellants shows that the herd of cattle consisted of about 100 head, while that on behalf of respondent shows that it did not exceed 50 in number. There is no showing as to the value of the land or cattle at the time of the marriage. Soon after the marriage Charles Williams homesteaded 160 acres, adjoining the 120 acres owned by him at the time of the marriage; he afterward traded 80 acres of the original 120-acre tract and made improvements on the remaining 90 acres by remodeling the dwelling house, building a granary, and rebuilding the stables thereon. Eighty acres of the homestead tract was deeded to Thomas J. Williams, a son of Charles Williams by a former marriage, upon the understanding and agreement that the son was to remain at home and assist his father upon the farm from the time he was 19 years of age until he was 21. After this transfer the real estate of Williams consisted of the 90 acres remaining of the original tract and 80 acres of the homestead tract, upon which he resided with his wife and used as a farm. About 70 acres of the original tract was in cultivation, on which crops of hay and grain were raised, which were used to feed the stock, and any surplus remaining sold from time to time. Shortly after the marriage Williams began selling off the original herd of cattle, together with the increase, selling no considerable number at any one time and after about five years he accumulated $1,000, which was deposited in a bank at Logan, Utah. Some of this deposit was withdrawn at times, being used and loaned and other deposits made. About the year 1903, or 1904, Williams and wife sold the 170-acre farm for the sum of $2,500, which amount, together with $1,000 in the bank at Logan, Utah, and a small amount of personal property, constituted all their assets. On or about the dates last aforesaid they purchased 15 acres of land near Emmett, Gem county, Idaho, the deed to which was taken in the name of Charles Williams, and erected a dwelling thereon, where they afterward resided until about the time of their death. The purchase price of the real estate, and the cost of constructing the buildings thereon, represented an expenditure of $1,925, and at

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Digitized by Google

the time of his death Williams left $626 in money and notes. It is this tract of land and personal property which is involved in this action.

Charles Williams died on June 6, 1912, leaving him surviving his wife and several children by a former marriage, and thereafter, on November 30, 1912, Eliza B. Williams died, leaving her surviving a daughter by a former marriage. The probate court decreed that all property in the hands of the executors of the estate of Charles Williams, deceased, was community property, and ordered that it be distributed as such, which decree and order was affirmed by the district court, from which this appeal is prosecuted. The principal issue in this case is whether or not the assets of the estate of Charles Williams, deceased, are separate or community property, or if mixed, what portions are separate and what portions community.

[1] C. S. § 4659, provides all property owned by the husband before marriage, and that acquired by gift, bequest, devise, or descent is his separate property, and section 4660 provides all other property acquired after marriage by either husband or wife, including rents and profits of the separate property of the husband and wife, is community property. The property in question, having been acquired during coverture, is presumed to be community property, and the burden of proof rests on the party who asserts that it is separate property to show such fact by a preponderance of the evidence. Humbird Lumber Co. v. Doran, 24 Idaho, 507, 135 Pac. 66; Chaney v. Gauld Co., 28 Idaho, 76, 152 Pac. 468; 21 Cyc. 1653; 5 R. C. L. 849; 6 Ency. Ev. 826, 827.

[2] The separate property of either spouse may undergo mutations and changes during the marriage relation, and still retain its separate character, yet the proof to trace and identify it in its changed condition must be clear and satisfactory. Ahlstrom v. Tage, 31 Idaho, 459, 174 Pac. 605.

[3] Appellants contend that only $250 of the $3,500 owned by the deceased and his wife at the time of the sale of the farm was community property. This was sought to be shown by the relative value of the original 90-acre tract and the homesteaded tract which is admitted to be community property at the time of the sale. Evidence was offered tending to show that said tracts were worth $2,250 and $250, respectively. It is also contended that the $1,000 on deposit in the bank at Logan, Utah, at the time of the sale of the farm, was the proceeds of the sale of cattle which the deceased, Charles Williams, owned at the time of the marriage, and therefore separate estate. The record discloses no effort on the part of the deceased, Charles Williams, and his wife to keep the community funds distinct from the separate property of the husband. It also discloses that the income from the separate and community property was mixed and mingled by them without any idea of keeping the separate property of the husband distinct from the community accumulations. The facts disclosed by the record and legitimate inferences to be drawn therefrom bring this case within the rule that—

"An appellate court will not disturb the judgment of the trial court, because of conflict in the evidence, where there is sufficient proof, if uncontradicted, to sustain it." Sweeten v. Ezell, 30 Idaho, 154, 163 Pac. 612; Davenport v. Burke, 30 Idaho, 599, 167 Pac. 481; Lambrix v. Frazier, 31 Idaho, 382, 171 Pac. 1134; Wallace v. Hartford Fire Ins. Co., 31 Idaho, 481, 174 Pac. 1009; Labonte v. Davidson, 31 Idaho, 644, 175 Pac. 588; Fleming v. Benson, 178 Pac. 482.

We find no error in the record sufficient to reverse the judgment, and it is therefore affirmed, with costs to respondent.

MORGAN, C. J., and BUDGE, J., concur.

RUSSELL v. SMITH.

(Supreme Court of Oregon. June 29, 1920.)

1. Appeal and error ⟸627(2)—Appeal will be dismissed where transcript is not filed within 30 days.

Where an appeal was perfected April 16, 1920, and no order extending the time for filing the transcript appeared of record, the appeal will, under L. O. L. § 554, as amended by Gen. Laws 1913, p. 618, requiring the transcript to be filed in 30 days, be dismissed, under subdivision 2, if the transcript is not filed within the required time.

2. Appeal and error ⟸1231—Upon dismissal of appeal judgment will be enforced against the appellant and his sureties.

Where an appeal was dismissed, under L. O. L. § 554, subd. 2, as amended by Gen. Laws 1913, p. 618, for failure of appellant to file a transcript within 30 days, judgment will, under subdivision 3, be enforced against the appellant and his sureties.

In Banc.

Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action by G. H. Russell against C. Sam Smith. From a judgment for defendant, plaintiff appeals. On motion to dismiss. Appeal dismissed.

M. E. Brink and Jay H. Upton, both of Prineville, for appellant.

M. R. Elliott, of Prineville, for respondent.

McBRIDE, C. J. This is a motion to dismiss an appeal. The defendant received a

Digitized by Google

judgment in the court for costs and disbursements, from which judgment plaintiff appealed.

[1] The judgment was rendered on February 17, 1920, and the notice of appeal and undertaking were served on defendant on April 10, 1920. The appeal was therefore perfected on April 16, 1920. No order extending the time to file a transcript on appeal appears of record. Section 554, L. O. L., as amended by chapter 320, Gen. Laws of 1913, requires that the appellant shall file a transcript on appeal within 30 days after the appeal has been perfected. The transcript was therefore due here at the latest on the 17th day of May, 1920, but no transcript has been filed. Defendant moves to dismiss the appeal.

[2] Subdivision 2 of section 554, supra, provides that if the transcript is not filed within the time provided, or within any extension of such time, the appeal shall be dismissed. Subdivision 3 provides that upon such dismissal the judgment may be enforced by the appellate court against the appellant and his sureties.

The appeal will therefore be dismissed and the judgment affirmed, both against the appellant and his sureties, with defendant's costs and disbursements in this proceeding.

STEELE v. STEELE.

(Supreme Court of Oregon. June 29, 1920.)

1. Divorce ⟸29—Evidence held to show personal indignities entitling plaintiff to divorce.

Where defendant had frequently stated with profanity that he did not care for plaintiff and had refused to permit her to return home after she went to take care of his sick mother, the charge of personal indignities rendering life burdensome, which is ground for divorce under L. O. L. § 507, was sustained.

2. Divorce ⟸29—Personal violence unnecessary to "personal indignities."

To constitute personal indignities which are a ground for divorce under L. O. L. § 507, it is not necessary that there be actual personal violence or attempt at personal violence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Indignity.]

3. Divorce ⟸308—Defendant ordered to pay $15 per month for support of daughter.

Where plaintiff had been awarded a divorce with custody of her 14 year old daughter, but it appeared that defendant had no property except his earnings, and that he was in poor health and capable of earning only about $50 per month, he will be required to pay $15 per month for the support of the daughter.

In Banc.

Appeal from Circuit Court, Marion County; Geo. G. Bingham, Judge.

Suit for divorce by Belle Steele against D. D. Steele. Decree for defendant, and plaintiff appeals. Reversed, and decree for plaintiff.

M. E. Pogue, of Salem, for appellant.

Smith & Shields, of Salem, for respondent.

Max Gehlhar, Dist. Atty., of Salem, for the State.

BENNETT, J. This is a suit for divorce brought by Mrs. Steele, the plaintiff. The plaintiff and defendant had been once married and divorced, but became reconciled and remarried, largely on account of their daughter, apparently, who is now about 14 years of age.

The suit is brought on the ground of cruel and inhuman treatment and personal indignities rendering life burdensome.

The plaintiff testified:

"He wasn't kind and he told me repeatedly he didn't care for me. The words he used, 'He didn't give a damn for me,' and it was only because of our daughter that he lived with me. * * * When I went after my trunks he told me he didn't give a damn for me; that he had ceased to love me."

"Q. Now, there is a statement here that some time in 1918 you asked him for money for treatment by a physician. State to the court what was said at that time. A. Well, my health was very poor at that time, and I asked him for money to come to town. I was taking treatments, and he wouldn't give me any, and I made the remark, 'Donald, if you don't give me money, how do you expect me to get it?' And he said, 'I don't give a damn how you get it or where you get it.'"

Finally the plaintiff went to Salem to take care of the defendant's mother, who was very old and very sick, and who was living at the home of defendant's sister in Salem. After being at Salem for the purpose of taking care of his mother, for a week or two, she went back to Turner, where she and her husband lived, to attend the graduating exercises of her daughter. He did not want her to return to Salem, and when she explained that there was no one else to help his sister take care of their mother, and that they had arranged to go back, he told her if she went to Salem to stay and never come back to his home again, and he has never since consented to her returning home.

All of this is corroborated by the daughter and by defendant's sister, who testified—and the defendant himself admits—that he ordered her to stay away if she went to Salem to take care of his mother, and that he has never since been willing for her to come back. And defendant's own sister testified that at different times she had heard him say in the presence of the plaintiff that "he didn't care for her, that he had ceased to love her, and that he would never live with her again."

The defendant makes no defense except as

Digitized by Google

to the matter of support for the daughter, but the district attorney appears on behalf of the state and contests the divorce.

There is no evidence or claim that plaintiff has ever misconducted herself in any way or been guilty of any kind of unlawful conduct.

[1] We think the evidence is sufficient to sustain the charge of personal indignities. Section 507, L. O. L., provides that the marriage contract may be dissolved for "cruel and inhuman treatment or personal indignities rendering life burdensome."

We do not see how it could be otherwise than to make a woman's life burdensome to live with a husband who had ceased to care for her, and who did not want to live with her and was frequently telling her so in such a coarse and brutal way, and that he did not "care a damn for her." We think no good purpose could be served by compelling a woman to live with a man under such circumstances.

[2] It was supposed at one time that actual personal violence, or attempt at personal violence, was necessary to constitute cruel and inhuman treatment or personal indignities; but it is now well settled that that is no longer the law, if it ever was.

Section 88, 19 C. J., states the law thus:

"It was formerly thought that actual bodily harm, or apprehension thereof, must be shown to authorize granting a divorce on the ground of cruelty, and this doctrine seems still to prevail in a few jurisdictions; but this view has been generally repudiated, and the modern doctrine is that any unwarranted conduct by either spouse which causes the other mental suffering of sufficient degree constitutes such cruelty as will authorize a divorce."

There are no two cases exactly alike, but we think this case is well within the principles announced by this court in Lisenby v. Lisenby, 89 Or. 273, 173 Pac. 888, and Railsback v. Railsback, 92 Or. 623, 182 Pac. 131. We think the plaintiff is entitled to her decree of divorce and for the custody of the daughter.

[3] As to the allowance for the support of the daughter there is some difficulty. The parties seem to be working people and are poor. Neither of them have anything except their earnings. The defendant is engaged in the butcher business, apparently in a small way, in Turner, and his only revenue is from that business. His testimony in relation to the matter is undisputed, and he claims his receipts from the business over and above the expenses are about $50 per month. As we have said, these people are working people, and the daughter has now reached the age where she can help some in her own support.

The defendant, according to his testimony which is also undisputed, has lately been sick and partly paralyzed for a period of three or four months, and he has never entirely recovered his health, and is not able to do hard work. We think under the circumstances he should contribute $15 a month toward the support of the daughter during her minority if she shall continue to remain dependent upon her mother and to live with her during that time. This is a meager sum, it is true, but under the circumstances it seems all the father will be able to contribute after he takes care of his own living and necessary personal expenses.

The decree will be so framed.

MARTIN v. GAULD CO.

(Supreme Court of Oregon. June 29, 1920.)

1. Master and servant ⟸39(2)—Evidence in avoidance of written resignation inadmissible, in absence of plea.

In an employé's action for wrongful discharge, prior to termination of contract, evidence that employé's written resignation and acceptance was at request of the employer and merely for purpose of appearances, was inadmissible, in absence of a plea in confession and avoidance.

2. Master and servant ⟸37—Resignation defeats recovery for wrongful discharge.

An employé, tendering his written resignation, which is accepted by the employer, cannot recover for wrongful discharge prior to termination of contract, though the resignation was at the employer's request and was made merely for the sake of appearances.

3. Master and servant ⟸39(2)—Variance as to salary claimed held not fatal.

In an action for wrongful discharge, variance between allegation that plaintiff was employed at a fixed salary per month and 10 per cent. profits during the year, after deduction of an amount equal to 10 per cent. of the capital stock, and proof that he was employed at such a salary, and that it was subsequently agreed that he was to receive the 10 per cent. of the profits, *held* not fatal, under L. O. L. § 97.

4. Master and servant ⟸43—Construction of term "profits" held question for court.

In employé's action for wrongful discharge in violation of contract entitling him to certain per cent. of profits, where there was no understanding between the parties as to what should constitute profits, the interpretation of the contract with respect to the meaning of the term "profits" *held* for the court.

5. Appeal and error ⟸1172(3) — Judgment not reversed, where good as to one cause of action, though verdict single.

In action on two counts, appellate court, in holding judgment correct as to first cause of action and incorrect as to other cause of action, will not reverse judgment, though verdict of jury was for a single sum, where the amount

Digitized by Google

to which plaintiff was entitled under the first cause of action could be ascertained from the record, and the appellate court in such case will affirm judgment as to first cause of action and reverse it as to second cause of action.

Department 1.

Appeal from Circuit Court, Multnomah County; George W. Stapleton, Judge.

Action by V. F. Martin against the Gauld Company. Judgment for plaintiff, and defendant appeals. Affirmed as to the first cause of action, and remanded, with direction to enter nonsuit as to second cause of action.

This is an action wherein plaintiff seeks to recover damages for breach of a contract of employment. The complaint sets up two causes of action. In the first it is alleged that in February, 1916, defendant employed plaintiff as its manager and agreed to pay him $250 per month, and in addition thereto 10 per centum of the profits made by defendant during the year 1916, after deducting from such profits 10 per centum of the capital stock of defendant. It is alleged that plaintiff fully performed his obligations under the agreement; that the business during that year earned a profit of $42,000, and that after deducting 10 per centum of the capital stock, $15,000, there remained a profit of $27,000, of which plaintiff is entitled to 10 per cent., or $2,700; that the fixed salary of $250 per month has been paid, but that defendant refuses to pay the agreed share of the profits to plaintiff, and he therefore asks judgment thereon for $2,700.

The second cause of action avers that in February of 1917, defendant employed plaintiff as its manager, agreeing to pay him a fixed salary of $350 per month, for the full year, and in addition thereto agreed that, if defendant's stock of merchandise should be reduced to a value not exceeding $170,000, and accounts and bills receivable reduced to and maintained at a sum not exceeding $120,000, and defendant's indebtedness to the bank reduced to and maintained at a sum not exceeding $85,000, then and in that event defendant would pay to plaintiff as additional compensation 10 per centum of the profits received in money during said term of employment. It is then alleged that on August 1, 1917, defendant wrongfully discharged plaintiff, without cause, thereby preventing him from bringing the business to the agreed basis, and earning the 10 per centum of profits provided for in the contract, as he otherwise would have done. For this cause he prays for damages in the sum of $5,000. Defendant's answer to the first cause of action is a denial. As to the second cause of action, defendant alleges that on August 1, 1917, without having complied with any of the conditions to entitle him to compensation under the profit-sharing agreement, he voluntarily abandoned the employment and abandoned all efforts to comply with the conditions and earn the additional compensation. It is further alleged that on August 1, 1917, defendant's stock of merchandise amounted to $208,918.68, its bills and accounts receivable amounted to $152,616.26, and its indebtedness to the bank amounted to $95,000. It is also averred that his salary of $350 per month had been paid in full to August 1.

Plaintiff's reply consists entirely of denials. The cause was tried to a jury, resulting in a verdict and judgment in favor of plaintiff in the sum of $4,450, from which defendant appeals.

John W. Reynolds, of Portland (Flegel, Reynolds & Flegel, of Portland, on the brief), for appellant.

E. B. Seabrook and A. M. Dibble, both of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for respondent.

BENSON, J. (after stating the facts as above). In considering this case, we shall adopt the order pursued by counsel, and in the first instance direct our attention to the second cause of action. This cause must stand or fall upon the question as to whether plaintiff resigned his position or was wrongfully discharged. Plaintiff testifies that on the evening of August 1, Mr. Flegel, as a managing director of the defendant corporation, said to him, "Well, I tell you, Martin, Mr. Alvord and I have decided that we should change the management of the company; you had better retire." To which the plaintiff replied, "All right." And that thereafter some discussion occurred looking to a purchase, by him, of the business, and that on the next morning he wrote and mailed this letter:

"The Gauld Company,

"Corner 12th and Everett St.

"Portland, Or. Aug. 2, 1917.

"Mr. A. F. Flegel—Dear Sir: The financial consideration is too heavy for me to assume at this time. I herewith hand you my resignation as manager of the company. I will be pleased to have you so regulate matters so I may get away as soon as possible. However will gladly stay as long as you think necessary to show my successor whatever is required.

"Wishing my successor, yourself and the company the best of success, I am,

"Respectfully, V. F. Martin."

In reply to which he received the following:

"Flegel, Reynolds & Flegel,

"Attorneys at Law,

"Portland, Oregon, Aug. 3, 1917.

"Mr. V. F. Martin, % The Gauld Company, 69 N. 12th St., City—My Dear Martin: I have your letter of Aug. 2d, with the information that the financial burden was too heavy for you to assume in connection with the purchase of the Gauld Company business, and sincerely re-

Digitized by Google

gret your inability to make your financial arrangements, for the reason that I was determined to give you every preference, both in regard to price and to terms, but I was seriously afraid that the investment was, as you have found, too large.

"The board of directors have determined to accept your resignation, to take effect immediately, and you are hereby authorized to draw a check for your August salary, and turn the business over to Mr. Creasey, assistant manager. Yours very truly,

"Board of Directors of the Gauld Company,
"By A. F. Flegel."

Plaintiff contends that this correspondence does not state the actual facts at all; that in truth he was peremptorily discharged, and that the foregoing correspondence was indulged in merely "to save his face," or, as he explains:

"I thought that was the most graceful way. I was discharged, and I thought that was the most graceful way out of it. It is usual, when a man is discharged, to ask for his resignation; that is the most graceful way, of course."

The letter of resignation, written and mailed by the plaintiff, and the written reply of defendant, accepting the same, taken together, constitute a contract, which, upon its face, is valid and binding upon the parties. The plaintiff admits the execution of these writings, which are perfectly clear and free from ambiguity, but insists it was a compulsory resignation.

[1, 2] In other words, although his reply contains no plea other than a denial, he offers evidence which admits the execution of a written contract and seeks to avoid its legal effect. It is elementary that, in the absence of a proper pleading, such evidence in avoidance cannot be considered. But, even if there were a proper plea in confession and avoidance, we think the evidence submitted totally fails to establish any ground for escaping the legal effect of the written resignation and acceptance. While there is some conflict in the authorities upon this subject, we think the better reasoning supports the conclusion reached in Wharton v. Christie, 53 N. J. Law, 607, 23 Atl. 258, and Merrill v. Wakefield Rattan Co., 1 App. Div. 118, 37 N. Y. Supp. 64. The motion for a judgment of nonsuit should have been allowed.

[3] Regarding the first cause of action, defendant's first contention is that there is a fatal variance between the contract as alleged in the complaint and that proven. The complaint avers that in the month of February, 1916, plaintiff was employed as manager of defendant's business, at a fixed salary of $250 per month, and was to receive, at the end of the year, 10 per cent. of the profits earned during the year, after deducting therefrom an amount equal to 10 per cent. of the capital stock. The evidence of the plaintiff is to the effect that in February he was employed as manager at a salary of $250 per month, and that in March it was agreed that he should have, in addition to such salary, 10 per cent. of the profits earned during the year, after deducting 10 per cent. of the capital stock. Upon the subject of variance between allegations and proofs, section 97, L. O. L., says:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

In the present case, there is no contention upon the part of the defendant that there was any different agreement as to profit sharing, and a difference of a few days in time between making the original contract and the subsequent modification cannot have misled defendant in making its defense, which was based upon the contention that there was never any agreement of any sort upon that subject during that year.

[4] It is next urged that the court erred in refusing defendant's request for the following instruction to the jury:

"If you find from the evidence that defendant contracted with plaintiff to pay plaintiff, in addition to his salary, 10 per cent. of the profits for 1916, after deducting 10 per cent. on the capital stock, then it is for you to determine from the evidence whether profits were made in the year 1916, and, if so, how much. It is for you to determine whether profits, within the meaning of such contract, included an increase in the aggregate amount or value of merchandise and the amount of uncollected bills, or whether, on the other hand, such profits comprised only gains realized in money, and available for distribution."

The vice of this instruction lies in the fact that it leaves the question of what constitutes profits to be determined by the jury. There is no evidence in the record tending to show that, if there was any profit-sharing agreement for the year 1916, there was any understanding between the parties as to what should be the meaning of the term, and therefore the interpretation of the contract was exclusively a matter for the court. Upon this subject the court advised the jury as follows:

"On the proposition as to whether or not profits were earned during the year, the court will instruct you that profits in the ordinary business acceptation of the term, means the earning or increased value of the assets of the business over and above the cost price of the goods that have been handled during the period, plus the cost and expenses of operation or overhead charges, as it is called, and plus the cost of handling the financial operations of the business. So that, if in that connection you find that at the expiration of the period covered in the first cause of action, that there was disclosed in the annual statement or annual auditor's report that there was an accumulation or addition to the value of the assets

Digitized by Google

of the business over that at the beginning of the year, in excess of 10 per cent. of the capital stock of the corporation, then I instruct you that that additional amount will be in the ordinary meaning of the term profits, whether it be in cash, notes and accounts, or merchandise, or any other assets of the corporation. But I will also instruct you that it must be something beyond the mere natural advance in the price of the goods upon the shelves caused by a changed condition in the market. It must be an accumulation of earnings, an addition to the value of the assets of the corporation, over and above the cost of the goods and the costs and expenses of the operations of the business during the period, that comes about as the result of handling the operations of the business through the methods of industry and industrial enterprise applied to the general management of the business. The mere increase of the value of the goods upon the shelves over and above what they were at the beginning of the year should not be considered as profits. That is only an element which might enter into the question of profits, but all earnings and additions which are merely attributable to that cause cannot be considered profits, so as to enable the plaintiff to claim compensation upon it in excess of the 10 per cent. of the capital stock of the corporation."

This instruction is fully as favorable as the defendant could ask.

[5] Defendant further insists that, if this court shall find it necessary to reverse the judgment as to the second cause of action, it must necessarily reverse it as to the first cause of action also, for the reason that the verdict of the jury is for a single sum, and that the amount allowed upon each of the two counts cannot be segregated. The verdict reads thus:

"We, the jury impaneled and sworn to try the above-entitled cause, find our verdict in favor of the plaintiff, and fix and determine the amount to be recovered by plaintiff from defendant at the sum of $4,450."

An examination of the record discloses that the complaint alleges, and the evidence of the plaintiff tends to prove, that upon the first cause of action, 10 per cent. of the profits, computed after deducting from the total profits 10 per cent. of the capital stock, amounts to $2,700. Upon the second cause of action the court withdrew the question of profit sharing from the consideration of the jury, submitting to them only the question of damages incurred by the loss of salary for the remainder of the term after discharge, which the jury evidently computed at the fixed sum of $350 per month for the remaining five months of the year, amounting to $1,750. These two sums aggregate the exact sum specified in the verdict, and leave us without any doubt as to the fact that the jury intended to allow plaintiff the $2,700 demanded by him in the first count of his complaint. It is true that at one time the plaintiff testified that his August salary had not been paid, and later, upon cross-examination, admitted that during the month of July he had overdrawn his account to an extent which would fully pay his August salary, leaving but four months' salary still unpaid; but an examination clearly shows that this evidence was overlooked or disregarded by the jury. Eliminating, therefore, all that the jury could possibly have awarded plaintiff upon the second count, there remains the sum of $2,700, the exact amount of plaintiff's claim upon the first count, and it is easily and safely to be segregated from the lump sum named in the verdict.

The cases cited by defendant in support of its contention upon this point, all base their conclusion upon the fact that the state of the record is such as to render a severing of the two elements of the verdict impossible, except in the case of Little Rock & Ft. Smith R. R. Co. v. Perry, 37 Ark. 164, in which there is nothing to indicate the amount of the verdict, or what difficulties were presented in the interpretation of the verdict. All that is said regarding the matter is:

"As to the second count in the complaint, no error is claimed, but the judgment, being in solido, must be reversed."

We conclude that, as to the first cause of action, the judgment should be affirmed. As to the second cause of action, the case will be remanded, with directions to enter a judgment of nonsuit.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

COLE v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. July 6, 1920.)

1. **Municipal corporations ⇐185(8)—Trial of policeman before executive board or civil service commission does not require arraignment or plea.**

It is not necessary that a sergeant of police, tried for misconduct, should be arraigned and required to plead before the executive board and the civil service commission, where neither the charter nor rules make any such requirements, since such proceedings are more or less informal and are left somewhat to the discretion of the commissioners.

2. **Evidence ⇐83(2)—Presumption executive board and civil service commission acted in good faith in removing policeman.**

It must be assumed that the executive board of a city and its civil service commission acted in good faith for the best interests of the police force and of the public in removing a police officer.

Digitized by Google

3. Municipal corporations ⟹185(13)—Reviewing court cannot pass on facts where any evidence sustains findings for dismissal of a policeman.

On writ of review as to sufficiency of cause to justify dismissal of police officer by executive board, which was confirmed by civil service commission, where there is any evidence whatever to sustain the findings of the board and commission, the reviewing court cannot inquire into and pass on the facts.

In Banc.

Appeal from Circuit Court, Multnomah county; Geo. N. Davis, Judge.

E. W. Cole brought a writ of review to the circuit court for Multnomah county to review the action of the civil service commission of Portland in sustaining his dismissal by the committee on police on charges preferred by A. G. Rushlight, as mayor, and from an order setting aside the dismissal and remanding the cause to the civil service commission for a new trial, the City of Portland and other defendants appeal. Judgment of the circuit court reversed, and finding and decision of civil service commission affirmed.

This proceeding is a writ of review to bring up the proceedings of the board of civil service commissioners of the city of Portland, Or., confirming and refusing to set aside the action of the executive board of that city in discharging the plaintiff, who was a member of the police force thereof. The case is an old one, and has been pending on appeal for a long time. There is no brief or appearance of any kind on behalf of the plaintiff and respondent.

The plaintiff was a sergeant in the police force of Portland in the early part of the year 1912. It appears from his petition for a writ of review that charges were filed against him before the executive board by A. G. Rushlight, who was then mayor of the city. Plaintiff appeared in answer to the charges and a trial was had before the committee on police, and evidence was introduced tending to show that the plaintiff had violated the rules governing the police force by going to the mayor over the the head of the chief of police in the matter of his transfer from one district to another, and that immoral soliciting had been more or less carried on in his district, without any arrest being made by him.

The police committee sustained the charges, and recommended his dismissal from the force, and such dismissal and discharge was ordered by the executive board. Thereafter the plaintiff appeared before the civil service commission and asked for reinstatement, and after hearing the case and receiving evidence pro and con, the dismissal by the executive board was sustained.

The evidence that was taken before the police committee of the executive board appears in the return, but the evidence before the civil service commission does not appear. The members of the executive board are not made defendants in the proceeding, individually or as a body.

After the civil service commission had sustained the dismissal of the plaintiff, he applied to the circuit court for Multnomah county for a writ of review, alleging:

"That said dismissal was unlawful and without cause, for the reason that the petitioner herein was not arraigned and given an opportunity to plead to the charges made against him; that the evidence was erroneously construed; that the charges were erroneously construed; that there was error in rendering the decision that the order of removal should be sustained; that there was error on the part of said civil service commission in dismissing said Cole from said police department; that there was error in admission of the testimony on the hearing of the trial of this petitioner; that there was no testimony authorizing the dismissal of this petitioner from the police department; that error was committed in allowing A. G. Rushlight, as mayor, to act as accuser, witness, and a member of the civil service commission and executive board which acted as the court and judges in the matter of the written charges preferred against E. W. Cole, petitioner herein.

After the hearing of the writ of review in the circuit court there was an order setting aside the dismissal of the plaintiff by the civil service commission and remanding the cause to said commission for a new trial. From this order the defendants appealed to this court.

Walter P. La Roche and Lyman E. Latourette, both of Portland, for appellants.

Stott & Collier and H. H. Northrup, all of Portland, for respondent.

BENNETT, J. (after stating the facts as above). We are of the opinion that there was no error on the part of the executive board and civil service commission which can be revised in this review proceeding.

[1] It is true that the record does not show that the plaintiff was arraigned or required to plead at his trial before the executive board and civil service commission. But the charter of the city does not require any such arraignment or plea, and at the time these proceedings were commenced before the executive board there were no rules requiring anything of the kind.

[2] The plaintiff appeared and had ample opportunity to, and did in fact, answer the charges before the executive board, and the proceeding before the civil service commission was initiated by him. Such proceedings are, in the nature of things, more or less informal, and something must be left to the wise discretion of the board of commissioners. It must be asssumed, in the first instance, that the executive board and the civ-

Digitized by Google

il service commission acted in good faith, and for the best interests of the police force and of the public.

It is urged that the mayor who filed the charges also sat as a member of the executive board and a member of the commission at the time of the trial. Even if we assume that the fact that he had filed the charges against the plaintiff disqualified him from acting as a member of the board or commission while the matter was before them, it does not sufficiently appear that he participated in the trial to justify the court in reviewing the proceedings upon that ground. Indeed, his own affidavit and the affidavit of another of the commissioners show that he did not, and these affidavits are not disputed in any way.

[3] In order to review the finding of the commission as to the sufficiency of the cause to justify the dismissal of the plaintiff as a police officer, it would be necessary for this court to pass upon a question of fact. There seems to have been a trial of the facts before the police committee, and another trial before the civil service commission, in both of which trials there was a finding against the plaintiff. Under the circumstances, the courts would not be justified in interfering with the result of these trials.

It is well settled that upon a review the court cannot inquire into and pass upon the facts, when there is any evidence whatever to sustain the findings of the tribunal sought to be reviewed. Poppleton v. Yamhill County, 8 Or. 337, 340; Smith v. Portland, 25 Or. 297, 301, 35 Pac. 665; Oregon Coal Co. v. Coos Co., 30 Or. 308, 310, 47 Pac. 851; Garnsey v. County Court, 33 Or. 201, 54 Pac. 539, 1089; Roethler v. Cummings, 84 Or. 442, 447, 165 Pac. 355.

In Smith v. Portland, supra, Mr. Justice Moore, delivering the opinion of the court and quoting from a previous decision, said:

"The authorities * * * fully sustain the position that the writ of review only brings up the record of the inferior court, and that the superior court, upon review, tries the cause only by the record, and only as to questions of jurisdiction, and as to error in proceeding. It will not on review try questions of fact."

The judgment of the circuit court must be reversed, and the finding and decision of the civil service commission affirmed.

BROWN et al. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. June 29, 1920.)

1. Municipal corporations ⟸514(1) — Reassessment permissible only in manner prescribed by charter.

A reassessment for a street improvement can be made only by virtue of authority conferred by charter, for, if the power of levying a reassessment is granted, it can be exercised only in the manner prescribed by statute.

2. Municipal corporations ⟸514(2)—Power to reassess not dependent on former assessment being declared void.

Under the charter of the city of Portland the authority of the city council to ordain a reassessment does not always depend on the fact that a court has declared or rendered void a former assessment, but such action may be taken when the council is in doubt as to the validity of such assessment.

3. Municipal corporations ⟸514(9)—Proceeding held to provide for reassessment, and therefore to be barred by limitations; "institute."

Under charter of city of Portland, providing that no proceeding for a reassessment for a local improvement shall be instituted after 10 years from the passage of resolution of intention for the making of the original improvement, where resolution for making the original street improvement was passed in 1903, and a reassessment initiated in 1909 was by the Supreme Court found defective, proceeding instituted in December, 1914, by resolution reciting in effect that "the Supreme Court has held void" the 1909 reassessment ordinance, and culminating in the passage, in January, 1915, of an ordinance in form making a reassessment, *held* not an amendment or correction of the 1909 reassessment, but a new assessment or reassessment, and therefore barred by the charter limitation; "institute" being defined to mean "to set up, to originate, to introduce," and therefore, as used in the charter, meaning "commence" or "initiate."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Institute.]

In Banc.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Proceeding by David Brown and others for a writ of review directed to the City of Portland and another. Writ dismissed, and plaintiffs appeal. Reversed.

This is a proceeding by David Brown and others for a writ of review to examine and cancel a reassessment made by Ordinance No. 30287 for the improvement of Albina avenue, from Page street to River street, in the city of Portland. The circuit court held that the proceedings making the reassessment were regular and dismissed the writ. Plaintiffs appeal.

The proceedings relating to the street improvement involved have been before this court several times. A brief history of the matter, as far as necessary to relate here, is about as follows:

In 1903 the city of Portland attempted to assess plaintiffs' property for the improvement of Albina avenue. The assessment was

Digitized by Google

resisted and set aside by the court. The city then attempted to make a reassessment, which was adjudged void in the case of Applegate v. City of Portland, 53 Or. 552, 99 Pac. 890, and the city was directed to proceed to reassess the property. Thereupon the city endeavored to make another reassessment, but this was resisted and adjudged invalid in Brown v. City of Portland, 73 Or. 302, 144 Pac. 121. The court there held that:

"The case is governed by the principles announced in Hochfeld v. Portland, 72 Or. 190 (142 Pac. 824), and Cook v. Portland, ante, p. 299 (144 Pac. 120); the facts and questions involved being substantially alike in all three instances. The judgment is accordingly reversed, with directions to the council to proceed anew to the reassessment as suggested in those cases."

In the Hochfeld Case it was said (72 Or. at page 200, 142 Pac. 827):

"Although the city had jurisdiction to act in the proceeding, yet it acted erroneously in its omission to determine the question of fact involved by findings entered upon its record. This is not a fatal error authorizing the court to declare the reassessment proceeding utterly void. [The provisions of section 611, L. O. L., are here in part set forth.] The conclusion is that the decision of the circuit court dismissing the writ should be reversed, and the cause remanded, with directions to instruct the defendants to give the notice required by its charter for hearing the objections appearing in the record, and to proceed to the determination of them in accordance with this opinion."

Thereafter the city authorities proceeded to adopt Resolution No. 8383, which recited in effect:

"It appearing that the Supreme Court of Oregon, in the case of David and Anna Brown et al. v. City of Portland et al., has held void Ordinance No. 20478"

—making a reassessment for the improvement of Albina avenue. The resolution directed the city auditor to give notice of the passage of the resolution and of the hearing of objections to the preliminary reassessment; the time set being January 25, 1915, at 2:30 o'clock p. m.

The plaintiffs, who are property owners, made various objections to the reassessment, which are set forth in the petition for a writ of review. The council heard the objections, and made findings of fact, and overruled the same, and passed Ordinance No. 30287, entitled "An ordinance making a reassessment for the improvement of Albina avenue from the north line of Page street to the center line of River street in Albina, in the city of Portland, Oregon," and made a reassessment for the cost of the improvement. The petition for the writ alleges inter alia, that the defendant city of Portland had no jurisdiction nor power to pass said reassessment ordinance, No. 30287, for the reasons (1) that the council failed to obtain jurisdiction to make the reassessment, because the notice given for the hearing was not authorized by charter; (2) because the resolution of intention of making the original improvement was passed in January, 1903, and more than 10 years have elapsed since the passage of such resolution of intention for the making of the original work, and there is no lawful authority for instituting these proceedings for such a reassessment, or for passing said Resolution No. 8383 on December 23, 1914, attempting to institute reassessment proceedings for the improvement of Albina avenue after said 10-year period had expired; (3) the original improvement was not made in good faith; (4) that some of the property was sold on a former reassessment.

Ralph R. Duniway, of Portland, for appellants.

L. E. Latourette, of Portland (W. P. La Roche, of Portland, on the briefs), for respondents.

BEAN, J. (after stating the facts as above). The first question for consideration is that raised by the plea of the statute of limitations. The charter of the city of Portland, as presented by the briefs, provides the power and procedure of the city in making a reassessment. It provides that, whenever an assessment for any local improvement is set aside, annulled, declared, or rendered void, or its enforcement refused by any court of this state or any federal court having jurisdiction therein, either directly or by virtue of any decision of this court, or when the council shall be in doubt as to the validity of such assessment, the council may by ordinance make a new assessment or reassessment upon the property benefited by such improvement to the extent of their respective and proportionate shares of the full value thereof. The procedure of the council is specified by section 400, thus:

"The council shall by resolution declare the district that will be benefited by the improvement for which the reassessment is made and shall direct the auditor or city engineer to prepare a preliminary assessment upon the property included therein within a time to be fixed by said resolution. Upon the passage of such resolution the auditor shall, as soon thereafter as such reassessment is prepared, give notice by ten successive publications in the city official newspaper that such assessment is on file in his office, giving the date of the passage of the resolution directing the making of the same and the time at which the council will hear and consider objections to said assessment by parties aggrieved thereby, and warning such persons not to depart until such reassessment has been completed."

This section of the charter further requires the auditor to forthwith mail a notice to the owner of each lot. It permits the owners of property to file objections in writing to such

Digitized by Google

assessment. The council is required to hear and determine all objections filed. The council may correct or set aside and order the remaking of such assessment, "and shall pass an ordinance approving and confirming such reassessment, as corrected and remade." Section 400 further provides:

"But no proceedings shall be instituted for such reassessment unless within ten years of the passage of the resolution of intention for the making of the original work, improvement or repair."

The position of the city is that the charter provision, that no proceeding for a reassessment shall be instituted unless within 10 years after the passage of the resolution of intention for making the original improvement, is not applicable, because, as claimed on behalf of the city, the reassessment in question "was initiated September 8, 1909, when the council directed the auditor to prepare a proposed reassessment." This is upon the theory that the prior reassessment involved in the case of Brown v. Portland, which we will refer to hereafter as the former case, was not held absolutely void or annulled. The judgment in the former case was by mandate directed to be entered in the lower court. This court found in that case, which was also a proceeding for a writ of review, that there was error as alleged, and reversed the judgment of the court below in dismissing the writ. The order entering the mandate provided among other things as follows:

"And it is further ordered and adjudged in accordance with said mandate that defendants give the notice required by charter to appellants plaintiffs for a hearing of objections appearing in the record and to proceed to the determination of them in accordance with the law and the opinion of the Supreme Court."

Thereupon the council adopted Resolution No. 8383, notice was given, objections made by plaintiffs, and hearing had, detailed findings were made by the council, and that tribunal by Ordinance No. 30287, now in question, ordained that a reassessment of plaintiffs' property according to the benefits for the cost of the improvement be made and approved, and confirmed the preliminary assessment prepared by the auditor and filed October 18, 1909. Section 3 of the ordinance directs that interest on the several amounts be added and collected at the rate of 6 per cent. per annum from the date of the delinquency of the original assessment. Section 4 directs the auditor "to enter the assessment hereinbefore made in the docket of city liens and give notice thereof." The claim of the city is in effect that no new assessment or reassessment was made by the ordinance, but that only an amendment or correction of the reassessment involved in the former action was made.

[1, 2] It must be conceded that the proceedings which are the subject of inquiry have the general appearance of a reassessment. Were they such in legal effect? A reassessment for an improvement of this nature can be made by virtue of authority conferred by the city charter. The right of levying a reassessment is not inherent in the city. If the power of levying a reassessment is granted, it can be exercised only in the manner prescribed by statute. 2 Page & Jones, Taxation by Assessment, § 958; Judson on Taxation (2d Ed.) § 416. Section 400 of the charter provides that "the council may by ordinance make a new assessment or reassessment" under certain conditions. The authority of the city council to ordain thus does not always depend upon the fact that a court has declared or rendered void a former assessment. Such action may be taken when the council is in doubt as to the validity of such assessment.

[3] The reason for the proceeding as declared by the resolution was that the Supreme Court in the former case "held void" the prior assessment ordinance, No. 20478. The fact that the council did not require the auditor again to perform the clerical work of copying or preparing the preliminary assessment would not change the purport of the proceeding. The matter of this street assessment was before this court in the case of Evans v. Meridian Investment Co., 84 Or. 246, 163 Pac. 1165, in which Mr. Chief Justice McBride stated that "it has attained the character of a genuine antique." Referring to the former case at page 249, of 84 Or., at page 1166 of 163 Pac., the Chief Justice said:

"Thereupon the city endeavored to make another reassessment, but this was resisted and adjudged invalid in Brown v. City of Portland, 73 Or. 302, 144 Pac. 121, and the case sent back, with permission to the city again to reassess the property."

This plainly shows how this court understood the result of the former case, and an examination of the petition for a rehearing in that case does not disclose that the learned counsel, who were the same as in the present case, took any different view of the judicial determination therein as to that part. Several questions raised in this case were adjudicated in the former case. The inhibition of the statute limiting the time for the institution of proceedings for a reassessment as affecting the reassessment ordinance, No. 30287, could not have been adjudicated in the former case. It was not an issue in that case. The ordinance had not then been passed, nor the proceedings for the reassessment initiated. Neither the language of the opinions in the three former cases referred to nor the mandates therein indicate that it was the intention of the court to pass upon the question of the bar of the statute.

We are not required to determine the

Digitized by Google

validity or invalidity of the former reassessment. That question was adjudicated in the former case. Suffice it to say that the former levy had been considered defective in the two opinions of this court. It has been held that a reassessment may be levied where the original assessment was invalid because the ordinance was defective (Gorton v. City of Chicago, 201 Ill. 534, 66 N. E. 541), or because the improvement was authorized by resolution, instead of by ordinance (Newman v. City of Emporia, 41 Kan. 583, 21 Pac. 593). It has also been held that a reassessment may be made if the original assessment is insufficient, but is not a nullity (Foster v. City of Alton, 173 Ill. 587, 51 N. E. 76), and in cases of other irregularities (2 Page & Jones on Taxation by Assessment, § 962).

Whether the former assessment was defective or a nullity, the fact remains that the city council commenced anew and by Ordinance No. 30287 made a reassessment of plaintiffs' property for the cost of improvement. Phipps v. Medford, 81 Or. 119, 125, 156 Pac. 787, 158 Pac. 666. The period of time within which the council was authorized to make the reassessment had then expired. When the proceedings for the reassessment were instituted by the introduction and passage of Resolution No. 8383, the council was inhibited by the charter from taking such action. Whether the council initiated the proceedings strictly in conformity with the charter or the decision of this court in the former case is unimportant. The proceedings for a reassessment that were instituted by resolution on September 8, 1909, culminated in the passage of Ordinance No. 20748, which proceedings were adjudged illegal and canceled, and the city was directed to make a reassessment by this court, in the former case. The reassessment which was instituted on December 23, 1914, was barred by the statute of limitations in section 400 of the charter. The city council had no authority to pass Ordinance No. 30287. Fry v. Mt. Vernon, 42 Wash. 268, 84 Pac. 864; Olympia v. Knox, 49 Wash. 537, 95 Pac. 1090.

"Institute" is defined to mean "to set up; to originate; to introduce." See Webster's New International Dictionary; 22 Cyc. 1373. The word "instituted," therefore, as used in the charter, means commenced or initiated. The lawmakers in their wisdom saw fit to limit the time for making such a reassessment. There had been litigation respecting the street improvement referred to, which had continued for a long time. In the meantime the statute of limitations had run. Much the same condition exists as considered in Bessler v. Powder River Gold Dredging Co., 90 Or. 663, 176 Pac. 791, 178 Pac. 237. More than 17 years have now elapsed since the passage of the original resolution of intention for the making of the original work. Evidently the lawmakers considered that, in fixing a limit of 10 years for reassessment, the city authorities would have sufficient opportunity to make necessary reassessments and correct any errors. We have only to apply the charter as it reads. 2 Page & Jones on Taxation by Assessment, § 972; Westall v. Altschul, 126 Cal. 164, 58 Pac. 458; Doremus v. City of Chicago, 212 Ill. 513, 72 N. E. 403.

It follows that the judgment of the lower court must be reversed, the writ sustained, Ordinance No. 30287 annulled, and the reassessment made thereby canceled. It is so ordered.

HOCHFELD et al. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. June 29, 1920.)

In Banc.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Proceeding by S. Hochfeld and others for a writ of review directed to the City of Portland and another. Writ dismissed, and plaintiffs appeal. Reversed.

Ralph R. Duniway, of Portland, for appellants.

L. E. Latourette, of Portland (W. P. La Roche, of Portland, on the brief), for respondents.

BEAN, J. This is a writ of review proceeding relative to a reassessment made by Ordinance No. 30289 of the city of Portland, for the cost of improvement of East Oak street, from Union avenue to a point 65 feet east of the east line of East Sixth street, in the city of Portland. The lower court found the reassessment proceedings regular and dismissed the writ. Plaintiff appeals.

This case is similar to the case of David and Anna Brown et al. v. City of Portland, 190 Pac. 722, and the case of George H. Cook et al. v. City of Portland, 190 Pac. 726, in both of which cases an opinion has this day been rendered. The case is governed by the principles announced in Brown v. Portland.

The judgment of the lower court is accordingly reversed, and the writ of review is sustained, and the reassessment made by Ordinance No. 30289 is set aside.

Digitized by Google

COOK et al. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. June 29, 1920.)

In Banc.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Proceeding by George H. Cook and others for a writ of review directed to the city of Portland and another. Writ dismissed, and plaintiffs appeal. Reversed.

Ralph R. Duniway, of Portland, for appellants.

L. E. Latourette, of Portland (W. P. La Roche, of Portland, on the briefs), for respondents.

BEAN, J. This is a writ of review proceeding, instituted by the plaintiff to have canceled a reassessment made by Ordinance No. 30288, of the city of Portland for the cost of improving Karl street from Milwaukie street to East Twentieth street in the city of Portland. The trial court affirmed the proceeding making the reassessment and dismissed the writ, and plaintiffs appeal.

The petition for the writ alleges that the city authorities were without authority to make the assessment by Ordinance No. 30288, because the resolution of intention for making the original improvement of Karl street was passed August 5, 1908, and more than 10 years had elapsed since the passage of such resolution of intention prior to the passage of Resolution No. 8384, on December 23, 1914, instituting proceedings for reassessment by Ordinance No. 30288.

The facts of the case are substantially the same, and the case is governed by the same principles of law as in Brown v. Portland, 190 Pac. 722, and Hochfeld v. Portland, 190 Pac. 725, in each of which an opinion has this day been rendered.

The judgment of the lower court will therefore be reversed, the writ sustained, and the reassessment made by Ordinance No. 30288 set aside.

ALLEN v. MAGILL.

(Supreme Court of Oregon. June 29, 1920.)

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 189 Pac. 986.

D. W. Sheahan, of Enterprise, for appellant.

A. S. Cooley, of Enterprise, for respondent.

BENSON, J. The defendant has presented a petition for rehearing in this case, wherein it is very earnestly contended that the conclusions reached in the original opinion herein are not justified by the evidence. We have therefore made a careful review of the record, and the result is that our former opinion is confirmed thereby. It is true that many years ago there was some sort of an agreement between the plaintiff and defendant's predecessor in interest whereby arbitrators made a division of the waters of the stream, but defendant's predecessor found that the water so allotted to him was so inadequate as to be valueless, and was abandoned more than 10 years prior to the commencement of this suit. The petition for rehearing is therefore denied.

JAMISON v. McMILLEN et al. (No. 2404.)

(Supreme Court of New Mexico. June 8, 1920. Rehearing Denied July 1, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⇐888(2)—Pleading ⇐408—Defendant litigating material facts omitted from complaint cannot object after judgment, and complaint may be amended on appeal; objection that complaint fails to state cause of action may be raised at any time.

Under section 4114, Code 1915, an objection that the complaint fails to state facts sufficient to constitute a cause of action can be raised at any time, and is not waived by failure to demur. If the defendant fails to object to the complaint and litigates the material fact or facts omitted therefrom, he cannot after judgment raise the question as to the insufficiency of the complaint, and on appeal the complaint would be amended to conform to the facts proven on the trial.

2. Appeal and error ⇐679(2)—Duty of appellant to perfect record stated.

It is appellant's duty to see that the record is kept and certified so as to present the point which he desires to have the appellate court review, and, where he contends that the trial court erroneously held that his second amended complaint failed to state a cause of action, it is incumbent upon him to have such amended complaint incorporated into the record.

3. Pleading ⇐67—Plaintiff need not anticipate defenses.

In an action in ejectment the plaintiff is not required to anticipate the defendant's defense, but, if he does so, facts such as would show a title sufficiently strong to destroy such defense must be stated.

Appeal from District Court, Bernalillo County; M. C. Mechem, Judge.

Action by H. B. Jamison, receiver for the Albuquerque Wool Scouring Mills, against A. B. McMillen, trustee for the First National Bank of Albuquerque, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Digitized by Google

H. B. Jamison, of Albuquerque, for appellant.

A. B. McMillen, of Albuquerque, for appellees.

ROBERTS, J. The judgment from which this appeal is taken is as follows:

"This day this cause came on to be heard. Whereupon it was suggested that Pearce C. Rodey had resigned as receiver, and that H. B. Jamison had been appointed as his successor. It is therefore ordered that the said H. B. Jamison be and hereby is substituted as plaintiff in said cause.

"Thereupon plaintiff moved to amend his complaint by striking out paragraph 5, to which motion the defendants by their counsel objected.

"Whereupon, the court having heard argument and being advised in the premises, it is ordered that said plaintiff be, and he hereby is, allowed to amend his complaint by striking out paragraph 5 thereof, to which order of the court the defendants excepted.

"Thereupon, the plaintiff having offered to introduce evidence, defendants objected to said introduction and demurrer to said complaint for the reason that the same does not state facts sufficient to constitute a cause of action.

"Whereupon the court, having heard argument and being fully advised in the premises, finds that said complaint does not state facts sufficient to constitute a cause of action, and that said demurrer ought to be sustained. It is therefore ordered that the said demurrer be, and the same hereby is, sustained, to which order and judgment of the court the plaintiff excepts.

"Thereupon, on application of plaintiff, he was allowed to amend his complaint, and said demurrer being renewed as to said complaint as amended, and having been argued by counsel and submitted to the court, the court finds that said complaint as amended does not state facts sufficient to constitute a cause of action, and that said demurrer ought to be sustained.

"It is therefore ordered that said demurrer be, and the same hereby is, sustained, to which order of the court the plaintiff excepted.

"And thereupon, the plaintiff declining to further amend, and electing to stand upon his said complaint, it is ordered that said complaint be, and the same hereby is, dismissed, and that defendant recover from plaintiff its costs to be taxed, to which judgment of the court the said plaintiff excepted."

No written demurrer appears in the record, and the appellant claims that there is no warrant in the Code for an oral demurrer to a complaint. Appellees argue that the objection that the complaint fails to state facts sufficient to constitute a cause of action may be raised at any time and in any appropriate manner that may direct the court's attention to the point of objection; that in this case it was raised by objecting to the introduction of evidence and by the oral demurrer. Appellant replies with the statement that the objection to the introduction of evidence and oral demurrer were insufficient, because they do not specifically point out wherein the complaint failed to state a cause of action, which it is contended was necessary under the rule announced in the case of Bank of Commerce v. Western Union Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120. In that case the matter was raised only by objection to the introduction of evidence on the ground that the complaint failed to state facts sufficient to constitute a cause of action, and the objection was overruled. The evidence later adduced clearly established a cause of action. The rule there announced would have no application to a case where the trial court sustained the objection, and in no event could it be held applicable to this case, for there is no bill of exceptions showing the objection interposed. So far as appears, the court might have been fully informed by specific objection interposed by counsel for appellees.

[1] Under section 4114, Code 1915, an objection that the complaint fails to state facts sufficient to constitute a cause of action can be raised at any time and is not waived by failure to demur. If the defendant fails to object to the complaint and litigates the material fact or facts omitted therefrom, he cannot after judgment raise the question as to the insufficiency of the complaint, and on appeal the complaint would be amended to conform to the facts proven on the trial Canavan v. Canavan, 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064.

[2] Appellees contend that there is nothing here for this court to review because the second amended complaint does not appear in the transcript. The judgment set out shows that appellant filed one amended complaint and was given leave to file another amended complaint. The judgment was entered on the 12th day of December, 1918. The record here shows a complaint which the clerk certifies was filed on the 24th day of April, 1918. On the margin of this complaint paragraph 5 has a notation, "Out by amendment." The complaint is numbered beginning with paragraph 1 and continuing down to and including paragraph 5. There is a paragraph shown as paragraph "1A." Appellant says that paragraph 1A was inserted by interlineation pursuant to the leave given by the court to file the second amended complaint, but there is nothing to show this fact save the statement of counsel for appellant. Of course, transcripts of record are established only by the signature of the clerk under seal of the court. Counsel for appellant perhaps is correct in his assertion, but it would be rather a novel way of establishing a record to do so by the assertion of one counsel, not denied by the other. It was appellant's duty to see that the record was kept and certified so as to present the point which he desired to have the court review. In the absence of the amended complaint to which the motion

Digitized by Google

and demurrer was addressed, we would, of course, be required to assume that the action of the trial court was justified. But, even if we should accept appellant's statement as to the second amended complaint, the action of the trial court would necessarily be upheld, because the complaint does not state facts sufficient to constitute a cause of action in ejectment, which appellant contends was the theory of the complaint after paragraph 5 was stricken out. With paragraph 5 in the complaint, it would be hard to determine just what object the pleader had in view. Paragraph 4 reads as follows:

"That the defendant A. B. McMillen, purporting to act as trustee for the First National Bank of Albuquerque, a corporation, under an alleged deed of trust claimed to have been executed by the Albuquerque Wool Scouring Mills, a corporation, recorded on the 11th day of January, 1913, in Volume 12 at page 134 of Trust Deed Record for the County of Bernalillo, did on the 2d day of August, 1916, take possession of the property heretofore described and commenced the advertisement of the same for sale, said sale to be held on the 5th day of September, 1916, as this plaintiff alleges on information and belief, and that thereafter the said A. B. McMillen, purporting to act as such trustee for the First National Bank of Albuquerque, a corporation, under and by virtue of such deed of trust, alleged to have been made by the Albuquerque Wool Scouring Mills, a corporation, to secure certain alleged notes to the First National Bank of Albuquerque in a sum aggregating $43,000, did purport to transfer by deed dated September 19, 1916, and recorded in Book 56 at page 494 of the Records of Bernalillo County, the above-described premises to the First National Bank of Albuquerque, a corporation, which said First National Scouring Mills of Albuquerque, or its agent or lessee, the Wool Scouring Mills of Albuquerque, defendant herein, has since the 5th day of September 1916, entered into possession of said premises, and unlawfully withholds possession thereof from this receiver, who is legally entitled thereto, and that by reason of such unlawful possession and use of the premises herein described, this plaintiff was damaged in a large amount, which sum cannot be ascertained without an accounting from the defendants herein, but said damage is not less than $1,800."

[3] Accepting appellant's argument that the relief sought was ejectment, it will be seen that appellant sets up the claim of appellees and wholly fails to show the invalidity thereof. In an action in ejectment, the plaintiff is not required to anticipate the defendant's defense, but, if he does so, facts such as would show a title sufficiently strong to destroy such defense must be stated. 15 Cyc. p. 96. Here the complaint set up the basis of appellees' claim to the right of possession and failed to show its invalidity. Under no view of the case was the judgment of the trial court wrong.

The judgment is affirmed; and it is so ordered.

PARKER, C. J., and HOLLOMAN, District Judge, concur.

DE GRAFTENREID v. CASAUS. (No. 2306.)

(Supreme Court of New Mexico. June 8, 1920.)

(Syllabus by the Court.)

1. Taxation ⟸660—Publication for tax sale held sufficient.

Section 15, chapter 22, Laws 1899, which requires the notice of tax sale to be published once each week for four consecutive weeks, the last publication to be not less than 30 days prior to the date of sale, is complied with by publication of the notice of sale on the same day of the week for 4 consecutive weeks, although the full period of 28 days has not elapsed between the first and last publication, where the fourth publication is more than 30 days prior to the date of sale, following the case of Dewitz v. Joyce-Pruitt Co., 20 N. M. 572, 151 Pac. 237.

2. Taxation ⟸742—Sale of tax certificate acquired under former laws authorized.

Section 36, chapter 84, Laws 1913, authorizes the sale of delinquent tax sale certificates acquired by the various counties under former laws, as well as under said chapter 84.

Appeal from District Court, Chaves County; Richardson, Judge.

Suit to quiet title by Joseph De Graftenreid against Leandro Casaus who counterclaimed. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Gibbany & Epstein, of Roswell, for appellant.

F. Faircloth, of Santa Rosa, for appellee.

ROBERTS, J. Appellant filed suit in the district court of Chaves county to quiet title to the southwest quarter of section 20, in township 1 north of range 24 east. The complaint was in the ordinary form. Appellee answered first by general denial; second, by setting up the fact that appellant claimed title to the land under a tax deed issued by the county of Chaves, and attacking the validity of the proceedings leading up to the issuance of the deed. He also filed a counterclaim, setting up the fact that he was the owner of the real estate, and that appellant claimed some interest therein adverse to his right, and asked that his title be quieted as against appellant. Appellant filed a motion to strike out certain portions of the answer and all of the counterclaim, and, after various orders were entered by

Digitized by Google

the court and modifications thereof, the pleadings stood as follows: Appellant's complaint; appellee's general denial and counterclaim; appellant's reply, denying the facts pleaded in counterclaim. Evidence was thereupon taken and at the conclusion of appellant's case in chief, appellee filed a demurrer to the evidence. The demurrer was taken under advisement by the court, and appellee introduced his proof under his counterclaim. Thereafter the court sustained the demurrer to the evidence, and afterwards made findings of fact and stated conclusions of law, and entered judgment for appellee, denying appellant the relief prayed for, and quieting appellee's title to the real estate in question. Counsel appearing for the appellee in this court did not try the case in the court below.

It is somewhat difficult to understand the theory upon which the cause was tried, or the basis for the judgment of the trial court. Appellant quotes the memorandum finding by the court as follows:

"The court is of the opinion that the case does not fall within the Supreme Court's decision in the case of Maxwell v. Page, wherein all of the transactions with reference to the taxes were under the act of the Legislature of 1899, and therefore the court is of the opinion that the demurrer made by the defendants at the conclusion of the testimony of the plaintiff should be, and is hereby, sustained."

In the case of Maxwell v. Page, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155, the notice of sale was not advertised pursuant to the statute. The tax law of 1899 (chapter 22, Laws 1899) required the publication of a notice of sale for 4 weeks, the last insertion to be not less than 30 days before the date fixed for the sale. That statute also contained a curative provision, which precluded an attack upon a tax sale "except upon the ground that the taxes, penalties, interest and cost had been paid before the sale or that the property was not subject to taxation." In the case referred to the last insertion was less than 30 days before the time fixed for the sale, and we held that under the curative provision of the statute the sale was not invalidated by reason of such defective publication. The statute of 1899 was repealed by chapter 84, Laws 1913, and the act of 1913 did not contain the curative provision which was the basis for the holding in the Maxwell-Page case.

[1] In this case the property was advertised for sale for taxes for the last half of the year 1909. The date of sale was fixed in the notice at November 7, 1910. The first insertion of the notice was on September 13, 1910, and a like notice was published on the same day of each week thereafter until five insertions of the notice in the newspaper had been made, the fifth insertion being on October 11, 1910. The court and counsel below all were evidently of the opinion that to comply with the statute (section 15, c. 22, Laws 1899) it was necessary to insert the notice of publication five times. The law provided:

"The said delinquent tax list and notice shall be published not less than once each week for a period of four consecutive weeks, the last publication to be not less than thirty days prior to the return day named in said notice [the day of sale]."

That it was so regarded is apparent from the judgment of the court and the argument advanced here by appellant, who seeks to show that, notwithstanding the repeal of the 1899 act by the law of 1913, the curative provision in the former law would, under the Maxwell-Page Case, preclude an attack upon the validity of the sale because of the defect in publication. But the publication of the notice of sale was sufficient, and it is not necessary that the rule in the Maxwell-Page Case be invoked.

In the case of Dewitz v. Joyce-Pruitt Co., 20 N. M. 572, 151 Pac. 237, this court in construing section 4647, Code 1915, which required notice of sale "by virtue of any execution, decree or other process issued out of such courts," etc., to be published "once each week for four successive weeks," held that the statute did not require the full four weeks to elapse between the first insertion of the notice in the newspaper and the day of sale, but that the sale could be held at any time not less than 3 days after the fourth and last insertion. Here there were four insertions of the notice, once each week for 4 consecutive weeks, but the full period of 28 days did not elapse between the insertion of the first and last notice, assuming that the fifth notice was surplusage and not required. The fourth notice was inserted more than 30 days prior to the date of sale, consequently there was no defect in the advertisement.

Counsel for appellee in this court does not undertake to sustain the judgment of the lower court on the ground that the notice of sale was defective, but takes a new position not advanced in the trial court, which is that:

"The treasurer and collector of a county has no authority to sell or assign a tax sale certificate unless he is authorized to do so by statute; hence if chapter 22 of the Session Laws of 1899 was repealed by chapter 84 of the Session Laws of 1913, a tax sale certificate assigned by a treasurer and collector on the 20th day of October, 1915, cannot be authorized by that act; the assignment of such tax sale certificate must be held to have been made by authority of some act in force at the date of such assignment."

[2] We cannot agree with his contention. Section 36, c. 84, Laws 1913, contains the authority for the sale by the county of tax sale certificates acquired by the county under

Digitized by Google

said chapter and prior laws. It provides in part:

"When any property shall be struck off to the county as aforesaid, it shall be the duty of the collector to sell and assign the duplicate certificate of such sale to any person," etc.

Appellee's argument necessarily must be predicated upon the theory that said section only authorizes the sale of certificates issued by authority of said chapter 84. This, we think, is placing an unwarranted limitation upon the latter act. It would be unreasonable to suppose that the Legislature had intended that no disposition whatever could be made of all the tax sale certificates acquired by the various counties under the former law which was repealed. Several cases have been before the court where certificates have been sold under the act of 1913, which had been issued to the counties under the former law, and in each case it was taken for granted by court and counsel that authority to sell was conferred by the later act, and we now so hold.

The trial court was wrong in its construction of the law relative to the publication of the notice of sale, for which reason the judgment must be reversed, and the cause remanded to the district court for further proceedings. We are not remanding the cause with directions to render judgment for appellant because the ends of justice may require the reframing of the pleadings and a new trial.

PARKER, C. J., and RAYNOLDS, J., concur.

BACA v. PADILLA. (No. 2373.)

(Supreme Court of New Mexico. June 9, 1920.)

(Syllabus by the Court.)

1. Criminal law ⇐640—State may employ private counsel on order of court with consent of district attorney or Attorney General.

Section 1860, Code 1915, by implication authorizes the appearance of private counsel on behalf of the state in criminal proceedings "on order of the court, with the consent of the district attorney or Attorney General."

2. Attorney and client ⇐147—Contract by attorney to assist in prosecution of criminal case for contingent fee held contrary to public policy.

Contracts by attorneys at law for contingent fees are generally upheld by the courts, but a contract by an attorney at law to assist in the prosecution of a criminal case for a contingent fee, dependent upon the conviction of the accused, is contrary to public policy.

3. Work and labor ⇐10—Contract to assist in criminal prosecution for contingent fee may be basis for quantum meruit.

Where an attorney at law enters into a contract with another to assist in the prosecution of a criminal case for a contingent fee, the contract is void and there can be no recovery on the contract, but such a contract is not inherently malum in se or malum prohibitum, and the attorney may recover the reasonable value of his services on a quantum meruit.

4. Work and labor ⇐10—When recovery on quantum meruit allowable stated.

When the illegality, either in whole or in part, is in the thing which the party seeking to recover was to do, then there can be no recovery upon a quantum meruit, but where the illegality was not in what the plaintiff was to do but in the manner in which he was to be compensated for doing the legal thing, then he can recover upon a quantum meruit for the reasonable value of his services.

Appeal from District Court, Socorro County; M. C. Mechem, Judge.

Action by Elfego Baca against Zacarias Padilla. Judgment for plaintiff, and defendant appeals. Affirmed.

Neill B. Field, of Albuquerque, for appellant.

M. C. Spicer, of Socorro, for appellee.

ROBERTS, J. Appellee brought this suit to recover the sum of $5,000, alleged to be due on a contract to perform professional services as an attorney at law for the appellant, at his request, in the prosecution of a certain criminal case pending in Valencia county, N. M., for which services it was alleged the appellant agreed to pay appellee a reasonable fee. Appellant filed a general denial and also pleaded payment and the statute of limitations. The case was tried to the court, and after the evidence was heard the court made a general finding that plaintiff was entitled to recover the sum of $500. Appellant submitted a finding of fact which, in so far as material, found that appellee accepted employment on the following terms, i. e., if the parties he was to prosecute were acquitted he should be paid a reasonable fee, and if convicted he should receive a "big fee," and that in pursuance to such agreement appellee prosecuted the said action and obtained a verdict of guilty against the defendants therein. Appellant asked the court to conclude, as a matter of law, from the foregoing facts specially found, that the contract made and entered into between the appellant and appellee was and is contrary to public policy and void. The conclusion of law was refused, and judgment was entered in favor of appellee in the sum of $500.

[1] The controlling question in this case is as to whether or not an attorney at law can

Digitized by Google

ter into a valid contract with a client to assist in the prosecution of a criminal case upon a contingent fee. Appellant argues that it is contrary to the public policy of this state for a private prosecutor to appear in a criminal case. Section 1860, Code 1915, by implication authorizes the appearance of private counsel on behalf of the state in criminal proceedings "on order of the court, with the consent of the district attorney or Attorney General." And in the case of State v. Lucero, 20 N. M. 55, 146 Pac. 407, the right of such private counsel to appear was recognized by this court. This question then may be laid aside and attention directed to a consideration of the question which disposes of this case.

[2] Contracts for contingent fees by attorneys at law were not tolerated at all at common law, but in most of the states such contracts are allowed and their validity sustained; this principally upon two grounds: First, that of necessity; the argument being that otherwise many poor suitors with meritorious causes of action would be denied access to the courts because too poverty-stricken to pay counsel; that instead of perverting justice the allowance of such fees is the means of securing the same. The second ground is that at common law the practice of law was followed because of the honor it bestowed upon the lawyer, and not for profit or as a means of livelihood; possibly a false assumption, but nevertheless always religiously adhered to in the profession. In this country the sham has been cast aside, and the courts universally recognize that, while the profession of the law is most honorable, a man who follows the profession must be able to earn a living, and while jealously guarding the relations between attorney and client, and never hesitating to enforce fair dealing on the part of the attorney toward the client, any contract between the attorney and client for the attorney's compensation for legal services, so long as the same is fair, reasonable, and valid, will be enforced.

Many cases will be found cited in the note to section 421, Thornton on Attorneys at Law, upholding the validity of contracts for contingent fees generally. We do not believe any case will be found which upholds the validity of a contingent fee beyond the rule of necessity, that is to say, the courts will not uphold such contracts where provisions may be made for the prosecution of the suit by the court in other ways. The most familiar illustration is that offered by suits for divorce and alimony. Contracts have been made by attorneys to prosecute such suits for a designated portion of the alimony recovered, and all such contracts, so far as we are aware, have been declared invalid upon one ground or the other, i. e.: (1) That there was no necessity for permitting such contracts, because the court was authorized by law to require the husband to pay suit money, thus enabling the wife to prosecute her action; (2) that it is the policy of the law that reconciliation should be effected between husband and wife, and the attorney, having a great interest in the amount of alimony recovered, which depended, of course, upon the prosecution of the suit to a conclusion, would at all times be standing in the way of such reconciliation. This matter, in so far as divorce cases are concerned, was ably discussed by the Supreme Court of California in the case of Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548. Many other similar cases will be found referred to in the note to the case of Roller v. Murray, 38 L. R. A. (N. S.) 1202; Barngrover v. Pettigrew, 2 L. R. A. (N. S.) 260. Many of these cases, while not discussing the reason for the rule, held that such contracts are void as against public policy.

There is no case directly in point on the proposition involved in the case now under consideration. There is a discussion of the question in the case of Price v. Caperton, 1 Duv. (Ky.) 207, but what was said there on the subject was obiter. The only point decided was the right of private prosecutors to appear in the state's case, and the right was upheld.

If the right of a private prosecutor to accept employment for a contingent fee is viewed from the point of necessity, clearly the contract would not be upheld, because the state by its prosecuting officers is presumed to be able to attend to the prosecution of all criminal cases, and again probably the power rests in the court in a case of necessity to appoint some member of the bar to appear and assist in the prosecution. So there would be no occasion for invoking the law of necessity, as is done by the courts in upholding the contingent fee contract in civil cases. Hence it could not be said that the necessities of the case would result in the abrogation of the common-law rule. Unlike a civil suit where the ability of the plaintiff to pay any fee might depend upon the establishment of his cause of action, here, under no conceivable aspect of the case, could the party's ability to employ a private prosecutor in a criminal case be increased or diminished by the outcome of the prosecution. On the other hand, we have injected into the prosecution of a criminal case a prosecutor whose personal interests would be subserved best by securing the conviction of the defendant, and this regardless of the question as to whether or not the defendant were guilty or innocent; that is to say, the size of his fee, or possibly whether he receive any fee at all, would be dependent upon the conviction of the defendant, however innocent he might be. This is contrary to the policy of our law. The state provides a prosecuting attorney, pays him a salary, and no part of his compensation is dependent upon the conviction or acquittal of those charged with infractions of the state

Digitized by Google

law. He is supposed to be a disinterested person, interested only in seeing that justice is administered and the guilty persons punished. To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.

[3] But assuming, for the sake of argument, that the express contract which the court found had been made was contrary to public policy and void because appellee was to receive a contingent fee, the question nevertheless remains as to whether the decision of the court is sustainable notwithstanding. The appellee in his complaint did not declare especially on the original contract, but generally indebitatus assumpsit. The appellant has not brought up the evidence, and consequently we are unable to tell just how the express contract got into the case, but it will be observed from the finding made by the court as to the terms of the express contract there was no illegality in that which appellee agreed to do, i. e., assist in the prosecution of the criminal case. The illegality was in the manner by which he was to be compensated. In Thornton on Attorneys at Law, vol. 2, § 435, the author says:

"The general rule undoubtedly is that an attorney is not precluded from recovering compensation for valuable services by the mere fact that such services were rendered under a void or voidable contract. There can, of course, be no recovery on the contract, but where it is not inherently malum in se or malum prohibitum the attorney may recover the reasonable value of his services on a quantum meruit."

[4] The author of the note to the case of Barngrover v. Pettigrew, 2 L. R. A. (N. S.) 260, says:

"There is an obvious distinction bearing upon the right of an attorney to recover upon a quantum meruit for services rendered pursuant to an illegal contract, between a case where the contract is illegal because the services agreed to be rendered in performance thereof are illegal, and a case where the contract is illegal only because of some improper provision relating to the mode of compensation, or an illegal stipulation against the right of the client to compromise the claim without the consent of the attorney. It is apparent, in the first case, that every objection to permitting a recovery upon an express contract applies with equal force to a recovery upon a quantum meruit. And this is true even when the services are not intrinsically illegal, but are improper and contrary to public policy because of the circumstances under which they are rendered.

"Thus, it was held in Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035, and Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779, that an attorney who enters into a barratrous contract to bring suits cannot recover upon an implied contract for services rendered in a suit brought pursuant to such contract; though the services are not, in themselves and apart from the barratrous contract, improper or illegal. But the weight of authority seems to support the proposition that, if the services performed by the attorney are not themselves illegal, either intrinsically or by reason of the circumstances under which they are rendered, the attorney may recover upon a quantum meruit for their reasonable value, notwithstanding that the contract is, for other reasons, champertous and illegal."

Later cases drawing the same distinction will be found cited in a note to the case of Roller v. Murray, supra. A reading of the cases cited in these two notes (and the notes are very full and complete and further citation would only be as to subsequent cases) will show that when the distinction pointed out by the author of the note in the case first referred to is kept in mind the authorities are all in agreement. When the illegality, either in whole or in part, is in the thing which the party seeking to recover was to do, then there can be no recovery upon a quantum meruit. But where the illegality was not in what the plaintiff was to do but in the manner in which he was to be compensated for doing the legal thing, then he can recover upon a quantum meruit for the reasonable value of his services. This was evidently the theory upon which the court below gave judgment for appellee, and upon this theory the judgment is sustainable.

The judgment will therefore be affirmed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

SIMMERS et al. v. BOYD et al. (No. 2441.)

(Supreme Court of New Mexico. May 27, 1920.)

(Syllabus by the Court.)

Appeal and error ⊜356, 395—On failure to appeal or file cost bond in time, appeal dismissed.

Where an appeal was either not taken within 6 months from the entry of the final judgment, or, if taken within the time limited, the cost bond was not filed within 30 days, as required by section 15, c. 43, Laws 1917, the appeal will be dismissed. Hernandez v. Roberts, 24 N. M. 253, 173 Pac. 1034, followed.

Appeal from District Court, Doña Ana County; Medler, Judge.

Action between John Alexander Simmers and another and Nathan E. Boyd and an-

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

other. Judgment for the latter, and the former appeal. Appeal dismissed.

Holt & Sutherland, of Las Cruces, for appellants.

J. H. Paxton, of Las Cruces, for appellees.

ROBERTS, J. In this case final judgment was signed by the district judge on the 25th day of September, 1918. The judgment was filed with the clerk of the district court on the 26th day of September, 1918. On the 25th day of March, 1919, counsel for appellant filed with the clerk of the district court of Doña Ana county an application for an appeal. The order granting the appeal was signed by the district judge on the 27th day of March, and was filed in the office of the clerk of the district court on the 26th day of April, 1919.

Section 1, c. 43, Laws 1917, gives any party aggrieved the right to appeal at any time "within six months from the entry of any final judgment in any civil action." Appellee has moved to dismiss the appeal herein, because it was not taken within the time limited by the statute. Judgment having been entered on the 26th day of September, 1918, the 6 months within which the appeal could be taken expired on the 26th day of March, 1919. Appellant contends that the appeal was taken by the filing of the motion therefor on the 25th day of March, 1919, in the office of the clerk of the district court, that the granting of the appeal was a matter of right, and that the order of the court allowing the appeal was a ministerial act at most, and that he should not be prejudiced by reason of the absence or failure of the judge to act. If, however, we accept appellant's statement as true—i. e., that the appeal was taken on the 25th day of March by the filing of his application therefor, and that this was within the 6 months period limited by the statute—appellant is then confronted with a jurisdictional defect which necessitates a dismissal of the appeal.

Section 15, c. 43, Laws 1917, requires the filing of a cost bond within 30 days from the time of taking an appeal or suing out a writ of error, and further provides that upon failure so to do the appeal "shall fail." In the case of Hernandez v. Roberts, 24 N. M. 253, 173 Pac. 1034, in discussing the effect to this statute, we said:

"It provides that in case of failure to file the bond the appeal or writ of error shall fail. * * * This court is deprived of jurisdiction to hear and determine the cause in case of failure to file the bond, and this consequence is not to be avoided by either waiver or consent of the opposite party. It is a provision evidently intended by the Legislature to abate all causes brought into this court in which these requirements have not been complied with."

Accepting appellant's statement as correct that his appeal was taken on the 25th day of March, the time to file the cost bond expired within 30 days, or on, to wit, the 24th day of April, 1919. The cost bond was not filed until the 26th day of April, consequently not within the time limited, and this court would be without jurisdiction to hear and determine the appeal.

Therefore, under either view of the case, the appeal will have to be dismissed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

NORMENT et ux. (HAWKINS, Intervenor) v. MARDORF et al.

NORMENT et ux. (SECURITY INVESTMENT & DEVELOPMENT CO., Intervenor) v. SAME.

(Nos. 2301, 2302.)

(Supreme Court of New Mexico. June 8, 1920.)

(Syllabus by the Court.)

1. **Appeal and error ⟸660(2)—Appellant taking up less than the entire record cannot suggest diminution or apply for certiorari to supply the same.**

Where appellant takes up less than the entire record under section 32, c. 43, Laws 1917, he cannot, under section 34 of the same chapter, suggest a diminution of the record or ask for a certiorari to supply such diminution after he has filed his brief on the merits.

2. **Appeal and error ⟸596—Appellant's duty to make transcript comply with statute stated.**

While section 23, c. 43, Laws 1917, provides that in all cases the transcript of record shall contain a copy of the final judgment, order, decision, or conviction appealed from, it is the duty of appellant to see that the transcript filed complies with this section, as the duty rests upon the appellant in all cases to see that a proper transcript is filed in the appellate court.

3. **Appeal and error ⟸607(2)—Appellant taking up less than entire record must set forth in præcipe questions desired to be reviewed.**

Where appellant takes up less than the entire record under section 32, c. 43, Laws 1917, it is his duty in his præcipe to set forth the question which he desires to have reviewed on appeal and the portion of the record which he deems essential.

Appeal from District Court, Santa Fé County; Holloman, Judge.

Suits by C. G. Mardorf and another against James W. Norment and wife, wherein F. G. Hawkins intervened in one action, and the Security Investment & Development Company

Digitized by Google

in the other. From a ruling in each case refusing leave to intervene, interveners appeal. Dismissed.

A. M. Edwards and J. H. Crist, both of Santa Fé, for appellants.

E. R. Wright, of Santa Fé, for appellees.

ROBERTS, J. One opinion will dispose of the question presented in each of the above cases. Mardorf, as trustee, and the bank, sued Norment and wife to foreclose certain real estate mortgages, and also to enforce a judgment lien which it claimed upon certain real estate. Turley and wife were joined as defendants because they had purchased some of the real estate covered by the lien. The matter went to judgment, and the property was ordered sold. The special master in conformity with the order of the court made the sale and reported the same to the court and asked its approval. The sale was made March 11, 1918. The report of sale was filed May 18, 1918. On March 23, 1918, appellant Hawkins filed his petition in intervention in which he set out that on the 21st of February, 1918, for a valuable consideration, he had purchased from James W. Norment all the property, real and personal, covered by the order of sale and asking certain relief against what was known as the "Sandell judgment," and that certain moneys alleged to be overplus after discharging the mortgage liens be paid to him. Afterwards, on the 23d day of June, he filed objections to the special master's report of sale. The record here shows that on April 29, 1918, an order was entered denying the petition in intervention, and Hawkins the right to intervene. On the 27th day of May, 1918, the court approved the special master's report of sale. On the 14th day of June Hawkins filed a motion for appeal "from the order of the court entered in this case May 27, 1918, overruling and denying his petition for leave to intervene in the above-entitled cause and for leave to make and file certain objections to the special master's report in this cause." The appeal was granted on the same day and was in conformity with the application.

In cause No. 2302, in which the Security Investment & Development Company, intervener, appeals, the facts were the same as those just stated, except that on the 23d day of May, 1918, the Security Investment & Development Company sought to intervene, setting up the fact that, after the "Sandell judgment" became a lien on the Norments' property, it became a purchaser of the property, and in its petition to intervene sought to show facts which would require the court to satisfy the Sandell judgment first out of the property sold and then the balance to be applied on the mortgage lien leaving the real estate not covered by the mortgage free from the lien of the Sandell judgment. It also on the 29th day of April, 1918, filed objections to the special master's report of sale, which were designed to accomplish the same purpose. Its right to intervene was denied by order entered April 29, 1918. On May 27th following an order was filed approving the special master's sale. The motion for appeal and allowance of the same were worded identically with the motion and order in cause No. 2301.

Appellees move to dismiss the appeal in both cases on the ground that no order, judgment, or decree was ever entered in either of said causes from which the appeal was pretendedly taken on the 14th day of June, 1918; in other words, each appeal was prayed and granted from the order of the court entered on May 27, 1918, denying the right to intervene or to file objections to the master's report in each case, and the only order which appears in the record is the one of April 29th.

Appellants in each case filed a brief on the merits March 26, 1919. Appellees' motion to dismiss was filed on April 2d thereafter. In October, 1919, appellants in each case filed a motion for certiorari for diminution of the record, in which it is alleged, substantially supported by affidavit, that there was an order entered on the 27th day of May, 1918, in each of said causes denying intervener in each case the right to intervene, and showing that the order and objections were omitted from the transcript by mistake of the clerk; said clerk having copied into the record a similar record of April 29, 1918. Appellees contend that appellants are not entitled to the writ of certiorari because of the provisions of section 34, c. 48, Laws 1917, which reads as follows:

"The appellant or plaintiff in error shall not be heard to suggest a diminution of the record or to ask for a certiorari to supply such diminution in any case where such appellant or plaintiff in error has caused to be certified to the Supreme Court either by agreement or under section thirty-two less than the entire record, unless such suggestion or motion shall be made prior to the filing of his brief," etc.

Section 32, referred to in section 34, in so far as material, reads as follows:

"Whenever it is desired to review the action of the trial court upon any point or points not necessarily involving all of the record or evidence in a cause and no agreement between the parties has been made as provided in the two preceding sections, the appellant or plaintiff in error shall file in the office of the clerk of the district court a præcipe setting forth the questions he desires to have reviewed, and those portions of the record and proceedings he deems necessary for such review; and he shall be bound in the Supreme Court by the præcipe so filed."

The two preceding sections referred to in section 32 read as follows:

"Sec. 30. The parties may by agreement in writing, with the approval of the judge, direct

Digitized by Google

the clerk of the district court in making up the transcript, for the Supreme Court, to omit therefrom any designated portion of the proceedings not deemed material to the disposition of the cause in the Supreme Court and in such case the transcript of the record shall not embrace such portions of the proceedings.

"Sec. 31. The parties may, without the necessity of setting out all the proceedings at length, agree upon such agreed statement of the case and of the facts proven, with or without copies of any part of the proceedings, as shall, in their opinion, enable the appellate court to determine whether there has been any error in the judgment; and if the judge shall approve and sign such statement the same should be filed among the papers of the cause and shall constitute a part of the record, and on appeal or writ of error shall be copied into the transcript in lieu of such proceedings themselves."

[1] It is argued that appellants in each of the cases did not bring up all of the record; that the præcipe filed in each case called for the judgment of foreclosure and for no part of the record proper which preceded such judgment, for the special master's report of sale, petition in intervention, objections to the special master's report, court's order overruling said objections, court's order approving said special master's report, motion for appeal, court's order granting appeal, bond, stipulation for extension of time, order of court granting same, certificate of costs, and the præcipe; that, appellants having by præcipe asked for less than the entire record, they were proceeding apparently under section 32; that, if so, section 34 conclusively precludes them from suggesting a diminution of the record, because the application was not made prior to the filing of their brief on the merits, and the statute would seem clearly to have this effect. Consequently, if the appeal is taken under said section 32, and it was appellants' intention to present a question not involving all of the record, they are precluded from applying for certiorari. This being true, then the case would stand here with an appeal prayed and allowed from a judgment not incorporated into the transcript, and, no final judgment appearing in the transcript from which the appeal is taken, of course it should be dismissed.

Appellants argue, however, that section 23 provides that in all cases the transcript of record shall contain a copy of the final judgment, order, decision, or conviction appealed from, etc., and because of this section it was the duty of the clerk, without appellants asking him to do so in the præcipe, to include the final judgment from which the appeal was taken; that the failure was the default of the clerk, and it is the duty of the court to notice such failure and correct the same by having the clerk of the district court comply with his duty under the statute.

[2] If appellants' construction of this statute be accepted, still the duty rested upon them to see that a proper transcript was filed in this court. The duty of having a transcript properly prepared and filed rests upon the appellant or plaintiff in error. Baca v. Unknown Heirs, 20 N. M. 1, 146 Pac. 945, Ann. Cas. 1918C, 612; New Mexico, Colo. Coal Mining Co. v. Baker, 21 N. M. 531, 157 Pac. 167; Loftus v. Jonnson, 22 N. M. 302, 161 Pac. 1115; Baca v. Catron, 24 N. M. 242, 173 Pac. 862.

In the case of the Gauss-Langenberg Hat Co. v. Bank, 17 N. M. 233, 124 Pac. 794, a writ of error was allowed by the Supreme Court. The transcript failed to contain the writ of error and citation thereon which was commanded by section 23 in the same language as applies to the final judgment. This court dismissed the writ of error upon the ground that, absent the writ of error from the transcript, it had no jurisdiction to entertain the cause, and the same argument as to lack of jurisdiction would apply to the absence of the final judgment. The significant fact, however, is that the court instead of issuing a writ of certiorari commanding the clerk to send up the writ of error dismissed the same.

But, while said section 23 commands in all cases that insertion in the transcript of the final judgment and the other matters named, it is silent as to the person upon whom the duty rests. The next section (section 24) says that either party may file a præcipe for a transcript of the record with the clerk, and makes it the duty of the clerk to prepare the transcript in accordance with the præcipe. As above shown, this court has held in several cases that the duty of seeing that the transcript is properly prepared rests upon the appellant or plaintiff in error, and it was his duty to see that the final judgment was included in the transcript. If it was not there when the transcript was first filed in this court under the statute, he had until his brief was filed on the merits in which to have the mistake corrected. The Legislature has seen fit to place a limitation upon his right to supply deficiencies in the record, and has said that he cannot do so after he has filed his brief on the merits. To permit the issuance of the writ of certiorari at this time would be to disregard the plain provisions of the statute. This the court cannot do.

[3] But, aside from this question, the præcipe filed by appellants was apparently under section 32, and was wholly deficient under said section to entitle them to have any question reviewed. The præcipe fails to set forth any question which they desire to have reviewed, and, calling for less than the entire record as it does, the record would be deficient under the general provisions of the statute; in other words, under said chapter 43, the appellant is required to either bring up the entire record, that is to say, "all entries, orders and rulings of record in the clerk's office, and all papers regularly filed in a

Digitized by Google

cause with the clerk of the district court" made a part of the record proper by section 28, when he takes his appeal, and having done which he is in a position to review any question dependent only upon the record proper for determination, which he elects to assign as error, or he may proceed under either sections 30, 31, or 32 of said chapter. If proceeding under section 32, bringing up less than the entire record, he must set forth in his præcipe the question which he desires to have reviewed. If appellants elect to contend that they are proceeding under the general provisions relative to appeal, then they are unable to present any question because the record is deficient; in other words, they have not brought up all the record. If they are proceeding under the section referred to, which gives the appellant or plaintiff in error the right to bring up less than the entire record, then they are unable to present any question, because they do not set forth as required by the statute in their præcipe the question which they desire to have reviewed. So in either event, and even if the certiorari were granted, appellants would be unable to present any question for the determination of this court. For which reason the writs of error will be dismissed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

MARDORF et al. v. NORMENT et ux. (No. 2310.)

(Supreme Court of New Mexico. June 8, 1920.)

(Syllabus by the Court.)

Appeal and error ⇐330(1)—Appeal will be dismissed where appellant has parted with his interest and taken inconsistent position.

Where it is made to appear to the Supreme Court by affidavit, or otherwise, after an appeal was taken, that the appellant has parted with his interest in the subject-matter of the litigation, and has by act and agreement taken a position inconsistent with his right of appeal and no actual controversy exists between the parties, the appeal will be dismissed.

Appeal from District Court, Santa Fé County; Holloman, Judge.

Action by C. G. Mardorf, trustee, for the Capital City Bank, and the Capital City Bank, against James W. Norment and wife. Judgment for plaintiffs, and defendants appeal. Appeal dismissed.

J. H. Crist and A. M. Edwards, both of Santa Fé, for appellants.

E. R. Wright, of Santa Fé, for appellees.

ROBERTS, J. This appeal was prosecuted by James W. Norment and wife, defendants in the court below, from a judgment foreclosing a mortgage lien upon certain real estate owned by said Norments, and from the order of the court approving the master's report of sale and action thereon.

The bank purchased a judgment lien upon Norment's property for more than $4,000 known as the "Sandell judgment." Appellants contended in the lower court that the bank should have paid off the judgment and secured the satisfaction thereof under an agreement which they had with the bank, and that the money for such purpose was secured by a mortgage which they had executed to the bank. This mortgage covered only a portion of the real estate owned by the Norments, and secured other indebtedness as well. Appellants not being able to pay either the mortgage debt or the judgment lien, the bank filed suit to foreclose its mortgage and to enforce the judgment lien. It proceeded only against the property included in the mortgage. The judgment lien covered all of Norment's real estate in Santa Fé county, and the original decree entered in the foreclosure suit provided that the property should be sold and the judgment lien first satisfied. The master appointed to make the sale reported to the court that he had sold the property; that the proceeds were insufficient to satisfy both the judgment and mortgage lien; that he had satisfied the mortgage debt in full, and there was a balance of some $700 to be applied on the judgment lien, and the judgment lien was kept alive as to the remainder of Norment's real estate, and from appellants' brief this is the point they apparently desire to review in this court.

Appellees have filed a motion to dismiss the appeal because appellants have waived their right to appeal, and by their acts and conduct have estopped themselves from prosecuting the same. They have filed affidavits setting up the facts, which stand uncontradicted showing that prior to the sale the Norments divested themselves of the title to all the real estate which they owned in Santa Fé county, conveying the same to Mr. Hawkins, Mr. Norment's brother-in-law; that the real estate was subsequently transferred to the Mutual Investment & Agency Company, a holding company formed by Mr. Hawkins; that at the request of Norment, acting through his attorney, the time for redemption was extended on the property bid in by the bank in satisfaction of the judgment of foreclosure; that at his request the "Sandell judgment" was assigned to Hawkins by the bank. It is contended by appellees that a judgment of reversal at this time would be ineffectual; that Norment has no further interest in the judgment or the property upon

Digitized by Google

which it was a lien, and this is apparently true from the affidavits and records before us.

This being true, there is no actual controversy now existing between Norment and the bank. An appellant may be estopped from prosecuting an appeal by act or agreement which is inconsistent with such right (3 C. J. 664), and where there is no actual controversy, there can be no appeal (Elliott's Appellate Procedure, § 148). For this reason the appeal must be dismissed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

LENOX HALL v. SEELYE. (No. 22335.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Schools and school districts ⇐8—Demurrer to evidence showing that extras were furnished to pupil held properly sustained.

The evidence failing to show any contract for extras, it was not error to sustain a demurrer to the evidence introduced for the purpose of showing that they were furnished.

2. Frauds, statute of ⇐129(2)—Actual acceptance of a pupil into school held to satisfy statute.

It was error to charge that the contract to receive the defendant's daughter into the plaintiff's school needed to be in writing, as the facts showed her actual acceptance as a pupil, which was sufficient.

3. Appeal and error ⇐1064(1)—Trial ⇐343—Erroneous instruction held harmless; general verdict held to signify that contract was not performed.

The main contention was as to performance or nonperformance by the plaintiff of the terms of the contract, and in the absence of special findings the general verdict in favor of the defendant fairly signifies that the jury found the services were not performed, and from all the facts and circumstances shown by the record the error is deemed harmless.

Porter, J., dissenting.

Appeal from District Court, Dickinson County.

Action by Lenox Hall, a corporation, against A. B. Seelye. Judgment for defendant, and plaintiff appeals. Affirmed.

R. H. Seeds and C. S. Crawford, both of Abilene, for appellant.

Bruce C. Hurd, of Abilene, for appellee.

WEST, J. The plaintiff sued to recover upon a contract by which the defendant's daughter had entered its school for the year beginning September, 1916, and ending June, 1917, claiming an unpaid balance due of $330. The second cause of action was for alleged extras furnished in the sum of $30.20. The defendant denied entering into the contract as alleged, and averred that if any was made it was void under the statute of frauds, and denied the correctness of the account set out in the second cause of action, but admitted the payment of $430.

It seems that the school catalogue provided, among other things, that pupils, unless entered with written agreement to the contrary, were received only for the full school year or such part as remained after their entrance—

"and are accepted with the understanding that parent or guardian is financially responsible for full payment for the full year or such part as remains after entrance. * * *"

The application for entrance covered the school year at $760, including extras—piano, harmony (25 lessons), and physical education. The principal wrote the defendant's wife:

"Under the list of extras you will notice that private lessons in harmony, one lesson per week, is $25 per term of 25 lessons. * * * Therefore, with the two extras in addition to piano, the price for board and tuition for the year would be $760. * * *"

The founder, president, and principal of the school testified that she did not know any cause or reason why the pupil failed to return after the Christmas holidays. Her secretary wrote to the defendant and his wife in October that the music teacher had been giving the pupil private lessons in harmony, as it seemed there had been no class in harmony formed for that year:

"In talking it over with Mr. Moll, however, he assures us that it will be necessary for Marion to have full lessons in harmony to graduate, and I feel very sure that you will not object to the extra charge for this. Mr. Moll's charge per lesson is $3, and as we do not know just how many lessons it will take to give her the required amount of harmony, that is, whether it will take all or part of the second semester, perhaps the better way would be to make the charge for these lessons as they are taken. In Marion's contract, $25 was allowed for the class harmony, so this amount stands to her credit, and we will charge the harmony lessons against this amount."

In reply the mother wrote that she had inferred there would be a class in harmony or her money would not have been accepted; that she was afraid music, which she desired to be the principal work, was being sacrificed for the literary work, and from what she could read between the lines in her daughter's letters the mother concluded music hours were not regular and were being shortened to give time for other things; further, that she and her husband were not quite satisfied that the daughter was receiving the

Digitized by Google

benefit from her work they had hoped for, and were undecided whether she would continue for the second semester or not. The pupil testified that she was enrolled for a course in harmony, but that she had no class lessons in harmony; on the other hand, was required to take private lessons in the course and to pay $3 apiece for them.

The head of the school testified that she furnished the extras sued for in the second cause of action, "some of them being by her request," and acted on her own judgment because she had charge of the child's education, but did not consult the father, who signed the contract, and that the charges were reasonable.

The defendant recovered in the action and the plaintiff appeals, assigning as error the sustaining of the demurrer to the evidence on the second cause of action, the giving of improper instructions to the jury, and the denying of a new trial.

[1] It is asserted that the witnesses for the plaintiff testified that items set out in the second cause of action were just and reasonable, but, as the correspondence shows no contract for these extras, the court properly sustained the demurrer to this evidence.

[2, 3] Complaint is made that the jury were charged four different times that before they could find for the plaintiff it was necessary to find that the application was received and accepted in writing. The abstract shows that the jury were thus charged twice inferentially and once directly, but counsel for the defendant say this was harmless error because the evidence showed that the plaintiff did not perform its agreement, and this was the important issue in the case. The reception of the pupil pursuant to the written application was entirely sufficient without acceptance in writing, and was just as valid and binding as any written acceptance would have been.

The jury were also instructed that if they found and believed from the evidence:

"That the plaintiff has not performed all the terms and conditions of the contract in question, * * * your verdict and finding should be for the defendant."

From the scattered items of evidence found in the abstracts the jury seem to have been well justified in concluding that the services desired and contracted for were not performed. It is quite plain that the daughter was sent to the plaintiff's school for instruction in piano and harmony for a school year, for which $760 was to be paid, and that piano and harmony were the subjects least taught her. Quite naturally, therefore, the mother, after so intimating and advising the president, took her daughter out. Usually a general verdict for the defendant is equivalent to a finding against the plaintiff on all the issues necessary to his recovery. Bixby v. Bailey, 11 Kan. 359; Martin v. Hoffman, 77 Kan. 185, 93 Pac. 625; Barrett v. Dessy, 78 Kan. 642, 97 Pac. 786. As the evidence showed a payment of $430 on account of tuition, and no disposition to withhold the remainder for any reason except failure to teach the desired subjects, it is hardly possible that the instruction so misled the jury as to cause them to base their verdict on failure to accept the contract in writing.

There was apparently no question at the trial as to a written acceptance, but the testimony was practically all addressed to the question of providing the instruction contracted for. Hence there is no just ground for holding that the wrong instruction was the cause of the plaintiff's failure to prevail, and in view of all the facts and circumstances shown by the record we are constrained to hold the error in this respect harmless.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, MARSHALL, and DAWSON, JJ., concurring.

PORTER, J., dissenting.

Digitized by Google

WILSEY STATE BANK v. AMEND et ux.
(No. 22414.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸1064(1)—Instruction that if plaintiff held notes merely for collection there could be no recovery held not reversible error.

In an action upon promissory notes brought against the makers by one claiming to be a holder in due course, the defendants pleaded that the plaintiff held them merely for collection, and the case was tried largely on that issue. The jury were instructed that if the defendants' claim in this regard were true there could be no recovery. It is *held* that, whether or not one holding a note for collection may ordinarily maintain an action thereon in his own name, the circumstances of this case do not justify a reversal by reason of that instruction.

2. Vendor and purchaser ⟸303—That vendor refused to permit reasonable examination of abstract was a defense to suit for price.

Where a contract for the sale of real estate provides that, upon the payment of a series of notes then executed by the purchaser maturing at different times, and upon the execution of new notes for the balance of the price, the vendor is to deliver a deed and an abstract showing a clear title, and after the maturity of all the notes which were given when the contract was entered into, no payment having been made, action is brought upon them by one not a holder in due course, it is a sufficient defense to show that the only offer made by the vendor to deliver a deed and abstract of title had been accompanied by a refusal to permit the purchaser to retain the abstract long enough to allow a reasonable time for its examination.

3. Appeal and error ⟸302(3), 1005(4), 1052(7)—Trial ⟸296(2) — Refusal of offer of testimony held not erroneous, where not produced at hearing of motion for new trial; ruling as to evidence not prejudicial, where judgment was based on another theory; decision of trial court on weight of evidence conclusive; instruction omitting defensive pleading held not error in view of other instructions.

Various trial rulings *held* not to justify a reversal.

Appeal from District Court, Morris County.

Action by the Wilsey State Bank against Anthony E. Amend and wife. Verdict and judgment for defendants, and plaintiff appeals. Affirmed.

W. J. Pirtle, of Council Grove, W. S. Kretsinger, of Emporia, and M. B. Nicholson, of Council Grove, for appellant.

W. L. Huggins, of Emporia, and Edwin Anderson, of Council Grove, for appellees.

MASON, J. The Wilsey State Bank sued Anthony E. Amend and his wife upon four promissory notes executed by them to W. E. Stewart Land Company, the plaintiff claiming by indorsement before maturity as a holder in due course. The defendants filed a verified answer, which, in addition to a general denial and other matters not necessary to be stated, alleged that the plaintiff held the notes merely for collection; that they were given as a part of the price of real estate at the time of the execution of a written contract (which was set out) for its purchase by them from the land company; and that such company had failed to furnish an abstract of title as required by the contract. A general denial by the plaintiff closed the issues. A verdict was returned for the defendants on which judgment was rendered. The plaintiff appeals.

[1] 1. The charge to the jury included a statement to the effect that the verdict should be for the defendants if it were found that the plaintiff was not the owner of the notes sued on, but was only holding them for collection. At the request of the plaintiff this special question was submitted: "Is the plaintiff the owner and holder of the notes sued on in this action?" The jury answered: "No." In view of the instruction referred to and of the defendants' pleading on the subject, this response must be interpreted as meaning that the plaintiff held the notes merely for collection. The plaintiff contends that even in that case it was entitled to recover, and that the instruction was erroneous. One who holds the legal title to a note, although without beneficial interest, may maintain an action thereon in his own name. Manley v. Park, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967, 1 Ann. Cas. 832; Greene v. McAuley, 70 Kan. 601, 79 Pac. 133, 68 L. R. A. 308. Assuming that this rule would enable a suit on a note to be maintained by one to whom it had been delivered for collection, we do not regard the instruction in question as warranting a reversal under the circumstances here presented. No instruction covering that phase of the matter was requested by the plaintiff, nor does it appear that the attention of the trial court was specifically directed to it in any way. In the pleadings the defendant alleged and the plaintiff denied that the notes were held for collection. The plaintiff claimed not as a holder for collection, but as a purchaser for value before maturity under an indorsement to it without recourse. The case was tried largely upon the issue of its being a holder in due course. Strong evidence was given in behalf of the plaintiff that it had purchased and paid for the notes before their maturity. There was also evidence, however, that the cashier had stated that they were held merely for collection. In view of these considerations, we do not feel justified in setting aside the judgment merely because as an abstract proposition the maker of a

Digitized by Google

note cannot defeat an action on it by showing that some one other than the plaintiff is entitled to the proceeds of the litigation. Inasmuch, however, as the verdict is clearly based on the plaintiff's want of title, the judgment obviously does not constitute an adjudication that the defendants are not liable on the notes, and will not operate as a bar to another action thereon, whether brought in the name of the bank or of the original payee. It does, however, finally determine that the bank has none of the rights peculiar to the innocent purchaser of negotiable paper.

[2] 2. The plaintiff asserts that the evidence had no tendency to establish a defense on the merits, and that therefore its demurrer thereto should have been sustained, and, there being no substantial controversy as to the facts, a judgment should now be ordered in its favor. A part of the defendants' answer was merely an attempt to state—perhaps incorrectly—the effect of a written contract as a part of which the notes were given. The contract itself, however, was set out in full, showing an agreement substantially to this effect.

The land company agreed to sell and the defendants to buy land in Texas. The defendants gave the four notes sued upon (due respectively in 20 days, 60 days, 4 months, and 6 months), which were said to be received as earnest money, to be applied as part payment. Upon the payment of these notes, and the execution of vendor's lien notes for a like amount by the defendants, the company was to deliver a deed with an abstract of title and a certificate of one of three lawyers named as to its sufficiency, which the defendants were to accept.

The defendants pleaded, among other things, that the company had refused to furnish such abstract of title or legal opinion. Evidence was given in their behalf that a representative of the company, about two weeks before the maturity of the last note, asked the defendant to pay the notes that had been given and to execute the vendor's lien notes required by the contract, offering if they did so to deliver the deed and the abstract of title; that the abstract was a document of some 300 or 400 pages, and the defendants' attorney asked for several days or a reasonable time in which to examine it; that the company's representative refused to leave it, saying that he was going away that afternoon, and wanted the new notes signed then or not at all. This evidence would support a finding that the company had refused to give the defendants a reasonable opportunity to inspect the abstract before closing the deal, and we think such a finding would be a sufficient defense to the action upon the notes. The contract contained these provisions:

"The company agrees that on or before sixty days from date, hereof, or within a reasonable time thereafter, provided first this contract has been approved by the president of the company, and the purchaser has paid or caused to be paid to the company an amount equal to one-half of the total named herein, and shall have executed the vendor's lien notes stipulated above, to convey or cause to be conveyed to the purchaser by general warranty deed, the above-described land free and clear of all liens, taxes, incumbrances and charges of every nature whatsoever, except as may be otherwise provided herein. * * *

"The company further agrees to furnish to the purchaser at the time of the delivery of the deed an abstract of title to the above land properly certified to date, showing good and merchantable title, with taxes paid to January 1, 1918, and in addition thereto also agrees to furnish to said purchaser a certificate of opinion, certifying the title good and merchantable. * * *

"When the payments have been made as provided herein the company agrees to convey or cause to be conveyed the land herein described as provided herein."

From this language the plaintiff argues that it did not devolve upon the company to make and deliver the deed, abstract, and certificate of opinion until the defendants had paid the notes which they had already given and executed the new ones. It did, however, devolve upon it to offer to do so. Where a contract is made for the purchase of land, the purchaser giving a series of notes coming due at different times, the conveyance to be made upon the completion of the last payment, if the vendor refrains from suing until that time has arrived, he must tender the deed prior to commencing his action on the notes. He is not relieved of this obligation by the fact that the purchaser has failed to pay his notes as they have matured, and is in that respect in default. Soper v. Gabe, 55 Kan. 646, 41 Pac. 969. A failure of the title would be a defense even to notes that had matured before the time for the delivery of the deed had arrived. Yost v. Guinn, 106 Kan. 465, 188 Pac. 427. The notes not having passed into the hands of an innocent purchaser, and no action having been brought until all had become due and the time for closing the contract had arrived, it was necessary, in order to fix the liability of their makers, that the ability and willingness of the vendor to perform its part should be demonstrated. The mere exhibition to the purchaser of an abstract of title without a reasonable time being allowed for its inspection would not be a compliance with a requirement for its tender. The object of the abstract being to show the condition of the title, an agreement to furnish it implies that a fair opportunity is to be given for its examination.

The contract provided that if the defendants should fail to pay the notes sued upon at maturity the contract should at the option of the company become void, and the notes should be forfeited to it as liquidated

Digitized by Google

damages. No reliance appears to be placed upon this provision; and, whatever effect might be given it under other circumstances, it could be of no avail here.

[3] 3. Complaint is made because one of the defendants in the course of his testimony as to his talk with the plaintiff's cashier, the purpose being to show that the bank did not own the notes, was permitted to state what he had said to the cashier regarding his liability on them. The ruling could not have been prejudicial, since the judgment is based wholly on the theory of nonownership, and not on the absence of liability.

The plaintiff claimed to have bought the notes, indorsed as already indicated, on March 2, 1918. One of the defendants testified that he saw them at the bank about two weeks later, and that they then bore no indorsement. The plaintiff offered to show by another witness that he had seen them on April 1, 1918, and that they then were indorsed to the plaintiff. The offer was refused, and the ruling is assigned as error. The testimony was not very important, since it did not necessarily contradict the testimony concerning the condition of the notes when the bank claimed to have acquired them. Moreover, no evidence that the witness would have testified in accordance with the offer appears to have been produced at the hearing of the motion for a new trial, as required by the statute. Gen. Stat. 1915, § 7209.

Complaint is made because the court in its instructions, in stating the defenses pleaded, omitted to say specifically that the defendants denied that the plaintiff had purchased the notes before maturity and for value. The court stated that the petition alleged such an acquirement of the notes, that the answer included a general denial, and that the matter was in issue; therefore no prejudice can have resulted from the omission.

It is urged that the evidence of the cashier's statement that the notes were in the bank for collection could only raise a suspicion as to whether the plaintiff held them in good faith, and is not enough to overthrow the positive testimony in support of its claim. The matter involves the weighing of evidence, and the decision of the trial court thereon is final.

The judgment is affirmed.

All the Justices concurring.

DUNLAVY v. MOFFETT. (No. 22699.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

Landlord and tenant ⇐331(2)—Verdict for landlord's conversion of tenant's share of crop held excessive.

The proceedings examined, and *held*, the defendant suffered no material prejudice on account of instructions given, but the verdict was excessive.

Appeal from District Court, Harper County.

Action by Howard Dunlavy against T. S. Moffett. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Jas. G. Washbon, of Harper, A. L. Noble, of Winfield, and Tincher & Houck, of Medicine Lodge, for appellant.

Ezra Branine, of Newton, and Vernon Day, of Anthony, for appellee.

BURCH, J. The action was one by a tenant for damages on account of conversion by the landlord of the tenant's share of a crop of wheat. The plaintiff recovered, and the defendant appeals.

The defendant asserts that the tenant forfeited his share of the crop by breach of covenants and abandonment of the premises, and that this subject was not properly presented to the jury. The evidence discloses that the landlord dealt with the tenant on the basis that the tenant had not forfeited, and was the owner of the wheat. Just before harvest the landlord, in a letter to the tenant relating to harvesting the wheat, recognized the tenant's ownership. Assuming that the instructions to the jury were faulty, a new trial would not benefit the defendant.

The defendant rightfully contends that the verdict was too large. The converted wheat was sold on the market for $1.30 and $1.60 per bushel, and these sales furnished the best evidence there was of value. While there was testimony that hard wheat sold for $1.78 per bushel, there was no evidence that the wheat in question was of a grade which would command that price. The number of bushels was not in dispute, and the plaintiff's damages amounted to $1,141.73. The defendant had undisputed claims against the plaintiff amounting to $612.05. The verdict was for $594.90, an excess of $65.22.

The plaintiff did not sow 30 acres of wheat which he agreed to sow, and the defendant was not able to utilize the ground. It lay in the middle of an 80-acre field, the rest of which the plaintiff sowed to wheat. Using the portion of the field sowed to wheat as a standard, the defendant was damaged $91 on account of this breach of the plaintiff's contract.

The plaintiff gave his note for $705.50, the amount of which was computed on the basis of a price per acre for grass and alfalfa land. The defendant did make some use of the grass and alfalfa land. He claimed he was not able to derive as much benefit from it as the note amounted to, but no attempt was made to estimate the difference in dollars and cents, and there seemed to be no way of doing so.

Digitized by Google

There is so little left to try, and it is so manifest that a new trial would not result in greater certainty, that the litigation ought to end. Therefore the district court is directed to modify its judgment so as to allow the plaintiff $438.68, with interest at 6 per cent. from November 1, 1916. As modified, the judgment is affirmed.

All the Justices concurring.

CHAMBERLIN METAL WEATHERSTRIP CO v. BANK OF PLEASANTON.
(No. 22552.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

Principal and agent ⟸109(4)—Principal could not compel bank to pay it the amount of a check indorsed in its name and collected by its agent.

A corporation of Michigan sent its agent to Kansas to contract for and supply weatherstrips to such customers as he could induce to purchase them. The form of contract furnished to and used by him provided for payment in cash on completion of the work. On completing a contract with one customer she gave him a check on a local bank whose cashier knew he had been in the vicinity for some time filling similar contracts. The agent indorsed the check, "Chamberlin Metal Weatherstrip Co., by Sprague T. Haskell, Agent," and the bank paid it to the agent, who absconded with the proceeds. *Held*, that the principal cannot compel the bank to pay to it the amount of the check thus indorsed and collected by its agent.

Appeal from District Court, Linn County.

Action by the Chamberlin Metal Weatherstrip Company against the Bank of Pleasanton. Judgment for plaintiff, and defendant appeals. Reversed and cause remanded, with direction to enter judgment for defendant.

John A. Hall, of Pleasanton, for appellant.
Chas. F. Trinkle, of La Cygne, for appellee.

WEST, J. The defendant appeals from a judgment holding it liable for the amount of a check cashed by it.

The plaintiff sent its agent, Sprague T. Haskell, out to sell weatherstrips and authorized him to contract with Mrs. S. J. Ellis to supply strips for 36 openings. The contract closed with the following words:

"Terms: Unless specially written herein are cash on completion of work.

"Respectfully submitted July 1, 1912. In duplicate.

"Chamberlin Metal Weatherstrip Co.,
"By Sprague T. Haskell."

Haskell who took several other orders in the vicinity, filled this for Mrs. Ellis and received her check for $134 on the defendant bank, receipting therefor in the following words on the back of the contract:

"July 16, 1912.

"Received of Mrs. S. J. Ellis check for $134 in full of this contract.

"Chamberlain Metal W. S. Co.,
"By Sprague T. Haskell."

The collection manager of the company testified that Haskell was not authorized to collect any money from Mrs. Ellis for him or to sign or indorse any checks for the company, or ever permitted to do so. It seems that the money never reached the company. The secretary and treasurer testified that he never authorized Haskell to collect money from customers and that he never had any authority to take money from Mrs. Ellis. It was agreed that Mrs. Ellis gave the check to Haskell, who indorsed it, "Chamberlin Metal Weatherstrip Co., by Sprague T. Haskell," and presented it to the bank and received payment. The company wrote to the bank's attorney that a review of the correspondence failed to show that Haskell had any authority to collect accounts; "the contract also states that remittances be sent direct to either the St. Louis office or Detroit office." Later he wrote that he took it for granted that the Ellis contract was on the form containing this clause. As a matter of fact the contract contained no such clause whatever.

The cashier of the defendant bank testified that Haskell came in and talked to him about various jobs he was doing in the vicinity; that he was around there about 60 days; and that he (the cashier) knew of no one else connected with the company. There was testimony of other witnesses to the effect that Haskell was the only man in the neighborhood doing business for the company.

The theory of the plaintiff is that Haskell had no authority to indorse the check and therefore the bank paid it to him at its peril and must pay it over again. It is plain that Haskell was the agent for the company, and the only one in the vicinity of Pleasanton who had any connection with the company and was acting on its behalf in contracting for weatherstrips; that the contract with Mrs. Ellis specifically provided for cash payment upon completion of the work, and bore no sort of indication that such payment could be made to any one other than Haskell or at any place except Pleasanton. It is equally clear that had Haskell collected the cash from Mrs. Ellis and absconded with it the company could not look to her for payment over again. So the one question is whether or not the weatherstrip company can send an agent into a neighborhood with material and authorize him to contract for and to carry out contracts for weatherstrips, pay-

Digitized by Google

ment to be made in cash upon completion of the work, and then, when he takes a check instead of cash and indorses it as in this case, the bank whose cashier knows that he has been doing this sort of work for the company for several weeks, and which honors the check, must lose rather than the company whose agent has failed to remit. There is certainly nothing in the elements of justice and fair dealing to lend support to the plaintiff's contention, and unless some settled rule of law places the loss on the bank it should fall on the company whose agent seems to have played it false and not on the innocent party whose check was the mere instrument or conduit by and through which Mrs. Ellis paid for the work on its completion.

When the case was first here (Chamberlain Co. v. Bank, 98 Kan. 611, 160 Pac. 1138), it was on an objection to testimony under the petition which alleged that Haskell had no authority to indorse the check and that the indorsement was a forgery, and that he had no authority to make collection on the plaintiff's account. The bank demurred, and after its demurrer was overruled it answered by general denial. After the opening statements of counsel in harmony with the pleadings an objection to the introduction of testimony was sustained. The general rules of the law merchant set forth in that opinion are correct, but, as already indicated, they do not solve the problem now presented.

This time in the court below an agreed statement of facts was offered in evidence which covered nothing necessary to be noticed now. The company relies on Vacuum Cleaner Co. v. Bank, 101 Kan. 726, 168 Pac. 870, as decisive of this case. But there we read:

"It is said that Berryhill was held out as the plaintiff's agent, and that authority to indorse the plaintiff's name on the check should be implied. The evidence was that Berryhill installed a vacuum cleaner in the home of C. E. Roth—made the contract, did the work, and collected the price—and the defendant knew these facts. The evidence further disclosed, however, that Berryhill had made a contract in his own name to sell Roth a vacuum cleaner not manufactured by the plaintiff. The plaintiff had a machine which had been used for purposes of demonstration. The plaintiff sold this machine at a discount to Berryhill, who used it to fill his contract with Roth. Consequently Berryhill did not act for the plaintiff in any capacity in the Roth transaction." 101 Kan. 727, 168 Pac. 870.

True, it was further said that, even if Berryhill had the authority to install and take checks for the price, the authority to indorse could not be implied; reference being made to 2 C. J. 636. In this text it is said that the most comprehensive grant in general terms of power to an agent does not include authority to indorse commercial paper, "unless the exercise of such power is so necessary to the accomplishment of the agency that such intent of the principal must be presumed in order to make the power effectual." Also, that mere authority to receive negotiable paper carries with it no power to indorse, "as the receipt of the paper accomplishes the purpose of the agency, and hence exhausts the power. * * .* " Pages 637, 638.

Following this the author says:

"Much must depend upon the position of the agent and the circumstances of the case, and the agent's authority to execute or indorse commercial paper will be presumed whenever such power is reasonably necessary to effectuate the main object of the agency." Page 638.

This is not a case involving the mere question of an agent's authority to indorse commercial paper for his principal, because the agent's power would ordinarily include no such authority. But here the company sent its man out to a distant state with full authority to contract for weatherstrips, to furnish the material, and do the work, or to use the material and do the work, and sent him with a contract which expressly provided for cash payment upon completion of the work. It was not the duty of Mrs. Ellis to address a letter to the company's home office to know where it desired her to make this payment. The only way she knew the company was through its agent contracting to do what she had contracted to have done. Certainly, on completion of the work, had she refused to pay him cash he could have treated such refusal as a determination to breach the contract she had made. On the contrary, had she promptly paid him the cash there could be no question that her relations with the company had thereby ended. For all practical purposes, in the vicinity of Pleasanton, Haskell was the company. Now, instead of handing him the cash as she might have done, and which he might have received and thereby bound his company, she handed this agent her check—an order to pay some of her money deposited there—on the local bank where he had frequently called and where it was known he was handling this business in that vicinity. By simply taking the check to the bank and receiving cash on it he was in fact receiving "cash on completion of the work," the indorsement being a mere incident to and instrument for completing this simple operation.

The bank was fully justified in assuming that a reputable company would not clothe its agent with authority to go to a state far distant from its residence to procure customers to sign a formal contract authorizing him to use the material belonging to it and do the work agreed upon to be paid for in cash on completion, without expecting him to collect such cash, in the absence of any agreement or restriction as to its payment to any

Digitized by Google

other person or at any other place. The mere use of the check as a ready means of collecting cash is so incidental and so natural that for the bank to have refused payment would have amounted to an imputation upon the commercial sanity or honesty of the concern which sent out its agent thus clothed.

This doctrine suggests no new rule of law. In Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527, it was held:

"On a sale of goods, payment made by check drawn by the buyer on his bank is a mere mode of making a cash payment, and not the acceptance of a security."

In National Bank v. Old Town Bank, 112 Fed. 726, 50 C. C. A. 443, the legatees and distributees of an estate employed a Chicago lawyer to represent them in the administration and settlement and to receive the amounts coming to them as distributees. He retained a law firm to assist him and the executors paid to this firm certain specified legacies, which were remitted to this employé and by him paid to the persons entitled. Later he procured receipts and forwarded them to the firm who delivered them to the executors. The firm deducted the total amounts of the fee charged, drew their checks to the employé for his portion and drew checks for amounts due certain distributees payable to their order, and forwarded such checks to the employé, who indorsed them in the name of his client as attorney and deposited them in the bank to his credit. The bank forwarded them for collection to the defendant, which collected through the clearing house, and subsequently trouble arose between the parties involving the effect of this indorsement. It was held by the Circuit Court of Appeals of the Seventh Circuit that the attorney, being responsible to his client for the money collected, and being the only person authorized by them to receive, had power as attorney to indorse the checks for collection and to collect them. In the opinion the court said, quoting from Mr. Mechem:

"Authority to do a given act carries with it an implied authority to do those things which are necessary in order to accomplish the main end, and what is necessary must be determined in many cases by reference to the particular facts." 112 Fed. 728, 50 C. C. A. 445.

Sprague and Another v. Gillett and Another, 9 Metc. (Mass.) 91, involved this question: The joint owners of part of a vessel authorized another owner to purchase their proportion of the outfit for the vessel, but did not furnish him with funds. He bought on credit of six months, and gave a note as agent of these joint owners, who, not knowing that he had purchased on credit, paid him the amount of the purchase. The seller sued the joint owners and was held entitled to recover. In the opinion it was said:

"That he was not in terms expressly so authorized is admitted; but he was authorized to make the purchase, and no funds were advanced to him, to enable him to purchase for cash. This, by implication, unquestionably authorized him to make the purchase on the defendants' credit. When an agent is authorized to do an act for his employer, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted." 9 Metc. (Mass.) 92.

The Supreme Court of Virginia in Whitten v. Bank of Fincastle, 100 Va. 546, 42 S. E. 309, held that—

"The power to make or indorse negotiable instruments may be implied as a necessary incident of powers expressly conferred. Where an entire business is placed under the management of an agent, the authority of the agent is presumed to be commensurate with the necessities of the situation. He has implied authority to do whatever is ordinarily incident to the conduct of such business, whatever is necessary to the efficient execution of the duties, or whatever is customary in a particular trade." Syl. 3 of 100 Va.

One of the executors of an estate had been given a power of attorney by his mother, clothing him with authority "for the transaction generally and particularly of all my business." Acting under this he executed the promissory note sued on, which was presented to the defendant bank and by it discounted and the proceeds passed to the credit of the mother. The lower court held the estate of the executor liable and this ruling was reversed by the Supreme Court, which remanded the cause, saying:

"The court should then inquire more particularly into the circumstances attending the execution of the note in question, and the disposition that was made of its proceeds. If it was passed to the credit of M. M. Godwin and used in the purchase of any part of the estates in her possession at the time of her death, it is but proper that the banks should be allowed to appropriate to its debt whatever was purchased with its proceeds. Inquiry should also be made into the power of James Godwin to bind the estate of M. M. Godwin by a negotiable note. The power to make or indorse negotiable instruments may be implied as a necessary incident of powers expressly conferred." 100 Va. 550, 42 S. E. 310.

This decision was approved and followed by the Supreme Court of New York in Porges v. United States Mortgage & Trust Co., 135 App. Div. 484, 120 N. Y. Supp. 487, holding that—

"Under a power of attorney to sell or dispose of certain property, to accept in payment cash or other property, to sell the property so received, and with the proceeds pay off incumbrances, the agent could convert a check received for the property into cash by the indorsement thereof, though the check was made payable to the principal." Syl. 2 of 120 N. Y. Supp.

Digitized by Google

In the opinion it was said:

"It is true that the power did not in express terms authorize Hoyt to indorse checks drawn to plaintiff's order, but this we think was necessarily involved. * * * The check was simply a token representing cash. Hoyt had authority to use the cash derived from the transaction, and we think had likewise authority to convert the check into cash, which was the practical effect of depositing it." 135 App. Div. 487, 120 N. Y. Supp. 490.

It is not intended to impair in the least the strength of the rule that a bank must know at its peril that the one to whom it pays indorsed checks had authority to indorse them. 3 R. C. L. 542, § 171. It is meant only that the bank in this case had sufficient reason to regard the agent as duly authorized, and that the authority with which his employer had actually clothed him carried the authority to collect cash and the implied authority to do so by means of the check which he received for his company.

The judgment is reversed and the cause remanded, with directions to enter judgment for the defendant.

All the Justices concurring.

SCHLESENER v. MOTT et al. (No. 22513.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Brokers ⟹34, 65(2)—Agents to sell, who by misrepresentation obtain a profit over their commission, forfeit their right to it, and become liable in damages.

Agents employed by a landowner to sell or exchange properties for an agreed commission owe their principal the utmost good faith and loyalty while their agency exists, and, if they violate their duty and obligation to him by concealing information as to the prices of property, and by misrepresentation and fraud obtain a profit to themselves in excess of the agreed commission, they forfeit their right to the commission, and render themselves liable for the damages suffered by the principal through their bad faith and breach of duty.

2. Brokers ⟹38(4)—Brokers' misrepresentations and fraud held sustained by evidence.

The findings of the jury as to the misrepresentation and fraud of the defendants are *held* to be sustained by the evidence.

3. Trial ⟹340(5)—Trial court may correct manifest error in verdict as to amount of damages.

It is competent for the trial court to correct a manifest error in the findings and verdict of the jury as to the amount of damages sustained by the injured parties.

4. Appeal and error ⟹966(2)—Continuance on account of illness of juror held no ground for reversal.

After the evidence had been concluded a juror became ill, and the court thereupon continued the case for a number of days until the juror had recovered from his illness, and then resumed and finished the trial of the case. *Held*, that such a continuance was within the discretion of the court, and, as no prejudice appears to have resulted from the action, it affords no ground for a reversal.

5. Appeal and error ⟹1151(3)—Modification of judgment as to damages directed.

As one item of credit was not allowed by the jury to the defendants, a modification of the judgment to that extent is directed.

Appeal from District Court, Dickinson County.

Action by L. A. Schlesener against W. H. Mott and J. R. Kohler, partners as Mott & Kohler. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

C. S. Crawford and E. S. Crawford, both of Abilene, for appellants.

Bruce C. Hurd and S. S. Smith, both of Abilene, for appellee.

JOHNSTON, C. J. L. A. Schlesener brought this action to recover damages resulting from the false representations and fraud of his agents, W. H. Mott, and J. R. Kohler, in the sale, purchase and exchange of parcels of real estate. Plaintiff recovered damages in the amount of $3,504.22, and from the judgment defendants appeal.

[1] It appears that plaintiff owned a tract of land in Texas upon which a value of $8,000 was placed. It was subject to an incumbrance of $3,812, which included four vendor's lien notes of $373.75 each, previously executed by plaintiff. He employed defendants as his agents to procure a sale or an exchange of his Texas land for other property. Some time afterwards the defendants informed plaintiff they had obtained an offer of a tract of 174 acres of land in Butler county, Kan., in exchange for his Texas land. They represented that the Kansas land was priced at $11,310, which was $65 an acre, and it was subject to a mortgage of $2,500. The fact was that the owner, Wilson, had given an option on the land at the price of $5,500 to one Colcrazer, and the later had offered to turn it over to the defendants for an allowance of $1 an acre, amounting to $174. The defendants concealed from plaintiff the facts relating to the ownership of the land and led him to believe that the owner of the land would take the Texas land of the plaintiff at $8,000, subject to the incumbrance of $3,810.80, which he would assume, and convey the Kansas land to plaintiff at a price of $11,310, which plaintiff was to take subject to the in-

Digitized by Google

cumbrance of $2,500, and pay the difference between the net values so arrived at, amounting to $4,622.80 in cash. While on a trip to inspect the Kansas land, the defendants adroitly brought him in contact with a man who said he lived near the Kansas land and knew its value, who told the plaintiff that it was worth $100 to $125 an acre. After some hesitation the plaintiff was finally induced to make the exchange, and he paid $4,622.80 and received a deed for the Kansas land, subject to the incumbrance. It appears that the owner of the Kansas land had not negotiated for nor taken the Texas land in exchange for that conveyed by him, and when the plaintiff executed a deed for the Texas land he found that no grantee was named in the instrument. He called attention to the omission, saying it was important to him to have a grantee that was responsible, one who would pay the vendor's lien notes upon which plaintiff was liable. The defendants represented that they had reasons of their own for leaving the grantee unnamed, but that they would guarantee that the grantee would pay the notes and relieve the plaintiff from liability on them. The defendants held the Texas land in their own right for future disposition. Some time after the exchange the plaintiff was sued upon the vendor's lien notes, which defendants had guaranteed would be paid, and this put plaintiff on inquiry, and he then learned the real facts of the transaction and of the fraud that had been perpetrated upon him. While the indebtedness arising on these notes amounted to $1,416, it appears that the plaintiff obtained a settlement of the indebtedness for the sum of $1,235. The defendants associated with them in the negotiations one Charles Bradshaw, all of whom were acquainted with the important facts, and when the deal was completed and the exchange made the profits arising from the difference in the actual cost of the Kansas land and the fraudulently swollen price which defendants had induced plaintiff to pay for it were divided between defendants and Bradshaw, and the defendants also collected from plaintiff the agreed commission of $200 for making the exchange.

[2] It is contended by the defendants that the evidence did not warrant the findings and judgment that were rendered. The misrepresentations made to plaintiff and the fraud perpetrated upon him were flagrant, and the evidence of them was abundant. Under their employment they owed to plaintiff the utmost good faith and loyalty. This principle required them to frankly inform the plaintiff of the actual price of the Kansas land, but instead of doing so they doubled the price, and represented that the inflated price was the lowest figure at which it could be obtained. The most that they were entitled to was the agreed compensation, but they violated their duty and obligation to him, and appropriated to themselves the difference between the actual price and the fraudulently fixed price which they induced the plaintiff to pay for the Kansas land, and thereby they lost their right to the agreed commission, and rendered themselves liable to the plaintiff for the damage suffered by him through their bad faith and breach of duty. Jeffries v. Robbins, 66 Kan. 427, 71 Pac. 852; Kershaw v. Schafer, 88 Kan. 691, 129 Pac. 1137; Rinebarger v. Weesner, 91 Kan. 303, 137 Pac. 969; Ratliffe v. Cease, 100 Kan. 445, 164 Pac. 1091; Avery v. Baird, 106 Kan. 507, 188 Pac. 254; 31 Cyc. 1430; 2 C. J. 697; 21 R. C. L. 825.

Although questioned, the evidence appears to be sufficient to show that the Kansas land could have been purchased from Wilson, the owner, for $5,500, and there was the added amount of $174, which Colcrazer asked for his option. No allowance appears to have been made by the jury for the $174 which was actually paid by the defendants to Colcrazer, and, as he appears to have had no connection with the misrepresentations or fraud of the defendants, and the amount paid was not an unreasonable charge, we think that allowance should have been made by the jury.

[3] There is a complaint that the findings are not supported by the testimony. An error was made by the jury in the finding that the plaintiff was entitled to $1,416 for the vendor's lien notes on the Texas land, which the plaintiff was compelled to pay. Since the plaintiff settled this claim by the payment of $1,235, he could only recover on that item the actual loss sustained. This error, however, was corrected by the trial court by eliminating the excess. The court had the authority to make the reduction, and of this ruling there in no good ground for complaint.

Complaint is also made of the instructions to the jury, in that the evidence did not present the issues as outlined by the court, nor the instructions properly state the law applicable to the facts. A careful examination of the instructions satisfies us that the issues were fairly presented, and that the law of the case given to the jury was substantially correct.

[4] It appears that after the evidence was submitted, one of the jurors was seized with an illness which rendered him unable to attend court. On that account the jury were duly cautioned and permitted to separate, and the case was continued for a number of days, and until the juror was able to resume his duties. Afterwards the case was argued and submitted to the jury. The postponement of the case and the resumption of the trial upon the recovery of the juror was well within the discretion of the trial court.

Other exceptions are taken to the rulings of the trial court, but in them we find no error nor anything requiring special comment.

[5] Because of the disallowance of the item of $174 actually paid to Colcrazer for the option which he held, that amount should

Digitized by Google

have been added to the $5,500, making the total cost of the Kansas land $5,674.

The case will therefore be remanded, with the direction that the judgment be modified by reducing the verdict to the extent of $174, and with this reduction the judgment is affirmed.

All the Justices concurring.

CLAY COUNTY CO-OP. TELEPHONE ASS'N v. SOUTHWESTERN BELL TELEPHONE CO. et al.
(No. 22959.)

(Supreme Court of Kansas. June 12, 1920.)

(Syllabus by the Court.)

1. Public Service Commissions ⟸30—Orders of the court of industrial relations are to be reviewed according to the Public Utilities Act.

Chapter 29 of the Laws of the Special Session of 1920, abolishing the Public Utilities Commission, and creating the court of industrial relations, gives the court of industrial relations authority over two classes of subjects—regulation of public utilities, and regulation of industrial relations. On its public utilities side, the court of industrial relations is simply the successor of the Public Utilities Commission, and orders made in the field of public utilities regulation are to be reviewed, as before, according to the Public Utilities Act.

2. Public Service Commissions ⟸30—Industrial relations court act held to provide for method of review as to industrial relations only.

Section 12 of the act of 1920 (Laws 1920, c. 29), provides a method for the review of orders made in the field of industrial relations only.

3. Public Service Commissions ⟸30—No direct appeal from court of industrial relations by notice of appeal.

There is no appeal from an order of the court of industrial relations direct to this court by notice of appeal given under the Civil Code.

4. Mandamus ⟸3(8)—Public policy requires that controversy within jurisdiction of court of industrial relations on its public utilities side shall be adjusted there.

It is the public policy of this state, established by the Legislature, that any controversy which falls within the scope of the jurisdiction of the court of industrial relations on its public utilities side shall be adjusted there, subject to such review by the courts as the Public Utilities Act prescribes; and the section of the Civil Code, providing that the writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of law, must be interpreted accordingly.

5. Mandamus ⟸3(8)—Telephone company seeking physical connection with another company has adequate remedy in court of industrial relations.

A telephone company, claiming the right to compel physical connection of its system of lines and exchanges with the switchboard of another telephone company, by virtue of provisions of the Public Utilities Act, has a plain and adequate remedy in the ordinary course of law, by application to the court of industrial relations.

6. Telegraphs and telephones ⟸12—Connection contract between systems held to give stranger no common-law right to connect its system.

Because two telephone companies connect their systems of lines and exchanges on the switchboard of one of them, and give to each other telephone service under a contract, a third telephone company has no common-law right to connect its system of lines and exchanges with the same switchboard, on equal terms.

Appeal and petition in mandamus by the Clay County Co-operative Telephone Association against the Southwestern Bell Telephone Company, the United Telephone Company, and the Court of Industrial Relations, to review an order of the Court of Industrial Relations denying an application of the Clay County Co-operative Telephone Association to require switchboard connection between it and the other two telephone companies. Appeal dismissed, and writ of mandamus denied.

R. C. Miller and C. Vincent Jones, both of Clay Center, for complainant.

J. W. Gleed, D. E. Palmer, John M. Kinkel,, and F. S. Jackson, all of Topeka, and J. O. Wilson, of Salina, for respondents.

BURCH, J. The proceeding is one induced by an order of the court of industrial relations denying an application to require switchboard connection between independent telephone systems.

The Co-operative Company has an exchange at Clay Center, with an installation of 117 business phones, 262 residence phones, and 275 rural phones. It has recently purchased an exchange at Idana, a small city in Clay county west of Clay Center, and has a connection with that exchange. The United Company has numerous exchanges and toll lines in Kansas, and toll-line connections with the lines of other companies serving Kansas and other states. It has an exchange at Clay Center, and has a toll-line connection with the Idana exchange, operated under contract. The Bell Company has an extensive telephone system, with a toll line from Kansas City, Mo., through Topeka, Kan., to Clay Center. It owns a portion of the stock of the United Company, and by agreement has its toll line connected with the switchboard of the United Company at Clay Center.

Digitized by Google

The Co-operative Company presented an application to the court of industrial relations for an order requiring switchboard connection at Clay Center between its lines and the lines of the United and Bell Companies. The ground of the application was that the public service and convenience of the patrons of the Co-operative Company would be promoted, and the court of industrial relations was asked to fix liability for cost of the connections, and to fix compensation for the transmission of messages arising with and delivered through the several exchanges. The United Company and the Bell Company responded with a denial of jurisdiction in the court of industrial relations to make the orders applied for. They further averred that the relief sought would deprive them of property without due process of law, and would deprive them of the equal protection of the law, contrary to provisions of the Constitution of the United States. Reserving these questions, the respondents then stated facts to show that from economic, operative, and other standpoints the orders prayed for should not be granted. The action of the court of industrial relations was expressed in the following order:

"Now on this first day of April, 1920, the above-entitled matter comes on for order by the court upon the complaint filed herein on the fifth day of November, 1919, and the evidence introduced in support of said complaint on the 19th day of February, 1920; and the court, being fully advised in the premises, finds that under the evidence and circumstances of this case it would be unreasonable for the court to order a connection between the lines of the complainant and the respondents, in the city of Clay Center, prayed for herein.

"It is therefore by the court ordered: That the complaint of the Clay County Co-operative Telephone Association, Complainant, v. Southwestern Bell Telephone Company and United Telephone Company, Respondents, be, and the same is, hereby dismissed."

[1-3] The petition to this court prays that the court of industrial relations be required to enter a just, reasonable, and lawful order in the premises, and so takes the form of a petition in mandamus, under section 12 of the act creating the court of industrial relations, which reads as follows:

"In case either party to said controversy should feel aggrieved at any order made and entered by said court of industrial relations, such party is hereby authorized and empowered within ten days after service of such order upon it to bring proper proceedings in the Supreme Court of the state of Kansas to compel said court of industrial relations to make and enter a just, reasonable and lawful order in the premises." Laws Special Session 1920, c. 29, § 12.

Accepting this theory of the petition, the court is without jurisdiction. The statute creating the court of industrial relations bears on its face marks of the craftsmanship which framed it. Leaving out of account section 2, the statute is a complete act, covering an entirely new field of legislation, which for convenience may be called the field of industrial relations, cognizance of which is committed to a tribunal having an authority unique in American jurisprudence, exercisable according to an outlined procedure. Action of the new court in that field is reviewable according to the method prescribed in section 12. Thus considered, the statute has nothing to do with general regulation of public utilities, which was committed to the Public Utilities Commission by the Public Utilities Act (Laws 1911, c. 238; Gen. Stat. 1915, c. 97) and supplementary and amendatory acts. Had the new statute been enacted in this form, there would have been two tribunals, each having jurisdiction over a distinct and separate field. Section 2 and a tying-in sentence in section 4 were simply injected into this scheme of legislation. The result is that, while the Public Utilities Commission was abolished, its jurisdiction was committed, in whole and intact, together with appropriate methods of procedure and review, to the court of industrial relations. While the court of industrial relations, under the molding power conferred by both the Public Utilities Act and the new law, will doubtless have but one procedure for itself, orders made in the public utilities field are to be reviewed as before, according to the method prescribed by the Public Utilities Act, and orders made in the field of industrial relations are to be reviewed according to the method specifically prescribed by the new law.

That the foregoing interpretation is necessarily true in respect to the remedy provided in section 12 of the act of 1920 is proved by its phraseology. The language is "said controversy." The word "controversy" first appears in section 7, and there and elsewhere throughout the act means a controversy in the field of industrial relations. Section 13 is merely a special statute of limitation. Section 25, providing that the rights given and remedies afforded are cumulative, and providing that the act does not repeal other laws, is interpretative only, and does not contain creative legislation. Section 26 merely confers such incidental powers as may be necessary to make express grants effective.

In this instance the controversy has nothing to do with industrial relations falling within the scope of the body of the act of 1920. It falls within the scope of public utilities regulation according to the Public Utilities Act, which is fully preserved, and the plaintiff should have followed the procedure there prescribed. Gen. Stat. 1915, § 8348.

The plaintiff filed an ordinary notice of appeal with the clerk of the court of industrial relations, and claims this court acquired jurisdiction of the cause by virtue of the no-

Digitized by Google

tice, under the provisions of the Code of Civil Procedure. From what has just been said it is obvious the notice was nugatory. The court of industrial relations, on its public utilities side, is just what the Public Utilities Commission was.

The plaintiff argues that it is entitled to relief by writ of mandamus granted by this court, independently of the action of the court of industrial relations. The purpose of the writ of mandamus is to compel performance of a clear legal duty. It is said the defendants rest under the clear legal duty not to discriminate against the plaintiff by excluding its telephone system from physical connection with their telephone systems, because of certain provisions of the Public Utilities Act. Without expressing an opinion on the subject, it will be assumed, for the purpose of a decision, that this claim is correct. Nevertheless, an original action of mandamus is not the proper remedy.

The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of law. Gen. Stat. 1915, § 7647 (Code Civ. Proc. § 715). This statute is merely declaratory of the common law. The plaintiff has a plain and adequate remedy by application to the court of industrial relations, as the legal successor to the Public Utilities Commission. It is said, however, that such remedy is out of the ordinary course of law, and the case of Larabee v. Railway Co., 74 Kan. 808, 88 Pac. 72, is cited. That case was decided many years ago, when public utilities regulation in this state was confined to railroads. A tribunal with the jurisdiction and powers of the court of industrial relations was beyond the range of legislative vision, and all remedies were regarded as unusual and out of the ordinary course which did not follow closely the ancient paths of law and equity. The case was one to compel resumption of a definite service under established conditions—switching cars from a mill—which had simply been discontinued. The court had nothing to do but to command restoration of the service. The case fell naturally within the ordinary jurisdiction of the courts in mandamus, and the court took jurisdiction at once. It is now clearly perceived that what is most needed in the field of business intercourse is expert administrative adjustment, and not court adjudication. Advancing step by step according to that principle, the Legislature superseded the board of railroad commissioners with the Public Utilities Commission, gave it authority to regulate public utilities generally, and then superseded the Public Utilities Commission with the court of industrial relations, and gave it greatly amplified powers. The policy has become the settled policy of the state. It contemplates that any controversy which naturally falls within the scope of the jurisdiction of the court of industrial relations shall be adjusted there, subject to such review by the courts as the statute provides, and the mandamus statute must be interpreted accordingly. The present controversy is peculiarly one of the kind just referred to. The proposition is to compel partial amalgamation of independent, competing telephone systems. The court might order formation of the relation, if that were all, but the writ of mandamus, if issued, must prescribe the terms of the relation. Those terms involve switchboard changes, installation of connections, apportionment of cost, regulation of operation, service, rates, division of tolls, accounting, and other matters with which none but a body like the court of industrial relations is competent to deal. At the oral argument it was suggested by counsel for plaintiff that, after ordering the connection, the court should send the case to the court of industrial relations for adjustment of those details—a confession that mandamus is not a fit remedy, and that the court of industrial relations is the proper place to go for relief. Therefore the court holds the plaintiff had a remedy in what the Legislature has established as the ordinary course of law for such cases.

The plaintiff claims that, aside from the Public Utilities Act, the rights which it recognizes and the remedies which it affords for the protection of such rights, the plaintiff has a clear legal right, and the defendants rest under a correlative legal duty, respecting the subject in controversy, under the common law. The court is of a different opinion.

[4-6] There is no dispute that telephone companies are analogous to common carriers with respect to communication of intelligence, and are obliged to serve without discrimination all applicants for service within the field occupied. Likewise there is no dispute that in the absence of statute, no telephone company is obliged to make an initial switchboard connection with any other. The question, however, is whether or not the United Company, which has voluntarily contracted service connection with the Bell Company, is compelled to permit general switchboard connection with any other telephone company which applies; and whether or not the Bell Company, which has voluntarily contracted service connection with the United Company, is compelled to establish the same relations with any other company which applies.

In the case of State ex rel. v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319, the Supreme Court of Indiana had before it for decision the question whether or not the owner of a telephone system, physically connected with another system under a working agreement, could discontinue service by means of the connection. It appeared that the owner admitted to his switchboard lines from other exchanges. From that fact the court deduced certain conclusions, which, however, were not

Digitized by Google

made the basis for decision of the question The court said:

"Such physical connection cannot be acquired as of right, but if such connection is voluntarily made by contract, as is here alleged to be the case, so that the public acquires as interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded. Maham v. Mich. Tel. Co. (1903) 132 Mich. 242, 93 N. W. 629. * * *

"Appellee is furnishing to other exchanges in West Lebanon direct connection and communication with their patrons to other exchanges, and the same service requested by relator. Appellee has thus fixed a classification of those similarly situated and affected. Delaware, etc., Tel. Co. v. State ex rel. (1892) 50 Fed. 677, 2 C. C. A. 1.

"* * * The act of admitting the connection alleged is equivalent to a declaration that all will be admitted to the connection, on the terms and conditions imposed as to one or more."

172 Ind. pp. 636, 641, 87 N. E. 650, 652.

This pronouncement has been restated as law by some text-writers, has been favored by some case annotators, and has been approved by some courts in disposing of controversies which did not require decision of the question. The ruling has been condemned by some courts in disposing of controversies which did not require decision of the question, and a contrary view has been indicated by other courts under like circumstances.

The first observation to be made respecting the declaration of the Cadwallader Case is that it was dictum. The rights of third persons who were not parties to the working agreement and who were not seeking independent admission to the owner's switchboard were not involved. Pacific Telephone & Telegraph Co. v. Anderson (D. C.) 196 Fed. 699. Besides this, the court said:

"We have given the cause this much attention because of its public interest and character, but the judgment must be affirmed upon other grounds." 172 Ind. 642, 87 N. E. 652.

In the next place, the authorities cited to sustain the doctrine announced require consideration. In the Michigan case cited, one telephone company bought the franchises and exchange of another, connected the two systems, and for a time gave service to the subscribers to both. It then undertook to discontinue service by means of the purchased system. A subscriber having a term contract enforced his right. In the federal case cited, the Postal Telegraph Company wanted a telephone in its office. The Western Union Telegraph Company, like other subscribers, had a telephone, and the equal right of the Postal Company to an office telephone was enforced by mandamus. Further on in the opinion in the Cadwallader Case, several decisions are cited in support of the proposition that all who are similarly situated must be served alike, but each decision is identical in principle with the one rendered in the Postal Telegraph Company's case. With great respect for the Indiana Supreme Court, it is submitted that none of the cases cited sustains its declaration of principles. They all deal with the rights of individual persons or corporations to residence or business telephones, and not with the rights of one telephone company to use the telephone system of another. The result is, the declaration is not authoritative evidence of the common law.

The declaration contained in the Cadwallader Case was expressly disapproved in the case of Telephone Co. v. Telephone & Telegraph Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550. In the opinion it was said:

"The case just referred to correctly holds, as we understand the law, that each telephone company under the common law is independent of all other telephone companies, save for the duty to receive and forward to any point on its line messages received from such other company or companies, and hence that it is not bound to accord to any such outside organization or its patrons connection with its switchboard on an equality with its own patrons; that such connection is a privilege to be accorded only as the result of contract, or in obedience to a statute. We concur in the reasoning that an opposite rule would soon result in the practical confiscation of the larger plants having long-distance lines, since the motive would be insistent and irresistible in small companies organized for the purpose, or depleted and run-down companies, to demand such connection; the maintenance of the long lines being without expense to them. But we are unable to agree with the Supreme Court of Indiana that, if a contract for such connection be once made without the specification of any time for it to run, this connection cannot thereafter be severed without the joint concurrence of the companies so in combination; nor are we able to see how the exercise of the right of contract to effect such a joint traffic arrangement between two companies can confer any right upon other companies, not parties to the contract, to a participation in its benefits. Such a rule, while in terms asserting the independent right of contract, denies its existence in fact." 125 Tenn. 283, 141 S. W. 848, 43 L. R. A. (N. S.) 550.

In the case of Telephone Co. v. Telephone Co., 147 Mo. App. 216, 126 S. W. 773, the court followed the decision in the Cadwallader Case. The presiding judge filed a dissenting opinion, in which he made the discriminations indicated by the following quotations:

"Fairness and equality to all, favors or special privileges in the conduct of the business as a public business to none, is the life of the law. This is very far from letting another in

Digitized by Google

the same line of business into a participation in that business, even if the owner, by his voluntary act has chosen to let in some other. It is the public who is under the protection of the law and the courts. Neither are concerned in promoting the interests of one corporation as against another. * * *

"The trouble with the opinion of my learned Brother, in my judgment, is that two ideas are confused: One the right of all the public to enjoy equal privileges with every one else of the public in the use of telephone service over defendant's line; the other, the right of the defendant, notwithstanding its contract with plaintiff, to allow another company, engaged in the same business, the same rights granted plaintiff—in short the right to become a part of its system."

147 Mo. App. 248, 249, 126 S. W. 783.

The Supreme Court of the state of Missouri, in an identical case, overruled the Court of Appeals, and held that the dissenting opinion stated the law. Home Telephone Co. v. Sarcoxie Telephone Co., 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124. The substance of the decision may be indicated as follows: In the absence of statute or contract, the relation of telephone company A to telephone company B in respect to service is simply that of an individual of the general public. Telephone company B may extend its field of operations by making a contract with telephone company C whereby their systems are connected. This having been done, the relation of telephone company A to the connected systems is that of an individual of the general public. The public service has been extended, but the private right of the individual has not been enlarged, and company A has no more right to appropriate the joint facilities of companies B and C to the extension of its own system than it had to connect with company B's system before the contract was made. After citing the statute of the state of Missouri regarding sufficient facilities for the dispatch of public business, and prompt and impartial service on demand or tender of usual charges, the court said:

"This section does not require physical connection between telephone lines. It does require such company to receive all messages from other telephone or telegraph lines and transmit them, as it likewise requires it to receive all messages from individuals. This does not mean that such corporation must yield to a physical connection with its lines by a competitive company and permit the use thereof in that way. In such case and under this statute the telephone corporation or the telegraph corporation has no greater right than the individual. If the individual goes to the office of the telephone company and tenders payment for a message, the company must accommodate him. So, too, if a telegraph company or other telephone company goes in the capacity of an individual or corporate entity and demands a similar service, it must be rendered. But this does not mean that the telephone company must put up a switchboard for all such individuals or corporations desiring to do business with the telephone company. * * *

"The theory of the case at bar is that under the law the Sarcoxie Company was compelled to grant physical connection to the Bell Company, because it had arranged for such connection with a competitor of the Bell Company. Under the railway cases cited, supra, this contention is not well founded."

236 Mo. 133, 138, 139 S. W. 108, 113 (36 L. R. A. [N. S.] 124).

In the case of Pacific Telephone & Telegraph Co. v. Anderson, 196 Fed. 699, Rudkin, District Judge, after referring to the Cadwallader Case, said:

"Where a public service corporation enters into private contracts with others in furtherance of its business, I find no warrant for holding that its public duties are in all cases extended to the full scope of the private contract. * * *

"It is a common practice among railroads to permit other companies to operate trains over their lines on terms agreed upon between them; but it has never been held or intimated that by such an act a company loses all control over its property or obligates itself to grant similar privileges to every other company that may apply therefor. Any such rule would wrest from the proper officers of the corporation the power to manage and control its affairs, and would be destructive of private property rights.

"The defendant companies had therefore no right to demand a physical connection with the Anderson line simply because that right had been accorded to another, and they certainly have no such rights under the statute of this state, for that statute vests the power and discretion to direct physical connection in the Public Service Commission." Pages 703, 705.

In the case of Union Trust & Savings Bank v. Telephone Co., 258 Ill. 202, 101 N. E. 535, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258, the court had under consideration a contract for exclusive telephone connection. In the opinion it was said:

"Without the contract the telephone company would be at liberty to contract with both the Kinloch and Bell systems for long distance connections. * * * Such service, however desirable, is now impossible. It will continue to be impossible unless contracts can be made with both long distance companies. These contracts cannot be compelled, but none of the corporations can by any contract deprive themselves of the power to make them. It may be that the telephone company cannot be compelled to give long distance service or to connect its exchange with any other system, or, having connected with one system, to permit a connection with another. It may decline to undertake any service which cannot be begun and completed over its own lines. If it does undertake such service, it may select its own lines and it may confine itself to one agent, but it may not bind itself to do so and contract away its right and power to use more than one agency." 258 Ill. 209, 101 N. E. 537, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258.

Digitized by Google

This case is erroneously cited in Jones on Telegraph and Telephone Companies, page 364, note 113, as sustaining the particular doctrine of the Cadwallader Case under discussion.

In the case of People v. Telegraph Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637, the syllabus reads:

"The fact that a telegraph company has an arrangement with one telephone company whereby verbal messages are transmitted and received over the telephone line does not operate as a waiver of its right to refuse verbal messages over the line of another telephone company." 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637.

In the opinion it was said:

"The only serious question is whether the fact that the defendant has waived its rights in that respect as to the other telephone company requires a like waiver on its part as to the relator, and we do not think that it does. It may be willing to assume risks with another telephone company of whose responsibility it may be satisfied, which it would not be willing to assume with the relator for proper and sufficient reasons. Such arrangements are founded entirely upon the agreements of parties, and defendant is not bound to admit every other corporation into a like arrangement. This has been the rule as to carriers." 166 Ill. 21, 46 N. E. 733, 36 L. R. A. 637.

These cases are sufficient to show substantial grounds of opposition to the views expressed in the Cadwallader Case. It may be conceded they are not, in strictness, authoritative upon the precise question under consideration, but they are quite as much so as the decision in the Cadwallader Case, to the force of which nothing has been contributed by any of the courts which have approved it.

Some of the courts which favor the doctrine of the Cadwallader Case deny the analogy between physical connection of telephone systems and physical connection of railroad systems, in order to defeat the argument against connection founded on the railroad cases so frequently referred to. It is said that railroad connection involves much more complicated relations, the things transported are essentially different—electric undulations in one case, and physical objects in the other—and in the case of telephone systems the communicants at each end of the telephone wire do the transmitting. In the case of United States Tel. Co. v. Central Union Tel. Co. (C. C.) 171 Fed. 130, it was said:

"When it is said that a long distance telephone company has no right to compel a connection with a local telephone exchange belonging to another company (which, of course, must be done, if at all, on reasonable and fair terms to the local company), for the same reason that one railroad company cannot be permitted to run its engines and cars loaded with its freight on the lines of another railroad company, no account is taken of the fact that the law as applied to railroad companies is a law arising out of convenience and necessity; for it would be physically impossible and unsafe for one railroad company to be permitted to run its cars and engines, except with the consent of the other company, over another company's lines. This is an obvious fact." Page 143.

If joint operation be in fact physically possible and safe and for the public benefit, it does not make much difference how the arrangement comes into existence. The Rock Island Railroad Company has no track between Topeka, Kan., and Kansas City, Mo. It operates trains over the tracks of the Union Pacific Railroad Company, under a contract, just as the United Company forwards its messages from Clay Center, Kan., to Kansas City, Mo., over the line of the Bell Company, under contract. If the officials of the two railroads were able to make a contract which renders this operation of trains possible and safe, it is conceivable a court or industrial commission, with the aid of experts, might frame an order in the terms of the contract. In the case of telephone companies, as in the case of railroad companies, there are physical connection and use of physical property, maintenance of structures and way, operation, and accounting; and equality of right may not be denied on the ground of mere inconvenience arising from bigness and complexity of the business. The rural subscriber at his telephone on a fence post and iron wire line, talking to his mail-order house over long distance, obstructs traffic as one freight train obstructs passage of another. Under the proposed theory, as fast as new telephone companies multiply and demand admission, the United Company must add to its switchboard, and the Bell Company must enlarge and improve its facilities. The Union Pacific Company can do the same thing. Every element on which right depends is as fully present in one kind of case as in the other; and if, as a matter of law, a telephone company, by admitting another to its switchboard under contract, dedicates that switchboard to general use by all who may apply, there is good reason to say the Union Pacific—simply another public utility for purposes of communication—dedicated its track to general use by its contract with the Rock Island Company. On the other hand, if it be the law that the Union Pacific Company waived nothing but its right to exclude the Rock Island Company from use of its tracks and other facilities, the same rule should govern the relation of the parties to this suit.

It will be observed the court has not quoted from the decisions in the railroad cases, and the subject may be considered on principle, independently of those decisions.

Telephone companies which engage in the

Digitized by Google

business of furnishing telephones or facilities for telephone communication must serve the general public, within the field occupied, without discrimination. Individuals, whether persons or corporations, who desire telephones in their residences or places of business, or who desire to use telephone facilities, are members of the general public in that respect, and on the same footing.

Let it be assumed, for the purpose of analysis, that the United Company established an exchange at Clay Center. Any one who desires a telephone is entitled to have one. Let it be assumed that the Co-operative Company then established an exchange in Clay Center. Any one who desires a telephone of this company is entitled to have one; and each company is entitled to a telephone of the other, should it so desire. That service satisfies the public duty of each company. Patrons of the United Company have no right, as individuals or in the name of the public interest, to demand that the United Company furnish them with means of communication with patrons of the Co-operative group who do not patronize the United Company. Patrons of the Co-operative Company are in the same situation. Without a statute, facilities for communication between the two groups of patrons cannot be compelled.

Let it be assumed that neither company has toll-line communication with Kansas City, Mo. Patrons of neither company can demand, as individuals or in the name of the public interest, that facilities for such communication be supplied. Afterwards the United Company builds a toll line to Kansas City. Patrons of the Co-operative Company have no right to that service, except as they take a United Company telephone or go to one of its booths, and have no right to demand that the Co-operative Company build a line to Kansas City. Local relations between the two groups of patrons remain as they were before the toll line was constructed.

Instead of building a toll line to Kansas City, the United Company buys one already built by the Bell Company. The situation is the same as if the United Company had built it. Instead of buying the line, the United Company enters into a contract with the Bell Company whereby both companies use it, and divide tolls on a satisfactory basis. The relation of the group of the public served by the Co-operative Company to the United Company and its toll-line connection is the same as if the United Company owned the toll line. Patrons of the Co-operative Company can subscribe for a United Company telephone, or go to its booths. Members of the public in Topeka and Kansas City who desire to communicate with Clay Center have a toll line to that place, and have at their disposal a local exchange serving the public—the exchange of the United Company.

The Co-operative Company extends lines into the country, and establishes a system of rural telephones. The rural patrons of the Co-operative Company stand on the same footing as the city patrons of that company, so far as right to access to the United Company's facilities is concerned. Besides that, those patrons have no right to call on the United Company for a class of service which it does not profess to give. It has dedicated its capital and facilities to no service beyond the Clay Center city exchange and the toll-line connection with Kansas City.

The Co-operative Company buys the Idana exchange, and connects it with the Clay Center exchange. The relation of patrons of the Idana exchange to the United Company's exchange and toll line is precisely the same as that of the Co-operative Company's rural patrons.

The United Company extends its line northward to connect with exchanges at Morganville, Clyde, and Concordia. Nobody can complain because it did not choose to make southerly connections with Broughton, Wakefield, and Junction City.

These illustrations are sufficient to develop the subject. The result is that by building or or buying a line to Kansas City, or by contracting for a line to Kansas City, the United Company has made no classification of telephone users, and has discriminated against no group of telephone users whatever; and no telephone user, or group of telephone users, has any lawful ground for complaint. The patrons of one telephone system must go to the Legislature to obtain authority to compel another telephone system to serve them.

The Bell Company might have stopped its toll line at Topeka. If it had done so, Clay Center could not have complained of unjust classification or discrimination. No community beyond Clay Center can complain because the toll line stopped there. At Clay Center the Bell Company furnishes toll service to Kansas City to all telephone users who may apply, and by virtue of its connection with the United Company furnishes exchange service to all telephone users who may apply. It has made no classification of telephone users, and has not discriminated against any telephone users.

So much for those individuals and groups of individuals for whose benefit telephone service is instituted and maintained. What about the relations of telephone companies organized to institute and maintain such service, among themselves?

No amount of refinement on the nature of telephone communication and telephone service can disguise the fact that what the plaintiff seeks, and what any third company seeks, is use of the property, organization, and fruits of enterprise of the parties to the contract. The court is perfectly willing to say that by their contract the United Company

Digitized by Google

and the Bell Company waived the independence they possessed before the contract was made. They cannot refuse to each other the service secured by the contract. The court is not able, however, to add to the extent of the waiver disclosed by the contract. To do so is to go beyond the intention of the parties and the factual results of the contract. To declare that the contract operates as a general waiver for the benefit of companies not parties to it is not to declare a fact, or inference of fact, at all. It is to attach a legal consequence. This legal consequence is not attached by way of applying well-understood principles of law to a novel state of facts. The state of facts is of a common kind, and the legal consequence is attached by application of a new rule of law of tremendous importance, special in its nature, and made out of whole cloth, which is legislation, and not adjudication.

There is no rule or presumption of common law that any third company ought to participate in the joinder of two others. No doubt there are telephone lines and exchanges which ought to be united. No doubt there are instances in which exchanges are formed for the sole purpose of pirating upon other systems. Each case of proposed physical connection must be considered on its merits, and the subject of compelling involuntary physical connection between different telephone systems cannot be dealt with except by some agency acting under special legislative authority.

The decision is, the plaintiff has no remedy by virtue of section 12 of the act of 1920, no remedy by appeal according to the Code of Civil Procedure, and whatever right it may have by virtue of the Public Utilities Act should be vindicated by invoking the remedies there provided. The plaintiff has no common-law right on which to predicate the proceeding. Therefore the appeal is dismissed, and the writ of mandamus is denied.

All the Justices concurring.

BROOKENS et al. v. BROOKENS et al. (No. 22742.)

(Supreme Court of Kansas. June 5, 1920. Rehearing Denied July 10, 1920.)

(Syllabus by the Court.)

1. Wills ⇐106—Description in devise stating ownership and location sufficient.

A description of land devised in a will, giving the ownership and location of it in general terms, which point with reasonable certainty to its identity, is sufficient.

2. Partition ⇐21—Part of children held not entitled to maintain action without another's consent.

The testator provided in his will that the rents and profits of a certain farm should be given to his two unmarried daughters so long as either of them should remain unmarried or the farm remain unsold, and subject to this use given to the daughters all his property was given to his children in equal shares. Some of the children brought this action to obtain a partition of the farm while one of the daughters was unmarried and claiming the rents and profits of the farm. *Held*, that there can be no partition of the farm while the daughter is unmarried, without her consent.

Appeal from District Court, Smith County.

Action for partition by W. O. Brookens and others against E. E. Brookens and others. Judgment for defendants denying relief, and plaintiffs appeal. Affirmed.

Monroe, Hursh, Sloan & Monroe, of Topeka, for appellants.

Edwin D. McKeever and E. E. Brookens, both of Topeka, for appellees.

JOHNSTON, C. J. In this action a partition of real estate was asked by plaintiffs, and, it being denied, they appeal from the judgment.

Shortly before his death J. S. Brookens executed a will in which several charitable bequests were made and the use of certain pieces of real estate was given to two unmarried daughters. It was then provided that the residue of his property, real, personal, and mixed, was devised and bequeathed to his six children, including the daughters, share and share alike.

The controversy herein arises over the partition of a farm, the use of which was given to the daughters. The item of the will relating to this use is as follows:

"Item V. I give, devise and bequeath to my daughters, Angie Brookens and Floretta Brookens my home known as lot No. 1 in Jones' addition to the city of Holton, Jackson county, Kansas, for a home for such time as they or either of them shall remain unmarried, that is to say, that so long as both of my said daughters remain unmarried it shall be their joint home, but upon the marriage of one of my said daughters, it shall be the home of the other, until such time as she may marry, in which case or her death, it shall then pass to and be controlled by the provisions of items VII and VIII of this my last will and testament. And my said daughters in this item mentioned shall also have the entire rents and profits of my farm in Smith county, during the time the same shall remain unsold, and they, or either of them, shall remain unmarried."

[1] It appears that J. S. Brookens died testate on January 19, 1914, and that shortly afterwards the daughter Floretta was mar-

Digitized by Google

ried to E. R. Reynolds. The other daughter, Angie Brookens, is unmarried, and is occupying the home in Holton and enjoying the use of the farm sought to be partitioned. Three of the six children are asking for a partition of the farm, but are not claiming that the Holton home is subject to division. It is first contended that the land sought to be partitioned is not described so as to bring it within the use provided for in item five of the will. It will be observed that the land is described by the testator in his will as "my farm in Smith county," and there is no claim that he owned any farm land other than the tract in Smith county. A description of a tract of land, although general, is sufficient where it points with reasonable definiteness to its location. Ownership is an aid to identity, and as the will in this case describes the gift as "my farm in Smith county" both ownership and location are given, and together they leave no doubt as to the intention of the testator or as to the identity of the property devised. Bacon v. Leslie, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134; Zirkle v. Leonard, 61 Kan. 636, 60 Pac. 318; Keepers v. Yocum, 84 Kan. 554, 114 Pac. 1063, Ann. Cas. 1912A, 748.

[2] The principal contention is that under the will the daughters were only to enjoy the use or rents and profits of the farm until it was sold, and that as a sale may be effected through a division and distribution of the property among the heirs it is therefore subject to a partition. It is argued that the expression "during the time the same shall remain unsold" does not refer to a sale by mutual consent, that a sale would ordinarily be necessary to a division of the property into six shares, and that a sale in this partition proceeding would conform to the terms of the will and terminate the rights of the daughters to the rents and profits of the farm.

We see no difficulty in determining the purpose of the testator. It was, first, to provide a home for his daughters as long as they or either of them were unmarried, and upon the marriage of one of them it should be the home of the other, and if she should marry or die then the property should be equally divided among the surviving children. Following this gift of the use of a home is a provision for their maintenance while they were unmarried, and this was done by giving them the rents and profits of the farm "during the time the same shall remain unsold, or either of them shall remain unmarried." The provision in relation to the use of the land, read in the light of the preceding provision, clearly shows that the testator intended to provide not only a home in which the unmarried daughters might live, but also to provide for the maintenance and care of each of them while she was single and without the care and protection that a husband would give her. The gift might have been made clearer by more elaboration, but it was the manifest purpose of the testator that the use of the farm should continue as long as either of the daughters was unmarried. He also added the clause "during the time the same shall remain unsold." Evidently he contemplated that a sale by mutual consent might possibly be agreed upon by the heirs and legatees for whom provision was made. Under the will there can be no division of the property while Angie Brookens is unmarried, without her consent. The plaintiffs are not in possession of the property, nor are they entitled to possession or partition of it at this time.

The judgment of the district court is affirmed.

All the Justices concurring.

CENTRAL TRUST CO. v. ADAMS.

In re MILLS' ESTATE.

(Nos. 22718, 22719.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

Sales ⇐340—Action to recover part of price paid held not maintainable; seller in possession by sale of goods for which buyer had given notes elected his remedy.

Goods were sold on credit, installments of the price were represented by promissory notes, title passed to the buyer, possession remained with the seller, and delivery was to be made on full payment of the price. The buyer paid some of the notes and then defaulted. The seller, after notice to the buyer, resold the goods in proper manner, and applied the proceeds to satisfaction of the oldest dishonored notes. Two notes remained unpaid. The buyer died, and the unpaid notes were presented as claims against his estate. The administrator of the estate then sued the seller for the portion of the price which the buyer had paid. *Held*, the seller's election to resell constituted an election of remedy, the unpaid notes, which represented price, were abandoned as causes of action, and the seller was limited to an action for damages to complete his relief. *Held* further, the effort of the seller to recover on the notes did not recall his election, and did not constitute an election of remedy which enabled the administrator to maintain his action.

Appeal from District Court, Shawnee County.

Action by the Central Trust Company, as administrator of W. W. Mills deceased, against Isaac Adams. Judgment for defendant, and plaintiff appeals. Affirmed. The Central Trust Company, as administrator of

Digitized by Google

W. W. Mills, deceased, appealed to the district court from the allowance of the claim of Isaac Adams against the estate. From an adverse judgment, the administrator appeals. Reversed and cause remanded, with direction to enter judgment against the claimant.

Wheeler, Brewster & Hunt and James A. Troutman, all of Topeka, for appellant.

Z. T. Hazen, of Topeka, for appellee.

BURCH, J. These cases grew out of a sale of shares of corporate stock, and are to be determined by application of principles of the law of sales, including election of remedy.

Adams purchased shares of the capital stock of the Mills Dry Goods Company. He had an agreement with the company that it would take back the stock should he so desire. Adams became dissatisfied with the stock and sold it to W. W. Mills, who at the time was president of the dry goods company. The memorandum of sale reads as follows:

"January 23, 1915.

"Memorandum Receipt and Agreement.

"Received of Mr. W. W. Mills his personal check for $314.20 and eight promissory notes for $500 each, dated February 1, 1915, due on the 1st day of March, April, May, June, July, August, September, and October, 1915, each bearing 6 per cent. interest from date, all payable at the Central Savings Bank of Oakland, Cal., being purchase price of 40 and 7/10 shares of the capital stock of the Mills Dry Goods Company, incorporated under the laws of the state of Kansas, represented by certificates Nos. 574, 575, 580, 581, and 605, which said stock and certificates I hereby agree to transfer to said W. W. Mills on the full payment of said purchase price of $4,314.20.

"[Signed] Isaac Adams."

The first four notes were paid at maturity. Default was made in payment of the note due July 1, and in payment of the notes subsequently maturing. In January, 1916, after due notice to Mills, Adams resold the stock at private sale. The proceeds of the resale were applied to payment of the notes maturing July 1 and August 1, 1915, and satisfied them. Afterwards Mills died, and the unpaid notes which had matured on September 1 and October 1, 1915, were presented to the probate court, and allowed as valid claims against his estate. The administrator appealed to the district court. The claim against the Mills estate was filed in the probate court on November 20, 1918. On December 6, 1918, the administrator sued Adams to recover the cash payment acknowledged in the memorandum of sale and to recover the sums advanced to satisfy the four notes which Mills paid. The theory of the petition was that by reselling the stock Adams rendered himself unable to perform the contract, and consequently should return the portion of the price which he had received. The appeal from the probate court and the suit against Adams were heard together in the district court, and the administrator was defeated in both proceedings.

The sale was obviously a sale on credit. The memorandum regards the portion of the price evidenced by the notes as unpaid. The certificates of stock were to be delivered on payment of the full purchase price, and if the cash and notes paid the price in full the certificates were deliverable at once, and there was no occasion for the memorandum.

While the subject is not important, the parties have relieved the court from determining whether or not title to the stock passed with execution of the memorandum of sale. In the administrator's petition it is alleged that the title did pass, and Adams assents.

The memorandum of sale created no contract lien of any kind to secure payment of the notes, and there is no evidence of any collateral contract, oral or written, creating any form of lien to secure payment of the notes. We start, therefore, with a very simple and very common transaction. There was a sale of goods on credit, installments of the price were represented by notes, title passed to the buyer, possession remained with the seller, and delivery was to be made on full payment of the price.

The buyer defaulted. His delinquency was persistent, so far as the evidence discloses was unexplained, and the seller was at liberty to choose some remedy from those which the law afforded him. He chose the remedy of self-help, resold the goods, and applied the proceeds of the resale to satisfaction of the oldest notes.

There is debate in the books concerning the capacity in which a seller like Adams acts when holding the goods, and when reselling them for the account of the buyer. Much of the debate is logomachy, resulting from the craving to name, and by naming to bring within some established general category, something not quite fitting into any such category. The word "lien" is broad enough and descriptive enough to permit its employment in this connection, and it is enough to designate it "seller's lien." Likewise when the seller resells the goods it is enough to say that he acts as a seller having a seller's lien.

It is quite elementary that just before resale of the stock Adams stood at a point from which three paths diverged. He could eliminate the contract by rescinding the sale, treat the goods as his own, and do as he liked with them. He could affirm the contract, treat the buyer's obligation as subsisting, tender the goods to him or keep them for him, and inforce payment of the price. He could treat the contract as broken, resell the goods to recompense himself, as far as possible, for whatever loss he had sustained, and sue

Digitized by Google

for the remaining damages. He could take one path and only one, and, having made a choice, he could not afterwards return to the starting place and take another.

Adams testified that he resold the stock as collateral security for the debt. The testimony is not important, because it amounts to no more than his characterization of the nature of a past transaction. It adds nothing to the facts which have been stated, and the courts must deduce legal consequences from the facts rather than from his opinion.

The administrator would infer intention to rescind from the fact of resale, and there are some authorities to the effect that resale works rescission. The better view is that intention to rescind is not necessarily indicated by resale, because resale is perfectly consistent with intention to insist on damages for breach of contract, and the law does not execute an intention to rescind when none has been manifested. If in this instance the seller, before resale, had voted the stock at a corporate meeting, or had otherwise exhibited a distinct purpose to resume full dominion over the stock, rescission would be inferred; but without something more than resale the natural conclusion is that the seller merely intended to fix his damages.

Resale did establish a criterion for admeasurement of the seller's damages. There is no complaint about time, place, method, or result of the sale, and presumably the amount of the damages was the difference between the sum received and the contract price. Election to resell, however, constituted an election of remedy, which precluded the seller from afterwards suing for the price or the unpaid portion of the price. He could do that only on the theory that he held the stock subject to the buyer's order, and resale made it impossible for him to comply with the buyer's order and deliver the stock on payment or collection of the price. Note, 42 L. R. A. (N. S.) 669, 672.

When the seller elected to take damages instead of price, he elected to renounce recovery on the notes. They were obligations to pay price, and not damages. The probate court could not adjudicate damages, and its allowance of the abandoned notes as a claim against the Mills estate was a judicial error, which the district court repeated.

The administrator's action against Adams treats presentation of the notes to the probate court as a first election between inconsistent courses of conduct, and acquiesces in that election. The court does not regard invoking aid of the probate court as an intentional recalling of the election made by resale of the stock. It so happened that after application of the proceeds of resale the unpaid notes exactly or substantially equaled the remainder of the damages resulting from breach of the contract, and Adams simply mistook his remedy. He had no cause of action on the notes, and no choice between remedies, after the irrevocable act of resale. But one remedy was then available, an action for damages, and his attempt to complete his relief by unauthorized means did not constitute an election, within the proper meaning of that term, which applies to the first pronounced act of election. Note, Ann. Cas. 1913D, 1199.

The judgment in the case originating in the probate court is reversed, and the cause is remanded, with direction to render judgment against the claimant. The judgment in the case originating in the district court is affirmed.

All the Justices concurring.

BENNETT v. DICKINSON et al.
(No. 22403.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. **Carriers ⇐70—Shipment consigned to seller, "notify Bennett," with customer's attached draft drawn by seller on Bennett, did not pass title to him.**

The former judgment in this case is adhered to, holding that on a shipment of a car of corn consigned by the seller to himself, "notify Bennett," the bill of lading having attached a customer's draft drawn by the seller on Bennett and sent to a bank for collection, the title did not pass to Bennett until the draft was paid and the bill of lading surrendered, in the absence of evidence to overcome the presumption that this was the intention.

2. **Carriers ⇐76—Drawee of draft, not having title to corn when damaged, had no action against carrier because not the real party in interest.**

J. E. Rule delivered to the defendant railway at Clayton, Kan., a car of corn consigned by himself to himself as consignee, destination Shady Bend, Kan., and procured a "shipper's order notify" bill of lading to which he attached a draft on Bennett and sent to a bank in Topeka for collection. The corn was damaged in transit; the draft was paid on the day the car reached its destination. Former judgment adhered to, and *held*, the title not having passed to Bennett until the draft was paid, he cannot maintain an action against the railway company for the damages because the title to the property had not vested in him at the time the damages were sustained, and, having no interest, he was not the "real party in interest."

(Additional Syllabus by Editorial Staff.)

3. **Carriers ⇐76—Carrier liable to consignee under "open" bill of lading.**

Where goods are shipped on an "open" bill of lading delivered to the consignee, the carrier becomes liable to the consignee for any loss in transit.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

4. Carriers ⟸76—Consignee may maintain action for damages in transit.

Prima facie the consignee is entitled to the possession of the consigned goods and may maintain an action for damages in transit, because the general rule is that when goods are shipped to a consignee the carrier becomes the consignee's agent, and that delivery to the carrier is a delivery to the consignee.

5. Carriers ⟸76—One having special interest has action against carrier for damages.

Any one having a special interest in the goods or the shipment may maintain an action against a carrier for damage in transit.

6. Carriers ⟸76—Consignor may sue for loss in transit where consignee releases claim to goods.

Where a consignor releases all claim to goods lost in transit, the consignee is the proper party to sue for the loss.

Appeal from District Court, Shawnee County.

On rehearing. Former judgment adhered to. For former opinion, see 106 Kan. 95, 186 Pac. 1005.

E. S. Quinton, of Topeka, for appellant.

Luther Burns and John E. Du Mars, both of Topeka, for appellees.

PORTER, J. At the former hearing of this case the sole controversy was whether the title to the car of corn had passed to Bennett at the time the damage to the corn occurred. The facts in the case are that J. E. Rule, the shipper, finished loading the car at Clayton, Kan., on the 4th day of May, and at 4 o'clock on the same day the Rock Island Railway delivered the car to the connecting carrier, the Union Pacific, at Colby Junction; the destination of the corn was Shady Bend, on the Union Pacific. The car arrived at Shady Bend on May 7th, and on the same day Bennett paid the draft at Topeka and took up the bill of lading. He afterwards refused to accept the corn, claiming that by reason of the leaky condition of the roof of the car the corn became wet and was rotten. In the shipment Rule consigned the car to himself, with directions to "notify Bennett"; attached to the bill of lading was a customer's draft, which was sent to a bank for collection. The trial court held that, the title not having passed to Bennett until he paid the draft, he could not maintain an action for damages to the corn occurring in transit. The judgment was affirmed. Bennett v. Railway Co., 106 Kan. 95, 186 Pac. 1005.

[1] A rehearing was granted on the representation that the court had overlooked appellant's sole contention in the appeal and the question decided by the trial court, which it is claimed was not whether the title to the corn had passed to Bennett but whether Bennett was the "real party in interest." In appellant's original reply brief it was stated that—

"The question ruled on by the court below was whether, under the written communications introduced in evidence, Bennett, the plaintiff, was the owner of this corn at Clayton, Kan., when delivered to the railway company by Rule under Bennett's directions."

It is now insisted that—

"The question the trial court decided and [which was] appealed from was that Bennett never purchased this corn and therefore was not the real party in interest."

As a matter of fact, the expression "real party in interest" was not mentioned in the memorandum opinion of the trial court; that question was not argued in appellant's original brief, nor referred to at the oral argument. Except as it appeared in certain quotations from decisions of other courts, the expression "real party in interest" was not mentioned in the briefs of the appellee. Moreover, the trial court did not decide that "Bennett never purchased" the corn, but merely that no title passed to him until he paid the draft. In the memorandum opinion the trial court said:

"According to the findings of the jury, the damage which is the basis of this action occurred in transit betwen Clayton and Shady Bend, and before Bennett took up the draft and came into possession of the bill of lading."

Of course, if Bennett had no title to the corn when the damage was sustained, he was not the real party in interest; and to say that he was not the real party in interest is only another way of stating the fact that he could not recover because he had no title.

The bill of lading contained what is known as a "shipper's order" clause, and the transaction was one of a class which occurs thousand of times every day in the business world. The meaning of a bill of lading with a "shipper's order" clause, or, as it is sometimes termed, an "order notify" clause, is well established. (See cases cited in original opinion.) Appellant now insists that the indorsement of the bill of lading assigned to Bennett all the rights the consignor had in the original contract of shipment, which would be true if Bennett had been the consignee, because in such a case delivery by the consignor to the carrier makes the carrier the agent of the consignee.

In the memorandum opinion the trial court said that—

"Rule's intention is plainly evidenced by his actions. He consigned the car to himself under circumstances which made it impossible for Bennett to get the car until he paid the draft."

Digitized by Google

[3, 4] It may be well to state again a few general principles which govern the right to maintain an action against the carrier for loss or damage to goods in transit. Where the goods are shipped on an "open" bill of lading delivered to the consignee, the carrier becomes liable to the consignee for any loss in transit. Parker Corp. v. Atl. C. L. R. Co., 152 N. C. 119, 67 S. E. 251. Prima facie the consignee is entitled to the possession of the consigned goods, and may sustain an action for damages in transit. Chandler v. Sprague, 5 Metc. 306, 38 Am. Dec. 404. This follows necessarily from the well-settled rule that where goods are shipped to a consignee the carrier becomes the agent of the consignee. In other words, delivery to the carrier is a delivery to the consignee.

[5] It frequently happens that the right to maintain such an action is concurrent in consignor and consignee, a judgment in one suit being a bar to any other suit for the same loss. Moreover, any one having a special interest in the goods or the shipment may maintain the action. In Mo. Pac. R. Co. v. Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, reported with notes in 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Ann. Cas. 790, we held that where property had been consigned by the general owner to an agent who has a special interest therein, as factor or commission agent, such consignee might maintain an action in his own name against the carrier to recover damages on account of the loss of commissions occasioned by negligent delay in transit of the goods. In the opinion it was stated that judgment in favor of the plaintiff could work no harm, as it would be a bar to an action for the same injury by the other party. The following statement of the law was quoted with approval:

"Consignee of the goods has the right to sue for their loss by the carrier, notwithstanding another party may be the owner of it. The obligation is to deliver to him. Generally the property vests in him by the mere delivery to the carrier." Southern Express Co. v. Armstead, 50 Ala. 350, p. 300.

[6] Again, where the consignor releases all claim to goods lost in transit, the consignee is the proper party to sue for the loss. Ela v. Mer. Union Ex. Co., 29 Wis. 611, 9 Am. Rep. 619. In this case, the trial court found, and the undisputed facts show, that the same person was both consignor and consignee, and the universal rule is that if the vendor reserves title to the goods the vendee is at no risk until the goods are actually delivered to him; and so in such a case the right to maintain an action for injury to the goods during transit rests alone with the vendor, who is the only party incurring a risk. Madison I. & P. R. Co. v. Whitesel, 11 Ind. 55. And that is the situation where the seller ships with draft attached to the bill of lading, the goods not to be delivered until payment of the draft. Cudahy Pack. Co. v. Dorsey, 26 Tex. Civ. App. 484, 63 S. W. 548, and cases cited in original opinion.

[2] A very pertinent inquiry is, Upon whom would the loss have fallen if the car of corn had been by an act of God destroyed while in transit? Beyond any question upon Rule, who, as the trial court found, took good care to see that he retained absolute title until Bennett paid the draft and took up the bill of lading. Bennett had no general or special interest in the property and incurred no risk in its transportation. The same test was applied in a case cited in the former opinion (St. Louis & S. F. Ry. Co. v. Allen, 31 Okl. 248, 120 Pac. 1090, reported with a note in 39 L. R. A. [N. S.] 309), where a car of coal was shipped under a "shipper's order" bill of lading; the purchaser paying the draft and taking up the bill of lading after the car had arrived at the place of destination. There was a shortage of several thousand pounds in the coal and the purchaser sued the railroad company and recovered judgment, which on appeal was reversed, because the loss occurred before the draft was paid and the bill of lading obtained by the purchaser. The case was decided solely on the proposition that the purchaser could not recover for the loss of property to which he had no title when the loss occurred. In the opinion it was said:

"Had this car of coal, between * * * Henryetta and Peckham, been destroyed on account of some act of God * * * upon whom would the loss have then fallen, under the facts as shown by the record—the consignor, the Wise-Moist Coal Company, or the defendant in error? Clearly upon the coal company, for the title was in them, and did not vest in the defendant in error until the payment of the draft with bill of lading attached."

It was further said in the opinion:

"The defendant in error has not attempted to bring this action as an assignee of the Wise-Moist Coal Company, but on the theory that he was the owner of the coal alleged to have been lost on account of the negligence of the plaintiff in error at the time of such loss. Under this record it was the duty of the Wise-Moist Coal Company to deliver that coal to the defendant in error. The railway company was its agent in making the delivery, and the defendant in error could have maintained an action against the coal company for this loss, or the coal company could have assigned this claim to the defendant in error, and he could have prosecuted the action, as assignee, against the railway company for such damages."

In the case of McNeely & Co. v. Lake Shore & M. S. Ry. Co. (Ind. App.) 115 N. E. 954, decided in 1917, the Studebaker corporation consigned a carload of automobiles to itself,

Digitized by Google

"shipper's order," "notify McNeely & Co." The bill of lading duly signed by the Studebaker corporation was attached to a draft drawn on McNeely and sent to the bank. The opinion followed and approved the Oklahoma case, supra. The damages claimed were for delay in shipment. It was said in the opinion:

"Appellant contends that it was and is the real party in interest, and that by paying the draft and obtaining the bill of lading, as above shown, it has the unquestionable right to maintain this suit for damages resulting from the unreasonable delay in shipment as alleged."

"Appellee contended that the evidence shows that appellant was neither the holder of the bill of lading nor the owner of the two automobiles, when the alleged delay in shipment occurred; that without proof of one or the other of such facts there can be no recovery; that there is no evidence tending to prove either of such facts, but, on the other hand, the undisputed evidence shows that the bill of lading was made to the order of the Studebaker Company, with draft attached; and that the draft was not paid and the bill of lading obtained by appellant until the day the automobiles arrived in Evansville."

In affirming the ruling of the trial court directing a judgment for the railway company, the court said:

"Where a bill of lading is made out to the order of the consignor, or of a third party, with directions thereon to notify a certain person, and a draft against such person for the purchase price of the goods so shipped is attached to such bill of lading and transmitted to the destination of such shipment through a bank, or otherwise, title to the property described in the bill of lading does not pass to the person to be so notified until the draft is paid" (citing numerous cases).

In another case the Carnegie Steel Company consigned a car of iron from itself at Pittsburgh to itself at Asheboro, N. C., "shipper's order notify" the Asheboro Wheelbarrow & Manufacturing Company, with bill of lading indorsed to the plaintiff company with sight draft attached and sent to a bank for collection. The plaintiff paid the draft and took up the bill of lading January 17, 1907, the day after the shipment reached destination, and in a suit against the railway company recovered judgment for damages by delay, which was reversed because the title to the property had not vested in the plaintiff at the time the delay occurred. In the opinion the court said:

"When the goods are shipped by bill of lading deliverable to the order of the vendor, in the absence of any evidence to the contrary, it is almost decisive to show his intention to reserve the jus disponendi and to prevent the property passing to the vendee. Benj. on Sales (17th Ed.) 372, where the decided cases are cited and commented upon at length. Dows v. Nat. Bank, 91 U. S. 618, 23 L. Ed. 214. In Bank v. Logan, 74 N. Y. 568, Folger, J., discusses the question and reviews the decided cases. In Bank v. Crocker, 111 Mass. 163, Ames, J., says: 'A carrier may be a mere bailee for the consignor; and when, by the terms of the bill of lading, the goods are to be delivered to the consignor's order, the carrier is his agent and not the consignee's. * * * In a contract of sale the fact of making the bill of lading deliverable to the order of the vendor, when not rebutted by evidence to the contrary, is decisive to show his intention to preserve the jus disponendi and to prevent the property from passing to the vendee.'

" 'By such a bill of lading the seller does not reserve merely a lien, but the absolute right of disposal of the goods.' 6 Am. & Eng. Enc. 1066, note 1. Until the draft is paid, the contract between the consignor and consignee is executory; that is, the consignor agrees to ship and place in the hands of the carrier the goods at the place designated, to be sold and delivered to the consignee when the draft is paid, both the title and possession remaining in the consignor until that time. If, in such case, the goods were injured or destroyed, the loss falls upon the consignor. If they are delayed in the carriage, the carrier is liable to the consignor. It is the fault of his agent. If the contract of the consignor imposed upon him the obligation to deliver the goods at any specified time, or in a reasonable time, and they are delayed by his agent, the consignee may recover of the consignor such damages as he may sustain as were in the contemplation of the parties. The only evidence in this case was that the goods were shipped to consignor's order, 'notify' plaintiff. The authorities appear to be uniform that, in such case, the consignee is not brought into any contract relation with the carrier and must look to the consignor for any damage sustained by a delay, who, in turn, must look to the carrier." Mfg. Co. v. So. Ry. Co., 149 N. C. 261, 62 S. E. 1091.

In a case where a car of apples was shipped by the vendor in good order but frozen on the road, the vendor taking a bill of lading with sight draft attached, it was held that as the vendor retained title the loss must be borne by him. The ground of the decision was well stated in the following language:

"By the established rules of commercial law, where goods are shipped at the risk of the purchaser and by his order, or if by other evidence the intention of the shipper is made apparent to part with his title, the carrier is held to be the agent of the consignee, and not the agent of the consignor. But if the seller does not intend to part with his title to and control over the property when he makes the consignment, the authorities regard the carrier as the consignor's agent, and not the consignee's." Willman Mercantile Co. v. Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698.

See, also, Seeligson v. Philbrick (C. C.) 30 Fed. 600; Jones v. Brewer, 79 Ala. 545; Per-

Digitized by Google

kins v. Eckert, 55 Cal. 400; Forcheimer v. Stewart, 65 Iowa, 593, 22 N. W. 886, 54 Am. St. Rep. 30; Reed v. Racine Boat Co. (1912) 156 Iowa, 12, 137 N. W. 458.

Corpus Juris states the rule which applies to the case at bar in these words:

"One who is mentioned in the bill of lading as the party to be notified on arrival of the goods has no such interest as will authorize him to maintain an action for loss of the goods shipped, in the absence of any evidence that he was either shipper or consignee." 10 C. J. § 527, title "Carriers."

Bennett's situation in respect of damages to the corn in transit was no different from what it would have been if on the day he paid the draft and received the bill of lading he had purchased any other property by a bill of sale and discovered that before it became his property it had been damaged by the fault or neglect of a third party. It is clear he would have no cause of action against the party at fault, because it is the law that where property is injured or destroyed "the loss falls upon the holder of the legal title." Grant v. United States, 7 Wall. 331, 19 L. Ed. 194.

Rule had a cause of action against the carrier, and if Bennett had procured an assignment of Rule's cause of action a different question would be presented. But there was no assignment of Rule's cause of action, and plaintiff's action was not brought, nor was it prosecuted, upon the theory of such an assignment. In the trial court Bennett's claim was that the title to the corn passed to him at Clayton, when Rule delivered the corn to the carrier. On this rehearing the theory is advanced that Rule's blank indorsement of the bill of lading and the payment of the draft by Bennett transferred to Bennett the cause of action for the loss that occurred in transit. The mere blank indorsement by Rule of the shipper's order bill of lading, which in the original opinion was said to have been for the purpose of facilitating the collection of the draft through the banks, was not an assignment of his cause of action for damages.

There being no assignment of Rule's claim for damages, the provision of the Code permitting the assignee of a cause of action to sue in his own name has nothing upon which to operate in this case. Nor does the Code provision authorizing an action to be prosecuted in the name of the real party in interest affect Bennett's rights, because the title to the property was still in Rule when the damages were sustained. Bennett had no interest in the claim, and Rule was the real party in interest.

The former judgment is adhered to.

All the Justices concurring.

COFFMAN v. HALL et al. (No. 22915.)

(Supreme Court of Kansas. June 24, 1920.)

(Syllabus by the Court.)

1. Drains ⟸34—Sustaining of demurrer to a protest against application to establish ditch is not a judicial function.

A board of county commissioners does not exercise judicial functions in sustaining a demurrer to a protest against an application for the establishment of a drainage ditch under sections 3874–3889 of the General Statutes of 1915.

2. Drains ⟸36(2)—No appeal to district court from order overruling demurrer to protest against application to establish ditch.

Section 564 of the Code of Civil Procedure (Gen. St. 1915, § 7468), does not give a right to an appeal from such an order as is mentioned in the first paragraph of this syllabus.

3. Drains ⟸34—Order of administrative board or officer does not preclude a subsequent order.

An order made by an administrative board or officer does not preclude a subsequent order on the same matter by the same board or officer on a proper application therefor.

Appeal from District Court, Saline County.

Proceeding on petition of J. H. Coffman filed with the Board of County Commissioners of Saline County for the establishment of a drainage ditch, with protest and plea by Helen Francis Hall and others. From an order sustaining a demurrer to the plea, respondents appealed to the district court, and from its judgment affirming the order of the Board, respondents appeal. Appeal dismissed.

David Ritchie, of Salina, for appellants.

Knittle & Knittle, W. B. Crowther, and F. C. Norton, all of Salina, for appellee.

MARSHALL, J. On November 25, 1919, J. H. Coffman, proceeding under sections 3874–3889 of the General Statutes of 1915, filed his petition with the board of county commissioners of Saline county, asking that the board establish and maintain drainage ditches on the southeast quarter of section 7 in Elm Creek township, in that county. Afterward to that petition the respondents filed their protest and plea, to which Coffman filed a demurrer which was sustained by the board of county commissioners. From the order sustaining the demurrer, the respondents appealed to the district court, where the order of the board of county commissioners was affirmed. From the judgment of the district court the respondents appeal to this court.

Digitized by Google

The protest and plea of the respondents, in substance, alleged that in 1891 the board of county commissioners of Saline county, after notice had been duly served on all parties interested, established a ditch and drain across the southeast quarter of section 7 in Elm Creek township, in Saline county. The respondents further alleged:

"Your said protestants further say that all the lands involved in the petition of November 25, 1919, are the same as the lands involved in the said petition of July 17, 1891, and that all of the parties owning the lands involved in the petition of November 25, 1919, are either the same persons, or holding their title under the persons who were parties to said proceeding under the petition of July 17, 1891."

[1] 1. The respondents argue that the board of county commissioners, in the hearing and determination of the protest and demurrer, were exercising judicial functions. It is true that in the determination of the question presented the board of county commissioners must have considered the legal effect of the protest and of the demurrer thereto; and it is true that, when the board comes to make an order establishing or refusing to establish the ditch, it must exercise sound judgment and discretion, but that will not render the power exercised by the board a judicial one. Many, if not all, administrative boards and officers, when acting under the law, must exercise judgment and discretion and often come to conclusions on disputed questions of fact and of law; but it has not been supposed that on account of the necessity for determining such questions these administrative boards and officers have been exercising judicial powers or functions.

The Board of Railroad Commissioners and its successors, the Public Utilities Commission and the court of industrial relations, the charter board, the "blue sky" board, the bank commissioner, the insurance commissioner, the tax commission, and the state auditor, are administrative boards and officers, and they often exercise powers partaking of a judicial nature, or quasi judicial powers; but they have not, by reason of the exercise of those powers, been exercising judicial functions. In the administration of county affairs the board of county commissioners, the county superintendent, and the county auditor exercise like judgment and discretion in performing the several duties that have been imposed on them by the Legislature; but in the exercise of these powers, although involving judgment and discretion and the determination of questions of fact and of law, these officers have not been exercising judicial functions.

Probably the closest parallel to the present situation that can be found is the power exercised by the board of county commissioners in establishing public roads. The authority conferred by the statute on the board of county commissioners is practically the same in each case; the duties performed are very similar. If the powers exercised in the one instance are judicial in their nature, they must be in the other; and likewise, if the powers are not judicial in the one, they must not be in the other. In Flagel v. Jackson County, 83 Kan. 709, 112 Pac. 622, an appeal was taken from the order of the board of county commissioners establishing a road. There this court said:

"That appeal was taken under section 2094 of the General Statutes of 1909. Gen. Stat. 1868, c. 25, § 30. While the language of the statute is broad, it is limited in its application; the district court exercises only judicial power, and the establishment of roads involves legislative and administrative power. Fulkerson v. Com'rs of Harper Co., 31 Kan. 125; Kent v. Com'rs of Labette Co., 42 Kan. 534. It is true that the jurisdiction of a district court to review on proceedings in error an order of county commissioners establishing a road has been upheld (Com'rs of Wabaunsee Co. v. Muhlenbacker, 18 Kan. 129; Com'rs of Chase Co. v. Cartter, 30 Kan. 581; Howell v. Redlon, 44 Kan. 558), but that remedy was not pursued in this instance. An appeal was taken under the statute referred to, which, had it been sustained, would have required a trial de novo of the matters heard and determined by the board in laying out the road." 83 Kan. 711, 112 Pac. 622.

The conclusion reached in the Flagel Case is supported by Fulkerson v. Com'rs of Harper Co., 31 Kan. 125, 1 Pac. 261, and by Kent v. Com'rs of Labette Co., 42 Kan. 534, 22 Pac. 610. In Auditor of State v. A., T. & S. F. Railroad Co., 6 Kan. 500, 7 Am. Rep. 575, the court used this language:

"The assessment of the property of the state, being then an incident to the taxing power, which is wholly legislative, and not judicial, may well be ascertained by agents appointed under the law; but in no sense under our Constitution can such agents be considered judicial officers. It is true that their duties require of them judgment and discretion; but this is also true of most of the duties of ministerial and executive officers, but this does not make them judicial officers, nor constitute them courts, or render their conclusions judicial acts." 6 Kan. 507 (7 Am. Rep. 575).

See, also, Ross v. Com'rs of Crawford Co., 16 Kan. 411; Com'rs of Lyon Co. v. Sergeant, 24 Kan. 572; State ex rel. v. Mohler, 98 Kan. 465, 471, 472, 158 Pac. 408.

The board of county commissioners was not performing a judicial function when it sustained the demurrer to the protest of the respondents.

[2] 2. The respondents argue that they had the right to appeal to the district court under section 564 of the Code of Civil Procedure

Digitized by Google

(Gen. St. 1915, § 7468). What has been said concerning the powers exercised by the board of county commissioners in establishing a ditch necessarily determines that the respondents had no right to an appeal under that provision of the Code. There are two other statutes that probably should be noticed before this question is finally disposed of. One of these is section 2568 of the General Statutes of 1915, which reads:

"Any person who shall be aggrieved by any decision of the board of commissioners may appeal from the decision of such board to the district court of the same county, by causing a written notice of such appeal to be served on the clerk of such board within thirty days after the making of such decision, and executing a bond to such county with sufficient security, to be approved by the clerk of said board, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant."

However, the conclusion reached in Flagel v. Jackson County, 83 Kan. 709, 112 Pac. 622, disposes of the respondents' right to appeal under this section of the statute. The other law to which reference must be made is section 3880 of the General Statutes of 1915, which provides for an appeal from the board of county commissioners to the probate court in proceedings of this nature. This statute was under consideration in Shreves v. Gibson, 76 Kan. 709, 92 Pac. 584, where it was held that the statute "is not void as an attempt to devolve legislative functions upon a judicial tribunal" for the reason that the appeal is to a commission to be appointed by the probate court, and not to the court itself. The respondents did not avail themselves of the right given by section 3880, and the court does not know of any other statute giving to them a right to appeal from the order of the board of county commissioners.

[3] 3. Although what has been said necessarily disposes of this appeal and compels its dismissal, the respondents present another question which will be noticed. They contend that the order establishing a ditch on the land in question in 1891 precludes an order establishing another ditch on the same land at a subsequent time. The presentation of an application to any of the administrative boards or officers of the state or county and the action of the board or officers thereon, either granting or denying the application, do not preclude a second application of the same parties to the same board or officer asking for the same, or another, or an additional order, nor preclude such board or officer from making an order thereon. The order made in 1891 did not preclude the board of county commissioners from making another order on the petition out of which this appeal arose.

The appeal is dismissed.

All the Justices concurring.

HAGGART v. KING. (No. 22551.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Brokers ⟸10, 55(3)—Listing of property for sale does not give an exclusive or irrevocable agency.

A landowner, by merely listing his property for sale with a broker, does not give the broker the exclusive agency to sell, and such an agency may be revoked at any time.

2. Brokers ⟸46—Broker not notifying owner of sale of land listed until after owner's sale is not entitled to commission.

Where the owner of land lists his property with a broker who finds a purchaser, but fails to notify the owner until after the owner had sold the property to another, the broker is not entitled to a commission. Helling v. Darby, 71 Kan. 107, 79 Pac. 1073.

3. Brokers ⟸82(2)—In action for commission answer held not subject to demurrer.

In an action to recover a real estate broker's commission, an answer admitting that the defendant had listed the property with the plaintiff to find a purchaser and alleging that, before he was notified by the plaintiff that he had found a purchaser, the defendant had sold the property to another, is not subject to demurrer on the ground that it fails to state a defense to the action.

Appeal from District Court, Ottawa County.

Action by F. L. Haggart against W. C. King. From an order sustaining a demurrer to the answer, defendant appeals. Reversed, and cause remanded, with direction to overrule the demurrer.

F. D. Blundon, of Salina, and E. C. Sweet, of Minneapolis, for appellant.

J. A. Fleming, of Salina, for appellee.

PORTER, J. The appeal is from an order sustaining a demurrer to the defendant's answer.

The plaintiff sued to recover a commission for selling real estate. The defendant, who lived in California, owned land in Ottawa county, Kan. The plaintiff lived at Salina. In answer to an inquiry by plaintiff, the defendant wrote, stating his terms and that he would be pleased to have the plaintiff sell the land; and in a second letter, dated October 12, 1918, wrote that he would sell the land for $3,800 net, if sold at once, and told the plaintiff to "get in touch with your buyers and explain the prospects." The petition set out copies of the correspondence and alleged that on October 23 plaintiff found a purchaser, John M. Bye, and entered into a written contract with him to take the land at $4,000, that the purchaser paid him $500 on the purchase price, and that plaintiff sign-

Digitized by Google

ed the contract as agent for the defendant. A copy of the written contract for the sale was attached to the petition, which showed that one of its provisions was that the defendant was to deliver to the purchaser "a good, merchantable abstract of title." The petition was apparently drawn upon the theory that plaintiff had been authorized to enter into a written contract with a purchaser, and in compliance therewith had made a binding contract for the sale of the land in the name of the defendant.

In his answer, besides a general denial, the defendant admitted writing the letters referred to in the petition, but denied any liability to the plaintiff resulting from the correspondence, and alleged that the contract between the plaintiff and John M. Bye had not been authorized nor ratified by him. As a further defense, the answer alleged that the land had been listed with the plaintiff for sale, but that before plaintiff found a buyer, and before he had communicated the fact to the defendant, the latter had sold the land to one F. D. Doering.

Two of plaintiff's contentions urged in support of the ruling on the demurrer may be considered together: First, it is contended that the answer is insufficient because it fails to show that the plaintiff's agency was ever revoked by notice to him; and, second, that after the receipt of the letter of October 12, authorizing him to proceed to sell the land, he was entitled to a reasonable time to induce prospective buyers to purchase on the terms stated, and thus to earn his commission before defendant could revoke his agency.

[1-3] Both contentions are based upon the erroneous assumption that plaintiff was given the exclusive agency for the sale of the property. In the case of Edwards v. Dana, 104 Kan. 266, 178 Pac. 407, which is relied upon by the plaintiff, it was expressly stated in the opinion that the agent had asked and was given by the landowner the exclusive sale of the property for a fixed time. Within that time he found a customer ready, able, and willing to buy on the owner's terms, and it was held that, inasmuch as the letter advising him that the owner had sold the land did not reach him until after the purchaser had been found, plaintiff had earned his commission. In the case at bar there was a mere listing of the property with the plaintiff to find a purchaser. Such an agency may be revoked at any time. Helling v. Darby, 71 Kan. 107, 79 Pac. 1073. In that case it was held that brokers in whose hands property had been placed for sale, and who, acting thereupon, had found a purchaser, but did not notify the owner until after he had sold it to another person, were not entitled to a commission for making the sale for the reason that they did not have exclusive authority to sell. See the cases cited in note 24 L. R. A. (N. S.) 279, in which it is said:

"It without doubt is the general rule that, where property is placed in a broker's hands for sale in the ordinary way, that is, without specifying any certain period of time within which the broker is to have the right to sell, or that he, within a certain time, shall have the exclusive right to sell, the mere fact that the property is given to the broker for sale does not deprive the owner himself of the right to sell the property, and where the owner sells such property before the broker has found a purchaser, he cannot be held liable for commissions or damages for a breach of the contract" —citing a large number of cases, including Helling v. Darby, supra.

In his brief plaintiff cites 9 C. J. title Brokers, § 22, note 15. Among the cases mentioned in the note is that of Wanstrath Real Est. Co. v. Wenz, 185 Mo. App. 162, 170 S. W. 345, but it is expressly stated in the note that in that case the plaintiff was given the exclusive agency and also the right to a commission in case of a sale by the owners.

There is some discussion in the briefs as to whether the written contract referred to in the petition, and which plaintiff entered into with John M. Bye, was binding upon the defendant. It has been held that, under the usual contract by which a landowner lists his property for sale with an agent, the latter has no authority to make a written contract that would be binding upon the owner. Sullivant v. Jahren, 71 Kan. 127, 79 Pac. 1071; Wiggam v. Shouse, 105 Kan. 637, 185 Pac. 896, and cases cited in the opinion. The subject of executing a contract of sale on behalf of defendant with one who might be found willing to purchase the land was not considered or mentioned in the correspondence. All that was said in these letters was only what would naturally be said between the landowner desirous of selling and a broker with whom he was listing the property.

One further contention of the plaintiff requires notice. In one of his letters to the defendant, a copy of which is set forth in the petition, and which was written before the defendant finally fixed the terms upon which he would sell the property, the plaintiff made this statement:

"I expect it best for me to give you the names of my parties I am figuring with so as to avoid misunderstanding, in case they should write to you in regard to the land; of course I would expect my commission, if these parties would buy the land. * * * Mr. Bye and Mr. F. D. Doering are the parties I have been dealing with, and will of course expect you to protect me on the commission, as I have put some time getting them interested."

In his answer defendant stated that before he learned of the sale to John M. Bye he had sold the land himself to F. D. Doering. The plaintiff insists that, having notified defendant that Doering was one of the men he had interested in the property, he is entitled to recover a commission for the sale

Digitized by Google

defendant made to Doering. The action, however, is to recover a commission for procuring another purchaser, with whom plaintiff claims to have made a binding contract to take the land at a certain price. The pleadings do not disclose how much Doering paid for the land, and, besides, the petition shows that plaintiff had abandoned negotiations with Doering. It alleges that he offered the land to Doering, who declined to purchase, and that he then arranged a sale with John M. Bye. The rule has often been applied to a defendant that he cannot, after litigation has begun, mend his hold and shift the ground of his defense. Redinger v. Jones, 68 Kan. 627, 637, 75 Pac. 997; Sandefur v. Hines, 69 Kan. 168, 76 Pac. 444; Stanton v. Barnes, 72 Kan. 541, 84 Pac. 116; Braniff v. Baier, 101 Kan. 117, 165 Pac. 816, L. R. A. 1917E, 1036. The same rule should apply in a proper case to a plaintiff, but, in any event, if plaintiff intended to rely upon a different cause of action from that stated in his petition, he should not have demurred to the answer.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

All the Justices concurring.

In re HOSFORD. (No. 22701.)

(Supreme Court of Kansas. June 5, 1920. Rehearing Denied July 10, 1920.)

(Syllabus by the Court.)

Witnesses ⊂=21—Court granting a divorce could not require officer of society having custody of child to disclose its whereabouts.

Where the juvenile court has in accordance with the statute committed a dependent and neglected child to the care of a children's aid society, a court, which had previously granted a divorce to the parents of the child, thereby loses jurisdiction to control its custody, and in a hearing of the application of one of the parents in relation thereto cannot require an officer of the aid society to disclose its whereabouts.

Original habeas corpus by George L. Hosford to obtain relief from a judgment of contempt of the district court, and a commitment to the county jail. Petitioner discharged.

E. L. Foulke, of Wichita, for petitioner.

Madden, Cooper & Madden, of Wichita, for respondent.

MASON, J. George L. Hosford refused to answer a question asked of him as a witness in the district court of Sedgwick county, and was adjudged guilty of contempt, and ordered committed to the county jail. He asks relief of this court by habeas corpus on the ground that the order was made without jurisdiction. The matter is submitted upon the papers.

The district court ordered the petitioner to be committed until he should signify his willingness to answer the question, or until the expiration of six months, but stayed the execution of the order until the next day to allow time for the matter to be presented here. Within that period this court took jurisdiction, and by reason of these facts the sheriff was enabled to make a return, which he did, to the effect that he was not restraining the petitioner. While that is technically true, the merits of the legal questions upon which the validity of the order of commitment depends have been fully argued, and it would be futile to withhold action until a physical restraint should be imposed.

The petitioner is the general superintendent of the Christian Service League—a "Children's Aid Society" as defined in the statute (Gen. Stat. 1915, § 6373)—to which has been intrusted by the juvenile court of Sedgwick county the custody of Ethel Hook, minor daughter of George Hook and Myrtle Hook, who had been divorced by a decree of the district court of that county in April, 1918, the custody of the child having been awarded to the father. In February, 1919, the juvenile court made a finding that the child was dependent and neglected, and gave her to the care of the league. In November, 1919, the child's mother applied to the district court, asking that the order made in the divorce case be modified, and that she be granted the custody of the child. Neither the league nor any one representing it was a party to the proceeding, but its superintendent, the petitioner, was present, and testified that the child had been placed by the juvenile court with the league for adoption. The judge asked him where the child was, and he declined to answer, on the ground of privilege and want of jurisdiction in the court; such refusal being the basis of the order adjudging him to be in contempt. The court awarded the custody of the child to the mother, but made no order in that respect upon the petitioner or the league.

The petitioner represents that the usefulness of such societies as that which he represents will be seriously impaired if parents of children committed to their care are permitted as a matter of right to be advised of their whereabouts. He contends that the continuing jurisdiction of the district court to control the custody of a minor child of the parties to a divorce suit ceases when the action of the juvenile court is properly invoked with respect to it; that the power exercised in such a case by the juvenile court is one specially delegated to it by the state in its capacity as supreme guardian of all minors,

Digitized by Google

and supersedes even that of another court, which had already acquired jurisdiction to determine the most suitable custodian of a child, whether depending upon the conflicting claims of its parents or upon its own welfare. So far as the matter is affected merely by the claims of father or mother little difficulty is presented. "The most striking demonstration of the supremacy of the guardianship of the state over that of the parent is furnished by the statutes under which children cruelly treated, abandoned, or being brought up in ways of vice are taken from the parents by administrative proceedings instituted by the state, and committed to public or charitable institutions." 20 R. C. L. 600.

In 1901, prior to the enactment of the juvenile court law, the Legislature authorized dependent or neglected children to be placed under the care of children's aid societies, and made provision against subsequent interference by the parents, in these words:

"No parent or guardian or other person who by instrument of writing surrenders or has heretofore surrendered the custody of a child to any children's aid society or institution shall thereafter, contrary to the terms of such instruments, be entitled to the custody of or any control or authority over or any right to interfere with any such child, and these same conditions shall prevail where a child is or has been delivered to such children's aid society or institution by action of any proper court." Gen. Stat. 1915, § 6378.

Although the provision of the statute giving the district court power to modify an order made in a divorce case regarding the custody of the children (Gen. Stat. 1915, § 7580) is a part of the Revised Code of Civil Procedure adopted in 1909, it is a re-enactment of a section of the original Code (Gen. Stat. 1868, c. 80, § 645), and is to be regarded as a continuation thereof (Gen. Stat. 1915, § 10973, subd. 1) yielding so far as there may be any conflict to the later expression of the legislative will.

The continuing jurisdiction of a court which has granted a divorce to supervise the custody of minor children of the parties cannot be interfered with by another court which, except for such retained jurisdiction, would have authority under a writ of habeas corpus to make the same inquiry and grant the same relief. In re Petitt, 84 Kan. 637, 114 Pac. 1071. The juvenile court, however, stands upon a very different footing. It is specifically given jurisdiction "of all cases concerning dependent, neglected, and delinquent children." Gen. Stat. 1915, § 3065. The conditions under which it may take control of a child and the manner in which it may exercise it are quite different from those existing in the case of any other tribunal. It is, of course, inferior to the district court, to which an appeal in some instances may be taken from its rulings (Gen. Stat. 1915, § 3076), and which may exercise supervision and control over it to prevent and correct errors and abuses (Gen. Stat. 1915, § 2957). But this appellate and supervising power must be exercised directly and according to some prescribed method. The district court has no authority, merely by reason of its broader powers, to disregard the action of the juvenile court. If, for instance, a boy whose custody had been awarded by the district court to his father should, by reason of some serious delinquency, be regularly committed by the juvenile court to the state reformatory, assuming that to be authorized by the statute (Gen. Stat. 1915, § 3073), or, as often happens, to the state industrial school, it would seem quite out of keeping with the general plan of administering such matters if the duration of his stay there could be controlled by the district court in virtue of its reserved jurisdiction, and that situation would not be essentially different from the one here presented, so far as relates to the jurisdiction of the district court; for, even such a commitment would not be for the purpose of punishment, but for the welfare of the child. In re Turner, 94 Kan. 115, 145 Pac. 871, Ann. Cas. 1916E, 1022.

It is not necessary to the protection of a minor that its control when regularly assumed by a court having only specially conferred powers, or by an administrative body, shall be subordinate to that of a court of general or superior jurisdiction. Much unfavorable criticism of the legal system of the state of Georgia was occasioned a few years ago by the refusal of its Supreme Court, on the ground of want of power, to order the release from custody of a 10 year old boy, Ollie Taylor. Taylor v. Means, 139 Ga. 578, 77 S. E. 373. The decision was widely interpreted as a holding that the boy had been sentenced to penal servitude until he should attain his majority, for the offense of having stolen a bottle of soda water, and that the law afforded no means of relieving him from that penalty. The facts appear to be that, although the language of the criminal law was to some extent employed, for practical purposes he was merely committed for his own good to a county industrial farm, and the want of jurisdiction in the superior or Supreme Court to interfere arose from the fact that the Legislature had empowered another tribunal—the authorities having charge of the farm—to decide when his own interests and the public welfare would be best subserved by his discharge. Moreover, the application for his release, which was denied by the Supreme Court, was made by his father, apparently for the selfish purpose of obtaining a material benefit from his services. 50 Congressional Record, 960; 4 Journal of Criminal Law and Criminology, 171.

Digitized by Google

We are of the opinion that in the present case, when the juvenile court intrusted the care of the child to the children's aid society, the cutting off of the right of the parents to its control involved also the extinguishment of the authority of the district court, derived from the retention of the jurisdiction acquired through the divorce action, to regulate the matter—an authority which originated in a consideration of the conflicting claims of the parents, although in its exercise the welfare of the child was of primary importance. As the court for this reason had no power to make an order affecting the custody of the child, there was no basis for an inquiry as to its whereabouts.

This view seems in accordance with that taken by the courts so far as the question has been discussed by them. In Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403, it was held that a court which had granted a divorce could not be divested of jurisdiction over a minor child of the parties by its secret removal to another county, where by fraudulent concealment of the facts an order of adoption had been procured. But in the opinion in that case the Court of Appeals expressly recognized the force of an earlier decision of the Supreme Court (Younger v. Younger, 106 Cal. 377, 39 Pac. 779), to the effect that—

"Where the adoption was regularly had, the status of the child was changed, and it no longer remained the child of the parties to the marriage, but became the child of another, and its relation to its natural parents ceased, and the jurisdiction of the divorce court was terminated." 14 Cal. App. 163, 111 Pac. 406.

The mere passage of a juvenile court act has been held not to affect the jurisdiction of the court trying a divorce suit over the minor children. McDaniel v. Youngblood, 201 Ala. 260, 77 South. 674. But it has been held that the pendency of a divorce case, in which the court as between the parties could determine the custody of their minor child, does not prevent the juvenile court from taking charge of it on the ground of its being neglected. Brana v. Brana, 139 La. 306, 71 South. 519. The scope of that decision is fairly indicated by these paragraphs of the syllabus:

"The decision of the juvenile court, vested with jurisdiction to determine when a child answers the description of a neglected child given by the Constitution is not to be challenged except in a direct action brought for that purpose, or in some appellate tribunal; and hence is not subject to inquiry in the civil district court, but must there be assumed to be well founded.

"The jurisdiction of the juvenile court as to the custody of neglected children is quasi criminal, operating as between the state and the parents, or as between the child and the state, and if the civil district court, having civil jurisdiction of a suit for separation from bed and board, has awarded the child to the mother, there was nothing to prevent the juvenile court from finding that the child was neglected and from taking it away from the parent who was neglecting it, or from both parents, as in that matter its jurisdiction was not concurrent with the civil district court."

The opinion refers to an earlier case where the father of a child sought without success to defeat the jurisdiction of the juvenile court over it on the ground that it was not neglected, and that it was subject to the control of the district court in an action for separation from bed and board, the Supreme Court saying:

"The juvenile court and the court in which a suit in separation from bed and board is pending between the parents of a child may have simultaneous, though not concurrent, or conflicting, jurisdiction of the custody of the child; that of the juvenile court to be exercised as between the state, or, so to speak, the child, and the parents of the child; and that of the other court to be exercised as between the two parents. In the instant case, on the assumption of the child Iska McCloskey not being a neglected child within the meaning of that term as defined by the Constitution (article 118, § 8), the juvenile court is utterly without jurisdiction of her custody, and the civil district court has exclusive jurisdiction. On the contrary assumption, the juvenile court has jurisdiction.

"With the facts of the case this court has nothing to do, but must assume that the learned judge of the juvenile court exercised jurisdiction because he found upon the facts that the said child of relator was a neglected child within the meaning of that term as expressly, carefully, and explicitly defined, by said article of the Constitution."

State v. McCloskey, 136 La. 739, 741, 742, 67 South, 813, 814.

During the proceedings in the district court in the present case a suggestion was made challenging the constitutionality of the Juvenile Court Act. No specific basis for a doubt in that regard was indicated, and the validity of the statute is not attacked in the brief of the respondent. It has been sustained against all the attacks heretofore made upon it in this court (In re Turner, 94 Kan. 115, 145 Pac. 871, Ann. Cas. 1916E, 1022), and the constitutionality of similar statutes has been elsewhere upheld in other respects (notes, 18 L. R. A. [N. S.] 886, and 45 L. R. A. [N. S.] 908, 913).

The question already determined is that upon which the case has been principally argued and as the conclusion reached requires the discharge of the petitioner there is no occasion for undertaking to determine in what circumstances an adoptive parent, or one standing in substantially that relation, should be excused from giving information at the demand of a natural parent as to the

Digitized by Google

whereabouts of an adopted child. It is obvious that under some conditions the welfare of the child may be promoted by the absolute severance of all connections with its parents, harsh as such a measure may seem. Persons in every way adapted to the responsibility, when considering whether or not they should adopt it, might not unreasonably be influenced in their decision by the question whether they could rely with entire confidence upon protection from any attempt of the natural parents to re-establish relations with it, and this might be insured only by keeping them in ignorance of where it was to be found. In a case in which the court denied the right of parents to be informed of the whereabouts of their two children, who by agreement had been turned over to an institution known as the Temporary Home for the Destitute, the court said:

"In some of our public institutions it has been deemed expedient to keep parents in ignorance of the place where homes have been found for their children, on account of the disposition often manifested to visit them and excite uneasiness and discontent in their minds. Such influences may be feared in this case, and there may be just ground for the suggestion made by the respondent's counsel that if the former character of the father were made known among the present schoolmates and associates of the children, it might cause annoyance and injury to them at their present tender age. The children ought not to be thus exposed, unless the judge who hears the cause shall have some ground to believe that their welfare requires it." Dumain and Wife v. Gwynne, 92 Mass. (10 Allen) 270, 275.

The petitioner is discharged.
All the Justices concurring.

TREADWELL v. BEEBE et al. (No. 22494.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Charities ⟸20(5)—City may accept bequest of trust fund for public charitable use.

A Kansas municipality has power to accept a bequest of a trust fund and to administer it in perpetuity if the purpose of the trust created by such bequest is for a public, charitable use.

2. Charities ⟸11—Trust fund to buy food and fuel for needy inhabitants of trustee city is a "public, charitable use."

A trust fund is for a "public, charitable use," where its purpose is to buy food and fuel for needy and deserving inhabitants of the municipality to which the trust fund is bequeathed and by which it is to be administered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Charity.]

3. Charities ⟸11—Trust fund to aid those suffering from cancer in obtaining treatment is for a public, charitable use.

A trust fund is for a public, charitable use, where its purpose is to aid any deserving person suffering from cancer to secure treatment for that disease in its early and probably curable stages.

4. Charities ⟸22(3)—Disposition of residue in trust for charitable public uses held not ambiguous.

The provisions of a will, making disposition of the residue of an estate after all the other provisions of the will are executed and fully discharged, examined, and no ambiguity discerned therein.

Appeal from District Court, Harper County.

Suit by Eliza Treadwell against Robert H. Beebe, executor of W. E. Treadwell, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Evans, Carey & Lilliston, W. E. Stanley, and Arnold C. Todd, all of Wichita, for appellant.

H. O. Davis, Vernon Day, Donald Muir, R. H. Beebe, and Henry J. Brady, all of Anthony, for appellees.

DAWSON, J. This suit by an heir at law challenges the validity of certain features of a will, and seeks a judicial construction of the will touching the disposition of the residuary estate.

The testator, W. E. Treadwell, in his lifetime was a citizen of Anthony, in Harper county. He died in 1918, seized of considerable real estate and of about $75,000 worth of personal property. By his will and codicil, he made certain bequests of money and property to various persons, provided for certain annuities to certain beneficiaries, including an annuity of $1,200 to his mother, the plaintiff, during her natural life. He also bequeathed $4,000 to the city of Anthony to purchase equipment for its fire department. The testator named the defendant Robert H. Beebe as executor, and to act as trustee to carry out the provisions of the will. In the original will, the testator provided:

"Sixteenth. After the death of * * * and of said Eliza C. Treadwell [the plaintiff mother] * * * the rest and residue of my estate shall be by my executor or trustee paid and delivered to my heirs at law in accordance with the laws of descents and distributions of the state of Kansas, unless I shall hereafter by codicil hereto attached otherwise direct, in which event the rest and residue of my estate shall be disposed of in accordance with such codicil."

Digitized by Google

The codicil provided:

"That my estate shall in all ways be administered and distributed as in my said will provided, excepting only that the rest, residue and remainder thereof, instead of descending in accordance with the laws of descent and distribution, as follows:

"After payment of annuities, legacies and gifts as in said will provided, all notes, accounts, bonds, choses in action then in the hands of my trustees or either of them and belonging to my estate, shall be converted into cash; and my trustee, Robert H. Beebe or his successor, shall then pay to the city of Anthony, Kansas, the sum of four thousand ($4,000.00) dollars, to be used by said city in purchasing equipment for its fire department, and for such purpose and to be paid as aforesaid, I do give and bequeath to said city of Anthony, Kansas, said sum of four thousand dollars, to be used by said city in purchasing equipment for its fire department.

"My trustees, the said Beebe or his successor, shall then pay to the said city of Anthony, Kansas, in trust, all funds then remaining in my estate as part thereof, to be held and used by said city as hereinafter provided, and for the uses and purposes hereinafter set out, and to be paid as above provided, I give and bequeath to said city of Anthony, Kansas, in trust all funds remaining in and a part of my estate after compliance with all the provisions of my will not affected by this codicil, and after payment of said sum of $4,000.

"The amount so paid by my trustee to said city of Anthony, Kansas, shall be profitably and safely invested and the net proceeds of the investment thereof shall be used by said city for the purpose of buying food and fuel for needy and deserving persons who have been actual residents of said city for at least six months. I request that the president of the First National Bank of Anthony, Kansas, the president of the Citizens' National Bank of Anthony, Kansas, and the president of the Farmers' State Bank of Anthony, Kansas, act as an investment committee to invest the sum so paid in trust to said city, to collect all moneys due from said investment and to pay the net proceeds thereof into the treasury of the city of Anthony, to be kept as a relief fund by the treasurer of said city of Anthony, as custodian thereof. Vacancies in said investment committee may be filled by the commissioners of said city. The commissioners of said city shall pay claims for food and fuel furnished by drawing their order on the fund resulting from such investment; all claims for food and fuel furnished shall be itemized and verified, but no publicity shall be given to the names of the persons aided from such fund. In the case of any deserving person suffering from cancer in its early and probably curable stages, the commissioners of said city may allow as much as fifty dollars from such fund to aid such person in securing treatment for such cancer.

"After all the provisions of my will and of this codicil have been carried out, should any real estate remain a part of my estate, my trustee the said Beebe or his successor, shall convey the same to my legal heirs, and they shall then acquire title to such real estate in the same proportions as they would have done had I died intestate on the date of such conveyance by my trustee."

The mother and sole heir of the testator in this action challenges the validity of the trust created by the will and conferred upon the city of Anthony, on two main grounds, viz.: (1) That the city has no corporate power to accept and administer the trust; and (2) that the trust does not create a public charity, and consequently is void under the rule against perpetuities. The third contention of the plaintiff is that she is entitled to a judicial construction of the will, and a ruling that she is now seized of a vested remainder in whatever residue of the estate may exist when the valid provisions of the will have all been performed and discharged. The trial court ruled against plaintiff on all her contentions, and she appeals.

In presenting these interesting questions we have been favored with voluminous briefs, which we have carefully studied; but we do not find that the propositions involved are very difficult, nor is there any dearth of authority to aid in their solution. If the trust creates a public charity, and until appellant's first proposition is determined we will assume that it does, then it seems that under the spirit of Kansas law, and perhaps under the letter of it, the city of Anthony may accept and administer the trust created by this will.

[1] The statutes confer on a city of the second class the power to make all necessary ordinances, not inconsistent with the laws of the state, "as may be expedient for maintaining the peace, good government, and welfare of the city and its trade," etc. Gen. Stat. 1915, § 1748. The city is authorized to purchase and hold real and personal property for the use of the city, and the word "purchase" has been held to mean the acquisition of title to property by any mode except by inheritance. Delaney v. City of Salina, 34 Kan. 532, 539, 9 Pac. 271. It has been held that a city may accept and administer a fund in perpetuity for the purpose of maintaining a public park (Schnack v. City of Larned, 106 Kan. 177, 186 Pac. 1012), and for the purpose of prospecting for and developing a coal mine (Delaney v. City of Salina, supra). In the Salina Case, the present contention was made and answered:

"It is claimed that it is not within the power of a city to accept or receive property as a devise, bequest, or legacy, or for any such purpose as that which is designated in the present will. We do not think that this point is sound or well taken. Mr. Dillon, in his work on Municipal Corporations, uses the following language:

" 'Sec. 436. Municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Legacies of personal prop-

Digitized by Google

erty, devises of real property, and gifts of either species of property, directly to the corporation and for its own use and benefit, intended to and which have the effect to ease them of their obligations or lighten the burdens of their citizens, are valid in law, in the absence of disabling or restraining statutes. Thus, a conveyance of land to a town or other public corporation for benevolent or public purposes, as for a site for a schoolhouse, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object contemplated.

" 'Sec. 437. Not only may municipal corporations take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of taking property, real and personal, in trust for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So such corporations may become cestuis que trust within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its duties, it may be compelled, in equity, to administer and execute it. But the Legislature may divest a municipal corporation of the power to administer the charitable trusts conferred upon it, and appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts.'

"See, also, Dillon on Municipal Corporations, §§ 438 to 443."

"From the time the first modest volume was given to the public until the present, Dillon on Municipal Corporations has been regarded as high authority by both the bar and the bench." Everly v. Adams, 95 Kan. 305, 308, 147 Pac. 1134, 1136 (L. R. A. 1915E, 448).

In 19 R. C. L. 770 et seq., it is said:

"So also a municipal corporation has an implied power to receive a gift of real estate for any corporate purposes. While a municipal corporation would, of course, have no power to purchase with the public funds land or other property, except for such public purposes as it was authorized to expend money for by its charter, it is well settled that it may hold real estate which is not devoted or intended to be devoted to any public purpose when such property has come to it in a lawful manner, as by gift or devise." Id. 770, 771.

"It is held in some jurisdictions that a municipal corporation has no power to administer a trust in favor of persons in reduced circumstances who are not paupers, or persons for whose support the municipality is under a statutory liability. In other jurisdictions it is held that such a trust is valid, as the effect of the gift is to prevent persons from becoming a public charge. * * * If a trust is beyond the power of a municipal corporation to execute, it is not on that account void, and a court of equity will appoint a new trustee to execute the trust." Id. 778, 779.

In 5 R. C. L. 320, 321, it is said:

"A municipal corporation may act as trustee of a charitable trust where the trust created is germane to the purpose for which the corporation was called into being, and when the administration of the trust and the liabilities it imposes are not foreign to the objects for which the corporation was instituted. In conformity with this rule it has been frequently declared that a municipal corporation may act as a trustee of a charitable trust for the support or establishment of free or public schools within the municipality. Some courts take the view, however, that a municipal corporation cannot take as trustee of a charitable trust unless the power to do so is expressly granted or is necessary to the performance of its duties as a territorial and municipal corporation, while other courts maintain the rule that a municipality may act as trustee of a charitable trust when it is not prohibited from so doing by statute. And this is true although the purposes of the trust are not strictly within the scope of the direct purposes of the corporation, but merely collateral thereto."

In 28 Cyc. 261, 262, in discussing the inherent powers of municipalities, it is said:

"Every municipality asks for such powers as its location or conditions suggest, or, its population or promoters may desire, and gets all which legislative complaisance may yield, with the result that an array of municipal charters of the United States present to legal view at once an amusing exhibition and a perplexing problem. The legislative attempt often seems to be to enumerate all the powers intended to be granted; and then, recognizing the futility of such effort, the Legislature supplies omissions with a clause known as the general welfare clause, granting to the corporation power to do all such acts and pass such ordinances as may conduce to the public welfare. This residuary grant of municipal power, in whatsoever phrase it may be couched, although obviously intended to add to the enumerated powers of the municipality, has been thought in some cases to be nugatory under the constructive limitations of the preceding specific enumeration. The better view seems to be that the 'general welfare clause' alone amounts to a grant of all usual and necessary municipal powers, and the enumeration of particular powers grants all others therein specified.

"It has also been held that a city may, without special authority from the Legislature, take a devise of land beyond its limits for a public park, and that it may do so in trust for a charitable use, although it may not, in the absence of such special authority, be able to exercise any police power over it." Id. 606, 607.

"A municipal corporation has the capacity and power to take and hold real or personal property, by devise, bequest, or deed of gift, in trust for purposes of a public nature, including charitable uses, germane to the objects of the corporation, even according to the weight of authority, although the object may be one which the municipality could not carry out at the public expense." Id. 616, 617.

Digitized by Google

In Maxcy v. Oshkosh, 144 Wis. 238, 250, 128 N. W. 899, 905, 31 L. R. A. (N. S.) 787, 793, it is said:

"That a city may become the trustee of a charitable trust, where the donation is made to aid some public purpose charitable in its nature, which it is the legal duty of the city to support and provide for, does not admit of doubt. When the trust is accepted, the city assumes the same obligations and becomes amenable to the same regulations that apply to other trustees of such trusts, and among them is the obligation to perpetually administer the charitable fund in accordance with the expressed wish of the testator. Thorndike v. Milwaukee Auditorium Co., 143 Wis. 1, 126 N. W. 881; Beurhaus v. Cole, 94 Wis. 617, 69 N. W. 986; Philadelphia v. Girard, 45 Pa. 25, 84 Am. Dec. 470; Vidal v. Philadelphia, 2 How. 180, 190, 11 L. Ed. 227, 231; McDonough v. Murdoch, 15 How. 367, 14 L. Ed. 732; Webb v. Neal, 5 Allen, 575; McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio, 217, 34 Am. Dec. 436; Sutton v. Cole, 3 Pick. 232; Commissioners of St. Peter's Parish v. McPherson, 1 Speers, L. 218; Governor v. Gridley, Walk. (Miss.) 328; Carmichael v. School Lands, 3 Howard (Miss.) 84; Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434; Quincy v. Atty. Gen., 160 Mass. 431, 35 N. E. 1066; Chambers v. St. Louis, 29 Mo. 543; Delaney v. Salina, 34 Kan. 532, 9 Pac. 271; Maynard v. Woodard, 36 Mich. 423; 2 Dill. Mun. Corp. (4th Ed.) § 567; Higginson v. Turner, 171 Mass. 586, 51 N. E. 172."

It is needless to pursue this inquiry further. The court holds that a Kansas municipality has power to accept a bequest of a fund and to administer it in perpetuity if the purpose of the trust thus created is for a public, charitable use.

[2, 3] The purposes of the trust which the testator sought to establish are:

"The buying of food and fuel for needy and deserving persons who have been actual residents of said city for at least six months." Analogous to legal settlement, Gen. Stat. 1915, § 6821.

"In the case of any deserving person suffering from cancer in its early and probably curable stages, the commissioners of said city may allow as much as fifty dollars from such fund to aid such person in securing treatment for such cancer."

Are these public uses public charities? It would seem so. The Constitution declares that such benevolent institutions as the public good may require shall be fostered by the state (article 7, § 1), and it is the duty of the several counties to provide for those inhabitants, who, by reason of infirmity or misfortune, may have claims upon the sympathy and aid of society (article 7, § 4). Pursuant thereto and in harmony therewith, elaborate and humanitarian statutes have been enacted, authorizing and requiring counties, cities, and townships to relieve the poor and afflicted. While the county is mainly the basic unit for the cost of local, charitable relief, yet the mayors and councils of the several cities are the overseers of the poor within their municipalities (Gen. Stat. 1915, § 6817); there may be city as well as county almshouses (section 6885); and the relief of the poor of a city is certainly a proper concern under its corporate duty to provide for the general welfare of the municipality. Food, fuel, clothing, and shelter are the primary essentials of existence within the Kansas parallels of latitude, and if a city cannot concern itself with the relief of the poor, or with the administration of relief provided by a charitably disposed philanthropist to the deserving poor, in the matter of distributing food and fuel, then all the long journey which organized society has traveled from the days of the cave man comes to naught, and our bosted humanitarianism is but a pretense and a humbug. Public purpose! There are no public purposes impressed on a civilized community so important as to see to it that deserving persons in its midst do not suffer from hunger and cold. Appellant cites the old case of State v. Township of Osawkee, 14 Kan. 418, 19 Am. Rep. 99, as authority against the validity of this trust. We shall not now undertake a re-examination of the principal questions involved in that case. The Legislature has deliberately disregarded that decision in two notable instances, for the relief of drought-stricken farmers in Central and Western Kansas (Laws of 1891, cc. 42, 129, 199; Laws of 1895, c. 242); and this court has recently qualified the reasoning upon which the decision in the Osawkee Case rested (Beck v. Shawnee County, 105 Kan. 325, 182 Pac. 397). We note, however, that even the rigid reasoning of the Osawkee Case would tend to sustain rather than to defeat the trusts created by this will. The learned jurist who wrote the opinion in the Osawkee Case, in speaking of its main purpose, said:

"It was generally understood that many farmers would come to this spring's sowing with little or no seed, and with stock weakened for lack of grain. To make good this lack is the evident purpose of the act—to provide grain for seed and feed. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from cold. It is not the helpless and dependent, whose wants are alone sought to be relieved. If it were, the fact that many who are neither helpless nor dependent might obtain assistance through its administration would be no valid objection to the constitutionality of the law. It contemplates a class who have fields to till and stock to care for, and purposes to help them with seed for their fields and grain for their stock, that thus they may pursue with better prospects of success their ordinary avocations. It taxes the whole community to assist one class, and that not for the purpose of relieving actual want, but to assist them in their regular occupations." 14 Kan. p. 423, 19 Am. Rep. 99.

What the Osawkee bond issue did not contemplate—food for the hungry, fuel for those suffering from cold—is precisely what this

Digitized by Google

trust to the city of Anthony does contemplate.

The De Boissiere Case, 66 Kan. 1, 71 Pac. 286, which had to deal with a private trust—to provide a home in perpetuity for the orphans of Odd Fellows—has no application here. The present benefaction is to provide necessities for everybody within the city of Anthony who may need and deserve relief from cold and hunger. This is clearly a public purpose. But there is a limitation—only "deserving" inhabitants may be so relieved. Well, there is no urgent corporate duty, perhaps none at all, to relieve the needs of the town loafer, the spendthrift, the worthlessly improvident; and Christian society, without any qualms of conscience, may leave them to the consequences of their own folly. This limitation upon the testator's beneficence does not create a legal infirmity in the erection of the trust.

Neither does the provision concerning the suggested committee of local bankers to invest the fund for the city affect the validity of the trust. A trust of this sort, designed to endure as long as the town exists, is worthy of the public spirited assistance of the best financial brains in the city, and quite appropriately the testator suggested—and he only requested—that the heads of the three leading financial institutions of the city be called into voluntary service in the matter of safety and permanency of the investment of the trust.

The provision for the assistance of persons afflicted with cancer is also a public philanthropy, and one which the testator, himself a long sufferer and victim of that disease, had a right to make, and which the city has power to accept and administer. This court would greatly regret it, if law or precedent compelled us to hold the contrary. Here there is no limitation. Any person, anywhere, suffering from cancer, in its earlier and probably curable stages, may be assisted in securing treatment. The provision obviously creates a public charity, and one which the city may accept for administration.

[4] The plaintiff's last contention is that, notwithstanding the trust provisions of the will, she is entitled to a judgment construing the will and to a judicial ruling that by its terms she takes presently, as vested remainderman, whatever property of the testator is left after the bequests, annuities, and public trusts created by the will are satisfied. The court holds otherwise. The will and codicil are to be read and construed together. The will says that after the death of the plaintiff, not before, the rest and residue is to be paid and delivered to his then existing statutory heirs. The will leaves no property undisposed of. The residue of the estate is bequeathed to certain persons readily ascertainable, to be received by them at a time—after his mother's death, and by a definite mode—the Kansas law of descents (sections 3824–3856, Gen. St. 1915). Lasnier v. Martin, 102 Kan. 551, 555, 171 Pac. 645. Furthermore, this bequest is conditional. If a codicil should be made, this provision of the will was not to become altogether effective; and a codicil was made:

"After all the provisions of my will and of this codicil have been carried out, should any real estate remain a part of my estate, my trustee the said Beebe or his successor, shall convey the same to my legal heirs, and they shall then acquire title to such real estate in the same proportions as they would have done had I died intestate on the date of such conveyance."

By the will the legal title to the property is conferred upon the executor and trustee. It remains in him until everything provided and contemplated by the will is accomplished. The mother takes nothing but what the will bestows on her—an annuity of $1,200 per annum. After all else has transpired, including her death, the executor is to convey the residue of the property to his then ascertainable heirs. Bullock v. Wiltberger, 92 Kan. 900, 142 Pac. 950; Markham v. Waterman, 105 Kan. 93, and citations on page 96, 181 Pac. 621, on page 622.

Doubtless there may be persons in esse who have now a vested interest, with enjoyment postponed, in the residue of this estate, but not the testator's mother, for the will clearly cuts her off with an annuity. They are those who are to enjoy the residue when the fullness of time and the final accomplishment of the executor's duties will mature their right to conveyances and possession. The trial court correctly held that the will and codicil contained no ambiguity of any consequence to the plaintiff.

All the Justices concurring.

Digitized by Google

BRACKVILLE v. SOUTHWESTERN BELL TELEPHONE CO. (No. 22731.)*

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Telegraphs and telephones ⟸26¾, New, vol. 7A Key-No. Series—Federal control held not to invalidate service of summons.

Service of summons upon a telephone corporation, shown by the return to have been made by the delivery of a copy to its managing agent, will not be set aside merely for the reason that at the time of such delivery its system had been taken over and was being operated by the Postmaster General.

2. Master and servant ⟸278(8)—Verdict held supported by evidence.

The negligence found by the jury is *held* to be within that pleaded and to be supported by some evidence.

3. Trial ⟸296(7)—Error in instruction on burden of proof as to contributory negligence held cured.

Any tendency of an instruction, relating to the burden of proof on the issue of contributory negligence, to mislead the jury into supposing that that defense could not be established by the plaintiff's own testimony is *held* to have been cured by an instruction immediately following it, to the effect that in determining the issues all the testimony was to be considered, as offered by the plaintiff or the defendant.

Porter and Dawson, JJ., dissenting in part.

Appeal from District Court, Wyandotte County.

Action by Irene Brackville by Antionette Brackville, her next friend, against Southwestern Bell Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

D. E. Palmer, C. J. Evans, and J. W. Gleed, all of Topeka, C. Angevine, of Kansas City, Kan., and D. A. Frank, of St. Louis, Mo., for appellant.

Wm. G. Holt, T. A. Milton, and J. K. Cubbison, all of Kansas City, Mo., and Chas. A. Blair, of Kansas City, Kan., for appellee.

MASON, J. Irene Brackville was injured by a fall while in the employ of the Southwestern Bell Telephone Company, a corporation. She brought an action against it, alleging her injury to have been due to its negligence, and recovered a judgment, from which it appeals.

[1] 1. The accident occurred on June 16, 1918. On July 22, 1918, the Postmaster General took possession of the telephone system owned and operated by the defendant. The petition in the present action was filed on January 21, 1919. The return on the summons recited that it had been served upon the defendant by the delivery of a copy to W. W. Yager, its managing agent, its president and the chairman of its board of directors not being found in the county. Under a special appearance the defendant moved to quash the service upon the ground that Yager was not at the time the copy of the summons was delivered to him the agent of the corporation, but of the Postmaster General. The overruling of that motion is assigned as error.

This court has held that under a statute authorizing service to be made on a railroad company through its ticket agent or station keeper personal jurisdiction of such a company which is in the hands of a receiver cannot be obtained by the delivery of a copy of the summons to one who had been employed by it in that capacity and had continued to perform the same duties for the receiver. Chilletti v. Railway Co., 102 Kan. 297, 171 Pac. 14, L. R. A. 1918C, 1147; Vann v. Railway Co., 103 Kan. 857, 176 Pac. 652. There is a difference of judicial opinion on the question (note, 47 L. R. A. [N. S.] 179; Missouri, K. & T. Ry. Co. v. Hudson [Okl.] 175 Pac. 743), but it was settled for this state by the decision first cited. While the situation there passed upon has much in common with that now under consideration, a material difference is to be noted in the relation of a company, as well as its agents, on the one hand to a receiver appointed to take charge of its business and on the other to the Postmaster General upon his assuming possession of its system by proclamation of the President under the federal statute. Upon the appointment of a receiver the possession of the corporation is immediately and completely ousted, and the individuals who have been serving it become at once, as by an original selection, agents and employés of the new operator, charged with the duty of rendering like services under direct responsibility to him. The President's proclamation under which the Postmaster General took over the management of the telegraph contained these paragraphs:

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson. Said Postmaster General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employés of said telegraph and telephone systems.

"Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employés of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 191 Pac. 578.

Digitized by Google

respective companies, associations, organizations, owners, managers, as the case may be."

During the existence of the status established by the proclamation—until the making of some further order—the defendant corporation continued to function, as an instrument of the government, which availed itself, not merely of the individuals who had been engaged in carrying on the business, but of the entire machinery so employed, including the company itself (the "owner"), with its board of directors as well as its other officers, agents, and employés. Upon each person acting for the company in any capacity there devolved in virtue of his place in the corporate organization the obligation to continue in the performance of his accustomed duties in behalf of the new head and subject to his control, but as a part of the original administrative machinery.

Moreover, the statute involved in the Chilletti Case authorized service to be made upon the "agent to sell tickets or station keeper" of any railroad company which had failed to designate a person upon whom service might be made. Gen. Stat. 1915, § 6963 (Code Civ. Proc. § 72). Its obvious purpose was to enable service to be made under such circumstances upon the individual who was actually selling tickets or keeping a station for the company, qualifying him to receive it by virtue of that occupation. The statute under which service was made in the present case applies to corporations generally, and authorizes service in the absence of its president (or chief officer, by whatever name known) upon its "cashier, treasurer, secretary, clerk or managing agent." Gen. Stat. 1915, § 6961 (Code Civ. Proc. § 70). An alternative service is then provided if none of "the aforesaid officers" can be found; the "managing agent" being thereby characterized as an officer of the corporation. The term "managing agent" carries with it a suggestion of supervising those active business operations which would pass under the supervision and control of the government upon its assumption of possession, but there is no presumption that an officer of the corporation would thereby lose his official standing, although a mere employé might cease to be in any way its representative when his performance of services for it was discontinued.

In the affidavit in support of the motion attacking the service it was stated that at the time the copy of the summons was delivered to him Yager was not the managing agent of the defendant. This statement, however, must from the context be interpreted as a mere conclusion of law, an interpretation of the consequences deemed to follow from the President's proclamation. It is fairly to be assumed that if any other basis existed for challenging his capacity—for instance if the matter were affected by some subsequent order of the Postmaster General—the facts in that respect would have been specifically stated. We conclude that the motion to set aside the service was properly overruled.

[2] 2. The defendant asserts that in the light of the pleadings and special findings there was no evidence whatever that the injury complained of was due to any negligence on its part. The plaintiff gave testimony to this effect: She had been sent to a lavatory on the floor below that on which she was working to wash a pin tray, going down the elevator and through a hall, the floor of which was at this time perfectly dry. When she returned it had been mopped or scrubbed for about half its length by the janitor, who, however, was not at that moment in sight. The wet floor attracted her attention—she saw that it was wet, although it was hard to see, the lights not being on. A slimy substance, which looked like soap—which was soap or something used for the same purpose—was on the floor. She was very careful. She did the best she could to get across. Her feet slipped on the slimy substance, and she fell. She put out her hand and tried to catch herself, and it slipped on the same substance. There was a lot of it at that particular place.

Among other forms of negligence alleged in the petition was the failure to provide a safe place to work, a safe hallway; permitting the floor of the hallway to be made wet, slippery, and soapy at a time when she was required to use it; and putting an unnecessary amount of water and soap upon it. The jury returned an affirmative answer to the question whether the hallway was being scrubbed in the usual manner. They were asked, if they found the janitor was negligent in any respect, to state in what such negligence consisted. They answered: "In using too much water and solution, and in not drying the space as same was applied." The language used by the jury is, of course, to be given any reasonable interpretation of which it is capable that is consistent with the general verdict. The evidence which has been stated warranted a conclusion that the defendant was negligent in allowing the hallway, at a time when the plaintiff was required to use it, to be in an unsafe condition by reason of the presence of such an amount of soap and water as to make it very slippery— a condition which was unnecessary because it could have been avoided either by the use of a less quantity originally, or by causing the part of the floor to which the solution was applied to be dried before any one was required to use it—so that a dry and therefore safe passageway might have been kept open. We think it requires no undue liberality of construction to say that this is substantially what the jury meant, and that the negligence found is within that pleaded. The fact that the method pursued in cleaning the floor was that usually employed by the janitor or the

Digitized by Google

defendant would not conclusively establish that it was nonnegligent.

[3] 3. Complaint is made of an instruction concerning the burden of proof as to contributory negligence, on the ground that it was substantially similar to those which have been condemned as likely to be understood by the jury as meaning that such defense cannot be established by the plaintiff's own evidence. Railway Co. v. Merrill, 61 Kan. 671, 60 Pac. 819; note, 33 L. R. A. (N. S.) 1178. The instruction challenged read as follows:

"The burden of proof is on the defendant to prove, by the preponderance of the evidence substantially as alleged in its answer, that the plaintiff was guilty of negligence which directly contributed as a proximate cause to her injury, and also to prove that the plaintiff was injured as a result of the usual and ordinary risks incident to her employment."

Whatever tendency this language may have had to mislead the jury into supposing that they were not entitled to consider the plaintiff's evidence in determining whether she had been guilty of negligence contributory to her injury we think was corrected by the instruction by which it was immediately followed, which read:

"In determining the issues in the case, you will consider all the testimony in the case, as introduced by plaintiff or defendant." Railway Co. v. Dawson, 64 Kan. 99, 114, 67 Pac. 521; Railroad Co. v. Burgess, 72 Kan. 454, 83 Pac. 991.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, WEST, and MARSHALL, JJ., concurring.

PORTER and DAWSON, JJ., dissent from the part of the decision holding that the evidence was sufficient to warrant a finding that the plaintiff's injury was due to the negligence of the defendant.

BEDFORD v. ANDERSON, Judge.
(No. 3473.)

(Supreme Court of Utah. June 8, 1920.)

Infants ⇐19—Judgment committing minor to Industrial School, on erroneous finding that mother was unfit to have custody, reversed.

Where court found that a minor was guilty of acts charged, and was a delinquent, and also that minor's mother was unfit to have custody, and committed the minor to the State Industrial School, and it appears on appeal that the finding of unfitness of the mother was not sustained by the evidence, the judgment will be reversed, and the minor ordered released from the State Industrial School, and restored to the legal custody and control of the juvenile court, but in the actual custody of the mother, there to remain unless the court, on due notice and on competent and sufficient evidence, determines that she is unfit.

Appeal from Juvenile Court, Salt Lake County; Hugo V. Anderson, Judge.

Ernest Brown was found guilty of delinquency and committed to the State Industrial School by Hugo V. Anderson, as Judge of the Juvenile Court of Salt Lake County, and the mother of the delinquent, Mrs. Lola Hobson Bedford, appeals. Judgment reversed in part.

C. E. Norton, of Salt Lake City, for appellant.

Dan B. Shields, Atty. Gen., O. C. Dalby, James H. Wolfe, H. Van Dam, Jr., and D. M. Draper, Asst. Attys. Gen., for respondent.

WEBER, J. The juvenile court of Salt Lake county found Ernest Brown, a minor 13 years of age, to be guilty of delinquency, and committed him to the State Industrial School. His mother, Mrs. Lola Hobson Bedford, has appealed, and assigns as error that the finding of the court that the minor was guilty of the acts charged was not supported by evidence.

It would serve no useful purpose to review the evidence. It is sufficient to state that the evidence amply justified the court's conclusion as to the boy's guilt. The court also found the mother to be unfit to have the custody of her son. We agree with appellant's counsel that the second finding is not justified by the evidence. In fact, the record is wholly devoid of any competent evidence to sustain this finding.

It is therefore ordered and adjudged that the part of the judgment of the juvenile court, by which the said minor is committed to the State Industrial School be reversed; that said minor be forthwith released from the State Industrial School, and restored to the legal custody and control of the juvenile court of Salt Lake county, but in the actual custody of his mother, and that he remain in his mother's custody, unless the court, upon due notice, and upon competent and sufficient evidence, determines that she is an unfit person to have the custody of said minor.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

STEVENSON v. STEVENSON. (No. 3448.)

(Supreme Court of Utah. June 17, 1920.)

1. Husband and wife ⟸4—Separation did not absolve husband from duty to support.

The fact that the parties separated did not absolve the husband from his duty to support his wife, and did not justify refusal to help her during an illness.

2. Divorce ⟸31—Wife entitled for husband's willful refusal to support.

Where husband and wife separated by agreement, and thereafter the husband contributed nothing to the wife's support, even during an illness following an operation, the wife is entitled to divorce for the husband's willful and intentional neglect and refusal to support her.

3. Divorce ⟸31—Court may not arbitrarily refuse decree on statutory ground of nonsupport.

Where the evidence shows a settled purpose on the part of defendant husband not to support plaintiff wife, the court may not arbitrarily refuse to grant her a divorce; the cause being statutory.[1]

Appeal from District Court, Weber County; A. W. Agee, Judge.

Action for divorce by Mildred Stevenson against Harold Stevenson. From judgment dismissing the action, plaintiff appeals. Reversed, and cause remanded, with directions to enter decree for plaintiff.

John A. Sneddon, of Ogden, for appellant.
Chez & Barker, of Ogden, for respondent.

WEBER, J. Plaintiff brought this action against defendant for divorce on the ground of nonsupport. She appeals from a judgment dismissing the action.

The parties were married at Farmington, Utah, March 21, 1919. At the time of the trial, December 15, 1919, plaintiff was, and and for eight years prior thereto had been, a resident of Weber county. Respondent supported her until June 15, 1919, when he quit work. They continued to live together till July 3, 1919, but the husand did no work during the period between June 15 and July 3, and earned nothing during that time, although solicited by his former employers to re-enter their service. On the last-mentioned date it was agreed between the parties that she go to her mother's and he to his mother's home. He remained out of employment till July 10, contributing nothing to his wife's support. Appellant testified that she was sick during August, following an operation, that she talked with her husband about the operation and asked him for support at that time, but that he refused to contribute anything to her support or to assist her in any way. From July 10 to August 20, 1919, he worked for the Utah Central Railroad Company, but contributed nothing to plaintiff. He did not call upon her during her sickness, and at the time of the trial appellant did not know where he was, had not heard from him, and had received no support from him since the previous June. The plaintiff produced a witness who corroborated material parts of her testimony.

[1-3] The fact that the parties separated did not absolve the husband from the duty of supporting his wife, and did not justify him in refusing to help her during her illness. He was an able-bodied man, and the undisputed evidence is that he was employed from July 10 to August 20, 1919, and could have had employment during all of the time he was at Ogden. We think that, under the circumstances of this case and the evidence produced by her, appellant was entitled to a divorce. To the writer it seems clear from the evidence that the respondent had the ability to support his wife, and that he willfully and intentionally neglected and refused to support her. The statute provides that the marriage contract may be dissolved for various causes, among which is the "willful neglect of defendant to provide for plaintiff the common necessaries of life." When the evidence is sufficient to sustain the charge of willful nonsupport, and it is apparent from the evidence that it is the settled purpose of the husband not to support his wife, as in this case, the court may not arbitrarily refuse to grant a divorce. When the evidence clearly establishes a statutory ground of divorce, the spouse producing such proof is entitled to a divorce as a matter of right. Rasmussen v. Call, 188 Pac. 276.

Among the findings of fact is one to the effect that since July 3, 1919, plaintiff has refused to live with defendant as his wife. The record contains no evidence that sustains this finding.

For the reasons stated, the judgment of the lower court is reversed, and the cause is remanded, with directions to that court to set aside its findings of fact, conclusions of law, and decree, and to make findings of fact and conclusions of law in favor of plaintiff, and to render and enter a decree accordingly; respondent to pay costs.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Rasmussen v. Call, 188 Pac. 276.

Digitized by Google

STATE v. ODEKIRK. (No. 3436.)

(Supreme Court of Utah. June 9, 1920.)

1. Adultery ⟸14—May be proved by circumstantial evidence.

In a prosecution for adultery, the guilt of defendant may be established by circumstantial evidence without the testimony of any witness who saw the act, or admissions of the accused or his accomplice.

2. Adultery ⟸14—Evidence held sufficient to sustain conviction.

Circumstantial evidence that defendant, partially undressed, was in the room with a girl to whom he had previously shown undue attention and written amatory letters, at 2 a. m., *held* sufficient to sustain conviction for adultery, though the evidence as to those circumstances was contradicted.

Appeal from District Court, Duchesne County; A. S. Morgan, Judge.

George C. Odekirk was convicted of adultery, and he appeals. Affirmed.

Chas. De Moisy, of Vernal, and Fred L. Watrous, of Duchesne, for appellant.

Dan B. Shields, Atty. Gen., and O. C. Dalby, Jas. H. Wolfe, H. Van Dam, Jr., and D. M. Draper, Asst. Attys. Gen., for the State.

CORFMAN, C. J. Defendant was convicted of the crime of adultery. After a denial of his motion for a new trial he appeals. He complains that the evidence was insufficient to justify the verdict of the jury, and that the verdict was contrary to law.

The evidence upon which a conviction was based was wholly circumstantial. In substance, it tends to show that on February 8, 1919, the date upon which the alleged offense was charged in the information as having been committed, the defendant was a married man residing at the town of Duchesne, Duchesne county, Utah, where he had been engaged in the business of merchandising. He was also the lessee of the Duchesne Hotel at said place. The record is not clear as to whether he had anything to do with the actual management or the conducting of this hostelry. His wife and children resided elsewhere at Duchesne. Defendant's alleged paramour on the night of February 7–8, 1919, occupied room 24 at said hotel. Room 23, adjoining and connected by a door, was occupied by other guests at the hotel. Both of these rooms opened into hallways, the former to the south, the latter to the north. The defendant testified that he occupied room 22, across the north hallway to the east. Other witnesses testified that room 22 was occupied by one Burt on the night in question. Joseph E. Murray, the city marshal of Duchesne, testified that on February 8, at about 2 o'clock a. m., he, with a deputy, accompanied by the defendant's wife, went to the hotel and knocked upon the door of room 24. The knock was answered by a voice from within room 24, which voice he says he recognized as being that of the defendant, saying, "Who's there?" After two or three minutes waiting, the witness heard shuffling about the room, and then the rattling of the lock to the door leading from room 24 to room 23; that he then commanded the deputy to go to and watch the north hallway, which the deputy did. A moment later the defendant emerged from room 23, and appeared in the north hallway without a coat or hat; his shoes were untied, and he was buttoning his trousers. He was immediately placed under arrest and taken to the jail. Shortly after taking the defendant to jail the marshal forced the outside door of room 24, and the alleged paramour was found in the act of destroying letters testified to as being in the handwriting of the defendant. These letters were received in evidence, and they tend to show that the defendant was unduly enamored with the occupant of the room. There is also much evidence tending to show that on numerous occasions the defendant had been unduly attentive to the girl occupant of room 24. Defendant in his own behalf testified that he had not been in room 24 on the night in question; that when he stopped at the hotel he usually occupied room 10; that he had anticipated a search would be made for him that night, and for that reason he had gone to room 22 and retired to evade being found at the hotel by the officers and his wife; that he heard the disturbance made by the officers, had arisen, and passed out of room 22 into the north hallway to ascertain the cause, when he was met by the officers and placed under arrest. The occupant of room 24 also testified that the defendant had not been in her room, and that it was she who had called out, "Who's there?" in response to the marshal's knocking on her door.

There is no direct evidence in the record that an act of sexual intercourse was committed by the defendant, as charged in the information. As heretofore remarked, the evidence upon which a conviction was based is purely circumstantial.

The defendant contends:

"The essential element of the crime of adultery is in the act of sexual intercourse, and hence the corpus delicti must be proven. In order to support a conviction for adultery there must be present certain evidential features, to wit: (a) The direct testimony of a witness or witnesses who saw the perpetration of the act; (b) confessions or admissions of the defendant as to his guilt, sufficiently explicit as to the time and place charged; (c) circumstantial evidence of the commission of the act of sexual

Digitized by Google

intercourse which clearly and unmistakably points to the guilt of the defendant; or (d) the testimony of an accomplice supported by independent corroboratory testimony."

[1] No witness testified to seeing the act complained of, the defendant made no admission or confession, and the alleged paramour, as well as the defendant, denied its commission. However we do not understand that counsel for the defendant makes the contention that all of these features must combine in order to prove the commission of a crime of this nature, but merely that the evidence upon which the state relies must give rise to more than mere conjecture or suspicion that the crime was committed. In other words, defendant contends that there must be something more proven than mere opportunity or suggestive circumstances in order to establish the offense. Such may be conceded, and yet in this class of cases, from the very nature of the crime, no conviction could be had in a great many cases unless the commission of the crime may be established by proof of the attending circumstances. The general rule is aptly stated in 2 C. J. at page 22, to be "that the crime may be sufficiently established by proof of circumstances from which the jury may reasonably infer the guilt of defendant."

[2] We are not prepared to say, under all the circumstances disclosed by the evidence in the record now under consideration, that the jury might not reasonably infer the guilt of the defendant. It would, in our opinion, be a very difficult matter indeed for fair-minded men to say that a married man with eight children, who admittedly is seen in company with a young woman on numerous occasions, writes her letters of endearment, takes a room at the same hotel where she is stopping, sleeps there away from his family without excuse for doing so, and is found emerging from her room at 2 o'clock in the morning after becoming alarmed by the peace officers, when both are found partly disrobed, does not give rise to a just inference that an act of unlawful sexual relation had been committed. True it is that the evidence was oftentimes in conflict, but, nevertheless, it was the province of the jury, as the triers of the facts to determine its weight, as in other criminal proceedings.

We do not think upon the record before us the court below committed error in overruling defendant's motion for a new trial, nor in entering judgment against the defendant upon a finding of guilt by the jury.

It is therefore ordered that the judgment of the district court be affirmed.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

UKON WATER CO. v. ROOKER et al. (No. 3450.)

(Supreme Court of Utah. June 9, 1920.)

1. **Appeal and error ⇐511(3)—Orders extending time for bill of exceptions attached to judgment roll not considered.**

Orders attached to the judgment roll, extending the time in which to prepare and serve a proposed bill of exceptions, cannot be considered in determining the jurisdiction of the district court to settle the bill after the expiration of thirty days, under Comp. Laws 1917, § 6969, where such orders are nowhere found in the bill itself.[1]

2. **Appeal and error ⇐655(2)—Bill of exception, not shown to have been settled within time as extended, stricken.**

Under Comp. Laws 1917, § 6969, where action of the court in settling a bill of exceptions after the expiration of 30 days does not appear to have been taken within time extended by the court, the bill will be stricken on motion.

3. **Appeal and error ⇐555—Assignments depending upon exceptions not considered where bill stricken.**

Where errors assigned relate wholly to the admission of testimony and the giving and refusal of instructions, and such matters are only found in the bill of exceptions, the assignments cannot be considered, where the bill of exceptions has been stricken.

Appeal from District Court, Box Elder County; J. D. Call, Judge.

Action by the Ukon Water Company against Henry W. Rooker and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. J. Whitaker, of Salt Lake City, and Wm. J. Lowe, of Brigham City, for appellants.

Le Roy B. Young, of Brigham City, for respondent.

GIDEON, J. In this action plaintiff seeks to condemn for culinary and domestic purposes the waters from a certain spring belonging to defendants. The complaint was filed June 3, 1919. Defendants made separate answers. On the 15th day of October, 1919, a stipulation was entered into between counsel for the respective parties to the effect that the taking of the water in question by the plaintiff was a public necessity, and that the waters sought to be condemned are subject to condemnation.

Plaintiff (respondent) has filed a motion to strike the bill of exceptions from the record, on the ground that it appears "from the bill of exceptions as settled by the trial court

[1] Dayton v. Free, 46 Utah, 277, 148 Pac. 408; Thomas v. Blythe, 44 Utah, 1, 137 Pac. 396; Hutchinson v. Smart, 169 Pac. 166; Swanson v. Sims, 170 Pac. 774; Taylor v. Paloma, G. & S. Min. Co., 171 Pac. 147; Fisher v. Bonneville Hotel Co., 188 Pac. 856.

Digitized by Google

that said bill of exceptions was not prepared and served upon respondent within 30 days after the entry of judgment in said case, and that nowhere in said bill of exceptions is there any order signed by the court extending the time within which to prepare and serve said bill of exceptions."

The verdict of the jury assessing the compensation to be paid the defendants was returned into court on October 16, 1919, and a money judgment based upon the verdict was entered by the court. On October 28, 1919, the court made and entered its judgment that the use for which the water was taken was a public use, and on the same day a final decree of condemnation was made by the court.

The appellant's counsel served the proposed draft of the bill of exceptions on counsel for respondent on the 17th day of January, 1920. The court approved and settled the bill, as served, on the 4th day of February, 1920. It nowhere appears in the bill of exceptions that any order was made extending the time in which to prepare and serve the bill.

Comp. Laws Utah 1917, § 6969, relating to the preparation and settlement of bills of exception, provides as follows:

"When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within thirty days after the entry of judgment if the action were tried with a jury, or after service of notice of the entry of judgment if the action were tried without a jury, or after service of notice of the determination of a motion for a new trial, prepare a draft of a bill and serve the same, or a copy thereof, upon the adverse party."

[1, 2] There are other provisions in the Code by which the time for the preparation can be extended. There are three orders attached to the judgment roll extending the time in which to prepare and serve the proposed bill of exceptions, but such orders are nowhere found in the bill itself, and they are not part of the judgment roll. They cannot, therefore, be considered in determining the jurisdiction of the district court to settle the bill. Dayton v. Free, 46 Utah, 277, 148 Pac. 408; Hutchinson v. Smart, 169 Pac. 166; Thomas v. Blythe, 44 Utah, 1, 137 Pac. 396; Taylor v. Paloma G. & S. Min. Co., 171 Pac. 147; Swanson v. Sims, 170 Pac. 774; Fisher v. Bonneville Hotel Co., 188 Pac. 856. The foregoing authorities are conclusive of the question herein determined. The motion to strike the bill of exceptions must therefore be granted.

[3] The errors assigned relate wholly to the admission of certain testimony on the part of plaintiff, the giving of certain instructions, and the refusal of the court to instruct as requested by defendants. The objectionable testimony and the exceptions to the same are found only in the bill of exceptions. The same is true respecting the exceptions to the instructions given, and the refusal to give those requested by defendant. The bill of exceptions not being before the court, these assignments cannot be considered.

No contention is made that the pleadings do not support the judgment. The allegations of the complaint, if true, without doubt entitle the plaintiff to the relief sought.

The judgment must for the reason given, be affirmed. Such is the order. Respondent to recover costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

MANNING et al. v. DAY. (No. 3467.)

(Supreme Court of Utah. June 17, 1920.)

1. Vendor and purchaser ⟸3(4) — Contract held a sale and not an option.

Facts *held* to show that plaintiffs made a sale of their equity of redemption to defendant, and did not merely give defendant an option to purchase it.

2. Vendor and purchaser ⟸79—Condition on which price became payable held performed.

Where defendant agreed to pay the purchase price for plaintiffs' equity of redemption upon consummating sale thereof to a third party, *held*, that the sale to the third party was consummated, so as to make the price payable, when, after the period of redemption had expired, deed to the property to such third party was executed by the mortgagee, to whom a sheriff's deed had been executed, and the consideration therefor was received by defendant exactly as if he himself had executed the deed.

3. Courts ⟸163—Action for price held not to involve "title or possession of real property" ousting city court of jurisdiction.

In action for purchase price of real property, defendant's denial that he purchased plaintiffs' interest did not involve either the "title or possession of real property" in the sense in which these words are used in Comp. Laws 1917, § 1711, as to city courts' jurisdiction.[1]

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Title.]

Appeal from District Court, Salt Lake County; Wilson McCarthy, Judge.

Action by J. C. Manning and others against W. P. Day. From judgment for plaintiffs, defendant appeals. Affirmed.

Sonle & Spalding, of Salt Lake City, for appellant.

D. H. Wenger and J. E. Darmer, both of Salt Lake City, for respondents.

THURMAN, J. Plaintiffs' complaint in substance alleges that on the ——— day of

[1] O. S. L. R. Co. v. District Court, 30 Utah, 371, 85 Pac. 360.

Digitized by Google

May, 1918, plaintiffs and defendant entered into an agreement whereby plaintiffs sold and conveyed to defendant all their interest in certain real estate in Davis county for the sum of $250, to be paid whenever a sale of said property was consummated with one Orson F. Walton; that said sale to Walton was consummated on or about the 26th day of July, 1918, and said sum of $250 thereupon became due and payable; that defendant refuses to pay the same.

Defendant denies the complaint except as specifically admitted, and affirmatively alleges that at the time alleged in the complaint plaintiffs were the owners of a one-half interest in the property mentioned, but that at said time the property was subject to a first mortgage in favor of Zion's Savings Bank & Trust Company (hereinafter called the bank); that said mortgage had been foreclosed and the property sold at sheriff's sale to said bank; that on or about the 1st day of May, 1918, defendant procured an option from plaintiffs for their interest in said property for the sum of $250; that thereafter, on or about the 26th day of July, 1918, within the period covered by said option, a sheriff's deed to said property was issued to said bank, and that plaintiffs had no interest in said property of any kind or nature whatever; that thereafter said bank sold and conveyed said property to Walton for a valuable consideration.

The issues presented by the pleadings involve two questions only: (1) Was the transaction between plaintiffs and defendant a sale or an option? (2) Did the defendant consummate a sale of the property or was the sale of the property by the bank to Walton an independent transaction unconnected with the deal between defendant and Walton?

The court found the issues in favor of plaintiffs, and judgment for the amount sued for was entered. Defendant appeals.

[1, 2] It appears from the evidence that at the time of the transaction between plaintiffs and defendant the defendant was the owner and holder of a second mortgage on the premises in question for the sum of $1,525; that in order to protect his said mortgage and procure satisfaction of the indebtedness secured thereby he entered into negotiations with Walton for the sale of said property or the exchange thereof for money and certain real estate belonging to Walton in Salt Lake City. In pursuance of this purpose at the time mentioned in plaintiffs' complaint defendant and Walton called upon plaintiffs at Kaysville, Utah, and then and there in the presence of Walton plaintiffs and defendant entered into the transaction referred to in plaintiffs' complaint. A few days afterwards defendant and Walton entered into a formal agreement in writing to the effect that defendant would assign to Walton his said mortgage for the sum of $1,525, and also convey to him the Davis county property subject to a mortgage of $2,000 to be placed thereon. In consideration of these undertakings on the part of defendant, Walton was to pay defendant the sum of $1,000 and convey to him the said real estate in Salt Lake City. It was further agreed between them that each of said parties would place in escrow with O. P. Soule, as depositary, the following documents involved in said agreement: The defendant was to deposit his mortgage and note for $1,525 and his contract with the plaintiffs for the purchase of their interest in the Davis county property, and Walton was to deposit his check for $1,000, payable to defendant, and also a warranty deed to defendant for the Salt Lake property. It was also provided in said agreement that, if on or before the 10th day of August, 1918, defendant should deliver to Walton a good and sufficient warranty deed to the Davis county property with an abstract showing a clear and unincumbered title, subject only to a $2,000 mortgage as heretofore stated, then the said Soule should deliver to Walton the deed to the Davis county property and deliver to defendant the deed to the Salt Lake property and the check of Walton for $1,000. It was further provided that, if for any reason defendant was unable to convey title to Walton for the Davis county property on or before the said 10th day of August, 1918, said Soule should return to Walton his deed to defendant for the Salt Lake property, and his said check for $1,000, and should likewise return to defendant the documents deposited by him. The documents were deposited as provided in the agreement. In the meantime Walton had already entered into possession of the Davis county property.

It is contended by defendant, and there is some evidence to that effect, that the transaction between him and plaintiffs was only an option given to him by them to purchase the property within a certain time; that plaintiffs only owned an equity of redemption in one half of the property desired by Walton, and that one Leaker owned a similar equity in the other half; that it was understood between him and plaintiffs that, if he could purchase Leaker's interests, he would also purchase theirs; that for that reason the transaction was put in the form of an option; that he was unable to purchase Leaker's interest, except at an exorbitant price which he refused to pay; that thereafter the agreement between him and Walton failed; that he then withdrew the papers he had deposited in escrow. After that defendant saw Walton and told him they could close the deal on precisely the same basis as that provided for in their agreement, but that Walton would have to take the deed from the bank instead of from defendant himself.

Digitized by Google

It appears from the evidence that the period of redemption expired July 24, 1918, and a deed from the sheriff to the bank and from the bank to Walton were executed on July 26th, two days after the period of redemption expired. At the request of Walton Soule delivered to defendant the check for $1,000 which Walton had deposited with him, and also the deed for the Salt Lake property. The entire transaction, in substance, was carried out just as had been agreed to between Walton and defendant. The only difference was that the deed to Walton was made by the bank instead of the defendant. The consideration received by both the defendant and Walton was exactly the same as provided in the escrow agreement.

Walton testified that the terms of the agreement between him and defendant were complied with; that defendant and Soule were at the bank on the 26th of July when the deed was turned over to Walton, and the conditions of the deal were in accordance with the agreement between him and defendant.

The written agreement between plaintiffs and defendant was either lost or destroyed by defendant when he withdrew the papers from escrow, but the evidence as to its contents tended strongly to establish the fact that the transaction was a sale, and not an option. The evidence also in a most satisfactory manner establishes the fact that the sale of the Davis county property to Walton was consummated substantially in accordance with the very plan defendant had in mind when he entered into the agreement with plaintiffs by which he procured their equity of redemption. Plaintiffs parted with their equity in good faith, believing that the consideration would be paid when the property was conveyed to Walton. Immediately after the period of redemption had expired and plaintiffs' power to redeem was lost, the sale was consummated, but by a different method. The deed was executed by the bank instead of the defendant. Defendant then repudiated his agreement with plaintiffs and refused to pay the consideration on the flimsy pretext that he had not consummated a sale to Walton.

[3] What we have said, in effect, disposes of all the assignments except one which we will briefly consider. This case was originally commenced in the city court of Salt Lake City. In that court a judgment of nonsuit was entered, and plaintiffs appealed to the district court. In the district court defendant raised the question of jurisdiction on the grounds that the action involved the title or possession of real property. In support of his contention defendant invokes Comp. Laws 1917, § 1711, which in part reads:

"The parties to an action in a city court cannot give evidence upon any questions which involve the title or possession of real property."

In the case at bar neither the title nor possession of real estate is involved. The defendant's denial that he purchased plaintiffs' interest does not involve either the title or possession of real property in the sense in which those words are used in the statute.

Without further comment we are of the opinion that the question here presented is controlled by the case of O. S. L. R. Co. v. District Court, 30 Utah, 371, 85 Pac. 360, cited by respondent. Appellant relies on numerous cases cited in his brief, none of which, in the opinion of the court, are sufficiently pertinent to justify special reference.

The judgment of the district court is affirmed at appellant's costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

STAHELI v. ADAMS et al. (No. 3438.)

(Supreme Court of Utah. June 9, 1920.)

1. Bills and notes ⟹539—On awarding attorney's fee in action on note, court should find what constitutes reasonable fee.

In action on note providing for attorney's fees, the court, in order to support a judgment awarding fees, should make a finding designating what amount would constitute a reasonable fee in the particular case.

2. Bills and notes ⟹471—Plaintiff suing on note providing for attorney's fees should plead and prove what is reasonable fee.

In action on note providing for payment of attorney's fees, the desirable procedure is for plaintiff to plead the amount claimed to be a reasonable fee, and to offer proof in support thereof.

3. Trial ⟹396(4)—Finding as to value of property in absence of any allegation or evidence as to value held reversible error.

In seller's action on buyer's note after seller had become repossessed of the property under contract providing that, if seller retakes possession of the property, the value thereof at time of repossession should be credited upon the note, court's finding as to the value of the property at the time that seller took possession *held* reversible error, where there was no allegation or evidence as to value of goods at such time.

4. Continuance ⟹20(1)—Plaintiff's counsel and court justified in relying on notice given defendant's counsel prior to withdrawal by counsel in accordance with statutory method.

Where counsel who filed answer for defendants attempted to withdraw from the case before the day set for trial, but did not give the notice or have the minute entry made of his withdrawal as required by Comp. Laws 1917, § 328, the court did not err in proceeding with the trial on the day for which it was set, in absence of the defendants and their attorneys,

Digitized by Google

since the plaintiff's counsel and the court were justified in relying upon the notice given the attorney for the defendants until such time as he had withdrawn from the case as provided by the statute.

5. Sales ⊂=353(8)—Complaint in seller's action on buyer's note held defective in not stating amount due thereon.

In seller's action on buyer's note after seller had retaken possession of the property under contract providing that in the event of seller repossessing himself of the property the value of property at such time should be credited on note, complaint, not alleging value of property at time of repossession by seller, *held* defective.

Appeal from District Court, Washington County; Joshua Greenwood, Judge.

Action by Frank Staheli against T. M. Adams and others. Judgment for plaintiff, and defendants appeal. Remanded for new trial, with directions.

O. A. Murdock, of Beaver, for appellants.

Chas. G. G. Higgins, of St. George, and Wm. Higgins, of Fillmore, for respondent.

GIDEON, J. The principal questions presented on this appeal are: (1) Does the complaint state a cause of action; (2) do the findings support the judgment; and (3) are the findings supported by the evidence?

The action was instituted to recover a money judgment upon a title-retaining note, given to the plaintiff by defendant in consideration of the sale of a threshing machine and a steam engine. The note or contract is set out in full in the complaint. It provides for the payment of $1,300 in three annual installments, payment to be made one-half in marketable wheat and one-half in oats, delivered at the market price prevailing at the time of delivery. Among other things, it is provided that if the note be not paid at maturity the rate of interest should be increased, and upon failure to pay the first installment as provided in the note the holder of the same, at his option, could declare the entire amount of the note due without notice. It is also provided that upon failure to perform the conditions of the note the plaintiff could repossess the property, sell the same with or without notice, and apply the proceeds, less costs and expenses on the note, or might, without sale, indorse the value of the property so taken on the note and defendants undertook to pay any balance due after such indorsement. There is an indorsement on the back of the note, dated one year after its execution, in which it is stated that the signers had failed to make the first payment, that the owner had declared the entire amount due, had taken possession of the machinery described in the note, and had allowed the signers the sum of $400 as part payment on the same. The complaint further alleges that no part of the price mentioned in the note had been paid, except the sum of $400, by return of the machinery. In the prayer of the complaint plaintiff asked judgment for the balance due on the note, with interest, $100 attorney's fee, and costs.

To that complaint a general demurrer that it did not state facts sufficient to constitute a cause of action was interposed, also that it was uncertain and ambiguous. The demurrer was overruled. Subsequently an answer was filed in which the execution of the note is admitted, but it is alleged as an affirmative defense that at the date plaintiff repossessed the property an agreement was made between him and the defendants, whereby it was agreed that in consideration of the return of the property plaintiff accepted it in full satisfaction of any amount due upon the note, and that he would cancel and deliver the note to defendants. Subsequently, trial was had at which defendants were not present either in person or by counsel.

The court, among other things, found that the plaintiff, with the consent of defendants, repossessed the property and indorsed on the note the sum of $400, but also found that he should have indorsed thereon the sum of $600. An additional finding was made that the wear and tear on the property during the time defendants had possession of it amounted to the sum of $500. There was also a finding respecting some expense incurred by plaintiff in repairing the property after repossessing it. As conclusions of law, plaintiff was found to be entitled to judgment against the defendants for the sum of $700, $200 interest, and $100 attorneys fee.

[1, 2] The errors assigned relate to the order sustaining the demurrer; that there is no evidence in the record to support the court's findings as to the amount to be credited on the note; that there is neither allegations in the complaint as to what would constitute a reasonable attorney's fee nor finding or testimony in the record to support the judgment granting plaintiff $100 attorney's fee. The only reference to attorney's fees in the complaint is that contained in the body of the note, which is copied in full in the complaint. There was no testimony, offered or received as to what would constitute a reasonable attorney's fee, neither is there any finding by the court as to what amount would be a reasonable fee. We do not determine, neither do we wish to be understood as holding, that a complaint such as we have here would not support a judgment for reasonable attorney's fees, nor that the court could not from its own knowledge or information make a finding upon that subject without testimony, under certain circumstances. We do hold, however, that in order to support a judgment the court should make a finding designating what amount would constitute a

Digitized by Google

reasonable fee in the particular case. The more desirable procedure would be to make an allegation in the complaint as to the amount claimed to be a reasonable fee, and to offer proof in support of that.

There is no allegation in the complaint as to the value of the property on the date it was retaken, and for aught that may appear therein, or in the court's findings, the value may have been the same the date the property was repossessed as it was at the time when it was sold.

[3] In the defendants' answer, in addition to the allegations that an agreement was made at the time the property was repossessed that the debt should be canceled, there are other allegations that the defendants repaired the property, spent considerable money on such repairs, and that the reasonable value of the property at the time it was repossessed was greater than when sold by plaintiff to defendants. There was some testimony concerning the cost incurred in recovering the property, also the cost of repairing it, and the wear and tear of the property during the time it was in the possession of defendants. The testimony relating to the repairs and to depreciation by use might have been material as assisting the court in arriving at the value of the property at the date of its return, but it was not otherwise material. Under the contract, plaintiff was entitled to have credited upon the note the value of the property when repossessed. There is a total absence in the record of any testimony bearing directly on that point. It must be concluded, therefore, that that finding is not supported by the testimony, and that defendants were prejudiced thereby.

[4] Some complaint is made that the court should not have proceeded with the trial in the absence of the defendants or their attorney. It appears that counsel who filed the answer for defendants had attempted to withdraw from the case before the day set for trial, but did not give the notice or have the minute entry made of his withdrawal, as required by Comp. Laws Utah 1917, § 328. We are of the opinion that plaintiff's counsel and the court were justified in relying upon the notice given the attorney for defendants until such time as he had withdrawn from the case as provided by the statute.

[5] The complaint, in our opinion, is defective. The findings do not seem to be supported in toto by the testimony; neither do the findings support the judgment.

The plaintiff, upon failure of defendants to make the initial payment, was within his rights in repossessing the property. It was his duty, however, to credit the value of the property upon the note if he exercised the option of so doing without sale. The important question, therefore, for the court to determine, if it found that the contract of accord and satisfaction was not made at the time of redelivery of the property, was to determine the value of the property at the date it was retaken.

The entire record is unsatisfactory, and indicates that the defendants, through no fault of plaintiff's counsel or the court, have not had their day in court. The plaintiff cannot be prejudiced in any way by a reexamination of the issues and a trial upon the merits when both parties are represented in court, if they desire to be represented. The district court, from its remarks in overruling the motion for a new trial, evidently felt that the defendants had not had their contention presented, but as the case had been heard and determined by his predecessor he did not feel justified in ordering a new trial.

The cause is therefore remanded to the district court, with directions to grant a new trial, plaintiff to be permitted to amend the complaint, if he so elects, in accordance with the views herein expressed. Neither party to recover costs on this appeal.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

In re JONES' ESTATE. (No. 3427.)

(Supreme Court of Utah. June 9, 1920.)

1. Appeal and error ⇐⇒77(2)—No appeal from order appointing special administrator, not being "final judgment."

No appeal will lie from an order appointing a special administrator of the estate of a decedent; such an order not being a "final judgment," under Const. art. 8, § 9, and Comp. Laws 1917, §§ 6990, 7606.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. Appeal and error ⇐⇒1—Right of appeal statutory.

The right of appeal does not exist unless given by constitutional or statutory authority, expressed or necessarily implied.[1]

Appeal from District Court, Box Elder County; J. D. Call, Judge.

In the matter of the estate of William H. Jones, deceased. From an order appointing John M. Jones as special administrator, Alice H. Rosenbaum appeals. Appeal dismissed.

B. H. Jones, of Brigham City, for appellant.

Le Roy B. Young, of Brigham City, for respondent.

[1] Golding v. Jennings, 1 Utah, 135; Benson v. Anderson, 9 Utah, 154, 33 Pac. 691.

Digitized by Google

CORFMAN, C. J. William H. Jones, a resident of Box Elder county, Utah, died at Salt Lake City, May 6, 1918, possessed of certain real and personal property situated in said Box Elder county. He left surviving him certain brothers and sisters, all of lawful age. June 3, 1918, B. H. Jones, one of the brothers of said William H. Jones, deceased, filed in the district court of Box Elder county a certain document purporting to be the last will and testament of said William H. Jones, deceased. At the same time a petition was filed, asking that the will be admitted to probate in said court. Before hearing on the petition of said B. H. Jones for the admission of said will to probate, to wit, May 27, 1919, certain heirs of decedent and parties interested in the said estate filed in said court their petition for the appointment of a special administrator of said estate. Said petition was granted, and an order made and entered by said court on June 2, 1919, appointing one John M. Jones, a brother of deceased, as special administrator of said estate, with the usual statutory powers of preserving the same. Said special administrator duly qualified. Other proceedings were had before said court concerning the matters of said estate, not material nor necessary to relate here.

An appeal was taken to this court from the said order appointing a special administrator by filing the usual notice thereof in said district court November 28, 1919, by Alice H. Rosenbaum, one of the sisters of said deceased and one of the legatees named in the alleged will.

The special administrator appears as respondent, and objects to the right of appellant to be heard on the merits, setting forth, not only many alleged irregularities and failures to comply with our statutes governing appellate procedure, but particularly challenging the appellant's right to be heard on the ground that the order of the district court appointing a special administrator of the estate of said decedent was not a final judgment nor an appealable order.

We think the position taken by respondent is well founded. Section 9 of article 8 of our state Constitution, with reference to appeals from the district courts, provides, among other things:

"Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law."

Comp. Laws Utah 1917, § 6990, provides:

"From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. * * * Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship."

Comp. Laws Utah 1917, § 7606, provides:

"When there is delay in granting letters testamentary or of administration from any cause * * * the court must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate."

[1, 2] No express provision is made in our Code of Civil Procedure giving a right of appeal from an order appointing a special administrator, nor do we think any such right was intended or may be reasonably implied from the reading of the foregoing constitutional or statutory provisions. The right of appeal does not exist unless given by constitutional or statutory authority, expressed or necessarily implied. Woerner, Am. Law of Adm. (2d Ed.) § 543, p. 1192; Golding v. Jennings, 1 Utah, 135; Benson v. Anderson, 9 Utah, 154, 33 Pac. 691; In re Carpenter, 73 Cal. 203, 14 Pac. 677. The order here appealed from was not a final order or decree. The order was not determinative of any of the rights of the parties before the district court. The very purpose of section 7606, supra, was to provide the means whereby the property belonging to the estates of decedents might be preserved while proceedings are pending for the appointment of an administrative officer by the court having jurisdiction of the estate. To hold otherwise than that no appeal lies from such an appointive order would nullify and render ineffective the manifest intent and purpose of the Legislature by its enactment.

It is therefore ordered that the appeal be dismissed.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

Digitized by Google

GOLDEN v. MITCHELL, District Court Judge. (No. 22932.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Judges ⟸25(2) — Powers of judge pro tempore substituting for retiring judge terminated on qualification of his successor.

When a district judge resigns and his successor has been appointed and has qualified, the judicial powers of a judge pro tempore who has served as a substitute for the retiring judge are terminated, and he has no further authority to act except by agreement of parties or by general acquiescence.

2. Judges ⟸25(2)—Verbal request by district judge that one continue to serve as judge pro tempore conferred no judicial powers.

A request by telephone, made by a newly appointed district judge, that a person who served as judge pro tempore for his retiring predecessor continue to act as judge pro tempore for a short time, conferred no authority upon the person who assumed to exercise judicial powers because of such request.

3. Constitutional law ⟸75 — Judicial powers and duties cannot be delegated.

Except as defined and limited by law, judicial powers and duties cannot be delegated. They must be personally discharged by the lawful holder of the judicial office.

4. Officers ⟸39—One assuming to exercise official powers does not become an "officer de facto" if authority is promptly challenged.

A person who assumes without authority to exercise official powers does not become an officer de facto if his authority to exercise such powers is promptly challenged.

5. Mandamus ⟸31—Writ will compel district judge to exercise jurisdiction on a motion for a new trial.

Where a district judge declines to hear, consider, and determine a motion for a new trial on the mistaken ground that he was altogether without jurisdiction to do so, mandamus is a proper remedy, and a writ will issue at the instance of the party aggrieved thereby.

Original mandamus by L. A. Golden against W. R. Mitchell, as Judge of the District Court of Smith County, Kan. Writ granted.

F. W. Mahin, of Smith Center, and Fred Robertson, of Kansas City, for plaintiff.

Turner & Stanley, of Mankato, and Relihan & Relihan, of Smith Center, for defendant.

DAWSON, J. The plaintiff asks for a writ of mandamus directing the recently appointed judge of the Fifteenth judicial district to hear, consider, and determine on its merits the plaintiff's motion for a new trial in a case which was tried prior to defendant's appointment.

During the year 1919, the regular district judge, Hon. R. M. Pickler, who had presided for many years in that district (Smith & other counties), suffered from impaired health, and some time late in that year, Charles L. Kagey, Esq., a Beloit lawyer, was elected judge pro tempore in Smith county. Some time in December, a case entitled L. A. Golden v. C. P. Curtis came on for trial before Kagey as judge pro tem. On December 31, 1919, the jury returned a verdict for Curtis. Meantime, Judge Pickler had sent his resignation as district judge to the Governor, and on January 1, 1920, the Governor appointed the present defendant, Hon. W. R. Mitchell, as Judge Pickler's successor, and Judge Mitchell took the oath of office and qualified the same day.

Within due time Golden filed his motion for a new trial, and when court convened in Smith county on January 5, 1920, the new judge failed to appear on account of sickness; and, under supervision of the clerk of the court, the members of the bar set about the selection of a judge pro tem. About the same time, C. L. Kagey, who had served as judge pro tem. for Judge Pickler, took the bench and assumed to hold court, to which assumption Golden's attorneys promptly and vigorously objected. They also informed Kagey that an application had been filed with the clerk requesting the election of a judge pro tem. to act in the absence of Judge Mitchell.

To justify his continued exercise of judicial functions, Kagey said:

"The court will say that it was his intention to adjourn court sine die on December 31, 1919, but on the afternoon of said day Hon. W. R. Mitchell, the duly appointed judge of this district, called the judge pro tem. on the telephone and stated to him that it was his desire that the judge pro tem. should not adjourn court, sine die, but should adjourn it subject to call, as he, the district judge, appointed, was unable on account of physical disability to go to Smith Center to hold court, and said district judge requested the judge pro tem. as a favor to him, to hold court one day this week if possible, for the purpose of hearing and determining any motions for new trials or other unfinished matters, and although such an arrangement was inconvenient for the judge pro tem., he consented to do so, and on the evening of December 31, 1919, he adjourned the district court of Smith county, Kan., subject to call, and informed all of the attorneys interested that court would probably sit the following Monday, that is on January 5, 1920, for the purpose of closing up all unfinished business."

As counsel for Golden persisted in their objection to Kagey's exercise of judicial powers and insisted on the selection of a judge pro tem. as a substitute for Judge Mitchell, Kagey caused a record to be made that the motion for a new trial in Golden v. Curtis was overruled "for want of prosecution."

Counsel for Golden:

Digitized by Google

"We ask that the record show that it wasn't for want of prosecution, but because the question was raised as to the jurisdiction of the court, and that the attorneys refused to present the motions on account of such authority being questioned."

Thereupon the following dialogue occurred:

"C. L. Kagey: The record will show, Mr. Mahin, that the court requested you to take up these motions and that you refused to do so, and the court thereupon proceeded to overrule them.

"W. E. Mahin: We wish the record to show the truth.

"C. L. Kagey: The record shows the truth.

"C. L. Kagey: There being no other business, the court thereupon adjourned sine die."

By the time these incidents had transpired, a member of the local bar had been elected judge pro tem.; and he took the bench, and continued for 30 days the motion for a new trial in Golden v. Curtis, and made some further orders not here pertinent.

On February 6, 1920, upon notice to Curtis, Golden presented to Judge W. R. Mitchell, at chambers, his motion for a new trial. Judge Mitchell declined to hear the motion, declined to consider it, and declined to rule on it, on the ground that "he considered himself without jurisdiction in the premises one way or the other."

Hence this lawsuit.

An alternative writ being issued by this court, the defendant moves that it be quashed—

"For the reason that all of the alleged grievances contained in the motion for said alternative writ and the writ itself, shows: That each and all of said orders and matters and that the order made by the judge at chambers on the 6th day of February, 1920, are orders that in their nature are final and for which the remedy, if any, is by appeal."

[1] This motion to quash the writ must be denied. Mr. Kagey was selected judge pro tem. as a substitute for Judge R. M. Pickler. When Judge Pickler resigned and the Governor had accepted his resignation and had appointed Mitchell as his successor and when the latter had been sworn in as the new district judge, Kagey's pro tempore judgeship expired. He was a substitute for Judge Pickler. Keys v. Keys, 83 Kan. 92, 95, 109 Pac. 985. When Judge Pickler retired from office, there could be no official substitute for him, and no excuse for a substitute. Cox v. State, 30 Kan. 202, 2 Pac. 155; 23 Cyc. 506. The new judge was in full charge of the judicial business of the district court of Smith county. If the new judge found it inconvenient or impossible to be present to discharge his judicial functions, the matter of a judge pro tempore might have been arranged by agreement of counsel (State v. Keehn, 85 Kan. 765, 118 Pac. 851; Bank v. Courter, 97 Kan. 178, 183, 155 Pac. 27), or by formal compliance with the provisions of law for the selection of a judge pro tempore.

[2, 3] It hardly needs to be declared that the telephone conversation between Judge Mitchell and C. L. Kagey conferred no judicial powers on the latter. A judge is not one of those fortunate public officials who can deputize another person to perform his official duties for him. In re Millington, 24 Kan. 214, 224. Sometimes his judicial burdens may be lightened by agreement of counsel that another lawyer or judge may sit for him, sometimes by the selection of a judge pro tempore in accordance with the statutes, and sometimes by reference of certain matters to a referee, all of which must also be done in conformity with the statute. But aside from such exceptions, a judge's powers and duties cannot be delegated. Throop on Public Officers, §§ 569, 570.

[4] If an occupant of a judicial office, as in other cases, be permitted to occupy such office for some considerable time, without serious question, such occupant of the judicial office may become a de facto judge (23 Cyc. 619) until the state or some person having a lawful right to the office sees fit to challenge his authority. That is not out of any regard for the usurping occupant, but for the protection of the public who deal with him as a lawful functionary. Throop on Public Officers, §§ 622–628; Mechem's Public Offices and Officers, §§ 315–321. But where the illegal assumption of official powers is promptly challenged, as was done by Golden, the rule as to de facto officers does not apply.

[5] Next as to plaintiff's right to redress by mandamus: It is usually the case that an erroneous ruling of a trial court or judge can be adequately redressed and corrected by appeal; but in a case like this, where the aggrieved party cannot have an unrestricted appeal, as the statute permits, until he has sincerely urged his motion for a new trial before a lawful trial court or judge, and until a lawful and binding ruling has been obtained thereon, there seems to be no other adequate redress than that accorded by mandamus. In the Bleakley Case, where the trial court had refused to act on a motion for a new trial, as a sort of disciplinary measure against Mrs. Bleakley for taking and keeping her "incubator" baby outside the trial court's jurisdiction, this court held that it was "the duty of the court below to rule upon the motion for a new trial by either granting or denying it." Bleakley v. Smart, 74 Kan. 476, 486, 87 Pac. 76, 80 (11 Ann. Cas. 125).

See, also, Munkers v. Watson, 9 Kan. 668; Duffitt & Ramsey v. Crozier, Judge, 30 Kan. 150, 1 Pac. 69; State ex rel. v. Webb, Judge, 34 Kan. 710, 9 Pac. 770; Bird v. Gilbert, 40 Kan. 469, 19 Pac. 924; City of Emporia v. Randolph, 56 Kan. 117, 42 Pac. 376; note in 4 A. L. R. 582.

Digitized by Google

While a failure to procure a ruling on a motion for a new trial is not altogether fatal, it does greatly restrict the scope of the appellate review. Tacha v. Railway Co., 97 Kan. 571, 155 Pac. 922; Lasnier v. Martin, 102 Kan. 551, 171 Pac. 645.

The action of Kagey was void; the plaintiff is entitled to have full judicial consideration of his motion for a new trial and to a ruling thereon. It follows that the writ of mandamus should be allowed.

All the Justices concurring.

McARTHUR et al. v. INDEPENDENT TORPEDO CO. (No. 22544.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸1064(1), 1067—In action for destruction of oil well, instructions given and refused on damages held not prejudicial.

The evidence considered in an action for damages for destruction of an oil well by explosion of a shell of nitroglycerin while it was being lowered into the well by the shooter, and *held*, the defendant was not prejudiced by refusal of an instruction that the measure of damages was the cost of drilling another well, and by giving an instruction under which the jury allowed damages equivalent to the cost of drilling the destroyed well and expenses incurred in trying to save it after the explosion.

2. Evidence ⟸506 — Explosives ⟸10 — Trial ⟸194(15)—Expert testimony held not to invade province of jury; demurrer to evidence as to negligence in destroying oil well held properly overruled; instruction held not to invade province of jury.

The proceedings examined, and *held*, a demurrer to plaintiffs' evidence was properly overruled; certain witnesses were qualified to give expert testimony; their testimony did not invade the province of the jury; and an instruction which told the jury certain facts, if found, constituted negligence, did not invade the province of the jury.

Appeal from District Court, Montgomery County.

Suit by J. A. McArthur and another against the Independent Torpedo Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

G. C. Spillers, of Tulsa, Okl., and Banks & O'Brien, of Independence, for appellant.

Chas. D. Welch, of Coffeyville, for appellees.

BURCH, J. The action was one for damages for destruction of an oil well by explosion of a shell of nitroglycerin while it was being lowered into the well. The plaintiffs recovered, and the defendant appeals.

[2] The principal charge of negligence was that the shell containing nitroglycerin was lowered with too great rapidity, and that its descent was suddenly arrested by undue application of the brake, producing a violent jerk, which caused the explosion. The principal assignment of error is that a demurrer to the evidence was overruled.

The evidence was conflicting with respect to every material matter except one. There was no dispute that to allow a shell to descend rapidly and then to make a sudden application of the brake was bad practice, was liable to cause an explosion, and was dangerous. There was abundant evidence that the shell was lowered at a greatly excessive rate of speed. Its speed was compared with the speed of the bailer when in use. The bailer is allowed to go down as fast as it will, at full speed, which will cause the crank on the reel to spin. In this instance, when the explosion occurred the crank was spinning with such rapidity that it appeared to experienced men who were present to have gotten beyond control. In lowering a shell of nitroglycerin the crank ought not to turn faster than the hand can follow it. There was abundant proof that just before the explosion the shooter who was lowering the shell set the brake suddenly, and so tight that after the explosion extra effort was required to release it. This phase of the case was covered by two findings, which read as follows:

"Q. (4) Do you find that the shooter, just prior to said explosion, set the brake so as to stop the shell containing nitroglycerine with a sudden jerk?

"A. Yes.

"Q. (6) Do you find that immediately after said explosion the brake which controlled the reel which contained the line attached to said shell was found to be tightly set?

"A. Yes."

The explosion occurred at a depth of 290 feet. One of the defendant's experts testified that if a 20-quart shell (the size of the one in question) were permitted to descend by its own weight it would be dangerous from the time it attained speed, which would probably be within 20 feet. Nitroglycerin is a dangerous agency, which must be handled with the utmost care. Concussion will explode it, and sudden application of the brake to the reel when a shell is descending rapidly might cause an explosion. The result is an adequate cause of the explosion proceeding from negligent conduct of the defendant was established, and it was within the province of the jury to draw the inference expressed by the verdict. Railway Co. v. Wood, 66 Kan. 613, 72 Pac. 215.

[1] It is said that two witnesses for the

Digitized by Google

plaintiffs were not qualified to give expert testimony, and that their testimony invaded the province of the jury. The witnesses were fully qualified, and the testimony which it is claimed invaded the province of the jury related to the one subject which has been referred to, about which there was no disagreement.

It is said the court invaded the province of the jury in respect to the same subject by instructing the jury that if they found the explosion was caused by excessive speed in lowering the shell, and sudden application of the brake whereby the shell was stopped with a violent jerk, the defendant was negligent. Whenever there is no room for divergent estimates to be placed on conduct, the law makes the estimate. This rule is too well established to need fortification by citation of authority. Here the jury was allowed to find whether or not the facts existed on which the court predicated negligence, but there was no difference of opinion among the men who knew, and there could be no difference of opinion among reasonable men, with reference to the quality of the defendant's conduct, if the explosion occurred from the cause indicated.

The defendant requested the court to instruct the jury that the measure of damages was the cost of drilling another well beside the one which was destroyed. The request was denied, and the court instructed the jury as follows:

"If you find for the plaintiffs herein, then it will be your duty to assess the plaintiffs' damages, and in this connection you are instructed that plaintiffs would be entitled to recover all of the damages which you find from the evidence they suffered as the proximate result of said premature explosion, and if you find that said well and casing therein were destroyed, then plaintiffs would be entitled to recover the value of said well and casing as it was prior to said explosion; and if you further find from the evidence that the plaintiffs acted as reasonably prudent men in endeavoring to save said well, and in so doing expended money and incurred expenses, then plaintiffs would be entitled to recover for such reasonable expense as you find they so expended in endeavoring to save said well."

The argument in support of the requested instruction rests on the assumption, stated in the brief, that the oil-bearing sand was not affected by the explosion, and that another well of the same depth would make the plaintiffs whole. The evidence was to the contrary. Salt water was encountered above the 200-foot level and in several other places. The plaintiffs were not able to case off the salt water after the explosion and prevent it from reaching the oil. However this may be, the plaintiffs were not awarded the value of the well, which according to the evidence was a five-barrel well, and worth $1,500 per barrel. The well cost $3,000. The defendant did not contest the amount, and it was fair evidence of what another well would cost. The plaintiffs spent some $900 in trying to save the well. The defendants did not contest the amount, which constituted a proper item of damages. See cases cited, 8 R. C. L. 450, § 21. Credit was given the defendant for the value of some salvage, amounting to $47.50. The verdict was for $3,500, and consequently the defendant has no reason to complain of the manner in which the subject of damages was submitted to the jury.

The defendant's employé in charge of the work testified that he took all proper precaution in lowering the charge of nitroglycerin into the well. He said he kept his hand on the brake, which was set just enough to allow the shell to pull itself slowly down the hole, and he was in absolute control all the time. While the shell was going down nicely he felt the jar of the explosion, automatically set the brake, and got away. Several other witnesses who were present when the explosion occurred contradicted him at every vital point. The jury accepted their testimony, and liability of the defendant followed as a matter of course.

The judgment of the district court is affirmed.

All the Justices concurring.

ROBERTSON et al. v. WANGLER et al.
(No. 22516.)

(Supreme Court of Kansas. June 5, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⟸1050(1)—Admission of evidence in ejectment held not prejudicial.

A ruling admitting evidence is *held* to have been nonprejudicial.

2. Witnesses ⟸178(3)—Incompetency to testify to transactions with decedent held waived by cross-examination.

The rule that the statute relating to the incompetence of a party under certain circumstances to testify concerning transactions with a person since deceased may be waived by the adverse party examining him as to a part of the transaction involved is applied in this situation: A party testified in his own behalf that he had seen a deed (under which he claimed) delivered by the grantor (his grandmother) to the grantee (his mother). On cross-examination it was brought out that just before the delivery he had gone to the grantor's house, found the deed, and brought it to her. It is *held* that, on cross-examination, he was properly permitted to testify, further, that the grantor had told him where the deed was and sent him to get it.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

3. Witnesses ⊂=160(2)—Witness held not so connected with transaction between decedent and another as to exclude his testimony.

In the circumstances above stated it is *held* that the witness' getting the deed for his grandmother and her delivering it to his mother are not so connected as to cause the delivery to be regarded as a transaction to which he was a party, and therefore to render him incompetent to testify concerning it; nor is his testimony to be rejected on the theory that its admission would be a violation of the spirit of the statute.

4. Evidence ⊂=230(1) — Grantor's declarations as to title held not admissible because of possession of land.

Testimony of unsworn declarations is *held* not to have been of such a nature as to be rendered admissible because of the speaker being in the possession of the land in controversy.

5. Appeal and error ⊂=1068(1, 5)—Ruling on instructions held not erroneous in view of verdict.

Rulings in the giving and refusing of instructions are *held* not to warrant a reversal.

6. Jury ⊂=31(6)—Failure of part of defendants to file pleadings held not to result in denial of jury trial as to other defendants.

The fact that some of the defendants whose interests were identical with the plaintiffs omitted to file pleadings is *held* not to have resulted in a denial to the appellants of their right to a trial by jury with respect to their controversy with them.

7. New trial ⊂=99 — Newly discovered evidence held not to require new trial.

The newly discovered evidence offered is *held* not to have required the granting of a new trial.

8. Ejectment ⊂=111(4) — Findings held not demonstrably wrong.

Findings of fact are *held* not to have been demonstrably wrong.

9. Appeal and error ⊂=1171(1) — Mistake in computation of interest held not material.

A mistake in computation in the general verdict is *held* not to have been important.

10. Appeal and error ⊂=991 — Result of an accounting not disturbed.

The result of an accounting is *held* not to show error.

Appeal from District Court; Harper County.

Action in ejectment by Arthur Robertson and another, against Jacob Wangler and wife, Robert Robertson and others, and the Fidelity Trust Company. Judgment for plaintiffs and for defendants Robert Robertson and others, and defendants Jacob Wangler and wife appeal. Affirmed.

E. C. Wilcox, Donald Muir, and Myrtle Youngberg, all of Anthony, for appellants.

Noble & Tincher, of Medicine Lodge, and James G. Washbon, of Harper, for appellees.

MASON, J. By the death of her husband intestate about 1897 Sarah Wangler inherited a half interest in a quarter section of land; the other half interest descending to their children, Jacob Wangler and Clara Robertson. Clara Robertson died in February, 1908, and Sarah Wangler in March, 1916, neither leaving a will. Jacob Wangler continued in the occupancy of the land. In February, 1917, this action for ejectment, partition, and accounting was brought against him by two of the five children of Clara Robertson. The other three children and their father, Robert Robertson, the husband of Clara Robertson, although their interest was the same as that of the plaintiffs, did not join them in bringing the action, but were made defendants. Jacob Wangler's wife was made a defendant in virtue of that relationship. Each of the children was found to have a one-sixteenth interest in the land, their father, Robert Robertson, a one-fourth interest, and Jacob Wangler a seven-sixteenths interest, and judgment was rendered accordingly, from which Jacob Wangler (his wife joining) appeals.

Each of the children derives a claim to one-eightieth of the land (this and all other fractions referring to undivided interests) through the following chain of title: Clara Robertson in 1899, while owning one-fourth, made a deed therefor to her mother, Sarah Wangler, and her brother, Jacob Wangler; each thereby receiving one-eighth. At the death of Sarah Wangler, her one-eighth descended, one-sixteenth to her son, Jacob Wangler, and the remaining one-sixteenth in equal shares to the five children of her then deceased daughter, Clara Robertson; each receiving one-eightieth. Jacob Wangler (his wife joining) pleaded that the deed of Clara Robertson for her one-fourth interest, instead of being made in part to his mother, Sarah Wangler, was made solely to himself. This question of fact was determined against him; the deed itself being produced and apparently agreed to as that in question. The claim of the adverse parties as thus far stated may therefore be considered as admitted or proved.

The plaintiff's account of the devolution of the rest of the title is as follows: Sarah Wangler conveyed (subject to a life interest reserved to herself) the one-half which she acquired when her husband died to her daughter, Clara Robertson, upon whose death a few weeks later it descended, one-fourth to Robert Robertson, her husband, and one-twentieth to each of their five children. The principal dispute of fact involved in the case was whether or not Sarah Wangler executed a deed for the half interest to Clara Robertson—particularly whether such a deed was ever delivered, and the rulings assailed by the appellant for the most part related to that issue. Jacob Wangler asserts a right

Digitized by Google

to the property by virtue of an agreement of Sarah Wangler to will it to him, in consideration of his caring for her during her life.

[1] 1. The lawyer who drew the deed just referred to in the course of his testimony concerning the circumstances attending its preparation, was asked what the grantor, Sarah Wangler, had said as to how it happened that the grantee, her daughter, Clara Robertson, had at the time no interest in the land. An objection to the competency of the question was overruled, and he replied in substance that Mrs. Wangler had said that her daughter had deeded to herself and her brother Jacob the one-fourth she (the daughter) had acquired by inheritance, and she (the mother) "thought it would be fair and right for Clara to have her interest in her father's estate, and she wanted to make it so she would." No motion appears to have been made to strike out any of the answer. Whether competent or not, the portion of the answer which was responsive to the question could not have been prejudicial, except as bearing on the issue as to whether the deed made by Clara Robertson ran to Jacob alone, or to Jacob and Sarah together, and as the deed itself was introduced, as already stated, this part of the answer could not have been important. Nor does any of it appear very vital. It is suggested that prejudice resulted because in his opening statement the plaintiff's attorney had said that Clara Robertson had made the deed, so that money could be borrowed to get Jacob out of some trouble he had gotten into. We think the connection too remote to give force to the suggestion.

[2] 2. The evidence of the delivery of the deed from Sarah Wangler to her daughter, Clara Robertson, was given by one of the plaintiffs, Arthur Robertson, who was 24 years old when he testified, and 14 at the time of the occurrences he related. The substance of his testimony in chief may be thus stated, a part of it being given over objections as to his competency:

Sarah Wangler, his grandmother, was sick at the home of his mother, Clara Robertson, about three or four weeks before the death of the latter. He saw Mrs. Wangler with the deed in her possession, a deed conveying a half interest in the quarter section, and he saw her give it to Mrs. Robertson, who put it in a cupboard in the kitchen, where it remained until she died, after an illness of about two weeks. Later he saw it in his father's pocket. On cross-examination these questions were asked and answers given:

"Q. Do you remember going over to Jake Wangler's house after your grandmother died? A. No, sir; I went over there after she died; yes.

"Q. Well, after your mother died, you went over to Jake Wangler's after your mother died to sign [get] a paper over there? A. No, sir.

"Q. Do you remember you went into the room where the old lady had lived, or was living, and took some papers out from under the carpet? A. Not after my mother died.

"Q. Did you take one before your mother died? A. Yes.

"Q. That was when, with reference to the time that your mother died? A. That was about tnree or four weeks before my mother died. * * *

"Q. That was the same instrument you saw up in the cupboard? A. Yes, sir.

"Q. Afterwards? A. Yes, sir.

"Q. Well, what did you do with it, after you took it out from the carpet? A. Took it home and gave it to my grandmother.

"Q. Don't you know, as a matter of fact, that your grandmother took it away from you? A. No, I guess not.

"Q. After you got it out from under the carpet? A. I gave it to her. She was sick in bed."

During the redirect examination proceedings were had indicated by this extract from the abstract:

"Q. You say that it was the same day that you saw your grandmother hand this deed to your mother that you got it from under the carpet? A. Yes, sir.

"Q. Where was it at—at whose house? A. In my grandmother's house where Jake lived.

"Q. How far was that from your house? A. Just a mile south.

"Q. And was your grandmother sick at your house? A. She was.

"Q. How did you come to go and get that deed? A. My grandmother told me to go down to Jake's— (Defendants object, and ask to have it stricken out. Objection overruled. Defendants move to strike that out, because it was a conversation had with Mrs. Wangler, who is now deceased. Objection overruled.) A. She told me to go down to Jake's and get the deed, and told me where it was at. (Defendants object to that, and ask that it be stricken out—conversation and statement claimed to be made by her. Objection overruled.)

"Q. Did you know where the deed was before that? Before she told you? A. No.

"Q. You went down there, did you? A. Yes.

"Q. And who was there at the house? A. There was not any one there.

"Q. And where did you find the deed? A. Under the carpet, exactly where she told me to get it. (Defendants move to strike out that part of it, because it is a statement of fact, or a statement made by the deceased, Mrs. Wangler, under which all the parties to this suit claim. Objection overruled.)

"Q. What did you do when you found the deed there? What did you do with it? A. I took the deed out and looked at it, and read it over and looked it over, and took it home, and gave it to grandmother.

"Q. And was it after that that you say that your grandmother handed it to your mother? A. Right in my presence. I gave it to my grandmother, and she gave it to my mother."

The appellants urge that the objections shown should have been sustained under the rule forbidding a witness to testify in his own behalf in respect to any transaction or communication had personally by him

Digitized by Google

with a person since deceased, where either party claims through such person. Gen. Stat. 1915, § 7222 (Code Civ. Proc. § 320). It will be noted that in the direct examination no testimony was given concerning anything that took place between the witness and his grandmother. He merely narrated what he had seen take place between her and his mother; nothing being said as to how the deed which he saw delivered had come into the hands of his grandmother at that time. In the cross-examination it was developed without objection, by answers that were responsive to the questions, that he went from his mother's home to that of his grandmother and found the deed under the carpet, and that he brought it back and gave it to his grandmother. The appellants having voluntarily brought out this much of the witness' relation to the matter, we think it was competent for the adverse parties to elicit the further facts that his trip to his grandmother's home was made at her request to procure the deed and that he found it in the place she had described to him. The matters inquired about on behalf of the plaintiffs were pertinent by way of explaining those elicited by the appellants. The witness said nothing about his having had the deed in his control until the cross-examination required him to tell of his getting it and handing it to the grantor. Being now a beneficiary under it and a plaintiff in the case, an explanation of how he came by it and why he made such disposition of it was proper, if not necessary to repel the adverse inferences that might otherwise have been drawn. The subject had been so far opened up by the appellants as to effect a waiver of the rule. Bank v. Abbott, 104 Kan. 344, 179 Pac. 326.

[3] 3. The appellants contend, however, that the rule was violated in the direct examination, before anything had occurred on which to base a claim of waiver, by permitting the witness to testify that he saw his grandmother give his mother the deed, and in support of the contention rely upon Wills v. Wood, 28 Kan. 400. It was there held that, where a conversation had taken place between a person since deceased and two others, neither of whom was competent to testify as to what was said to himself personally, the effect of the rule could not be evaded, and the whole conversation put in evidence, by each narrating what the person since deceased had said to the other, because this would at least be against the spirit of the statute. We do not regard the present as a parallel case. The transaction which the witness had with his grandmother was the getting of the deed at her request and the handing of it to her. There his connection with the matter ceased. He was a mere messenger. The transaction between his grandmother and his mother was the handing of the deed by the former to the latter. With this he had nothing to do. The one transaction had ended before the other began, and while there was a relation between them the situation was quite different with respect to the application of the rule from that presented by a running conversation between several people. In view of the policy of the court to resolve doubts in favor of the admission of evidence, the theory of the Wills-Wood Case is to be pressed no further than the line there drawn. A witness may testify to transactions had by others with persons since deceased, although the circumstances were such as to have disqualified him if he had taken part in them. Notes, 29 L. R. A. (N. S.) 1179; 42 L. R. A. (N. S.) 320; Gaston v. Clabaugh, 106 Kan. 160, 186 Pac. 1023.

[4] 4. The wife of Jacob Wangler testified that she knew of the circumstances of Arthur Robertson taking a paper from under the carpet, and that the paper he took was a proposed will of Sarah Wangler devising her property to Clara Robertson; that when he took it out from under the carpet his grandmother went over and got it and destroyed it. On cross-examination she said she did not see him take the paper—that all she knew about it was what she had learned from Mrs. Wangler. She also testified that Mrs. Wangler had told her she had taken this document out of Robert Robertson's pocket after his wife's death. All the testimony she had given about Arthur taking the paper out from under the carpet, and about Mrs. Wangler taking it from Robert's pocket, was stricken out. The appellants contend that the declarations of Mrs. Wangler on these matters were admissible, within the rule applied in Kitchell v. Hodgen, 78 Kan. 551, 97 Pac. 369, and cases there cited, because they were spoken while she was in possession of the land in controversy, in explanation of her rights therein, and in connection with her disposing of it to Jacob Wangler. If the contention is sound, it must be on the theory that the evidence tended to show that, although Mrs. Wangler was in possession of the land and had the legal title to five-eighths of it, she had assumed an obligation to devise her interest to Jacob Wangler. It does not appear to us to be open to that interpretation, but to consist of a narration of past events intended to contradict the story of Arthur Robertson.

[5] 5. In instructing the jury, the court undertook to enumerate the things necessary to be found in order to require a verdict in favor of the appellants, and included among them the payment of taxes and the making of valuable improvements by Jacob Wangler. No prejudice can have resulted from the inclusion of these items, for the jury found specifically that Jacob Wangler had paid the taxes and made the improvements. The verdict, therefore, could not have been based up-

Digitized by Google

on a failure of the appellants to prove their contentions in this regard.

The appellants complain of the refusal of their request for an instruction reading as follows:

"You are further instructed that if Sarah Wangler made a will, or any written agreement, by which she agreed to transfer to Clara Robertson her interest in said real estate, providing she would build her a house and maintain her there, and the said Sarah [Clara] Robertson did not perform the terms of said agreement, then she would not be entitled to any portion of the real estate so agreed to be conveyed to her."

This requested instruction was so worded as naturally to lead the jury to suppose that the plaintiffs were relying upon such a writing as that described. Evidence was given in behalf of the appellants of the execution of an instrument of that character, but the plaintiffs relied upon an outright deed, which they contended, and the jury specifically found, had been made by Sarah Wangler to Clara Robertson. We think there was no occasion for the instruction, that it would have been misleading, and that the specific finding referred to shows that the verdict was not based on any theory to which it could rightfully apply.

[6] 6. Robert Robertson, the father of the plaintiffs, filed no pleading until after the verdict had been returned, when (leave of court therefor having been given) he filed an answer admitting the allegations of the petition and asking partition as therein prayed. The three Robertson children, who were made defendants, were minors, and filed no pleading other than a general denial of the petition. After the return of the verdict the court decided the partition and accounting branch of the case upon the evidence already introduced, adopting most of the findings made by the jury and making some additional ones, and rendered judgment in favor of Robertson and his five children. The appellants contend that the granting of permission for Robert Robertson to file his answer was an abuse of discretion, and that they were denied the right to a trial by jury of the issue between themselves, on the one hand, and Robert Robertson and his three minor children, on the other. We regard it as impossible for the appellants to have been prejudiced by the fact that the case was submitted to the jury without formal issues having been made up between themselves, on the one hand, and the three minor children and their father, on the other. The plaintiffs set out in their petition the condition of the title as claimed by them, expressly stating the interests in the land held by their father and their three minor brothers. If the facts were such as to entitle the plaintiffs to recover, it necessarily followed that their father and their brothers owned the portion of the land assigned to them in the final judgment. The jury specifically found that Sarah Wangler had not agreed to give the land to Jacob Wangler, and that she had deeded an undivided one-half interest in it to the plaintiffs' mother. These findings were determinative of the real questions of fact that were in controversy. They were made in an action in which Robert Robertson and his three minor sons were parties, and they necessarily entered into the judgment rendered as between the plaintiffs and the appellants. If the parties whose interests were identical with those of the plaintiffs had formally signified their adoption of the allegations of the petition, it could have given the appellants no means of supporting their claims that they did not already possess; the absence of that condition did not in any way hinder them in making their showing. We think there is nothing substantial in the objections based on the want of more complete pleadings, or in the contention that by reason thereof they were denied a jury trial as to a part of their opponents.

[7] 7. A new trial was asked on the ground of newly discovered evidence. Two additional witnesses offered to testify that Sarah Wangler was not sick and in bed at the time of Clara Robertson's last illness. This evidence does not appear to contradict that of the plaintiffs, and in any event is not of sufficient importance to require the granting of a new trial. A third witness, who had already testified, offered to give additional testimony concerning statements made by Clara Robertson and Sarah Wangler. The fact that she had already been on the stand is a sufficient reason, in the absence of exceptional circumstances for upholding the decision of the trial court so far as it turns upon her offer. Dunham v. Bokel, 105 Kan. 369, 184 Pac. 636.

[8] 8. The appellants complain of an affirmative answer given by the jury to the following question submitted at their request:

"If a deed was made by Sarah Wangler to Clara Robertson, state whether or not the grantor in said deed intended, when it came into the hands of Arthur Robertson, that the title should pass to the heirs of Clara Robertson."

This is capable of being interpreted as meaning that the jury believed that at the time the deed made by Sarah Wangler came into the hands of Arthur Robertson, her grandson, she intended that the title should at some time pass to the heirs of Clara Robertson, the grantee. As so construed, it is at least unobjectionable, and the construction seems as plausible as any other that would make the question pertinent to the issues.

The jury also returned a negative answer to the question whether Sarah Wangler mort-

Digitized by Google

gaged the real estate with the knowledge of the children and husband of Clara Robertson. The appellants complain also of this, but point out no evidence showing such knowledge on the part of the children.

Complaint is also made of the finding against the truth of Jacob Wangler's story of his agreement with Sarah Wangler regarding her support. It cannot be said that the circumstances were such as to compel its acceptance.

[9] 9. In the general verdict the jury found that the plaintiffs were entitled to recover possession of an undivided nine-eightieths interest in the land. The fraction should have been ten-eightieths; the mistake being obviously one of computation, and of no importance, especially in view of the special findings.

[10] 10. A final complaint is of the result of the accounting, especially in respect to the refusal of allowances for expenditures. The matter is one in which the decision of the trial court carries great weight, and we find no sufficient reason for overruling the result reached.

The judgment is affirmed.

All the Justices concurring.

ELLISON et al. v. HENION. (S. F. 8552.)

(Supreme Court of California. June 16, 1920. Rehearing Denied July 15, 1920.)

1. Payment ⟸16(1)—Note taken for open account does not discharge original debt.

Where notes are taken in the ordinary course for what have previously been open accounts, the indebtedness for which they are taken is not paid, in the sense that it is absolutely discharged; and if default be made upon the notes, an action can be maintained on the original indebtedness, as if the notes had never been given.

2. Assignments ⟸79—Transfer of note for indebtedness on open accounts transfers the original debt.

The transfer of notes taken in ordinary course for what have previously been open accounts transfers the original debt, precluding original creditor from thereafter maintaining an action thereon.

3. Guaranty ⟸53(2)—Creditor could not recover against guarantor after transfer of note.

Where note evidencing debt on open account was transferred, the original creditor could not recover on the original debt as against the debtor's guarantor.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Henry H. Ellison and others, copartners doing business as John B. Ellison & Sons, against H. S. Henion. Judgment for plaintiffs, and defendant appeals. Reversed.

Frank J. Gordon, Welles Whitmore, and R. McMurchie, all of Oakland, for appellant.

Rothchild, Golden & Rothchild and J. A. Pritchard, all of San Francisco, for respondents.

OLNEY, J. This is an appeal by the defendant from a money judgment against him. The following facts appear without dispute: The defendant and two men by the name of Pike were stockholders and officers of a corporation known as the Pike Woolen Company, and the defendant and one of the Pikes executed to the plaintiffs a joint guaranty of any indebtedness that the woolen company might incur to them. The woolen company did incur such an indebtedness in the sum of $4,436.81. Thereafter the woolen company became embarrassed financially, and for the purpose of arranging its indebtedness executed two notes, one for $6,000 and one for $7,000, in favor of a representative of its creditors, including the plaintiffs. These notes represented the aggregate of the debts due the creditors, including the debt to the plaintiffs. The note for $6,000 was signed by the defendant's coguarantor, Pike, and his wife, as well as by the company, and, as security for its payment, Pike and his wife also executed a deed of trust of certain property of their own. The court finds, and we may assume that the finding is justified by the evidence, that the defendant consented to the plaintiffs taking these notes. Payments were made on the notes from time to time, but finally the woolen company defaulted upon them, and the payee of the notes, the representative of the creditors, threatened to sell the property of the Pikes covered by the trust deed. Thereupon the Pikes, or one or the other of them, arranged with the payee of the notes for their purchase or return upon the payment of $5,000.

The defendant claims that the arrangement was for the purchase of the notes, and the plaintiffs claim that it was for the return of the notes to the woolen company. But, whatever may have been the negotiation between the Pikes and the payee, the thing that was finally done was that, in consideration of $5,000 paid him, the payee of the notes indorsed them to one of the Pikes. The uncontradicted testimony also is that the notes remained outstanding as obligations of the woolen company, and that the $5,000 which was paid for the notes was obtained by Pike from a third person by a second hypothecation of his property. The $5,000 was distributed by the payee of the notes among the

Digitized by Google

creditors whom he represented, in proportion to their claims. Including their share of this, the plaintiffs received on account of their claim against the woolen company a total of $2,174.03, leaving a balance of $2,262.78, on which they received nothing.

Under these circumstances the plaintiffs brought the present action against the defendant; the complaint containing two counts, one on the joint guaranty of the defendant and Pike for the recovery of the unpaid balance mentioned, and the other on the defendant's liability for his proportion of that balance as a stockholder of the woolen company. The answer of the defendant pleaded payment of the obligation of the woolen company to the plaintiffs, and also set out as a separate defense the facts stated above with reference to the giving of the two notes, and their subsequent transfer to Pike. The trial court found that the original indebtedness of the woolen company to the plaintiffs had not been paid, and also, in effect, that the facts alleged as a separate defense were not true. This latter finding must have been an inadvertence, for the facts stated appear without conflict, and for the most part in the testimony for the plaintiffs, as well as in that for the defendant. This finding must therefore be considered as not sustained by the evidence. The trial court concluded that the plaintiffs were entitled to recover on both counts, and gave judgment to that effect.

It would seem to be quite evident that the plaintiffs cannot recover against the defendant as the guarantor of a debt of the woolen company, or as a stockholder of the company proportionately liable for its debt, if the plaintiffs had, before the commencement of their action, parted with the debt which is the basis of the action. The real question in the case is: Had they so parted?

[1] No question is made but that the original debt of the woolen company to the plaintiffs was covered into the two notes given the representative of the creditors. There is question made as to whether the two notes were taken in payment. The question, however, would seem to be one largely as to the use of terms, since the fact is clear that the notes were simply taken in ordinary course for what had previously been open accounts. It is well established that in such a case the indebtedness for which the notes are taken is not paid in the sense that it is absolutely discharged. If default be made upon the notes, an action can be maintained upon the original indebtedness, as if the notes had never been given.

[2] But, on the other hand, the notes evidence the debt, and if they are transferred the debt is transferred with them, and the original creditor can thereafter maintain no action upon it. It no longer belongs to him. That the original debt for which a note has been taken passes with the transfer of the note was directly decided in Goldman v. Murray, 164 Cal. 419, 129 Pac. 462. There the plaintiff brought an action to recover from the defendant as a stockholder of a certain corporation his proportion of a certain indebtedness of the corporation. It appeared that the corporation had been originally indebted for money advanced to it and gave its note to its creditor for the amount. The creditor then transferred the note to the plaintiff. The trial court found the note to be invalid as against the corporation, because of want of authority for its execution, but found that the original indebtedness of the corporation had been assigned by the original creditor to the plaintiff and granted a recovery upon it. On appeal, this finding of an assignment was attacked as not supported by the evidence. The only evidence on the point was that the note had been transferred to the plaintiff. It was held that this was enough; that the transfer of the note was in fact a transfer of the original debt as between the original creditor and the plaintiff, although the note was void as to the corporation. If the transfer of a void note be in effect an assignment of the indebtedness which it was intended to evidence, much more must the transfer of a valid note be in effect an assignment of the indebtedness which it does in fact evidence. See, also, 7 Cyc. 816; Harris v. Johnston, 7 U. S. (3 Cranch) 317, 2 L. Ed. 450; Looney v. District of Columbia, 113 U. S. 258, 5 Sup. Ct. 463, 28 L. Ed. 974; Davis v. Reilly, 1 L. R. Q. B. [1898] 1.

In the present case there is no question as to the fact of the transfer of the notes taken for the indebtedness of the woolen company. They were, as we have said, indorsed and delivered to Pike by the payee, the representative of the woolen company's creditors, upon the payment to him of $5,000. The indorsements were special; that is, to the order of Pike. There is no escape from the conclusion that by this transfer the creditors parted, not only with the notes, but with the debts for which the notes were given. In other words, when the plaintiffs brought this action, they were not the owners of or interested in the obligation whose guaranty they seek to enforce in one count, and the stockholder's liability pertaining to which they seek to enforce in the other.

The plaintiffs seek to avoid this conclusion by the claim that the payee did not intend to sell the notes to Pike, but to return them to the woolen company, and rely upon testimony of the payee to that effect. But, whatever he intended, the thing which he did was to transfer the notes by indorsement and delivery, and the legal effect of that which he did cannot be varied in this action, to which Pike is not a party, by evidence that he intended something else. There is, in fact, no evidence here

Digitized by Google

sufficient to warrant a reformation of his transaction with Pike; but, even if there were, it would be immaterial. Until the transaction is reformed, and the transfer in effect canceled, something which can be done only in an action against Pike, the transfer must be given effect. As long as the transfer stands uncanceled, the woolen company is liable to Pike upon the notes. To hold that it was also liable to the plaintiffs upon the original indebtedness for which the notes were given would be to subject it to a double liability for the same obligation.

[3] If the plaintiffs are not the owners of the obligation of the woolen company, as we believe it is plain they are not, it would seem to follow almost as of course that they cannot recover on a guaranty of that obligation, or upon the defendant's liability as a stockholder for his proportion of it. Whatever rights may exist in these respects would seem plainly to be in Pike as the owner of the notes which evidence the basic obligation. Plaintiffs' counsel, nevertheless, contend to the contrary in respect to the guaranty; their argument being that the obligation of the guarantor is an independent obligation, which, of course, it is, in a sense, and therefore not transferred by a transfer of the obligation guaranteed, and cite Black v. Sippy, 15 Or. 574, 16 Pac. 418, as in point. An examination of this case shows, however, that it is rather an authority for the view we have expressed. A statute of Oregon made both husband and wife liable for supplies furnished the family. The defendant's husband purchased certain family supplies, and gave his note for the purchase price. The firm which furnished the supplies then assigned the note to the plaintiff, and, the note not being paid, the plaintiff brought suit, not against the husband on his note, but against the wife upon her statutory liability. If, under these circumstances, it had been held that the obligation of the wife had not passed to the assignee of the note, but remained in the assignor, in whose favor the obligation was originally incurred, the case might perhaps be considered as tending to sustain the position of plaintiffs' counsel here. But that is exactly what was not held. On the contrary, it was held that the transfer of the note, evidencing as it did the debt, transferred the wife's liability for the debt, and the assignee of the note was allowed to recover against her. The decision would seem to be very closely in point here in favor of the view we have expressed. In any case, the correctness of that view seems to us almost self-evident.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

LYON & HOAG v. RAILROAD COMMISSION et al. (S. F. 9142.)

(Supreme Court of California. June 11, 1920. Rehearing Denied July 8, 1920.)

1. Constitutional law ⟸278(1)—Eminent domain ⟸2(1)—Compelling public utility to operate at loss is "taking of property without compensation."

The state has no power to compel the continued operation of a public utility at a loss, where the owner of that utility is willing to and does in fact abandon to the public all its property that has been devoted to the public use, since to compel the operation of the public utility at a loss is a taking of property without compensation in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking.]

2. Corporations ⟸382½, New, vol. 16 Key-No. Series—Theory on which a state exercises control over public utilities stated.

The theory on which the state exercises control of a public utility is that the property so used is thereby dedicated to a public use, the owner retaining the right to receive a reasonable compensation for use of the property and for the service performed in the operation and maintenance thereof, but, where owner abandons the dedicated property to the public, there is no further basis on which the regulatory power can be predicated.

3. Public Service Commissions ⟸35—Question not raised before Railroad Commission not considered by court on certiorari.

A question not raised before the Railroad Commission will not be considered by court on certiorari to review the commission's order.

4. Waters and water courses ⟸188(3)—Railroad Commission could not compel operation of waterworks at a loss after abandonment thereof.

Where owner of subdivision which had been furnishing water to purchasers of lots in subdivision abandoned the waterworks, and where at the request of the city officials and the Railroad Commission a waterworks company took charge and operated the waterworks so abandoned, Railroad Commission was powerless to compel the subdivision owner to resume operation at a loss.

Application for certiorari by Lyon & Hoag, a corporation, against the Railroad Commission and others, to review order of said Commission. Order annulled.

J. E. McCurdy, of San Mateo, and Walter H. Linforth, of San Francisco, for petitioner.

Hugh Gordon, of Los Angeles (Douglas Brookman, of San Francisco, of counsel), for Railroad Commission.

Stoney, Rouleau, Stoney & Palmer, of San Francisco, for other respondents.

WILBUR, J. Petitioner seeks the review of an order of the Railroad Commission

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

requiring it to re-establish its service of domestic water in a certain residence district of the city and county of San Francisco known as Lincoln Manor. Petitioner subdivided this tract, and, for the purpose of furnishing domestic water to the purchasers of lots therein, laid water pipes in the streets thereof, purchased water from the Spring Valley Water Company, and, by means of a pumping system, distributed it to the purchasers of lots within the tract. As fast as lots were sold and water connections desired for residences located thereon the same were made. The same water rates were charged by the petitioner as by the Spring Valley Water Company. As soon as all the lots in the tract were sold, the petitioner discontinued said water service and offered to give its water system free of charge to the Spring Valley Water Company for the purpose of a continuance of such service by the latter company. Inasmuch as said service required an expenditure for pumping the water, the latter company refused to accept the responsibility. The lot owners appealed to the Railroad Commission for relief, and, upon the hearing of their petition, an order was made requiring the petitioner to resume such service.

Petitioner claims that it is not a public utility. It also claims, if it is a public utility, that the control over it is vested in the board of supervisors of the city and county of San Francisco, and not in the Railroad Commission. In view of our conclusion that the state has no power, either directly or through the board of supervisors of the city and county of San Francisco or the Railroad Commission of the state of California, to make the order in question, it is unnecessary to determine either of the foregoing points raised by the petitioner.

[1] The state has no power to compel the continued operation of a public utility at a loss, where the owner of that utility is willing to and does in fact abandon to the public all its property that has been devoted to the public use. Since the submission of this case the Supreme Court of the United States has passed upon this question, and for that reason a discussion of the various decisions cited by the respondent in support of the order of the Railroad Commission is unnecessary. That court decided that "a carrier cannot be compelled to carry on even a branch of its business at a loss, much less the whole business of carriage." Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. —. A similar conclusion was suggested by our earlier decision in Fellows v. City of Los Angeles, 151 Cal. 52, 64, 90 Pac. 137, 141, where it was said:

"We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty. These questions are not now involved and we express no opinion concerning them."

[2] The basis of the conclusion that the state cannot compel the operation of a public utility at a loss is that such an order is a taking of property without compensation and therefore violates the Fourteenth Amendment to the federal Constitution. Brooks-Scanlon Co. v. R. R. Comm., supra; North Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745. The theory on which the state exercises control over a public utility is that the property so used is thereby dedicated to a public use. The dedication is qualified, however, in that the owner retains the right to receive a reasonable compensation for use of such property and for the service performed in the operation and maintenance thereof. Where, as in this case, the owner is willing to and does in fact abandon all the dedicated property to the public, there is no further basis upon which the regulatory power can be predicated. To require the former owner, after such abandonment, to continue to operate the property at a loss for the benefit of the public, would be a taking of such excessive cost of operation from such owner without compensation. The numerous cases cited by the respondent merely hold that a public corporation can be required to operate certain portions of its system at a loss, where the general business of which such system forms a part can be profitably operated. State ex rel. Caster v. Kansas Postal Telegraph-Cable Co., 96 Kan. 298, 150 Pac. 544; State ex rel. Public Service Commission v. Missouri Southern Railroad Co., 214 S. W. 381; People ex rel. Hubbard v. Colorado Title & Trust Co., 178 Pac. 6.

[3, 4] No case has been cited in which it has been held that authority exists to compel a public utility to operate at a loss on its whole system and investment, and the foregoing decisions of the Supreme Court of the United States determine that it cannot be done. This, we understand, is fully conceded by the respondent Railroad Commission. It contends, however, that the petitioner should be compelled to continue the service for a reasonable time pending its application to

Digitized by Google

the Railroad Commission for leave to abandon its service, or for increased rates to enable it to profitably continue such service. No such question was raised before the Railroad Commission. There the whole controversy was as to whether or not the petitioner was a public utility corporation and subject to the jurisdiction of the Railroad Commission. The commission found that petitioner had wholly abandoned its water pipes and pumping plant August 10, 1918, and that thereafter the same had been operated and used by the Spring Valley Water Company at the request of the city officials of San Francisco and of the Railroad Commission. The order of the Railroad Commission under review was made June 10, 1919. We conclude that after such a complete abandonment to the public of all its property devoted to a public use the Railroad Commission is powerless to compel the petitioner to resume operations at a loss. The order of the Railroad Commission required the petitioner to resume service, without additional compensation, and therefore at a continued loss.

The order under review is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; OLNEY, J.

BROWN v. ANDERSON-COTTONWOOD IRR. DIST. (S. F. 9126.)

(Supreme Court of California. June 16, 1920.)

1. Lost instruments ⟸7—Complaint for reissuance of lost bond held insufficient.

In action against irrigation district for reissuance of lost bond, complaint *held* insufficient to entitle plaintiff to relief under Civ. Code, § 329, in that it failed to allege that the bond had been lost or destroyed in the state, or in a calamity such as a fire or earthquake, as required by such statute.

2. Lost instruments ⟸3—Equity can give relief, notwithstanding special statutory proceeding.

The restoration of lost instruments is an old and well-estabished function of equity; its jurisdiction in such respect not being impaired by the enactment of statutes providing for special proceedings for the same purpose, unless the intent to make such special proceedings exclusive appears.

3. Lost instruments ⟸7—Complaint held sufficient to give equity jurisdiction.

Complaint *held* to state facts entitling plaintiff to decree in equity requiring reissuance by defendant irrigation district of lost bond, notwithstanding insufficiency of complaint under Civ. Code, § 329; such statute not impairing the jurisdiction of equity to afford relief.

4. Lost instruments ⟸3—Demand for duplicate bond not a condition precedent.

A demand on irrigation district for issuance of duplicate bond was not a condition precedent to an action in equity by owner of lost bond for reissuance of bond.

5. Lost instruments ⟸10—Decree canceling original bond in suit for reissuance of lost bond improper.

In action in equity against irrigation district for reissuance of lost bond, plaintiff was not entitled to decree canceling the original bond, since, such action not being in rem, the decree would not be effective as to third persons, who might get possession of original bond with right to enforce it.

6. Lost instruments ⟸2 — Duplicate bond pursuant to decree does not impose liability, where original bond is capable of enforcement.

Owner of lost irrigation bond, who has procured issuance of duplicate in equitable action therefor, cannot enforce bond against irrigation district, where the lost bond subsequently appears in the hands of a third person entitled to enforce it against the district.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Ada I. Brown against the Anderson-Cottonwood Irrigation District. Judgment for plaintiff, and defendant appeals. Affirmed, as modified.

Carr & Kennedy, of Redding, for appellant.

Tum Suden & Tum Suden, of San Francisco, for respondent.

OLNEY, J. This is an appeal by the defendant from a judgment entered against it upon its failure to answer after the overruling of a demurrer which it had interposed to the plaintiff's complaint. The question is therefore as to the sufficiency of the complaint.

[1] The complaint alleged in brief that the plaintiff was the owner of a $1,000 bond issued by the defendant, a public irrigation district, and that the bond had been lost, and prayed for a decree directing the issuance to the plaintiff of a new bond, and the cancellation of the one lost. The prayer and certain of the allegations of the complaint make it certain that the plaintiff had in mind to proceed under section 329 of the Civil Code. That section provides that—

"Whenever a bond * * * of a corporation * * * has * * * been lost or destroyed in this state by fire, earthquake, or other calamity, the owner thereof may bring an action against such corporation * * * for the purpose of obtaining a new or duplicate bond. * * *"

The principal ground of demurrer to the complaint was that it alleged merely that the bond had been lost or destroyed, and not that it had been lost or destroyed in this state,

Digitized by Google

or in any calamity such as a fire or earthquake. Viewed as the initiation of a proceeding under the Code section, the complaint was certainly insufficient in these particulars. The section by its terms plainly applies only to a loss or destruction in this state through some calamity, such as a fire or earthquake, and this the complaint did not allege.

[2] But it does not follow that the complaint was open to demurrer as failing to show a case wherein the plaintiff was entitled to relief. The Code section does not purport to prescribe the only case in which a lost or destroyed instrument may be restored, or to prescribe the procedure which alone can be followed to obtain such restoration. It provides merely that in certain cases a certain procedure may be followed for that purpose. The restoration of lost instruments is an old and well-established function of courts of equity, and it is likewise well established that their jurisdiction in this respect is not impaired by the passage of statutes providing for special proceedings for the same purpose, unless the intent to make such special proceedings exclusive appears. 25 Cyc. 1609. Such intent does not appear in the statutes of this state.

[3] Viewed, not as the initiation of a proceeding under the Code section, but as the equivalent under our reformed procedure of a bill in equity, the complaint is sufficient in the particulars under discussion, since to entitle the plaintiff to relief in equity the loss or destruction of the instrument is alone sufficient, and it is not necessary that it be lost or destroyed in any particular manner. It is wholly immaterial that the plaintiff mistakenly conceived that upon the facts stated in the complaint she was entitled to maintain an action under the authority of the Code section. It was necessary only that the complaint show that she had in fact a cause of action of some sort, and was entitled to relief. Showing this, the complaint is sufficient, and, the truth of its allegations being established either by evidence or by the admission of the defendant, as by its failure to answer, the plaintiff is entitled to have the relief which the facts established justify, although that relief may not be exactly what she conceived she was entitled to.

[4] The defendant also makes the point that viewed as the equivalent of a bill in equity, the complaint is yet insufficient because it fails to allege any demand upon the defendant for the issuance of a duplicate bond before the commencement of the action. It is true that the defendant would not be in the wrong until such demand was made and refused. But a suit in equity of this character is not one for relief against a wrong committed by the defendant, but is one to enforce a right in the plaintiff. The plaintiff's right to a duplicate bond depends wholly on the loss of the original, and a demand upon the defendant is not an element of the right and therefore not of the plaintiff's cause of action. Under these circumstances, the presence or absence of a prior demand upon and refusal by the defendant is material only on the question of the defendant being liable for costs. The case comes directly within the principle of Randolph v. Harris, 28 Cal. 561, 565, 87 Am. Dec. 139, where in a suit of this character it was held that a prior tender to the defendant of an indemnity bond was material only as to the matter of costs. Upon the point of the plaintiff's right to maintain the suit there is no distinction between a prior demand upon the defendant and a prior tender to it of an indemnity bond. Both are necessary to put the defendant in the wrong, but neither is an element of the right sought to be enforced. If one is not a condition precedent to the right to maintain the suit, there is no reason why the other should be. See, also, Gray v. Dougherty, 25 Cal. 266, 282, and Farmer's Exchange Bank v. Altura, etc., Co., 129 Cal. 263, 270, 61 Pac. 1077. The action of the lower court in overruling the defendant's demurrer was therefore correct.

[5] This conclusion, however, does not entirely dispose of the matter. The plaintiff was not entitled to relief under the Code section, but only to such relief as might be given by the court under its general equity powers. The plaintiff, however, after the overruling of the demurrer and the defendant's failure to answer, proceeded under the Code section, and the relief decreed by the judgment was that provided by the Code section. To the extent to which the relief so decreed exceeded or departed from that properly allowable in a suit in equity for the restoration of a lost instrument, the judgment is at fault. The Code section provides for a judgment not merely directing the issuing of a duplicate instrument, but also canceling the original instrument, and the judgment in this case so provides. It is difficult to see how literal effect can be given to this provision, in view of the fact that the original bond is supposedly lost or destroyed, so that its actual cancellation is an impossibility. Presumably what is meant is that the original bond be judicially declared to be null and void. Such a judicial declaration would of course be wholly ineffective as to third persons, unless the action be one in rem. It is not necessary to determine whether an action under the Code section would be of that character.

[6] The present action is not one under the Code section, and is purely in personam. The court not having the power to declare the bond void as to third persons, it should not be declared void as between the plaintiff and defendant, If, in spite of its supposed loss or destruction, it should subsequently appear in the hands of a third person entitled

Digitized by Google

to enforce it against the defendant, the plaintiff should have no right to enforce the duplicate bond issued in substitution for it. But she would have this right, if in the present action the original bond has been declared void as between her and the defendant. The plaintiff has no right to a decree which would or might have this effect. The judgment appealed from is therefore modified, by striking out the last paragraph thereof, beginning with the word "Wherefore," and ending with the word "herein," and substituting in lieu thereof the following:

"Wherefore, by reason of the premises, the court does hereby order, adjudge, and decree that in substitution for that certain $1,000 gold bond with attached coupons, specified in the complaint herein, and issued by the defendant herein, Anderson-Cottonwood Irrigation District, and evidencing an obligation of the defendant for the payment of a principal sum of $1,000, with the interest to accrue thereon, the said defendant do execute and issue to Ada I. Brown, the plaintiff herein, a duplicate bond of like tenor and import, together with duplicate coupons attached of like tenor and import, upon the plaintiff paying to the defendant all costs incurred by the latter in the premises, the same being hereby taxed at $——, together with the expenses of the execution and issue of said duplicate bond and coupons, and upon the plaintiff executing unto the defendant an indemnity bond in the sum of $2,000, in form and with sureties approved by the court, indemnifying defendant against any loss or liability which may be suffered by it by reason of the execution and issuance of said duplicate bond and coupons distinct from and in addition to the liability of defendant heretofore evidenced by the bond and coupons for which such duplicate bond and coupons are to be executed and issued in substitution."

As so modified, the judgment is affirmed; each party to bear its own costs on appeal.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

HUTCHISON v. BARR. (L. A. 6093.)

(Supreme Court of California. June 16, 1920.)

1. Pleading ⇐403(5)—Answer in foreclosure suit cured defect in complaint.

Where the answer of defendant successor of mortgagor in suit to foreclose admitted she was owner of the fee of the mortgaged property at commencement of the action, any defect in the complaint resulting from failure to plead such fact was cured.

2. Trial ⇐36, 391—Neither proof nor finding of admitted fact necessary.

In suit to foreclose a mortgage, where the fact that defendant was the owner of the fee at commencement of action was admitted, neither proof nor finding was necessary on such phase of the case.

3. Mortgages ⇐427(1)—Successor in interest of mortgagor could have been made defendant without joining mortgagor.

Defendant in suit to foreclose, as the successor in interest of the mortgagor, could have been made defendant in the first instance, without joining the mortgagor.

4. Mortgages ⇐427(1)—Mortgagor necessary party, if mortgagee insists on deficiency judgment.

In suit to foreclose, the mortgagor was a proper part to the action, and, under Code Civ. Proc. § 726, would have been a necessary party, if plaintiff mortgagee had insisted upon a personal deficiency judgment.

5. Mortgages ⇐427(1)—Dismissal of mortgagor did not affect right to judgment of foreclosure against successor.

Where the right to a deficiency judgment was ultimately abandoned by plaintiff mortgagee in suit to foreclose, and it appeared by the answer of the mortgagor's successor in interest that the mortgagor had divested itself of title, and that its successor was owner in fee, the mortgagor was not a necessary party, and dismissal of it did not affect plaintiff mortgagee's right to obtain judgment of foreclosure.

Department 2.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by D. E. Hutchison against Florence A. Barr and others. From judgment for plaintiff, foreclosing the mortgage, defendant named appeals. Affirmed, with penalty for frivolous appeal.

F. E. Davis, of Los Angeles, for appellant.
Leland S. Bower, of Los Angeles, for respondent.

LENNON, J. This action—one to foreclose a real property mortgage—was commenced April 3, 1918. The complaint, which was in the usual form of an action to foreclose, alleged, among other things, that the corporation defendant, Walter G. McCarty Company, was, on the 1st day of September, 1914, the owner in fee of the property designated and described in the complaint and that on the said 1st day of September, 1914, the corporation defendant executed to E. W. Grannis, plaintiff's assignor, as security for a promissory note in the sum of $2,000, the mortgage in suit upon the property described in the complaint. Plaintiff's complaint failed, however, to allege who was the owner of the mortgaged property at the time of the commencement of the action. The defendant Florence A. Barr was made a defendant in the action upon the allegation that she, as purchaser, had or claimed some interest in the mortgaged property which was subordinate to and subject to the lien of

Digitized by Google

plaintiff's mortgage. The record shows an entry of her default for failure to answer within the time allowed therefor. The record is silent, however, as to whether the default was set aside; but it presumably was, for the record shows that this defendant later "for herself alone, and not for her codefendants," answered the plaintiff's complaint.

In her answer, after denying all of the material allegations of the complaint for lack of information and belief, it was specifically and affirmatively admitted and alleged that defendant Florence A. Barr, as purchaser, had an interest in the mortgaged property and was the owner thereof in fee at the time of the commencement of the action. None of the other defendants answered, and shortly prior to the trial of the action the plaintiff directed, and there was thereupon entered, a dismissal of the action as to the mortgagor, the corporation defendant, and all of the other parties originally joined as defendants, save and except the defendant Florence A. Barr. Upon the issues raised by her answer the trial court found in substantial accord with the allegations of the complaint and, among other things, that the corporation defendant executed the note and mortgage in suit on the 1st day of September, 1914, and that on that date the corporation defendant was the owner in fee of the mortgaged property. The findings make no mention of who was the owner of the fee of the mortgaged property at the time of the commencement of the action, but there is a finding "that the defendant Florence A. Barr has an interest in said * * * real property and that her said interest is subsequent to and subject to plaintiff's mortgage lien," and the judgment provided that she be paid any surplus over and above the mortgage indebtedness. Judgment was accordingly entered for the plaintiff, foreclosing the mortgage, from which the defendant Florence A. Barr alone has appealed upon the judgment roll.

[1] The answer of the defendant Florence A. Barr admitted she was the owner of the fee of the mortgaged property at the time of the commencement of the action, and therefore cured the defect in the complaint, if any, resulting from the failure to plead that fact. Schenck v. Fire Ins. Co., 71 Cal. 28, 11 Pac. 807; Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; Shively v. Land & Water Co., 99 Cal. 259, 33 Pac. 848; County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644; Vance v. Anderson, 113 Cal. 532, 45 Pac. 816; Abner Doble Co. v. Keystone Co., 145 Cal. 490, 78 Pac. 1050; McGillivray v. Miller, 3 Cal. App. 188, 84 Pac. 778; Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 1073; Grangers' Union v. Ashe, 12 Cal. App. 757; Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635; Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892.

[2] That the defendant Florence A. Barr was the owner of the fee of the mortgaged premises at the time of the commencement of the action was, as we have seen by the averment of her answer, an admitted fact in the case, and consequently neither proof nor finding was necessary upon that phase of the case. Taylor v. C. P. R. R., 67 Cal. 615, 8 Pac. 436; Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500; Pomeroy v. Gregory, 66 Cal. 572, 6 Pac. 492; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; McMenomy v. White, 115 Cal. 389, 47 Pac. 109; Conway v. Supreme Council, 137 Cal. 386, 70 Pac. 223; Muller v. Rowell, 110 Cal. 318, 42 Pac. 804.

[3] The defendant Florence A. Barr, as a successor in interest of the mortgagor, could have been made defendant in the first instance without joining the mortgagor. Cal. Title Ins. Co. v. Miller, 3 Cal. App. 54, 84 Pac. 453; Bigelow v. Bush, 6 Paige (N. Y.) 343; Ingham v. Weed, 5 Cal. Unrep. 645, 48 Pac. 318. The purpose of the action to foreclose was "to subject to sale the title of the mortgagor—that is, such title as he had at the date of his mortgage—and to cut off all the rights of parties subsequently becoming interested therein." Burton v. Lies, 21 Cal. 88, 92; Goodenow v. Ewer, 16 Cal. 461, 468, 76 Am. Dec. 540; Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561.

[4] The mortgagor, the corporation defendant, was a proper party to the action, and would have been a necessary party thereto, if the plaintiff had insisted upon a personal deficiency judgment as was originally prayed for. Code Civ. Proc. § 726. However, inasmuch as the right to a deficiency judgment was ultimately abandoned by plaintiff, and it appearing upon the coming in of the answer of defendant Florence A. Barr that the mortgagor had divested itself of the title to the mortgaged property, and that defendant Florence A. Barr was the owner in fee of the property at the time of the commencement of the action, the mortgagor was no longer a necessary party.

[5] The dismissal of the defendant corporation did not, therefore, affect the right of the plaintiff to obtain a judgment of foreclosure against the defendant Florence A. Barr, for the record as a whole disclosed a cause of action against the grantee of the mortgagor. San Diego Realty Co. v. Hill, 168 Cal. 637, 143 Pac. 1021; McLaughlin v. Stewart, 1 Ont. Law Rep. 295; 27 Cyc. 1583.

The judgment appealed from is affirmed, with a penalty of $50 against the defendant Florence A. Barr for the institution and prosecution of a frivolous appeal.

We concur: WILBUR, J.; SLOANE, J.

Digitized by Google

CONNER v. BANK OF BAKERSFIELD (two cases). (L. A. 6025, 6058.)

(Supreme Court of California. June 17, 1920. Rehearing Denied July 15, 1920.)

1. Judgment ⇐713(2)—Conclusive on matters in issue or which might have been decided.

A judgment is conclusive in all other actions involving the same question, and on all matters involved in the issues which might have been litigated and decided.

2. Interpleader ⇐26—Defendant can put in issue plaintiff's right to compel interpleader.

Defendant in interpleader has the right to put in issue the question whether or not the facts are such as to entitle plaintiff to compel defendants to interplead.

3. Interpleader ⇐32—Right to compel interpleader only question which can be litigated.

In action to compel interpleader, the only question which can be litigated between plaintiff and defendants is the right to compel interpleader, and neither defendant can obtain affirmative relief against plaintiff, and their claims against him arising out of the subject-matter of the interpleader cannot be put in issue.

4. Interpleader ⇐11—Bank entitled to interplead conflicting claimants of fund.

Where a bank was holder of a fund admittedly due from it in which it claimed no interest, but there were conflicting claims to the fund between which the bank could not decide without risk of injury to itself, under Code Civ. Proc. § 386, it had the right to bring an action to compel the conflicting claimants to interplead.

5. Interpleader ⇐10—Plaintiff must be disinterested stakeholder.

Plaintiff in interpleader must be a disinterested stakeholder, and dispute as to the amount due is fatal to the action.

6. Interpleader ⇐10—Bank could not have interpleaded adverse claimants of proceeds of interest-bearing check.

Had a check for the proceeds of which the bank on which it was drawn required adverse claimants to interplead itself been interest-bearing, claim of one of the claimants to interest would have had the effect of putting in issue the extent of the obligation of the bank on the check, and the action could not have been maintained.

7. Judgment ⇐713(2) — Estoppel in subsequent action to claim greater obligation than admitted in interpleader suit.

If a defendant in an interpleader suit failed to question the extent of the obligation of plaintiff, he is estopped from later attempting to claim a greater obligation than that admitted and consented to in the interpleader.

8. Interpleader ⇐32 — Bank interpleading drawer and holder of certified check could not be compelled to litigate other liability.

A bank which interpleaded its depositor, who drew a certified check, and the holder of the check, could not have been compelled to litigate any liability in the action other than its admitted one for the amount of the check until it was first determined on which contract, the one with the depositor, or the one effected by the certification, it was liable.

9. Judgment ⇐590(4)—Defendant did not waive claim to damages by failing to set it up as bar to suit for interpleader.

Holder of a certified check did not waive her claim for damages against the bank through its failure to pay it, by failing to set up such claim as a bar to the bank's interpleader suit against herself and the drawer of the check, on the ground the bank had an interest in the outcome of the litigation because of its liability for damages, if the holder was found entitled to payment.

10. Interpleader ⇐10—Interest of plaintiff to defeat suit must be in subject-matter.

An interest of plaintiff in interpleader to defeat the relief prayed must be in the very thing or fund itself which is the subject-matter of the controversy.

11. Interest ⇐61—No action for interest as damages after payment in absence of agreement.

Ordinarily interest which is allowed as damages is strictly incidental to the debt, and no action for such damages can be maintained after the debt ceases by payment of the principal as such, in the absence of an agreement reserving the right, in view of Civ. Code, § 3290, a rule which cannot be invoked where the conditions of payment are such that the person entitled cannot assert the claim to damages at time of payment.

12. Interest ⇐62—Bank which severed claim to interest as damages from obligation on certified check cannot complain of subsequent action for such damages.

Where a bank which had certified a check severed the holder's claim to interest as damages for failure to pay from the original obligation by compelling the holder to prove her right to the amount of the check in its interpleader suit against the holder and the drawer without giving the holder an opportunity to present her claim for damages, it cannot complain of the holder's subsequent action for such interest as damages.

13. Interest ⇐20—Deposit of fund in court in interpleader action stopped running.

Holder of certified check, which bank failed to pay, interpleading drawer and holder for proceeds, *held* entitled, as damages for the failure to pay, only to interest from the date of the refusal to the date of the deposit of the fund in court in its interpleader action.

Department 2.

Appeals from Superior Court, Kern County; J. W. Mahon, Judge.

Digitized by Google

Action by Sarah L. Conner, executrix of the last will of C. L. Conner, deceased, against the Bank of Bakersfield, a corporation. From a judgment for plaintiff, both parties appeal. Affirmed.

Peter A. Breen, of San Francisco, and C. C. Cowgill, of Sonoma, for plaintiff.

J. W. Wiley and Wiley & Lambert, all of Bakersfield, for defendant.

LENNON, J. On July 21, 1910, defendant, the Bank of Bakersfield, certified a check in the sum of $3,799.66, drawn by G. J. Plantz and payable to the Kern Valley Bank. Plantz then delivered the check to the Kern Valley Bank for the account of C. L. Conner. Conner died a short time thereafter and plaintiff herein was appointed executrix of his will. On May 19, 1911, plaintiff presented said check to the Bank of Bakersfield, which refused payment. On July 20, 1911, this bank commenced an action in interpleader requesting that said executrix and Plantz be required to set out their conflicting claims to the money called for by the check. The executrix and Plantz thereupon interpleaded between themselves and the case came on for trial on September 21, 1912, on which date the amount of the check, namely, $3,799.66, was deposited in court by the bank. On December 9, 1912, the court rendered judgment in favor of the executrix and on March 6, 1917, when this judgment became final, the fund deposited in court was paid by the clerk to the executrix in accordance with the judgment. The present action was brought by the executrix to recover from the Bank of Bakersfield damages for its refusal to pay the check when presented. The lower court sustained a general demurrer to the complaint, and ordered judgment thereon in favor of defendant, which judgment was reversed by this court. Conner v. Bank of Bakersfield, 174 Cal. 400, 163 Pac. 353. Defendant then answered. At the trial plaintiff waived all claims for damages except the claim for interest at the rate of 7 per cent. per annum on said $3,799.66 from May 19, 1911, to March 6, 1917. The court gave judgment for plaintiff for $356.10 as damages; that sum being interest at 7 per cent. on $3,799.66 from May 19, 1911, the date of the presentation of said check, to September 21, 1912, the date of deposit in court. The bank appeals from this judgment, claiming that plaintiff is not entitled to any damages. An appeal is also taken by the executrix, who contends that the amount awarded is too small. The appeals were presented together.

The contention of the bank in this case is that the plaintiff herein, by stipulating in the interpleader suit that the bank was only a stakeholder in so far as the interpleader suit was concerned, and that the check might be deposited in court, and by litigating her claim to the fund without objection, released the bank from any liability for damages.

"In Southern Pac. R. R. Co. v. United States, 168 U. S. 1, it is said: 'The general principle announced in numerous cases in this court is that the right, question, or fact, definitely put in issue and directly determined by the court of competent jurisdiction as a ground of recovery, cannot be contested in a subsequent dispute between the same parties or their privies.'" Green v. Thornton, 130 Cal. 482, 485, 62 Pac. 750, 751.

[1] Moreover, a judgment is conclusive in all other actions involving the same question and upon all matters involved in the issues which might have been litigated and decided in the case. Bingham v. Kearney, 186 Cal. 176, 68 Pac. 597. A party cannot, however, be held to be precluded from pursuing, in a subsequent action, matters which were not within the issues in the former action, and the present plaintiff can only be held to have waived her right to obtain damages for the refusal to pay the check in the event that she was entitled to set up this right in the interpleader suit and failed to do so.

[2] A defendant in interpleader has the right to put in issue the question as to whether or not the facts were such as to entitle the plaintiff to compel the defendants to interplead. It has therefore been held in effect that, if the defendants in interpleader have fully litigated their claims without objection, they will be deemed to have consented to the remedy invoked and granted, and will not later be heard to object that the plaintiff's complaint did not state a cause of action for interpleader or that plaintiff's obligation to them was anything more or less than they consented and acknowledged it to be in the first instance for the purposes of interpleader. San Francisco Savings Union v. Long, 123 Cal. 107, 55 Pac. 708.

[3] However, in an action to compel interpleader, the only question which can be litigated between the plaintiff and the defendants therein is the right to compel interpleader. Neither of the defendants in such an action can obtain affirmative relief against the plaintiff and their claims against the plaintiff, if any, arising out of the subject-matter of the interpleader, cannot be put in issue in the interpleader suit, but will be considered only when presented in another and different action. Los Angeles v. Amidor, 140 Cal. 400, 73 Pac. 1049; Conner v. Bank of Bakersfield, supra.

[4, 5] The Bank of Bakersfield was the holder of a fund which admittedly was due from it and in which it claimed no interest whatever, but there were conflicting claims to the fund between which the bank could not decide without risk of injury to itself. It therefore had the right to bring an action to compel the conflicting claimants to the fund to interplead. Code Civ. Proc. § 386. It is true that the plaintiff in interpleader must be a disinterested stakeholder and a dispute as to the amount due is fatal to the action.

Digitized by Google

[6, 7] Had the check itself been interest-bearing, plaintiff's claim to interest would have had the effect of putting in issue the extent of the obligation of the bank on the check and, therefore, the action could not have been maintained. Appeal of the Bridesburg Manufacturing Co., 106 Pa. 275. In such a case, if a defendant failed to question the extent of the obligation of the plaintiff, he would be estopped from later attempting to claim a greater obligation than that admitted and consented to in the interpleader. But in the instant case the check was not interest-bearing, and there is no question but that the amount deposited by the bank in the interpleader suit was all that was due on the bank's original obligation.

[8] In the interpleader suit the bank admitted an obligation due either to a depositor, Plantz, or the holder of a certified check, the executrix. Both obligations were contractual in nature, and no other or different liability was admitted by the bank in that action, nor could it have been compelled to litigate any liability in that action. No claim for damages for breach of contract could be litigated until it was first determined upon which contract the bank was liable, and it was for the purpose of determining the latter question that the interpleader suit was brought. The claim now set up by the executrix is a claim for damages for breach of contract by refusing to pay on demand, the measure of such damages being interest on the amount of the check from the date of the refusal, and it was incumbent upon the executrix to prove her right to receive payment as against Plantz before asserting this claim to damages. While the bank admitted its liability on the original obligation to whichever defendant proved his claim to be superior, it admitted no liability for refusal to pay on demand, and, for all that appeared in the interpleader suit, it might have had defenses to a claim for damages for breach of contract, such as insufficiency of the demand for payment, etc.

[9, 10] The claim for damages for breach of contract was therefore dependent upon the outcome of the interpleader suit, but could not be litigated in that suit, for it was a claim for affirmative relief by one of the defendants against the plaintiff, and was not part of the original obligation which constituted the subject-matter of the controversy. Los Angeles v. Amidor, supra. Nor did the executrix waive her claim to damages by failing to set it up as a bar to the interpleader suit upon the ground that the bank had an interest in the outcome of the litigation because of its liability for damages in the event that the executrix was found to have been entitled to payment. The interest of the bank was not of such a nature as to prevent it from being a mere stakeholder of the fund which was the subject-matter of the interpleader suit. An interest of the plaintiff in interpleader in order to defeat the relief therein prayed for, must be in the very thing or fund itself, which is the subject-matter of the controversy.

"An interest in the legal question at issue to be determined by the result of the litigation will not prejudice the plaintiff's right to the relief. If, therefore, the plaintiff has with respect to other property not the subject-matter of the present suit, an interest that one of the defendants shall succeed, because the decision thus made will be favorable to his own future litigation concerning that other property—this is no objection to his maintaining a suit for an interpleader." Pomeroy's Equity Jurisprudence, vol. 4, § 1472; Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571.

[11, 12] Ordinarily interest which is allowed as damages is strictly incidental to the debt and no action for such damages can be maintained after the debt ceases by payment of the principal as such in the absence of an agreement reserving the right. Sutherland on Damages (4th Ed.) vol. 1, § 372; Civ. Code, § 3290. This rule cannot be invoked, however, where the conditions of payment are such that the person entitled to payment is precluded from asserting the claim to damages at the time of payment. The bank severed the claim to interest as damages from the original obligation by compelling the executrix to prove her right to the amount of the check in the interpleader suit without an opportunity to present the claim for damages. The bank is not, therefore, in a position to complain of the present action. McDonald v. Holdom, 208 Ill. 128, 70 N. E. 21.

The statements in the conclusions of law and judgment of the court in the interpleader suit to the effect that upon payment to the executrix the bank should be absolved from further liability on the check to both or either of said defendants undoubtedly refer to the liability for the amount of the check alone, which, as above stated, was the only liability on the part of the bank which could have been passed upon by the court under the issues in that case. Likewise the stipulation was not extraneous in its application, but went only to the extent of recognizing the bank as a stakeholder for the purposes of the interpleader action.

[13] While the present plaintiff is not estopped from bringing this action for damages, she cannot be held entitled to a greater amount of damages than that awarded by the trial court, namely, interest from the date of refusal to the date of deposit in court. This is so because:

"Where there is a legal contest between persons other than the debtor, rendering it doubtful to whom the debt should be paid, the debtor is not generally chargeable with interest during such contest, although if the fund in such cases has been used by the debtor and has earned interest the court will allow interest thereon notwithstanding the pendency of the litigation. * * * Where a fund in litigation or the

Digitized by Google

amount of a disputed claim is deposited in court, or subject to its order, interest is not recoverable thereon during the time it remains so deposited." 22 Cyc. p. 1558.

"Where a bill of interpleader is properly filed, the payment of the money into court stops the running of interest; but if the fund is not paid into court it is proper to compute interest up to the rendition of the final decree." 23 Cyc. 29; Sutherland on Damages (4th Ed.) vol. 1, p. 1223.

When a debtor has deposited the money beyond his control in the custody of the court and within the reach of the rightful owner he has done all that the law requires of him. Under such circumstances, in the absence of fraud or collusion, he cannot be held for damages for a continuing breach of contract because of the wrongful claims of third parties. If the plaintiff in interpleader were liable for interest as damages from the date of the refusal to pay until the payment to the person entitled, the burden of the loss caused by the necessity of deciding between conflicting claims would be thrust upon the innocent stakeholder, thus producing the very result which the action of interpleader was designed to avoid.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

In re McGREW.

Appeal of GILBERT.

(S. F. 9141.)

(Supreme Court of California. June 16, 1920. Rehearing Denied July 15, 1920.)

1. Appeal and error ⟸1011(1)—Finding on conflicting evidence not disturbed.

A fact finding supported by evidence, though conflicting, will not be disturbed on appeal.

2. Adoption ⟸3—Statutory requirements must be strictly followed.

The proceeding for adoption is a special one, and the requirements of the statute must be strictly construed, particularly with respect to the jurisdiction of the court.

3. Adoption ⟸10—Only court of county of petitioner's residence has jurisdiction to order adoption.

Under Civ. Code, § 226, declaring that one who desires to adopt a child may for that purpose petition the superior court of the county in which the petitioner resides, the court of the county in which the person desiring to adopt the child resides is the only one which has jurisdiction to declare and order an adoption, so an order of adoption of the superior court of a county of which the petitioner was not a resident is void for want of jurisdiction.

4. Bastards ⟸13—Father of illegitimate child may adopt.

Under Civ. Code, § 230, the father of an illegitimate child may adopt it, so that it will be deemed legitimate, though he is not married to the mother, by receiving it into his home, though the home into which he receives it, etc., is one in which he and the mother are living.

5. Adoption ⟸16—Father who had adopted bastard has sufficient interest to attack adoption by another.

The father of a bastard who had adopted the child by receiving it in his home so as to give it the rights of a legitimate child, under Civ. Code, § 230, has sufficient interest, being not only the natural, but the lawful, father to attack adoption by another.

6. Appeal and error ⟸1167—Mere error of pleading or procedure no ground for reversal.

Under Const. art. 6, § 4½, the fact that relief from a void order of adoption should have been sought by bill in equity instead of petition or motion, the six-month period allowed by Code Civ. Proc. § 473, permitting such attacks, having expired, is no ground for reversing an order setting aside the previous order of adoption; the error being only one of pleading or procedure.

7. Appeal and error ⟸916(1)—No presumption as to how pleading was entitled.

Where a pleading seeking vacation of order of adoption was in all respects a formal pleading, save perhaps the title, which was not shown by the record, the appellate court will not presume anything on the subject; it being claimed the proceeding should be by independent action instead of petition.

8. Judgment ⟸18(3)—Defect in entitling pleading not invalidating judgment.

Under Code Civ. Proc. § 1046, a defect in the title of a pleading will not invalidate a judgment if it intelligibly refers to the action or proceeding; so, where the pleading attacking an order of adoption was in all other respects formal, it cannot be attacked because entitled as a petition instead of an independent pleading.

Department 1.

Appeal from Superior Court, City and County of San Francisco; J. W. Mahon, Judge.

In the matter of the adoption of Francelia McGrew, a minor. On petition of Leland Chester Zimmerman, an order declaring the child was adopted by Hazel McGrew Gilbert was vacated, and she appeals. Affirmed.

Byron C. Parker, of San Francisco (Thomas P. Wickes, of San Francisco, of counsel), for appellant.

Dahlin & Jackson, of San Francisco, for respondent.

SHAW, J. This is an appeal from an order purporting to vacate a previous order

Digitized by Google

whereby the court had declared that the child, Francelia McGrew, was duly adopted by the appellant, Hazel McGrew, she being then unmarried.

The record shows that the order of adoption was made by a judge of the superior court of the city and county of San Francisco on June 19, 1917. The petition for adoption was filed by Hazel McGrew, stating that the child was then six weeks of age and was an illegitimate child of the petitioner's sister, Naomi McGrew, that the petitioner was a resident of San Francisco, was over 21 years of age, and was willing to and desired to adopt said child, and that the mother of the child consented thereto. The consent of the mother was duly signed and filed, and also an agreement by Hazel McGrew, as required by the statute. The order of adoption was in due form and included findings of every fact required by the statute, including the finding that the petitioner, Hazel McGrew, was at that time residing in the city and county of San Francisco.

In May, 1919, the respondent, Zimmerman, filed a petition in the matter of said adoption praying that the order of adoption be vacated, and that he be awarded the care and custody of the child. In his petition he alleged that at the time of filing her petition and of procuring the order of adoption on June 19, 1917, the said petitioner, Hazel McGrew, was not a resident of the city and county of San Francisco, but was a resident of the county of Sonoma, state of California. He further alleged that he was the father of the child, that he and the mother of the child were living together as husband and wife in San Francisco at the time of said adoption, and that after the birth of the child, and prior to June 19, 1917, he had adopted the child as his own legitimate child by publicly acknowledging it as his own child, receiving it into his home, and treating it as if it was his legitimate child in the manner provided in section 230 of the Civil Code; that some ten weeks after the birth of the child he moved to Lassen county, where he secured a better position than he had in San Francisco; that in September, 1917, he was drafted and was held in the service of the United States from that time until the latter part of April, 1919, a short time before he filed said application to vacate the order; and that he had no knowledge whatever of the making of said order of adoption until after his return from overseas. This petition was filed on May 8, 1919.

The court found that these allegations were true, and particularly that at the time of the filing of the petition and obtaining the order of adoption by Hazel McGrew she was not a resident of the city and county of San Francisco, but was a resident of Sonoma county, and that ever since its birth said Zimmerman at all times publicly acknowledged said child as his child and received it with the consent of its mother into his family, where he and its mother resided and kept house together, and at all times since the birth of said child supported and otherwise treated said child as if it were legitimate, and that he thereby adopted the same as his own legitimate child.

[1] It is claimed by the appellant that these findings are not supported by the evidence. We do not deem it necessary to give the details of the evidence. It is sufficient to say, that while there was some conflict, there was satisfactory evidence sufficient to sustain the findings of the court on both propositions. It may be proper to say here also that the father and mother of the child had become acquainted in Sonoma county, and the mother had become pregnant of this child, and that some four months before its birth the father desired to marry the mother and was prevented from so doing by the objections of the girl's mother; that he went with her to San Francisco and there hired rooms in which he lived with her until after said adoption order was made and until the latter part of July, 1917, when he went to Lassen county as aforesaid; that upon being drafted into the army he had made an allotment for the transmission by the government of the legal proportion of his pay to the child's mother for the support of herself and her child in accordance with the federal law on the subject.

[2, 3] The statute provides that one who desires to adopt a child may, "for that purpose, petition the superior court of the county in which the petitioner resides," and it also declares that, if the persons whose consent is necessary are not residents of said county, their written consent may be procured, and must be filed in the superior court of the said county at the time of the application and adoption. Civ. Code, § 226. This means that the court of the county in which the person desiring to adopt the child resides is the only county which has jurisdiction to declare and order an adoption. The proceeding for adoption is a special one, and the requirements of the statute must be strictly construed, particularly with respect to the jurisdiction of the court. Ex parte Clark, 87 Cal. 640, 25 Pac. 967; Estate of Williams, 102 Cal. 77, 36 Pac. 407, 41 Am. St. Rep. 163; Estate of McCombs, 174 Cal. 214, 162 Pac. 897. It follows, therefore, that the order of adoption, being made by a court without jurisdiction, is void.

[4, 5] The appellant objects further that the order, being valid on its face, cannot be set aside or vacated at the instance of any person having no interest in the matter, and that the father of an illegitimate child has no such legal interest as would entitle him to apply to have the order vacated. It is to be observed that the mother of the child died in the early part of April, 1919, prior to the return of the father from the United States

Digitized by Google

service. It may be doubted whether the interest of the father of an illegitimate child in its welfare, after the death of the mother, is insufficient to authorize him to apply to vacate the order of adoption of said child by some other person. The question is not in the case, however, and we need not consider it. The court found that the father had duly adopted it in the manner provided by section 230. In the language of that section, "such child is thereupon deemed for all purposes legitimate from the time of its birth." It is well settled that such adoption can be made by a father of an illegitimate child who has not been married to its mother at the time of such adoption. Garner v. Judd, 136 Cal. 394, 68 Pac. 1026; Baker v. Jones, 166 Cal. 113, 135 Pac. 288; Estate of McNamara, 183 Pac. 552. These cases also declare that such adoption may be made, although the only home the father has and the home in which he receives it is a home in which he is living with the mother as husband and wife, although they are not married. Consequently Zimmerman was not only the natural father, but was also the lawful father, of the child and as such he had the legal status necessary to authorize him to maintain this proceeding to vacate the order.

[8-8] Appellant also objects to the procedure followed by Zimmerman. She contends that the six months allowed by section 473 of the Code of Civil Procedure within which to apply for relief by motion or petition in the case itself had fully expired before the petition was filed, and that the only other mode by which relief on the ground of fraud or mistake can be obtained is by an action in the nature of a bill in equity. If the point were good, a proposition which it is not necessary here to determine, it would not be sufficient as ground for reversal, since it would be an error in procedure and pleading only. Const., art. 6, § 4½. But it is not well taken. The record shows that the petition of Zimmerman stated facts sufficient to constitute a cause of action to set aside the order on the grounds that it was procured by fraud and that it was made by a tribunal that had no jurisdiction to act in the matter, that a copy of the petition and order to show cause was duly served on the appellant, and that she appeared in court at the trial and contested the matter without making any objection to the form of the proceeding, or to the manner of service of process. It does not even appear that the pleading filed by Zimmerman and said to be a petition was not in fact and form a complaint in an independent action to vacate the order of adoption. It is in all formal respects a pleading of that character, except perhaps in the title, and the record before us does not show how the paper is entitled. So far as we know, it was properly entitled as an independent action, and we will not presume anything on that subject which is not shown by the record. A mere defect in the title of a paper in the case does not operate to invalidate a judgment if it intelligently refers to the action or proceeding. Code Civ. Proc., § 1046.

The order appealed from is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

SAUNDERS v. SIMMS. (L. A. 5439.)

(Supreme Court of California. June 14, 1920.)

1. Executors and administrators ⟸202(1) — Enforcement of revived judgment not limited to execution.

Code Civ. Proc. § 685, which has an introductory clause, "execution after five years," and thereafter provides that judgment may be enforced or carried into execution after the lapse of five years by leave of the court, does not limit enforcement of a judgment revived by leave of the court to enforcement by execution, but permits its enforcement by claim and suit against the administrator of the estate of a judgment debtor as provided by sections 1498, 1504, 1505.

2. Executors and administrators ⟸421—Suit to enforce payment of judgment not action for new judgment.

A suit against administrator based on a judgment against deceased to obtain judgment for payment of the claim against the estate in due course of administration is not an action for new judgment liability, but, under Code Civ. Proc. § 1504, only establishes the validity of the claim the same as if it had been allowed by the administrator and approved by the court.

3. Judgment ⟸855—Statute for relief of judgment gives courts discretion to remove limitations.

Code Civ. Proc. § 685, authorising enforcement of judgments after lapse of five years by leave of the court, merely authorizes the courts in their discretion to permit the enforcement by the ordinary process provided by law of a judgment otherwise barred by section 336.

4. Divorce ⟸311—Child cannot satisfy judgment against father for support furnished by mother.

Where, in divorce proceedings, the custody of a minor daughter has been awarded to her mother and her father was ordered to pay fixed sums for her support until her majority, a release of the father by the daughter after she became of age is no bar against recovery by the mother, who provided support for the daughter, of the unpaid installments.

In Bank.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by Alpharetta Saunders against Dan W. Simms as administrator with the will an-

Digitized by Google

nexed of the estate of Albert S. Collins, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Simms & Fulwider, of Los Angeles, for appellant.

H. V. Weisel, of Anaheim, and William & Rutan, of Santa Ana, for respondent.

SLOANE, J. The respondent on this appeal obtained a judgment in her action for divorce against her husband, Albert S. Collins, awarding her the custody of their minor child, Lida Collins, and requiring the defendant to pay to plaintiff, respondent here, the sum of $15 per month for the support of the minor. No payments were made under this judgment. Respondent furnished from her own resources the child's maintenance until she became of age. The accrued amounts due, owing, and unpaid at that time under the judgment aggregated the sum of $1,200 besides interest.

The judgment debtor, Albert S. Collins, died in the county of Orange on the 4th of August, 1916, some 16 years after the entry of the judgment and about 10 years after the last installment on the payments fell due. On the 17th of May, 1917, the respondent here applied to the superior court of San Bernardino county, where the original action was had, for leave to enforce the judgment under the provisions of section 685 of the Code of Civil Procedure.

This section in so far as pertinent to this case, is as follows:

"Sec. 685. *Execution After Five Years.*—In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings."

The court in this instance made an order that the judgment "may be enforced and carried into effect," and found that with accrued interest the sum of $2,112 was owing and unpaid. The order further recited: "That plaintiff is hereby given the right to enforce the same as provided by law against the estate of Albert S. Collins, deceased."

The judgment thus fortified and revived was thereupon presented as a claim against the estate of the deceased judgment debtor, and upon its rejection by the failure of the administrator to act thereon within ten days suit was instituted by respondent against the administrator in the county of Orange, where the probate proceedings were pending, to have the judgment adjudged a valid claim against the estate, to be paid in due course of administration. Judgment was so made and entered in the superior court of Orange county, and it is from this judgment that the appeal is taken.

Appellant concedes the jurisdiction of the San Bernardino superior court to entertain the motion and to grant leave to enforce the judgment by execution after the period of the statute of limitations had run, but contends that no authority is given, under section 685, to grant any further relief than could be obtained under an execution, and disputes the jurisdiction of the superior court of Orange county to give the judgment appealed from.

[1] We fail to understand upon what theory of construction appellant claims that the relief granted by section 685 in case of a money judgment is limited to enforcement by execution. It is true the text of the section is introduced by the disconnected clause "execution after five years," but it is apparent from the context, which provides that "in all cases the judgment may be enforced or carried into execution after the lapse of five years," that the word "execution" is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes of judgments. Where a judgment debtor has died, it is directed by section 1505 of the Code of Civil Procedure that no execution shall issue on the judgment, but that it shall be presented to the executor or administrator like any other claim. Section 1498 of the Code of Civil Procedure provides that where a claim is rejected the holder may bring suit; and it is declared by section 1504, of Code of Civil Procedure, that a judgment rendered against an executor or administrator "upon any claim for money against the estate" only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. This is the method for enforcing a judgment after the death of a judgment debtor substituted by law in place of enforcement by writ of execution. It is the same procedure that would have been required after the death of the judgment debtor if the statute of limitations had not run on the demand. We see no reason why this sort of relief may not be granted under section 685, as well as that by issuance and levy of a writ of execution.

[2] The suit to obtain judgment for payment of a claim in due course of administration is not, as appellant seems to think, an action to establish a new judgment liability, based upon the old, but, as set forth in section 1504 of the Code of Civil Procedure, only establishes the validity of the claim in the same manner as if it had been allowed by the administrator and approved by the court. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; Estate of More, 121 Cal. 638, 54 Pac. 148. And it is held that the allowance of a claim is not in any true sense a judgment. Morton v. Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53. There is nothing in Doehla v. Phillips, 151 Cal. 489, 91 Pac. 330, and other decisions cited by appellant, contrary to the view expressed. In the cases cited executions

Digitized by Google

were issued because they happened to afford appropriate and adequate relief, but there is nothing to indicate that some other appropriate means for collecting the judgment could not be resorted to in a proper case.

[3] Section 685 is a limitation upon the operation of the statute of limitations under section 336 of the Code of Civil Procedure to the extent that it places within the discretion of the courts the power to authorize the enforcement by the ordinary processes provided by law of a judgment otherwise barred by the statute. That is what was done in this instance.

[4] As a further defense in this action the defendant introduced an agreement of settlement executed between Lida Collins, the daughter, and the administrator of the father's estate, executed after she became of age, in which she attempted to release the estate from liability under this order for maintenance. Appellant argues that the daughter was the real beneficiary of the maintenance fund, and the respondent her mother, merely a trustee. The original judgment of the court directed the payment of this money to the mother to assist her in the support of the child placed in her custody. Having furnished such support from her own resources she is clearly entitled to recover it in this proceeding in her own name and for her own reimbursement, and the trial court properly disregarded the attempted release by the daughter.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

MUNSON v. FISHBURN et al. (L. A. 4909.)

(Supreme Court of California. June 19, 1920. Rehearing Denied July 19, 1920.)

1. Joint adventures ⇐4(1)—Duty of parties defined.

Associates in a common enterprise have the duty to each other to make full disclosures of any preference or profit not common to all associates.

2. Corporations ⇐30(2) — False representation that option holders were subscribers on same basis warrants rescission.

Option owners and promoters will not be allowed to retain profits realized from the exercise of the option unless the fact of such interest is disclosed in advance, and the claim of disclosure of profits will not relieve them from a rescission or damages because of false representations that they had no interest in the options, but were subscribers to the stock of a corporation on the same basis as plaintiff, whom they thereby induced to subscribe.

3. Fraud ⇐27—False representation that defendants have subscribed for stock on same terms held actionable.

The principle that a false statement as to price paid is actionable is equally applicable to false representations that others have subscribed for corporate stock on the same terms on which it is sought to and did induce plaintiff to subscribe.

4. Corporations ⇐80(12)—Return of stock held to put sellers in statu quo.

Where stock was issued directly to plaintiff from a corporation but, at the instance of defendants and in compliance with their agreement to sell him one share for every dollar subscribed and paid on a syndicate agreement which was induced by fraud, if plaintiff's offer to return the stock to defendants had been accomplished, it would have put defendants in statu quo.

5. Corporations ⇐80(10)—Four months' delay no defense to action by stock subscriber for damages.

Laches arising solely from four months' delay is no defense to an action by subscriber to stock for damages, and this is sufficient to defeat a general demurrer.

6. Corporations ⇐80(10)—Delay of a stock subscriber in bringing action for rescission held not laches.

Where a stock subscriber did not learn of a fraud and his right to rescind until about four months previous to action, and then promptly offered to rescind, his four months' delay in consulting an attorney was not so unreasonable as to amount to laches, where determination of his legal rights was difficult.

7. Corporations ⇐80(10)—Payment of assessments to preserve stock for tender to seller does not prevent rescission.

Plaintiff's payment of corporate stock assessments after discovery of fraud inducing its purchase does not constitute affirmance barring his action for rescission, since he was entitled to preserve the property so he could tender it back.

8. Corporations ⇐80(12) — Damages sufficiently alleged for rescission of purchase of stock.

Allegation that plaintiff was induced to purchase corporate stock at a fictitious value because of representation that defendants had purchased upon the same basis, and that plaintiff subsequently found that they were joint owners with another of options to be purchased by the corporation, and that the value of the stock purchased had never been greater than three-fifths of the fictitious value which he paid, *held* sufficient allegation of damages for rescission; it not being necessary to plead and prove the precise amount as in case of deceit.

9. Sales ⇐130(2)—Exact damage need not be shown in action for rescission.

In an action for rescission of a sale for fraud, the exact amount of damage need not be shown, provided it be in an appreciable sum.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

10. Fraud ⇐47, 59(1)—Damages measured by amount paid for stock with 7 per cent. interest less value of stock upon discovering fraud.

Where the action is for damages for fraudulent representations inducing the purchase of corporate stock, plaintiff must allege and prove a definite amount and the measure of damages, which would be the amounts paid, including assessments on the stock, with interest at 7 per cent. from the dates of such payments, less the value of the stock at the time of discovering the fraud.

11. Corporations ⇐80(6) — False statement that defendants had purchased stock on same basis held actionable.

Where the value of defendant's connection with a syndicate may not be capable of ascertainment, nevertheless, if plaintiff was induced to purchase corporate stock by defendants' false representations as to their purchase of such stock on the same basis, and thus change his position in reliance thereon, the lessened value of the stock would constitute damage for purpose of rescission, and the complaint on such theory is sufficient.

12. Corporations ⇐80(12)—Rescission of purchase of stock induced by fraud not limited to rescission against corporation.

Though defendants were not vested with any discretion in purchasing property for the corporation and never owned the stock which they, by fraudulent representations, induced plaintiff to purchase, yet, where the stock was taken upon their false representations that they had purchased stock on the same basis that plaintiff was induced to purchase, they failed to disclose their interest with another in options on land the company was taking, and plaintiff could rescind as against them, and was not limited to rescission against the corporation.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by S. M. Munson against J. E. Fishburn and others. Judgment for defendants, and plaintiff appeals. Reversed.

James S. Bennett, of Los Angeles, for appellant.

O'Melveny, Stevens & Milliken, John E. Biby, Walter K. Tuller, Edwin A. Meserve, Shirley E. Meserve, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondents.

LAWLOR, J. This is an appeal from a judgment on demurrer entered in favor of the defendants and against the plaintiff. The action was brought by the plaintiff for the rescission of a contract by which he subscribed to a syndicate to be formed by the defendants to acquire certain land, or for damages if rescission should be found to be inequitable.

It is alleged in the complaint that the defendants J. E. Fishburn, president of the National Bank of California, R. I. Rogers, vice president of said bank, R. A. Rowan & Co., a corporation, and W. H. Joyce were the owners of options to buy a certain tract of 2,800 acres of land in Los Angeles county; that a syndicate was formed for the purchase of said land; that, for the purpose of inducing the plaintiff to subscribe for shares in the syndicate and thereby become a copurchaser of the land with the defendants and other subscribers, "defendants and each of them represented to plaintiff that the defendants R. A. Rowan & Co. and W. H. Joyce were the owners of the options to purchase the land"; that the price to the subscribers to the syndicate was $850 per acre, payable as follows: $920,000 in cash on December 9, 1912, and the balance in two installments of equal amount in five and ten years, respectively, from the date of the exercise of the said options; that the said price was about $87.50 per acre in excess of the price to the said option owners, who were to receive and retain the difference for their options and services; that Fishburn and Rogers had subscribed to said syndicate and would pay on an equal basis with the other subscribers the sum of $25,000, respectively, into the said subscription fund of $920,000; "that, relying upon said representations that * * * Fishburn and Rogers had each subscribed the sum of $25,000 to said syndicate agreement on an equal basis with plaintiff and would pay in the amount of their said subscriptions, * * * plaintiff on or about the 10th day of November, 1912, signed said syndicate agreement and subscribed thereto the sum of $5,000," and thereafter paid said sum to defendants Rowan & Co. and Joyce; "that, had it been disclosed to plaintiff that * * * Fishburn and Rogers * * * had an interest in said options or in said profits, plaintiff would not have subscribed to said syndicate agreement or paid in the amount of his said subscription or any part thereof or at all become a party to said syndicate agreement;" that these representations were false in this, "that it was understood and agreed by and between defendants * * * that the amounts of said subscriptions * * * made by * * * Rogers and Fishburn, respectively, when paid in by them, should be returned to them, respectively, as their shares of the profit of $87.50 per acre mentioned in said syndicate agreement as being received and retained by * * * R. A. Rowan & Co. and Joyce"; that Fishburn and Rogers were the owners of a one-tenth interest, respectively, in the options represented to the plaintiff as being owned exclusively by the disclosed option owners, Rowan & Co. and Joyce; that at the time plaintiff signed the syndicate agreement the names of Fishburn and Rogers appeared as subscribers thereto with their sub-

Digitized by Google

scriptions in the sum of $25,000 each, and that they concealed from and failed to disclose to plaintiff that there was an agreement between them to the effect that the subscriptions of the undisclosed option owners should be returned to them as their share of said profits.

It is further alleged that on December 3, 1912, the amount of the subscription fund having been paid in ahead of time, the purchase of the land was made, and a corporation, known as the Laguna Land & Water Company, organized; that this corporation was capitalized at $2,000,000, and stock was issued and divided into 2,000,000 shares of the par value of $1 each; that 920,000 shares of this stock were issued to the option owners, Rowan & Co. and Joyce, in consideration of the transfer of the land to the corporation; that these 920,000 shares were distributed to the subscribers to the syndicate at the rate of one share for each dollar subscribed; that on the same day 25,000 shares were issued to each of the defendants Fishburn and Rogers, although they did not pay their subscriptions until January 24, 1913; that on the last-mentioned date they made a pretended payment to Rowan & Co. and Joyce of the amount of their subscriptions, and that at the same time, and pursuant to the agreement that the amount of their subscriptions, when paid, should be returned to them as their share of the profits, they received back from Rowan & Co. and Joyce the identical amount paid in by them.

The complaint then alleges that the plaintiff first discovered the fraud on June 1, 1915, but was not aware, until some time in November, 1915, of his right to rescind. On November 29, 1915, plaintiff notified the defendants that he rescinded the agreement, tendered back the stock which had been issued to him, demanded his money, and, being refused, brought this suit.

The demurrer was to the second amended complaint as amended, on the following general grounds:

"(1) That the same does not state facts sufficient to constitute a cause of action.

"(2) That the same is uncertain in the following respects, and each of them:

"(a) It cannot be ascertained how the payment of $25,000 made by J. E. Fishburn was a pretended or fictitious payment.

"(b) It cannot be ascertained how the payment of $25,000 made by R. I. Rogers was a pretended or fictitious payment."

The demurrer was sustained without leave to amend, and judgment was entered in favor of the defendants with costs.

[1] 1. It is well settled that associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates. In Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106, the defendant had secured an option on a certain tract of land for the sum of $27,500. He told one Whitlock that, if he would find him a purchaser who would pay $33,000 for the property, he (defendant) would pay Whitlock $3,000. Whitlock organized a corporation to make the purchase, and himself subscribed to the fund being raised to make the payment, but he did not disclose to his associates or cosubscribers that he was to get a profit. The court said:

"When he did this, he assumed as to his associates, under a well-established rule of law, a relation analogous to that which exists between partners, and was precluded from making any secret profit out of the contemplated purchase at their expense. *The implied understanding between joint purchasers is that each is engaging in an enterprise solely for the mutual and common benefit and advantage of all, and that each has a common interest with the others, according to the amount of his subscription.*" (Italics ours.)

The principle of that case was followed in California-Calaveras Min. Co. v. Walls, 170 Cal. 285, 293, 149 Pac. 595, 599, which quotes from the syllabus of the former case as follows:

"Promoters of a corporation formed for the express purpose of purchasing a particular piece of property occupy a fiduciary relation to their cosubscribers, and are bound to truthfully declare to their associates any personal interest they may have in the matter of the purchase. Without such disclosures they cannot legally profit at the expense of their associates, and if they were guilty of any misrepresentations of facts or suppression of truth in relation to their personal interest in the proposed purchase, the corporation is entitled to set aside the transaction, or recover compensation for any loss which it has suffered."

See, also, Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496; Smith v. Goethe, 147 Cal. 725, 82 Pac. 384; Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 361, 78 Pac. 550, 104 Am. St. Rep. 42; Sims v. Petaluma Gaslight Co., 131 Cal. 656, 63 Pac. 1011; San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410.

[2] While it is true that in some of the cases just cited, for example the Calaveras Case, it was not disclosed by the promoters that any one connected with the organization of the enterprise was to get a profit, and in the instant case it was made known to the subscribers that Rowan & Co. and Joyce were to receive the profits, nevertheless the same principle applies. Fishburn and Rogers held themselves out to the public as subscribers who had enough faith in the venture to risk $25,000 on it, and, because of this and the position they occupied in the financial world, plaintiff was induced to subscribe to the syndicate, which he alleges he would not have done had he known that they were interested

Digitized by Google

in the options to an extent equal to the amount of their subscriptions. The law imposed upon these defendants the same duty to disclose their interest in the options as it imposed upon Rowan & Co. and Joyce. There could be no question of plaintiff's right of action if there had been no disclosures as to the profits, for it is well settled that an option holder or promoter will not be allowed to retain profits, realized from the exercise of the option, unless the fact of his interest in the option is disclosed in advance. We think that Fishburn and Rogers, in addition to being option owners, were joint promoters with Rowan & Co. and Joyce, and hence were equally bound to make known to prospective subscribers the nature and extent of their interest in the enterprise. If we understand defendants' position, it is this: That, since the amount of the profits to accrue was fully disclosed to the plaintiff, he will not be heard to complain that he was not informed as to whom the profits would go. But this position ignores the claim of the plaintiff that he is entitled to rescission or damages because of the false representations that Fishburn and Rogers had no interest in the options but were subscribers on the same basis as himself, and that he was induced by these false representations to subscribe, which he would not otherwise have done.

[3] In Talmage v. Sanitary Security Co., 31 App. Div. 498, 52 N. Y. Supp. 139, where three actions were brought to rescind subscriptions to the capital stock of the defendant company and recover the installments paid thereon on the ground that certain men of standing in the community had held themselves out as subscribers, when in reality their stock was given to them, the court said:

"We think that the representations were material. The fact that other persons had subscribed to the stock of the defendant in a large amount (especially that the two experts mentioned had thought well enough of the scheme to invest in it) would naturally influence the determination of the plaintiffs in reference to subscribing to the stock. With the exception of men of extremely cool judgment and great confidence in their own judgment, we all are apt to be influenced in our action and conduct by the action and conduct of our fellows. Especially is this the case in speculations. * * * Now, of course, what concerns the purchaser is the value of the property. In itself, the price paid by the vendor is not of any moment, but it is of vital importance to the purchaser in forming his judgment as to value. The law recognizes this fact, and holds a false statement as to price paid actionable. *The principle is equally applicable to representations that other persons have purchased similar property, or subscribed for stock on the same terms upon which it is sought to induce any person to become a subscriber.*" (Italics ours.)

See, also, Garrett Co. v. Clark, 42 Misc. Rep. 610, 87 N. Y. Supp. 580; Rose v. Merchants' Trust Co., 96 N. Y. Supp. 956, 29 L. R. A. [N. S.] 477, note; 20 N. Y. Ann. Cas. 86, notes; 2 Elliott on Contracts, 105.

[4] 2. Defendants contend that in any event plaintiff could not have rescission for three reasons:

"First, it was impossible to put defendants in statu quo; second, plaintiff himself was guilty of laches; third, by paying assessments on the stock with full knowledge of the facts plaintiff himself affirmed the transaction."

We think there is no merit in any of these contentions.

As to the first, it is sufficient to point out that the agreement of the defendants was in effect an agreement to sell to the plaintiff one share of the corporate stock for every dollar he subscribed and paid upon the syndicate agreement; that, while it is true that the stock was issued to plaintiff directly from the corporation, nevertheless it was so issued at the instance of the defendants and in compliance with the said agreement; and that, if the offer by the plaintiffs to return to the defendants the stock received by him had been accepted by them, it would have put them in statu quo.

[5, 6] Upon the second point it may be observed that laches arising solely from a delay of four months is no defense to an action for damages, and that this is sufficient to defeat a general demurrer. With regard to the right to rescind the complaint shows that the plaintiff did not discover that Fishburn and Rogers were interested in the profits going to Rowan & Co. and Joyce until after June 1, 1915, and did not learn that he had a right to rescind on account of that fact until some time in November, 1915, and that the offer to rescind was made on November 29, 1915. Under the peculiar circumstances of this case and in view of the difficulty of determining the law as to the rights of a person in the position of the plaintiff, it is not surprising that he did not suspect that he had a right to rescind until he learned in November that other subscribers to the agreement, upon discovering the facts, had effected a rescission. Under the rule applied in Hannah v. Steinman, 159 Cal. 142, 152, 112 Pac. 1094, the delay of four months in consulting an attorney cannot be said to be so unreasonable as to amount to laches.

[7] Nor do we think that defendants' third contention that the payment of assessments by plaintiff after his discovery of the fraud constituted an affirmance of the transaction which bars his cause of action for rescission, if for no other reason than that he was entitled to preserve the property so that he might be in a position to tender it back if he should later seek rescission.

[8, 9] 3. The cause was argued in department and submitted for decision. The submission was subsequently vacated, and the cause set for further argument on the question:

Digitized by Google

"What injury is it necessary to show in a case where there is a rescission only, as distinguished from a suit for damages?"

In this connection defendants, in their memorandum filed following resubmission, contend that—

"If plaintiff did not show either that the property purchased was worth less than he paid for it or that it would have been worth more than it actually was worth if the representations had been true—in other words, if he did not show pecuniary injury—then he has not shown anything justifying either rescission or damages."

As already appears, it is alleged that at the time the plaintiff paid the $5,000 to Rowan & Co. and Joyce the interest which he thereby acquired had "a fictitious market value" of $5,000, which value was created "by reason of the belief of the subscribers" that Fishburn and Rogers had subscribed on the same basis as the other subscribers, that it subsequently became known to the subscribers that Fishburn and Rogers had not subscribed on the same basis, but were joint owners of the options with the other defendants, and that, by reason of this knowledge, plaintiff's stock became worth no more than $2,500, and has never since been of a greater value than $3,000. In our opinion, this is a sufficient allegation of damages for rescission. It is, of course, well-settled that in an action of damages for deceit the plaintiff must allege and prove the precise amount thereof. But this is not the rule where rescission is sought. Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011, was an action for rescission and to recover the money paid by the plaintiff to the defendant as the price of certain corporate stock upon the asserted fraudulent representations of defendant as to patent rights. It is said, at page 387 of 152 Cal., at page 1014 of 92 Pac.:

"It is also claimed that the complaint is insufficient because of the absence of any showing therein that any pecuniary damage was caused by the fraud alleged. It is true that there is no express allegation that plaintiff suffered pecuniary damage therefrom, but in cases of this character this is not necessary. That fraud which has produced, and will produce, no injury will not justify a rescission, nor support an action either for rescission or for damages, is an established principle of law and equity. But there is no rule that the injury must be of such a nature that it can be accurately measured in money. And we know of no rule of pleading which, in an action based upon a rescission between the parties or seeking to enforce such rescission, requires a statement that the fraud complained of had caused or would cause a specific amount of damages. It may be conceded that it must be shown that the plaintiff, by reason of the fraud, suffered an injury of a pecuniary nature, that is, an injury to his property rights, as distinguished from a mere injury to his feelings, but it will be sufficient if the facts alleged show that material injury will necessarily ensue from the fraud, although the amount of the pecuniary loss is not stated."

In Wainscott v. Occidental, etc., Association, 98 Cal. 253, 33 Pac. 88, the plaintiff sued to rescind certain conveyances which he asserted he had been induced to make through the defendant's false representations. The court said:

"'If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable.' Pomeroy's Equity Jurisprudence, § 898. * * * In an action to rescind upon the ground of fraud, the fraud is the essential thing, and, while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance."

This rule finds support in the following quotation from Black on Rescission and Cancellation, vol. 2, p. 901:

"When a stock subscription has been obtained by fraud, the subscriber is entitled to maintain a bill in equity to annul the same, without alleging or proving that he has sustained any pecuniary loss by reason of the fraud."

See, also, Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 195, 135 Pac. 496; Stern v. Lumber Co. (C. C.) 134 Fed. 509; Mack v. Latta, 83 App. Div. 242, 82 N. Y. Supp. 130, 135; Commonwealth Bonding, etc., Co. v. Bomar (Tex. Civ. App.) 169 S. W. 1060; Johns v. Coffee, 74 Wash. 189, 133 Pa. 4; 22 Standard Encyc. Procedure, 1001, note 66; Cook on Corporations, vol. 1, p. 447; Elliott on Contracts, vol. 1, p. 164; 14 Corpus Juris, 614, note 58.

In the recent case of Stillwell v. Rankin, 55 Mont. 130, 174 Pac. 186, the suit was brought to secure the rescission of a contract for the purchase of certain shares of stock. The alleged fraudulent representations upon which plaintiff based his cause of action were as follows: That, plaintiff being a stockholder in the company, defendant, an officer of the company, "stated to plaintiff that 100 shares of the stock had been turned back to the company by a subscriber who was unable to pay for it, and solicited plaintiff to purchase the stock 'to help the said company out,'" and plaintiff alleged that "in reliance thereon he agreed to purchase the stock (which otherwise he would not have purchased)." We quote from the opinion:

"Is it essential to the statement of a cause of action for the rescission of a contract for fraud that the plaintiff allege that he has suffered pecuniary loss? Authorities may be found which answer in the affirmative and most emphatically but curiously enough do not insist that the amount of such loss is material, if it is at all appreciable. * * * Courts of equity like courts of law, * * * do not concern themselves with wrongs which do not produce injury; but 'injury' and 'pecuniary loss' are not synonymous terms. * * * Most of the courts

Digitized by Google

and text-writers employ the term 'damage' in the sense of injury; a few restrict its meaning to financial loss. We prefer to adhere to the rule which gives to the term its broader significance, as including either pecuniary loss *or the alteration of one's position to his prejudice.* * * * If the allegations of this complaint are true, plaintiff was induced by fraudulent representations to assume obligations which otherwise he would not have assumed, and to purchase property which otherwise he would not have purchased. We deem the allegations sufficient to disclose damage within the meaning of that term which we adopt." (Italics ours.)

In Vulcan Fire Ins. Co. v. Jorgenson, 33 Cal. App. 763, 166 Pac. 835, the plaintiff sued to recover an alleged balance due on a subscription for certain shares of its capital stock. The defendant set up in his cross-complaint that his subscription was procured upon the false representation that a certain bank president, upon whose integrity and business capacity the defendant placed special reliance, was connected with the insurance corporation, and asked for the rescission of the contract and the recovery of the money paid. Judgment went for the defendant. Among the grounds urged for a reversal of the judgment was:

"That the record contains no allegation, evidence, or finding that the cross-complainant was in any way pecuniarily damaged by the alleged false representations."

The appellate court said:

"That such representations * * * are sufficient to entitle the subscriber to rescind, without proof of pecuniary damage suffered is well settled."

This language was objected to in a petition for a hearing in this court, but the petition was denied. In Davis v. Butler, 154 Cal., 623, 627, 98 Pac. 1047, 1049, it was said, citing Spreckels v. Gorrill, supra:

"It is not essential to the right to rescind a contract for the purchase of property that the purchaser should be able to show that the property purchased was worth less than he paid for it. It is enough that he was induced by false representations to buy property which would, if the representations had been true, have been worth more than it actually was worth."

The case of Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, is cited by defendants. In that case the plaintiff had been induced, through false representations made by the defendant as to former profits in conducting the business, to purchase an interest in the defendant's stock of hardware and agricultural implements. The opinion declares:

"The complaint states no cause of action so far as it relates to fraudulent representations respecting the question of former profits of the business. It contains no allegation that the plaintiff was induced thereby to pay a higher price for the goods than he would otherwise have done, nor is it averred that the business was not profitable after the plaintiff bought into it. In other words, there is nothing in the complaint to show that the plaintiff was in any way injured by the representations, admitting them to have been false. * * * In order to entitle a party to rescind a contract, he must not only show the fraud, but that as a result thereof some damage has resulted to him."

It was not held in that case or in any other cited by the defendants nor do we know of any case holding that the damage suffered must be capable of exact calculation in order to entitle the party injured to rescind the contract. It is only necessary that the allegation and proof must show an "appreciable" amount of loss.

[10, 11] Plaintiff alleges, in effect, that he was induced by the false representations to subscribe to the syndicate, and that the shares issued to him would, if the representations had been true, have been worth $2,000 more than their actual value at the time of the discovery of the fraud. By these false representations, it is alleged, the plaintiff was induced to part with his money, and, to the extent of the difference between the alleged market value of the stock, $3,000, and the sum which such stock would have been worth if the representations had been true, $5,000, the plaintiff has suffered a pecuniary loss of $2,000. In every case of fraud, either where damages or rescission is sought, it must be alleged and proved that the complainant has suffered material injury. But it is the character of the fraud constituting the cause of action which determines the extent to which the pleading and proof must go in order to establish damage. As already pointed out, plaintiff assumes to state his cause of action on the alternative theory, that, if he is not entitled to rescission damages may be awarded. First, as to rescission: It is clear from the authorities we have cited that the exact amount of damage need not be shown, provided it be in an "appreciable" sum. Where the action is for damages, however, the plaintiff must allege and prove that by reason of the fraud he has suffered damage in a definite amount. In the one case damage is predicated on the change in position; in the other on the extent of the pecuniary loss. The measure of damages here would be the amounts paid in by the plaintiff, including the assessments, with interest thereon at the rate of 7 per cent. from the dates of such payments, less the value of the stock at the time of the discovery of the fraud. Plaintiff alleges that the factor which induced him to subscribe to the syndicate was his confidence in the financial standing and business judgment of Fishburn and Rogers, who, it was represented, had already subscribed for 25,000 shares on the same basis as that upon which he was asked to invest. While the value of the connection of Fishburn and Rogers with the

Digitized by Google

syndicate may not be capable of ascertainment, nevertheless, if the plaintiff was induced by the defendants' false representations to change his position in reliance thereon, the lessened value of the stock would constitute damage for the purpose of rescission. The plaintiff "was placed in a worse position than he otherwise would have been." Pomeroy's Eq. Juris. (4th Ed.) vol. 2, § 898. We think the complaint is sufficient under either theory.

[12] 4. Nor can we agree with defendants' contention, made in their memorandum filed following the resubmission of the case:

"If there is any right of rescission, * * * it is a right to rescind against the corporation, and there is no right on the part of a subscriber to rescind a subscription as against other share holders or promoters."

The only authorities which defendants cite on this point are Western Bank v. Addie, L. R. 1 H. L. Cas. 185; Love v. Love, 145 Ill. App. 150, and Sim v. Edenborn (C. C.) 163 Fed. 655. The first of these cases held that the false representations of directors are imputable to the corporation, and one "who has been induced to purchase stock in reliance on such representations cannot be held to his contract." Love v. Love, supra, was a bill in equity for the partition of certain premises, and "the sole question" was "whether the lower court erred in appointing a receiver." Rescission was not in any way involved. In Sim v. Edenborn, supra, the court held that the original complaint outlined a cause of action in equity, while purporting to be a case at law and praying for damages at law. Defendants' demurrer was therefore sustained. But in Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441, a case arising out of the same transaction, the defendant was the principal promoter and organizer of a syndicate, and the plaintiff asked that he be released from a contract which he had made as a subscriber to the syndicate on the ground that the defendant, by inducing him to become a party to the agreement, was guilty of fraud. The court said, at page 226 of 203 N. Y., at page 446 of 96 N. E.:

"It is, of course, true that, in an action between two parties to a contract, one cannot avoid it as against the other, who is entirely innocent, on the ground that he was induced to make it by the fraud of a third party, wholly disconnected with the transaction. So far as I can find, however, this principle has never been applied in an action by the injured party against a person claiming protection as agent under the contract which he had fraudulently induced. But beyond this I do not think that it can be said that the moneys of plaintiff's assignors were not paid to defendant under a contract for his benefit, and to which he was a party. He was the promoter of the enterprise, and procured the execution of the syndicate agreement. By its express terms it was made by each subscriber, not only with the other subscribers, but also with him, as a syndicate manager, and it was for his benefit, not only in authorizing him to purchase the property in question, but also in conferring upon him general powers as a manager. If the contract be regarded as a single one between each subscriber on one side, and his fellow subscribers and the managers on the other, it must follow that the fraud of either of the latter in inducing it would be a ground for rescinding it against all parties. If the agreement should be regarded as embracing two contracts, one made by each subscriber with his fellow subscribers, and a second one made by him with defendant as agent and manager, it may be that in an action between the subscribers the contract could not be avoided, because of the latter's fraud, although I have doubts about that. In Metropolitan Coal Consumers' Case, 66 Law Times [N. S.] 700, it was held, after consideration of the principle now being urged by defendant, that a subscriber could be relieved from a subscription for corporation shares because of false statements made by promoters in a prospectus issued before the corporation was organized, 'although not made by the company or its agents.' But, however this may be, this is an action between the subscriber and the agent, between whom in terms there existed a contract authorizing the transactions here involved, and in view of this and the surrounding circumstances I do not think it possible for the latter to say that he was not a party to the contract and to the transactions which occurred under it, within the rule now being discussed."

In our opinion the principle there invoked is applicable to the facts alleged in this case. The defendants do not question the correctness of this principle, but they attempt to distinguish that case from the one at bar in that: (1) Whereas in the New York case "the property which the corporation acquired was the defendant's own property," here "the defendants never owned the tract of land and never owned the stock"; and (2) the defendants here were not vested with any discretion in purchasing property for the corporation, whereas in the Heckscher Case the defendant was authorized to exercise a discretion. As to the first ground of attempted distinction, we are not disposed to hold that, although defendants held the options on the land in question and undoubtedly did receive any profits there may have been in the transaction, the contract of subscription may not be rescinded as against them, because they did not have the title to the shares which plaintiff received or to the land which those shares represented. Nor, in the view we take, would the other distinction attempted to be drawn by defendants make any difference. Plaintiff's cause of action is based, not on the abuse of any discretion on the part of defendants in purchasing the land on which they held the options, but on their failure to disclose to him the interest which Fishburn and Rogers had therein. As we have said, a fiduciary relationship existed

Digitized by Google

between the defendants and the plaintiff, and, assuming, as we must, that the allegations of the complaint are true, the defendants should not be allowed to reap the benefit arising from their abuse of the confidence reposed in them.

It follows that the demurrer should have been overruled.

Judgment reversed.

We concur: SHAW, J.; OLNEY, J.

ARNOLD v. LA BELLE OIL CO.
(Civ. 3181.)

(District Court of Appeal, Second District, Division 2, California. May 1, 1920.)

1. Corporations ⟸432(4)—Contract purporting to be signed by officers prima facie proof of execution by officers so as to shift burden of proof.

In an action on a contract against a corporation, where the document on its face purported to have been signed by the president and secretary, and had attached thereto and impressed thereon the seal of the corporation, plaintiff made a prima facie case by introducing it in evidence, such showing being sufficient to shift the burden of proof on the corporation to show that the persons signing the contract were not officers.

2. Brokers ⟸43(3)—Letter employing broker to sell land sufficient.

A letter to a broker concerning the sale of land *held* a sufficient memorandum under Civ. Code, § 1624, subd. 6.

3. Brokers ⟸43(2)—Statute as to appointment of broker does not require formal written contract.

Civ. Code, § 1624, subd. 6, requiring an agreement employing broker to be in writing, etc., does not require any formal contract; it being sufficient that the fact of employment be expressed in writing, signed by the party to be charged, or his agent.

4. Brokers ⟸43(2)—Statute as to appointment of broker by writing held not to apply to executive corporate officer.

When Civ. Code, § 1624, is construed with and in the light of sections 2309, 2310, requiring an agent's authority to execute a contract in writing to be itself in writing, it does not apply to the executive officers of a corporation, and hence a writing, employing an agent to sell land, was sufficient where signed by an executive officer of the corporation, though the name of the secretary was not appended and the corporate seal was not attached thereto.

5. Corporations ⟸407(3)—Corporation may appoint acting secretary to execute written appointment of broker to sell land.

Assuming that a written appointment of broker by a corporation must be signed by the secretary and the corporate seal attached, under Civ. Code, § 1624, subd. 6, a particular person, although not the regularly elected, qualified, or acting secretary, but appointed by the directors to act in the latter's absence, could execute such an instrument in such capacity.

6. Corporations ⟸426(6)—Corporation by resolution of directors could ratify writing appointing broker to sell land.

Assuming that a writing by an executive officer of a corporation employing a broker to sell land was not a sufficient memorandum under Civ. Code, § 1624, because not signed by the secretary of the corporation, such writing became sufficient where the board of directors by resolution ratified the action of the corporate officer executing the writing, under section 2310.

7. Brokers ⟸57(2)—Entitled to agreed compensation on sale to purchaser for less than contemplated.

Where broker was employed to procure a purchaser for land at a certain price per acre, and was to get 5 per cent. of the price, as paid to the owner, he was entitled to such agreed percentage, where he furnished a purchaser at a less price, accepted by the owner.

8. Brokers ⟸57(2)—Subsequent modification of sale contract cannot defeat broker's compensation.

Modification of a contract of sale of land by mutual consent of the owner and a purchaser could not defeat the broker's right to the agreed compensation.

9. Brokers ⟸75—Entitled to compensation as price was paid.

Where broker was to receive 5 per cent. commission "in the manner as and when paid to us," he was entitled to such percentage of all payments made by the purchaser, and was not required to wait until the full purchase price was paid.

10. Brokers ⟸75—Not entitled to percentage out of due, but unpaid, installments.

A broker, entitled to 5 per cent. of the purchase price, "in the manner as and when" payments were received by the owner, was not entitled to recover commissions on payments due, but not yet made, though the purchaser was able, willing, and ready to pay.

11. Appeal and error ⟸768—Failure to deny statement conceded truth on appeal.

Where plaintiff on appeal, on objection of defendant in an action to recover broker's commissions for sale of land to an allowance in the judgment of commissions on unpaid installments, claimed that it was stipulated at the trial that the installments would have been paid by the purchaser had it not been impounded by attachment, and that judgment was to pass for the amount of the commission on such unpaid installment if plaintiff was entitled to judgment at all, it was assumed that appellant conceded the truth of such statement, where he did not deny it.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Ralph Arnold against the La Belle Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

Black & Black, of Los Angeles, for appellant.

E. S. Williams, of Los Angeles, for respondent.

THOMAS, J. The plaintiff seeks to recover the sum of $4,362.43, claimed to be due and unpaid at the time of the commencement of this action, and the further sum of $300, claimed to have become due, owing and unpaid "subsequent to the filing of the original complaint herein and the commencement of this action, and prior to the date of trial," by virtue of certain of the terms of a written instrument, which, in words and figures, is as follows:

"January 15, 1912.

"Mr. Ralph Arnold, 700 H. W. Hellman Building, Los Angeles, California.—Dear Sir: Until further notice, or until the La Belle Oil Company has sold its property in the Midway Oil Field to some other person or persons, you are authorized by us to offer for sale to your clients the north ½ of the southwest quarter of section 4, township 32 south range 23 E. M. D. B. & M. its 80 acres, more or less, at $4,000.00 per acre, on such terms and conditions as we, i. e. yourself and ourselves may mutually agree upon, and in the event of your effecting a sale of our land in section 4 (above described) or in the event of our effecting sale to any of your clients through your efforts or assistance, we agree to pay you five per cent. (5%) commission on the total sales price, in the manner as and when paid to us.

"It is understood that this is not meant as an exclusive option, and in the event of our being able to make a bona fide sale before we might be able to serve notice on you of our desire so to do, and in the event such sale be made to some other person or persons than those we may have come in contact with outside of your efforts, you will agree that there be no commission due you except and alone where you have participated.

"If the above is a true and correct understanding of our agreement, kindly sign a duplicate of this, signifying your acceptance.

"Very truly yours,

"La Belle Oil Company,

"[Signed] W. P. Cunningham, President.

"Acting Secretary:

"W. P. Thompson.

"[Corporate Seal of La Belle Oil Company.]

"Approved Jan. 15, 1912.

"[Signed] Ralph Arnold."

By proper allegation it is shown that plaintiff has fully complied with the terms of the foregoing instrument.

There was a demurrer to the amended complaint, which was overruled. Except for the mere formal parts, and the fact that it admits that the amount claimed to be due has not been paid, etc., defendant's answer denies each and every material allegation of the complaint. On the issues thus presented the case was tried by the court without a jury. At the close of plaintiff's case defendant moved for nonsuit, which motion was denied. Judgment went for plaintiff for the amount of his commission of 5 per cent. on the payments actually made to and received by the La Belle Oil Company prior to the commencement of the action, and also on the balance of $6,000, "which would have been paid prior to the trial if not impounded by the attachment herein." In short, the court found that all of the allegations of the complaint, as amended, as well as those of the supplemental complaint, were, and each of them was, true. The appeal is from the judgment so entered.

Finding No. 11 of the court reads as follows:

"The court finds that while it is true that there was no express resolution of the board of directors of said corporation defendant authorizing said written agreement with said plaintiff, there were no meetings of the board of directors of said corporation defendant from September 17, 1910, to March 13, 1912, and that during the whole of that period, and including the time when said agreement with said plaintiff was made, the directors of said defendant conducted the business of said defendant by informal discussion and conference between all of the directors except one of them to wit, F. E. Woodley, who did not give his attention to the affairs of said defendant corporation, and that at the time said agreement was made with said plaintiff and at all times thereafter all of said directors, excepting said Woodley, knew of and about said agreement, and that the same was made on behalf of said defendant corporation by its president and secretary, and discussed the same between them, and that said corporation did not, nor did any of its directors, at any time disavow said agreement or the execution thereof or dissent therefrom or claim to or notify said plaintiff that the same was not binding in any respect upon said defendant corporation; and the court further finds that said agreement with said plaintiff was specifically, expressly, and unanimously ratified in a written resolution of the board of directors of said defendant corporation at a regular meeting of said board held on June 12, 1912, at which a quorum of the directors of said corporation defendant was present and voting. The court finds that said agreement with said plaintiff or said plaintiff's agency was never terminated by notice or otherwise by said defendant."

It is urged by appellant here, as in the court below:

"(1) That the instrument quoted in full above and which is designated in the record as Plaintiff's Exhibit 1, was not proven; that without proper authorization said exhibit was not the act of defendant, and that no evidence was offered to show authorization; (2) that appellant was entitled to judgment at the close of plaintiff's case"

—in other words, errors of law occurring at the trial.

It is contended that the evidence is insufficient to show that Mr. Cunningham was president, or that Thompson was secretary, of the defendant company at the time of the execution and delivery by those parties of Plaintiff's Exhibit 1 to the plaintiff. The evidence on this point was by the plaintiff

Digitized by Google

himself, which was that Mr. Cunningham, the president, and Mr. Thompson, the acting secretary of the La Belle Oil Company, signed Plaintiff's Exhibit No. 1 in his presence. Following this testimony the instrument was offered in evidence. To this defendant objected on the ground that it does not purport on its face to be authorized by the defendant corporation, and until the authorization be produced it is incompetent and immaterial. This objection was by the court overruled.

At the threshold of this matter it may be observed that the defendant's answer, so far as it refers to the allegations of the complaint, simply denies that the instrument in question was binding upon the defendant, for the reason that defendant never authorized its name to be signed or its seal attached thereto. By its answer defendant, in legal effect, admits the execution and delivery of the instrument to plaintiff by the officers of the defendant corporation, but denies that those officers had authority from it so to do.

[1] The evidence, as it stood at the time of the offer of the instrument in evidence, we think made a prima facie case. Indeed, the instrument, Plaintiff's Exhibit No. 1, might have been introduced without the introduction of any preliminary oral evidence. Had such been the situation, a prima facie case to that extent would have been established, for the reason that the document on its face purported to have been signed by the president and secretary, and had attached thereto and impressed thereon the seal of the defendant corporation. Such a showing was sufficient to shift the burden of proof on defendant. McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260. For these reasons we think this ruling correct.

[2, 3] As supporting appellant's position, our attention is called to several decisions of the Supreme Court of this state, to wit, Curtin v. Salmon, etc., Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132, Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634, Blood v. La Serena, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, Salfield v. Sutter, etc., Co., 94 Cal. 546, 29 Pac. 1105, and Alta Silver M. Co. v. Alta Placer M. Co., 78 Cal. 629, 21 Pac. 373, but we think none of these in point here. So far as applicable to the case at bar, section 1624 of the Civil Code reads as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * * 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

We think no discussion is necessary to bring conviction that Plaintiff's Exhibit No. 1 is at least a "memorandum in writing" such as will bring it within the purview of this section. It seems to have been the uniform holding of the Supreme and appellate courts of this state that this section does not require any formal contract. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent. And the decisions of the Supreme Court of this state, as well as of this court, are in accord with the general rule on the subject in this country and England.

[4-8] The question, therefore, with which we are confronted here may be put as follows: "Is Plaintiff's Exhibit No. 1 the contract of the corporation?" We have already stated that plaintiff has established, prima facie, that it was. Supplementing this, a witness offered by defendant in its own behalf—Mr. W. P. Cunningham—in response to the very first question asked, testified that he was the president of the defendant corporation, and, in response to the second question, answered that he had been such "from its organization." In addition to this, we find in the record of the minutes of the board of directors of the defendant corporation, under date of June 12, 1915, that the following resolution was unanimously adopted:

"Resolved, that whereas Ralph Arnold has acted in the matter of sale and transfer of the La Belle Oil Company's property as special representative in a special agreement with W. P. Cunningham and W. P. Thompson, he should receive a commission of five per cent. (5%) on such deal as when paid to the La Belle Oil Company; therefore, be it resolved that the president and secretary are authorized to issue the company's check and pay the said Ralph Arnold five per cent. on such amount as the La Belle Oil Company received from the California Counties Oil Company as and when received."

The cases cited by appellant as supporting the contention that the exhibit in question is not the "contract" of the defendant corporation, as we have already intimated, are not in point, particularly in this: That when section 1624, supra, is construed with and in the light of sections 2309 and 2310 of the Civil Code—requiring an agent's authority to execute a contract in writing to be itself in writing—it does not, we think, apply to the executive officers of a corporation. "It has never been the practice to require powers of attorney to confer authority upon such agents. We think the statute was intended to apply to agents proper; that is, persons who were not officers of the corporation. The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself. It was early decided that directors, though they are only agents of the corporation, are exempt from the rule which requires the authority of an agent to be in writing in order to vest him with power to execute a deed." McCartney v. Clover, etc., Co., 232 Fed. 697, 146 C. C. A. 623. In the case just cited it is shown that—

Digitized by Google

"There are numerous authorities in which deeds and mortgages executed on behalf of corporations by executive officers without any resolution of the board, or any authority in writing, have been sustained."

From this we think it must be obvious that Plaintiff's Exhibit No. 1 was the act of the corporation, irrespective of the fact that the name of the secretary, actual or acting, might not have been appended, or the corporate seal attached thereto. We think, too, that even were the foregoing condition a prerequisite to the execution of an instrument such as is before us, a showing that a particular person, although not the regularly elected, qualified, or acting secretary, but appointed by the directors to act in the latter's absence, executed such instrument in such capacity, would be a sufficient compliance with the requirement referred to. Therefore, even although such prerequisite authorization be essential—which, as we have seen, is not—and it were held that such authority was not given in the first instance, still, under section 2310, supra, the resolution which we have quoted is, in our opinion, a complete ratification of the action of the corporation's officers, as already set forth, and as such there can be no question but that the exhibit before us is the "contract" or "memorandum in writing" conferring authority to plaintiff to act on behalf of the corporation for the purposes set forth therein.

[7] There is no attempt on the part of plaintiff to recover anything on the theory of quantum meruit or implied contract to pay for benefits. He is claiming under and by virtue of the specific terms and provisions of Plaintiff's Exhibit No. 1. By the terms of said exhibit it will be seen that plaintiff was authorized "to offer for sale * * * 80 acres, more or less, at $4,000 per acre, on such terms and conditions as we * * * may eventually agree upon." Plaintiff procured a purchaser, not at $4,000 per acre, or a total of $320,000, but for the total sum of $300,000, as will appear from Plaintiff's Exhibit No. 2. This was accepted by the defendant corporation on April 9, 1912, which entered into the agreement as set forth in Plaintiff's Exhibit 2 with the purchaser therein mentioned, viz., the California Counties Oil Company, a corporation, under which agreement the latter went into possession and did work upon the property. When this was done, plaintiff was entitled to the compensation agreed upon, according to the terms of Plaintiff's Exhibit No. 1. Brown v. Mason, 155 Cal. 155, 99 Pac. 867, 21 L. R. A. (N. S.) 328; Boland v. Ashurst Oil, etc., Co., 145 Cal. 405, 78 Pac. 871; Levy v. Wolf, 2 Cal. App. 491, 84 Pac. 313; Justy v. Erro, 16 Cal. App. 519, 117 Pac. 575; McMillan v. Beves, 147 Fed. 218, 77 C. C. A. 444.

It is contended by appellant that the said California Counties Oil Company abandoned the latter contract. The evidence here does not support this contention. But it does appear that this contract or agreement was modified by mutual consent of the parties thereto on the 28th day of November, 1916, by which modification it is provided, among other things, that—

"It is hereby understood and agreed by all the parties hereto that the intent and purpose of this agreement is to cancel and set aside the agreement of April 9, 1912. * * * Should the said party of the second part [the California Counties Oil Company] fail to make the said payment * * * within ten days * * * then this agreement shall be of no effect, and shall immediately become null and void, and shall in no wise affect the said agreement of April 9, 1912."

By this modification the price originally agreed to be paid—$300,000—was reduced to and fixed at the sum of $187,294.19. Of this amount the purchaser, the California Counties Oil Company, had paid to the defendant corporation, before the commencement of this action, the whole thereof, except the sum of $6,000, and said defendant had paid the plaintiff a commission amounting to $4,752.20, or 5 per cent. on the sum of $95,045.47. Thereafter, and before the commencement of this action, the said California Counties Oil Company paid said defendant the further sum of $86,248.72, under and by virtue of the contract of April 9, 1912, as modified as aforesaid. No commission on this amount, or any portion of it, has ever been paid to plaintiff.

[8] It is maintained by appellant that respondent was not entitled to commission on payments made to it under the said modification of Plaintiff's Exhibit No. 2, because "there is absolutely no testimony to show that respondent had anything to do with the execution of Plaintiff's Exhibit No. 3 [the modification agreement]." There is no merit in this contention. There is no reason shown why respondent should have had anything to do with it. As we have already seen, he was entitled to his compensation under Plaintiff's Exhibit No. 1, and according to the terms thereof. No subsequent agreement or modification of the original agreement between the vendee and the vendor therein could affect plaintiff's rights. Were it otherwise, the bars would be all down, and every agent who had rendered valuable service might by such legerdemain as suggested here, be defrauded, not only out of a portion but out of the whole of the compensation agreed to be paid to him for procuring a purchaser of property.

[9] By the terms of Plaintiff's Exhibit No. 1 plaintiff was to receive his said commission "in the manner as and when paid to us"—defendant. This is but another way of saying:

"You are not to receive your 5 per cent. on the whole of the purchase price when the deal

Digitized by Google

is closed, but as fast as the purchaser pays in to us we will deduct the commission from such payment and remit to you."

Indeed, this is all plaintiff contends for. The construction placed upon this phrase by defendant evidently is that in reality plaintiff was entitled to nothing until the full purchase price was paid, but that, notwithstanding this, the defendant had paid plaintiff the sum of $4,752.20, although under no legal obligation so to do. With the facts before us we are unable to accede to any such construction. It is conceded by defendant that the sum of $86,248.72 has actually been paid to it on account of the sale made originally to the purchaser, who was brought to it by plaintiff, and that it has paid plaintiff no commission thereon. He is entitled to it, as found by the learned trial judge.

[10, 11] It is next urged by appellant that—

"The judgment of the lower court includes commission on the sum of $6,000 payments due, but not yet made under Exhibit 3. To reiterate, respondent's contract calls for commissions only 'in the manner as and when' payments are received by appellant. It is but idle speculation to say that the purchaser is able, willing, and ready to pay. It may or may not become insolvent before it does so. The fact is that no payment has been made, and commission dependent thereon is not due. The judgment of the lower court must be modified at least in respect to this item."

In answer to this respondent claims that—

Said $6,000 became payable prior to the trial, "it being stipulated at the trial that the same would have been paid had it not been impounded by the attachment of the plaintiff herein. The matter is alleged in the supplemental complaint printed on pages 15 and 16 of the supplement to appellant's opening brief. It was the understanding of the trial court and of ourselves that the stipulation of the defendant was that judgment might pass for the amount of the commission on this sum of $6,000 as well as on the other amounts already paid if the plaintiff was entitled to judgment at all, and we do not understand why counsel raises this question now."

This statement of counsel for respondent is neither answered nor denied. Such being the case, coupled with the fact that the court actually found for the plaintiff on this item, as already seen, it will be assumed that appellant concedes the truth of such statement, and that the finding was proper. Colkins v. Doolittle, 188 Pac. 601; Welch v. Alcott, 192 Pac. ——.[1]

No other point raised by appellant need be considered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

SCHWARZ v. BOHLE et ux. (Civ. 3328.)

(District Court of Appeal, First District, Division 1, California. May 11, 1920. Hearing Denied by Supreme Court July 10, 1920.)

1. Judgment ⇐688—In action to quiet title against administrator held res judicata as to heirs.

Judgment in a former action to quiet title, brought by plaintiff against his deceased wife's administrator, was binding on her estate and conclusive against deceased's daughter and heir and the daughter's husband, and was res judicata as to them.

2. Vendor and purchaser ⇐13—Disclaimer by party not having interest no consideration for oral promise to deed land.

Where, in a husband's action against his deceased wife's estate to quiet title, it was decreed that land was community property, so that deceased's daughter had no interest in it, her disclaimer of interest in such action could furnish no consideration for plaintiff's oral promise to deed her the premises upon demand.

3. Frauds, statute of ⇐71—Oral promise to deed land void, in absence of fraudulent conduct.

An oral promise to deed land is void under the statute of frauds (Civ. Code, § 1624), in the absence of such fraudulent conduct as would take the case out of the statute.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frank R. Schwarz against Frederick H. Bohle and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Theodore L. Breslauer, of San Francisco (Harold C. Faulkner, of San Francisco, of counsel), for appellants.

McPike & Murray, of San Francisco, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover possession of the premises involved in it from the defendants, who were alleged to be tenants of the plaintiff and to have failed to pay their rent, and also failed and refused to surrender possession of the premises to the plaintiff as the owner thereof. The answer of the defendants denied their relation as tenants of the plaintiff and denied that the plaintiff was the owner of the premises. As a further answer to the plaintiff's complaint the defendants alleged that one Julia Schwarz, deceased, the wife of the plaintiff, and the mother of the defendant Eva Anna Bohle, was in her lifetime the owner of the premises in question; that she died intestate, and that after her death the plaintiff in this action represented to the said defendant Eva Anna Bohle that if she would disclaim to him all interest in

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Hearing by Supreme Court pending.

Digitized by Google

the property he would clear the title, and would thereafter on demand grant said premises to said Eva Anna Bohle; and that relying on such representations she disclaimed all her right, title, and interest in said property to said plaintiff, but that said plaintiff upon her demand has refused to convey said property to her; wherefore she prays that she be adjudged the owner of said property, and that the plaintiff be required to deed the same to her.

Upon the trial of the cause the plaintiff testified that the property in question was purchased by himself and his said wife, Julia Schwarz, as community property; that upon her death an administrator was appointed of her estate; that the plaintiff thereupon commenced an action against said administrator and also against the two children of himself and his deceased wife, of whom Eva Bohle was one, to quiet title to the premises, alleging the same to have been community property; and that he since his wife's death was the sole and absolute owner thereof. The administrator filed a general denial in said action; the other two defendants filed disclaimers therein. Upon the trial of that action the plaintiff recovered judgment decreeing him to be the sole owner of the property. The judgment roll in that case was then introduced in evidence in this case, and the plaintiff rested. Thereupon the defendants undertook to offer evidence in support of the affirmative averments of their answer to the effect that the plaintiff had orally promised the defendant herein, Eva Anna Bohle, that if she would give him a disclaimer in the former suit he would convey the premises to her upon demand. The court refused to permit the defendants to make this proof upon the two grounds that, if it was offered as an attack upon the former judgment, it was inadmissible, since that judgment was res adjudicata between the parties to this action; and if, on the other hand, it was offered by the defendant in an effort to establish an oral trust in the plaintiff to convey the premises to the said defendant Eva Anna Bohle, their pleadings were wholly insufficient to permit oral proof of such trust. The court thereupon rendered its judgment in the plaintiff's favor, and from such judgment the defendants prosecute this appeal.

[1] We are satisfied that the trial court committed no error in its aforesaid rulings upon the trial of this cause. The judgment entered in the former action to quiet title against the administrator of the estate of Julia Schwarz, deceased, was, of course, binding upon her estate, and would have been binding and conclusive as against the heirs of said deceased, even if they had not been parties to and have filed disclaimers in said action. Cunningham v. Ashley, 45 Cal. 485; McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681. It would therefore have been res adjudicata against these defendants if they had undertaken in this action to attack the same.

But the defendants, by their affirmative pleading in this case, make no attack upon said judgment, and in fact in their briefs herein expressly disclaim any intent to assail said judgment. The defendants' sole contention, as disclosed by their said pleading, is that the plaintiff received from Eva Anna Bohle a disclaimer of any interest in said premises derived from her deceased mother upon his oral promise to thereafter deed said premises to her, and that he has refused to make said deed. There are no averments of actual fraud in this pleading, nor is there the slightest attempt to bring this case as to its pleadings within the case of Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, and the later cases approving its doctrine as to constructive fraud. The utmost that can be said of the defendants' case, as presented both in their said pleading and in their proposed proofs, is that they are attempting to enforce an oral agreement to convey real estate.

[2, 3] There are several insuperable obstacles in the way of the defendants' success. The judgment in the former case decreed that the property in question in both cases was the community property of the plaintiff and his deceased wife, and hence passed to him solely and absolutely upon her death. The defendants, as we have seen, are bound by that judgment, and in fact do not assail it. It was thus conclusively determined that the defendant herein Eva Anna Bohle never had any interest whatever in said property. Her disclaimer, therefore, could furnish no consideration for the plaintiff's oral promise to deed her the premises upon demand, and it was therefore such a promise which, even if made, equity would not enforce. The provisions of section 1624 of the Civil Code embracing the statute of frauds is another insurmountable barrier to the defendants' recovery in this action, in the absence of those elements of fraudulent conduct on the plaintiff's part taking the case outside of the requirements of said statute. The trial court properly ruled that the defendants had presented no such case in their pleadings as would permit them to make their proffered proofs.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

Digitized by Google

PEOPLE v. WHITE. (Cr. 494.)

(District Court of Appeal, Third District, California. May 8, 1920.)

1. Criminal law ⟸412(3)—Statements of prisoners in cell admissible.

Statements voluntarily made by prisoners in a cell indicative of a purpose on the part of both to fabricate a defense to the charge were admissible in evidence.

2. Criminal law ⟸1169(1)—Admission of evidence harmless.

Where the evidence conclusively shows that defendants committed the offense charged, judgment of conviction will not be reversed on account of erroneous admission of evidence.

3. Indictment and information ⟸161(6)—Court could correct name of prosecutrix after jury was drawn.

Where information for rape through clerical error designated prosecutrix as "Carlson" instead of "Larsen," the court could, after the completion of the jury, under its inherent powers or under Penal Code, § 1008, permit the name to be changed.

4. Criminal law ⟸1032(1)—Objection to change in information waived by failure to object.

Where defendant by his silence acquiesced in suggestion of state's attorney of a clerical error in the information in the name of the prosecutrix, and court changed the name, he will not be heard to complain thereof on appeal.

5. Criminal law ⟸1141(1)—Presumptions in favor of regularity of proceedings below.

On appeal the presumptions are in favor of the regularity of the proceedings in the lower court.

6. Criminal law ⟸1186(4)—Erroneous change in information not reversible error.

If it was error for the court to change the name of the prosecutrix in the information after the jury was complete, conviction will not be reversed where there was no prejudice to the substantial rights of the defendant.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Raymond White was convicted of rape, and from the judgment of conviction and an order denying his motion for new trial, he appeals. Affirmed.

Charles Kasch, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1, 2] Appellant was convicted of the crime of rape, and he appeals from the judgment and the order denying his motion for a new trial. He was jointly charged with one Willard Carlson, but he was tried separately. The prosecutrix was 15 years of age, and the evidence shows quite conclusively that she was the victim of a brutal assault committed by the defendants acting in concert. Indeed, it would have been surprising if the jury had failed to convict appellant. We make these observations to indicate in what light we should view the two alleged errors upon which appellant relies for a reversal. The first of these relates to the introduction in evidence of a conversation between the two defendants while they were confined in jail before the trial. The testimony was given by a constable, who was secreted in one of the cells near those occupied by White and Carlson. Their statements were purely voluntary, and they were indicative of a purpose on the part of both defendants to fabricate a defense to the charge. At least the statements were capable of such construction, and it was entirely proper to submit them to the jurors for their consideration. The statements are too indecent for publication, but it is sufficient to say that they agreed as to what their testimony should be. That they should consider it necessary to make such agreement affords some evidence of a guilty mind. Innocent men might inquire of each other as to their recollection of an event or their knowledge of an alleged offense, but they are not at all likely to plunge immediately into a proposal and acceptance of a certain definite statement to be made by each in answer to a criminal charge. We are entirely satisfied that it was a proper circumstance for the jury to consider, but at any rate, under the rule that now prevails in this state, if the ruling was erroneous, it should not operate to overthrow the verdict.

[3-5] The other objection is probably worthy of more serious consideration. As to it the only record is contained in the following minutes of the clerk:

"The jury being now complete, * * * the clerk thereupon read the information to the jury and stated defendant's plea of not guilty. Thereupon the district attorney requested and was granted permission of the court to amend the information on its face by striking out the word 'Carlson' and inserting in lieu thereof the word 'Larsen.'"

In reference to this matter, appellant asseverates that he—

"was denied the right of trial by jury. The jury that returned the verdict was never impaneled or sworn to try him on the charge upon which he was convicted. At the time the jury that convicted him was sworn, the charge upon which he was convicted had not been filed against him. He never had an opportunity to challenge peremptorily or for any cause any of the jurors. In short, this was the most irregular trial which, in my opinion, has ever been submitted for review."

This is assuredly quite a picturesque and impressive impeachment of the district attorney and the trial judge, but it is entirely un-

Digitized by Google

warranted by the facts in the cause. We are justified in representing the situation as follows: Appellant was regularly and properly charged by an information with said crime committed June 30, 1919, in said county of Mendocino, against the person of Jennie Carlson. He was arraigned and pleaded not guilty, and the case was set for trial. A jury was impaneled according to law, and then the district attorney ascertained that a clerical mistake had been made in stating the name of the prosecutrix, that her real name was "Jennie Larsen," and not "Carlson," as it appeared, and asked the court's permission to make the change. To this request no objection was made by appellant, and by his silence he acquiesced in the suggestion. Thereupon the court granted permission to have the mistake thus corrected. This was done, and the cause proceeded to trial without any objection or suggestion that a different offense had been charged by changing the name of the prosecutrix; it being understood by all parties that only one offense was claimed by the district attorney, and that the amendment was sought for the reason already stated. The trial disclosed the name of the prosecuting witness to be Jennie Larsen, and it was shown very clearly that at the time and place and in the manner alleged in the information said offense was committed against her. He was convicted, and for the first time on appeal, he makes the point that another offense was charged by the amendment, and that for such offense he was never arraigned and was not legally put upon trial. Under such circumstances, can he successfully urge such objection? To ask the question is to answer it. The court had the right to permit the error to be corrected, it was plainly its duty to do so, and such action would not have been subject to objection, if any had been made. But, as we have seen, appellant acquiesced in the course that was pursued, and that affords an additional reason why he should not now be heard to complain. It is true that we have stated the case more fully than the record discloses, but as to this point we simply have the minutes of the clerk; they do not purport, nor are they expected, to contain the whole record, and the presumptions are in favor of the regularity of the proceedings. In the absence of any showing to the contrary we have a right to assume, therefore, what is altogether probable, namely, that the change was made for the reason suggested.

As to another arraignment and another plea, they were, of course, not called for, since but one offense was charged, and as to that the defendant was allowed every right which the law provides. It would have been an idle and foolish thing to repeat the arraignment and to reimpanel the jury simply because the court had permitted an amendment to the information for the purpose of properly identifying and describing the offense that was committed by the appellant.

We may add that the court would have inherent power to permit such a clerical mistake to be corrected, but section 1008 of the Penal Code expressly authorized amendments as follows:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant."

[6] Of course, there was no prejudice to the substantial rights of the defendant caused by the course herein pursued. Indeed, if we may assume that the proceedings were irregular, then no substantial wrong has been committed, and no injustice has been suffered. In this connection, the case of People v. Tomsky, 20 Cal. App. 672, 130 Pac. 184, may be read with interest and profit. It is ample authority to justify the rejection of appellant's contentions as opposed to the established principles of modern criminal procedure.

We think the judgment and order should be affirmed; and it is so ordered.

We concur: HART, J.; NICOL, Presiding Judge, pro tem.

UPLINGER v. YONKIN. (Civ. 2795.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1920.)

1. Evidence ⟸347—Foreign judgment may be proved by authenticated copy.

A foreign judgment may be proved by an authenticated copy of the judgment alone, without the judgment roll.

2. Evidence ⟸383(5)—Certificate attached to judgment established general jurisdiction of foreign court.

Certificate attached to judgment of foreign court, stating that such court was a court of record having a seal, was sufficient to establish, prima facie, that the foreign court was a court of general jurisdiction.

3. Evidence ⟸80(1)—Foreign laws presumed same as those of forum.

In the absence of evidence to the contrary, it is presumed that the law of a foreign state as to the requirement of notice of time of trial is the same as the law of the forum.

4. Judgment ⟸113—Notice of trial to defaulting defendant not necessary.

Notice of date of trial provided for by Code Civ. Proc. § 594, need not be given to a defaulting defendant.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

5. Judgment ⟸594(1)—Based on trial without notice erroneous, but not void.

A trial and judgment, given without notice of date of trial required by Code Civ. Proc. § 594, is merely erroneous, and is not in excess of the court's jurisdiction.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by John H. Uplinger against Henry H. Yonkin. Judgment for plaintiff, and defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

James R. Jaffray, of Los Angeles, for respondent.

CONREY, P. J. Action to recover judgment for money due upon a judgment entered against the defendant in the Circuit Court of De Kalb County, Ill. Judgment was entered herein against the defendant, who now appeals therefrom. Appellant presents three points, on which he claims that this judgment should be reversed.

[1] First point: That the Illinois judgment has not been proved as required by law, in this, that an authenticated copy of the judgment alone was received in evidence, without the judgment roll. This question has been determined adversely to appellant's contention in McHatton v. Rhodes, 143 Cal. 275, 76 Pac. 1036, 101 Am. St. Rep. 125. An issue presented in that case depended upon the validity of a judgment of a circuit court, a court of general jurisdiction in the state of Missouri. An authenticated copy of the Missouri judgment was admitted in evidence, without the judgment roll. The judgment of the superior court was affirmed, notwithstanding that the decision therein contained was clearly wrong unless supported by the evidence of the foreign judgment.

[2] Second point: That the judgment sued on is invalid as the basis of a recovery thereon in California, inasmuch as the judgment itself does not show that personal service of the summons in said action was had upon the defendant in the state of Illinois and within the jurisdiction of the court rendering said judgment, and there is not any other proof, by way of record or otherwise, offered in support of such jurisdiction. The judgment, as shown by the copy thereof, duly certified under seal of court and authenticated, states that—

"It appearing to the court that due personal service of process of summons issued in said cause has been had on the defendant for at least 10 days before the first day of this term, and he, being now here three times solemnly called in open court, comes not, nor does any person for him, but herein he makes default, which is on motion of plaintiff's attorney ordered to be taken, and the same is hereby entered of record."

Thereupon, it is stated, evidence was received, the damages were assessed, and recovery had in the sum specified. The certificate recites that said court is a court of record, having a seal. This is sufficient to establish, prima facie, that it is a court of general jurisdiction. In McHatton v. Rhodes, supra, the Missouri judgment was a judgment determining adversely to one Hattie Meagher her claim of title to certain real property. The recitals contained in the judgment were to the effect that she had been duly notified by publication. The Supreme Court of California held that in that case, "the court being of general jurisdiction, all presumptions are that it had jurisdiction, and that the effect of the recital in the judgment is that the notice or summons was properly published. It is declared in the Constitution of the United States that full faith and credit shall be given in each state to the judicial proceedings of every other state." The court referred to section 1963, subd. 16, Code Civ. Proc., and after some further discussion, said:

"In all cases where a judgment is collaterally attacked we must presume, in the absence of anything appearing to the contrary, that they were properly brought in. The presumption is the same where service has been made by publication as where personal service has been had."

[3-5] Third point: That the record does not show that any notice of the time of the hearing of said action was ever served upon or had by the defendant, or served upon or had by any attorney for defendant, and no evidence other than the so-called judgment was offered in that regard. This contention is based upon the provisions of section 594, Code of Civil Procedure of California, and the presumption (in the absence of other evidence) that the law of Illinois as to the requirement of notice of the time of trial, is the same as the law of California. But the notice provided for need not be given to a defaulting defendant. And even where the requirements of the section are applicable, a trial and judgment given without such notice is merely erroneous, and is not in excess of the court's jurisdiction; such, at least, is our inference from the only decision which seems to have touched the question. For in that decision (Estate of Dean, 149 Cal. 492, 87 Pac. 13) the court very carefully limited to cases of direct appeal its declaration that a judgment rendered in disregard of that section is erroneous and should be reversed.

We are of the opinion that the court did not err in receiving the evidence to which reference has been made, or in rendering

Digitized by Google

judgment against appellant on the facts as thus proved.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

RAMISH v. REICHENBACH et al.
(Civ. 3361.)

(District Court of Appeal, First District, Division 2, California. May 7, 1920.)

Appeal and error ⟸1011(1)—Finding on conflicting evidence conclusive.

Finding of fact on conflicting substantial evidence is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Adolph Ramish against Max Reichenbach and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Edward F. Wehrle, of Los Angeles, for appellants.

Alfred H. McAdoo and David E. Bergman, both of Los Angeles, for respondent.

NOURSE, J. Defendants appeal from a judgment rendered against them as involuntary trustees on plaintiff's complaint for rent of premises occupied by defendants in the double capacity as trustees for creditors and assignees of the insolvent under an assignment made for the benefit of all creditors of the insolvent other than plaintiff. The controversy arises through the fact that after the defendants were appointed trustees for the creditors a written agreement was made between them and plaintiff whereby plaintiff agreed to permit defendants to continue the occupation of the premises theretofore leased to the insolvent, and the defendants promised to pay to plaintiff the back rentals then due out of the first profits of the business. By the pleadings it is admitted that defendants also agreed to pay the expenses of conducting or operating the business, including the payment of the monthly rental and water charges for the premises occupied, before distributing or paying to the other creditors anything upon the indebtedness due them. During the course of their conduct of the business the defendants paid certain sums to an agent of one of the creditors and other sums to the attorney for the creditors, leaving in their possession insufficient moneys to meet the payment for the current rental admitted to be due to plaintiff. Upon the trial it was contended on the part of plaintiff that the moneys so paid out were for services rendered to the creditors, and defendants claimed that such payments were necessary and proper expenses of conducting and operating the business by the trustees. Plaintiff also asked for an accounting upon the theory that, though he was not a party to the original assignment for the benefit of creditors, the defendants by their special agreement with him became involuntary trustees for his benefit. The trial court found that the defendants during their conduct of the business received sufficient moneys to have enabled them under the terms of their agreement with plaintiff to pay him the amount claimed to be due as rental for the premises, but that the defendants used and disposed of such moneys, not in payment of the necessary expenses of conducting and operating the business, to an extent and in an amount sufficient to have paid plaintiff the amount due him.

The whole argument of appellants on this appeal resolves itself into an attack upon this finding as not supported by the evidence. There was substantial evidence tending to prove that one Brown, to whom payments were made for services rendered in checking up the cash and doing certain clerical work, was engaged by one of the creditors, and not by the trustees; also that such services were for the benefit of the creditors charged and were not necessary for the operation of the business under the trustees. There was also evidence that the attorney to whom other payments were made was employed by the creditors to prepare the original trust agreement and assignment, that he was not employed by either of the trustees, and that he rendered little, if any, legal services to them directly. The evidence on the part of appellants tending to show that some of these services were rendered for and at the request of the trustees merely presents a conflict upon which the trial court was required to find. The finding so made, being based upon conflicting evidence, is conclusive upon this appeal, and for these reasons the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

BOLAND v. SMITH. (Civ. 3095.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1920.)

1. Evidence ⟸442(6)—As to time of delivery of automobile sold not inadmissible as varying contract.

In buyer's action to rescind purchase of automobile, testimony as to subsequent conversations between parties as to when car would be delivered *held* competent to explain conditions, no date of delivery having been fixed in the written contract, and nothing shown therein as to whether first shipment had been ordered or would be made.

2. Sales ⟸81(1)—Contract for sale of automobile called for delivery in reasonable time.

Under a contract for sale of an automobile, delivery to be made "on or about out of first shipment of" the model, the obligation of the sellers was to have delivery made within a reasonable time, depending on conditions within knowledge of the sellers.

3. Sales ⟸130(3)—Evidence held to justify conclusion delay in delivery unreasonable.

In action to rescind purchase of automobile, evidence *held* to justify conclusion that delay in delivery was unreasonable.

4. Appeal and error ⟸907(2)—Presumption ruling of trial court supported by evidence.

Where the appellate court can surmise that such a showing has been made as would have justified a ruling as expressed by the trial court, and the evidence is not before the appellate court, it must presume that the condition of the case in its evidence was such as to support the ruling.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by William P. Boland against Stanley W. Smith, individually and as executor of C. F. Smith, deceased. From judgment for plaintiff rescinding contract for purchase of an automobile, defendant appeals. Affirmed.

Leo V. Youngworth and Harry J. McClean, both of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to enforce rescission of a contract for the purchase of an automobile. Judgment was awarded in accordance with the prayer of the complaint, and defendants appeal. (After judgment there was a substitution of parties plaintiff by reason of an assignment made by plaintiff Carlin G. Smith to Boland.)

On June 12, 1912, plaintiff negotiated with defendant, Stanley W. Smith, and C. F. Smith, since deceased, for the purchase of an automobile, and on that date paid a deposit of $500. A written contract in the form of a memorandum order was drawn up and signed by the purchaser and the vendors. The automobile was not at the time in the hands of the vendors ready for delivery, but was to be shipped from the factory at an Eastern point, and the written contract provided that the delivery was to be made "on or about out of first shipment of this model." The signature of the plaintiff first appeared attached to the order, and over the signature of the vendors was the following clause:

"We agree to fulfill all the terms and conditions of this order, subject to delay resulting from fires, strikes, action of elements, and other circumstances beyond our control."

No delivery of the car having been made, on the 25th of November, 1912, the plaintiff served a written notice of rescission upon the vendors and demanded the return to him of the $500 deposited. The court, in its findings of fact, recited that defendants had represented to plaintiff that they had several shipments of models of the kind of car desired coming, and that the first shipment would reach Los Angeles on or about the 1st day of July; that the defendants failed to make delivery of the car on July 1st, but stated to plaintiff that shipment had been delayed and that the car would be shortly delivered, and at various times between July 1 and October 17, 1912, the vendors represented and stated that shipment of said car would shortly be made; that on the 17th day of October the vendors specifically promised and agreed to make delivery of the car not later than three weeks from that date, to wit, not later than November 17, 1912; that the vendors received a shipment of the model of the car contracted to be delivered on or about the 25th day of December, and on the 26th of that month notified the plaintiff of the receipt of the car and offered to make delivery thereof. The court further found:

"That defendants have wholly refused and failed to make delivery of any car under the terms of their contract with the plaintiff within a reasonable time, and have failed and refused to return to plaintiff the sum of $500."

One of the contentions of the appellants here is that the court erred in admitting the oral testimony of the plaintiff touching the time that it was understood the automobile would be delivered; the claim being that the effect of such testimony was to vary the terms of the written contract. The testimony referred to was given by the plaintiff, and, as set forth in the bill of exceptions, is as follows:

"I had a conversation at the time the contract was made regarding the time of delivery. Mr. Smith said he would deliver the car between the 1st and 15th of July, that year. I had a further conversation with Mr. Smith, of Smith Bros., in August of 1912. I called on Mr Smith and asked him when I was to get my car; and he said, 'We expect it any day.' I went

Digitized by Google

in his place every once in a while to find out when he was to make delivery. On August 17th he called at my office to collect a bill for repairs. I said, 'When am I going to get my car?' He said, 'You will get your car within two weeks.' I called in two men, Mr. Sadler, who was in my office, and Mr. Rending, and asked them to listen to the conversation. I said, 'Clarence, you promised me delivery within two weeks.' He said, 'You will get your car within two weeks.' I said, 'I will give you three weeks; if I don't get my car within three weeks, I want my money.' He said, 'You will have the car or your money,' and he left and walked out. I made a memoranda of that conversation on the contract that he had signed and given to me. The car was not delivered on November 7th. I signed a notice of rescission, which was served on Mr. Smith."

Section 1860, Code of Civil Procedure, provides:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

[1-3] We think that the testimony was competent to explain the conditions, in view of the fact that no date of delivery was fixed in the written contract and nothing therein was shown as to whether the shipment of automobiles had already been ordered or as to when such shipment would be made. In our opinion, under the terms of the contract, it should be said that the obligation of the vendors was to have delivery made of the car within a reasonable time. What would amount to a reasonable time for shipment from the East and receipt in Los Angeles would depend upon conditions within the knowledge of the vendors, and for that reason we think it was proper for the court to receive testimony touching the representations and statements made by the vendors on the subject of delivery. While in the plaintiff's testimony conversations were shown between the plaintiff and one of the vendors, which conversations occurred subsequent to the making of the contract, those conversations were not relied upon by the trial judge as fixing a new and definite date upon which the automobile was agreed to be delivered, but only as showing the continuing conditions as to the nondelivery and the explanations made by the vendors in attempted excuse of the same, all of which was competent as going to the question as to whether at the time the plaintiff gave notice of rescission there had been an unreasonable delay on the part of the vendors in the delivery of the automobile. The court directly determined that the delay was unreasonable, and, upon the evidence shown, we think that that conclusion was justified.

A second contention of the appellants relates to the matter of another transaction had between the parties prior to the making of the particular contract here involved. In a cross-complaint defendants alleged facts concerning the prior transaction under which it seems the plaintiff had first bargained for a different automobile, which he received, and that he later returned the automobile, with the consent of the defendants, and forfeited some money which he had paid thereon. In the findings of the trial court it is determined that the transaction last referred to was distinct and separate from that sued upon by the plaintiff, and that the rescission of the former contract was not, as defendant asserted, a part of the consideration for the making of the contract to enforce rescission of which this action was brought. Appellants contend that the court refused to admit testimony offered by them in support of matters contained in the cross-complaint. We are unable to determine from the bill of exceptions as to what testimony was offered to that point. The bill of exceptions does not purport to contain all of the testimony heard at the trial. As to the offered testimony we find in the record, among the specifications, this statement:

"In reply to defendants' offer to prove the facts of the prior transaction as pleaded in the cross-complaint the court said: 'I just want the records to show that you started to prove other considerations for this contract not stated therein relative to the matter pleaded in the cross-complaint, and the court refused to hear it on the ground that as the evidence stands at this time you are not entitled to introduce any evidence whatever regarding the former trafisaction between these parties; in other words, that the court confines you to mutual obligations created by the written contract pleaded by you on the ordering of this car.'"

[4] As to how the evidence stood, as the court phrased it, at the time the judge made that statement, we are not enlightened. We can surmise that such a showing had been made as would have justified the ruling as expressed by the judge, and, that being true, we must presume that the condition of the case in its evidence was such as to support the ruling.

No other points are presented which require consideration or discussion.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Digitized by Google

CREDIT GUIDE CO. v. FIDELITY STORAGE & MOVING CO. (Civ. 2806.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1920.)

Limitation of actions ⟸66(8)—Action against bailee for property accrues on demand.

Where property came into possession of defendant warehouseman in 1912, and was demanded during the two next following years, action to recover it, commenced in 1917, was barred by Code Civ. Proc. § 338, subd. 3, the three-year statute.

Appeal from Superior Court, Los Angeles County; S. M. Marsh, Judge.

Action by the Credit Guide Company against the Fidelity Storage & Moving Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frederick A. Preston, of Los Angeles, for appellant.

D. Joseph Coyne, of Los Angeles, for respondent.

CONREY, P. J. Action to recover possession of certain described personal property or the value thereof. Judgment entered in favor of the plaintiff, from which the defendant appeals.

In the answer it was alleged that the action is barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure, under which an action of this character must be commenced within three years from the time when the cause of action accrued. The property in question belonged to plaintiff's assignor, Sarah B. Clark, and came into the possession of the defendant in December, 1912, or January, 1913. Mrs. Clark testified as follows:

"I have requested and demanded the return of the goods which were missing on a number of occasions, as follows: At Los Angeles, one or two times at defendant's place of business, the loss of the box having been discovered in April 1913. I demanded the same several months later. I was at that time advised that they could not locate the box or the contents, but that they said that they would continue their efforts. Several times after the occasion mentioned I took up the matter with the company, and was again advised that they were still searching for the chest containing the articles mentioned, but had not yet been successful."

In connection with the testimony of Mrs. Clark, it appears that her demand had been made and was being insisted upon by her as early as January, 1914. On the 8th of that month defendant sent her a letter, stating that defendant was endeavoring to find the chest in which said goods were said to be contained, and asked her for a description of the chest and contents. On the 29th of the same month they sent her a second leter, acknowledging receipt of a letter from her, of date January 19th, giving the contents of the chest, and stating that they were moving the contents of their old warehouse into their new one, "we are in hopes to find your chest in this way; if we do not, we will endeavor to make a settlement with you." This is practically all of the evidence bearing upon the time when the demand was made and when the claimant's right of action accrued. The action was not commenced until April 24, 1917. On these facts it seems to be established without any doubt that the evidence is insufficient to sustain the court's finding that the cause of action is not barred by the provisions of the third subdivision of section 338 of the Code of Civil Procedure.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

DARTER v. SCHUYLER. (Civ. 2150.)

(District Court of Appeal, Third District, California. May 12, 1920. Hearing Denied by Supreme Court July 8, 1920.)

1. Vendor and purchaser ⟸185 — Inexcusable failure to make payment under contract terminates it.

When in a contract for the sale of land time is made of the essence, an inexcusable failure on the part of holder of option to make a payment when the same should be paid according to the terms of the contract terminates his rights under the option, and makes it impossible for him to enforce the same in the absence of a waiver on the part of the other party.

2. Quieting title ⟸30(3)—Former owner of land held not necessary party.

Where an owner of land gave a third party an option to purchase it upon making certain payments, and such third person failed to make the payment at the time stipulated, whereupon the owner declared a forfeiture of the contract, and subsequently sold the land to plaintiff, in a suit by plaintiff to quiet title brought against the third party, the former owner was not a necessary party.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Suit by R. L. Darter against Mary R. Schuyler to quiet title. Judgment for plaintiff, and defendant appeals. Affirmed.

G. W. Langan and True Van Sickle, both of Oakland, for appellant.

C. W. Miller, of Stockton, for respondent.

NICOL, Presiding Judge pro tem. This action was commenced by plaintiff to quiet his title to a certain tract of land in the county

Digitized by Google

of San Joaquin, which land he purchased from one J. A. Coley on the 27th day of June, 1917.

On May 13, 1914, an agreement was entered into between the said J. A. Coley and defendant, Mary R. Schuyler, by which Coley agreed to sell and the defendant agreed to buy the said land for the purchase price of $53,000. The agreement acknowledges the receipt of $18,000, being the value placed on certain lots in Oakland, and the balance of the purchase price, amounting to $35,000, to be paid before July 1, 1919, together with interest at the rate of 6 per cent. per annum on all deferred payments, interest to be paid annually. The agreement provides that, in consideration of the defendant being given possession of the premises, she agrees to pay all taxes which may be levied or assessed on the premises, that by the terms of the contract it was expressly provided that time was of the essence thereof, and that in the event of the failure of said Mary R. Schuyler to make any payment at the time the same became due, or within 30 days thereafter, the contract should become null and void, and the said Mary R. Schuyler should forfeit all right thereto and to all moneys theretofore paid on account of the said agreement.

The defendant failed to make the payments as provided by the contract, and as to her failure in this regard the court found:

"That subsequent to the execution of said contract said defendant, Mary R. Schuyler, made certain payments thereunder aggregating the sum of $1,927.46 and no more, and all of such sum was paid before the 1st day of January, 1916; * * * that said Mary R. Schuyler failed, neglected, and refused to pay the interest on the purchase price mentioned in said contract or any part thereof as the same became due or otherwise, and also failed, neglected, and refused to pay the taxes levied upon said premises subsequent to the first installment of taxes for the year 1915; that said J. A. Coley made frequent demands upon said Mary R. Schuyler for the payment of the interest and taxes due from her under said contract prior to August 16, 1916; that on the date last mentioned said J. A. Coley notified said Mary R. Schuyler in writing that she was in default and had been in default for more than 30 days in the payments then due and payable under the terms of said contract, and that if she should fail for 10 days thereafter to perform said contract and make the payments then due thereunder that she would forfeit her rights under said contract; that said Mary R. Schuyler continued to fail and neglect to make payment of the interest and taxes then due and payable from her under said contract, and has never made nor tendered any amount whatever to apply on said contract since the 16th day of August, 1916."

[1] The law is settled in this state that, when in a contract for the sale of land time is made of the essence of the contract, an inexcusable failure on the part of the holder of the option to make a payment when the same should be paid according to the terms of the contract terminates his rights under the option, and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the other party (Champion G. Min. Co. v. Champion Mines, 164 Cal. 205, 128 Pac. 315; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17), and no notice is required to terminate the defendant's rights under the contract (Northern Assurance Co. v. Stout, 16 Cal. App. 548, 554, 117 Pac. 617; Newhall Land & Farming Co. v. Burns, 31 Cal. App. 549, 553, 161 Pac. 14; Commercial Bank v. Weldon, 148 Cal. 601, 84 Pac. 171). In the case of Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 Pac. 420, the plaintiff sued to quiet title to certain land, and the defendants answered, setting up certain contracts for the purchase and sale of the property upon which they were in default. The court, in passing upon the case, says:

"We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief. * * * Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited 'by the parties of the second part' (Slye and Condon) an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in Glock v. Howard & Wilson Colony Co., 123 Cal. 1-16 (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713): 'In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach and no affirmative act upon the part of the vendor was necessary to bring about this result.'"

[2] The defendant claims that J. A. Coley was a necessary party to the action, and in the absence of said Coley as a party the contract was a sufficient and complete answer to plaintiff's complaint. We think the cases above cited are a sufficient answer to this contention. The default of defendant in making the payments as called for by the said contract operated ipso facto as a forfeiture of the same and of the rights of the vendee thereunder. Northern Assurance Co. v. Stout, 16 Cal. App. 548, 117 Pac. 617; Newhall Land & Farming Co. v. Burns, 31 Cal. App. 549, 161 Pac. 14. The contract by reason of the said default of defendant had been forfeited and had ceased to exist at the time Coley conveyed the property to the plaintiff, and under these circumstances we do not consider that said Coley was a necessary, or even a proper, party to the action.

Digitized by Google

It is argued that there was a waiver of the strict performance of the terms of the contract by Coley as to the payments of interest and taxes. This contention of the defendant cannot be sustained. The trial court, upon conflicting evidence, found that the defendant was not excused from making the said payments as the same became due by any act or conduct on the part of said J. A. Coley, and that no act or conduct on his part justified her in failing to perform her part of the contract.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

DUNNING BROS. CO. v. JOHNSON.
(Civ. 2164.)

(District Court of Appeal, Third District, California. May 7, 1920.)

Judgment ⟸423—Equity may correct mutual mistake in description of property in pleadings and judgment.

Where, in a suit to quiet title as against a tax deed, the land involved has been both in the pleadings and the judgment erroneously through mutual mistake described as being in range "J," instead of range "I," a court of equity has power to correct the mistake.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Suit by the Dunning Brothers Company against Waldo S. Johnson to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. Ebert and W. E. Davies, both of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal from a judgment of the superior court of Yuba county quieting title of plaintiff to three lots in the city of Marysville and correcting a mistake in the description of the said lots as contained in a judgment entered in the case of John Martin v. Chester A. Smith et al.

On December 4, 1914, the defendant Waldo S. Johnson purchased, at a tax sale made by the tax collector of the said city of Marysville, the three lots in question, and received a certificate of sale for the same. Thereafter in December, 1915, Johnson demanded a deed for the lots in accordance with the certificate of sale, and John Martin, then the owner of the lots, brought suit to quiet his title to the same and also to cancel the said certificate of sale. Judgment was entered in favor of Martin from which Johnson appealed to the Supreme Court and the judgment was affirmed on September 5, 1918. Martin v. Smith et al., 178 Cal. 812, 175 Pac. 16.

On September 12, 1917, Martin and his wife deeded the lots in question to Dunning Brothers Company, the plaintiff in the present action. At the time of the making of this deed it was discovered for the first time that there was a mistake in the description of the lots as contained in the pleadings and judgment in the said case of Martin v. Smith et al., in this, that throughout all the proceedings in said case as well as in the judgment the lots were described as lots 2, 3, and 4 of block 1, in range letter "J," instead of in range letter "I," as the lots, blocks, and ranges are laid down, numbered, and designated upon the record map of said city of Marysville. The present suit was subsequently commenced to quiet plaintiff's title to the lots and for a decree correcting the mistake contained in the said judgment.

Upon the question of mistake the court upon ample and sufficient evidence found as follows:

"That, however, by inadvertence throughout all the pleadings in said action tried as aforesaid, and in said judgment, said lots of land above mentioned were described as being in range letter 'J,' instead of the true range, namely range letter 'I,' in said city. Said mistake was mutual between all the parties to said action and the cause was commenced, tried and determined upon the theory, and upon the belief upon the part of all the parties to said action and on the part of the court determining the same, that said lots were in said pleadings correctly described. While in truth and in fact the description thereof was incorrect, locating said lots in range letter 'J,' instead of the true range, namely, range letter 'I' in said city."

That a court of equity has the power to correct a mistake like the one here in question is too plain to admit of doubt. In Quivey v. Baker, 37 Cal. 465, a mortgage by mistake described a different lot from the one intended by the parties to be mortgaged. In fact, there was no such lot as the one erroneously described. Suit was afterwards commenced to foreclose the mortgage, the complaint describing the property by the same erroneous description contained in the mortgage. In the decree of foreclosure and in the sheriff's deed was the same mistake in description. It was held that an action would lie to correct all the mistakes and that equity will go back to the original transaction and reform all three so as to make them conform to the original intention of the parties. See, also, Busey v. Moraga, 130 Cal. 586, 62 Pac. 1081; Donald v. Beals, 57 Cal. 399. In Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317, it was held that—

"The power of a court of equity to relieve against judgments is not confined to cases where they have been procured by fraud, but extends

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

also to judgments wrongfully given by reason of mistake either of the court or of the injured party unmixed with fraud, and not the result of the negligence of the injured party."

In Partridge v. Harrow, 27 Iowa, 96, 99 Am. Dec. 643, there was a judgment ordered by the district court in favor of plaintiff, in an action on a note, and the clerk was directed to assess the amount due, that by mistake the clerk assessed the amount due at $223.86, instead of $370, and judgment was entered accordingly, defendants appealed to the Supreme Court and the judgment was affirmed, an execution was issued on the judgment and the amount thereof collected; thereafter, and more than one year after the rendition of the judgment, the mistake was discovered. The court said:

"The fact that the judgment of the district court had been affirmed in this court did not deprive that court of jurisdiction of this case. The judgment, as entered in the district court, was appealed from and affirmed, but that affirmance does not operate to prevent the correction of the judgment by the district court in respect to a matter that was not passed upon by this court. The petition shows that the affirmance of the judgment in the amount as rendered by the district court was also a mistake, and it cannot be doubted that such mistake may likewise by proper proceeding be corrected."

The demurrer interposed by the defendant to the complaint was properly overruled by the court and we find no error in the record.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

STONE v. PORTER-BURNHAM CO.
(Civ. 2848.)

(District Court of Appeal, Second District, California, Division 1. May 11, 1920.)

Sales ⟸89—Evidence held to support finding that agreement sued on had not been modified.

In an action to recover a balance of purchase price of potatoes sold, wherein defendant sought to prove a new agreement, rescinding the one sued on, and reducing the price of the potatoes, evidence *held* to support a finding that such new agreement had not been made.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. H. Stone against the Porter-Burnham Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Morris, of San Francisco, for appellant.

W. A. McGinn and Wm. B. Bealzley, both of Bakersfield, for respondent.

CONREY, P. J. Pursuant to the terms of a written contract the plaintiff delivered to the defendant a crop of potatoes for which the defendant agreed to pay at the rate of 2 cents per pound. This action was brought to recover the unpaid balance of money due for the merchandise so delivered. Judgment was entered in favor of the plaintiff for the amount demanded, and the defendant appeals from that judgment.

The answer of the defendant alleged that prior to the delivery of any of the potatoes it was learned that the potatoes were not of the quality specified in the written contract; that thereupon a new agreement was entered into whereby the first contract was rescinded and a new agreement of sale was made at the reduced price of $1.75 per hundred pounds; that pursuant to said new agreement the defendant received the potatoes thereafter delivered to it.

The court found against the defendant on the affirmative defense thus presented. The only question presented on this appeal arises upon the contention of appellant that this finding of the court was not sustained by the evidence. The writing alleged to constitute the new agreement was received in evidence in connection with the testimony of the defendant's agent, who testified that it was signed by the plaintiff in the presence of said agent, and that he delivered to the plaintiff a copy thereof. This was a receipt for money paid, with data indicating the $1.75 rate. The plaintiff would not admit that the signature to such paper was his signature, but did admit that it looked like his signature. On the other hand, he testified that the only paper which he did sign was merely a receipt for money, which did not contain the same figures contained in the document presented in evidence by the defendant; particularly that it did not contain any reference to the $1.75 price to be paid, and that he did not receive any copy of the paper signed by him. Defendant's agent testified to the facts alleged in the affirmative defense to the effect that the plaintiff had agreed with him for a rescission of the original written contract and for a new sale at the reduced rate of $1.75 per hundred pounds. The plaintiff denied that such conversation ever occurred, and denied that he had signed any writing providing for such reduced rate. The testimony of the plaintiff as to these matters was corroborated by the testimony of disinterested persons, who testified that defendant's agent had told them on the same day as the date found on said alleged new agreement that defendant was paying the plaintiff for his crop of potatoes at the rate of 2 cents per pound, and that now he would not pay more than $1.75 for the potatoes of said witnesses because the market price had gone down. Without further outlining the evidence, enough has

Digitized by Google

been said to show that the evidence is sufficient to support the finding of fact as made by the court.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

BENNETT v. FIRST NAT. BANK OF HOLLYWOOD. (Civ. 3253.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1920.)

1. Banks and banking ⟸148(2)—Bank liable for money paid out on forged indorsement.

A bank had no right to charge a depositor's account with money paid out upon a check, where the indorsement of the payee was forged.

2. Banks and banking ⟸148(2)—Bank not entitled to credit on money paid on forged indorsement by reason of money paid by forger to drawer.

Where T. forged note and mortgage and obtained a loan thereon in the name of the person whose name was forged, and received a check for one half of the loan payable to order of the third person, and forged the indorsement and received the money from a bank, and a check for the other half was later given to T., who cashed the same, and thereafter T. repaid one-half of the loan to the drawer of the check, the fact of such payment by the forger to the drawer did not entitle the bank to any credit on the amount paid out on the check with the forged indorsement.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by George Bennett against the First National Bank of Hollywood. Judgment for plaintiff, and defendant appeals. Affirmed.

Evans, Abbott & Pearce and W. E. Evans, all of Los Angeles, for appellant.

Howard F. Shepherd, of Los Angeles, for respondent.

SHAW, J. This action was brought by plaintiff against the First National Bank of Hollywood to recover the sum of $1,000, which the bank charged to his account because of the payment of a check drawn by him thereon and upon which the name of the payee was forged. Judgment went for plaintiff, from which the defendant appeals upon the judgment roll.

As appears from the findings, the facts are as follows: In August, 1917, one S. W. Thomas, then a man of good repute and president of the Garvanza Investment Company, falsely represented to plaintiff that he was the agent of Abbie Gilbert (who was in fact a real person), and that she desired a loan of $2,000, to be secured by mortgage upon certain real estate owned by her. Plaintiff agreed to make the loan, and some days thereafter Thomas delivered to him a note and mortgage purporting to be executed by Gilbert, both of which documents were in fact forged instruments. Thereupon plaintiff delivered to Thomas a check for $1,000, drawn upon defendant bank and payable to the order of Abbie Gilbert whose name Thomas, without her consent or knowledge, indorsed thereon and deposited it in the First National Bank of Glendale to the credit of the Garvanza Investment Company, the account of which he used for his own purposes, and which check, upon being presented to defendant, was paid in due course on August 22, 1917. Thereafter, to wit, on August 27, 1917, in advancing the balance due upon said purported loan, plaintiff gave his check upon defendant bank for $1,000 payable to the order of S. W. Thomas, who duly indorsed the same, which defendant paid to the account of said Garvanza Investment Company upon presentation, likewise charging the same to plaintiff's account. Prior to the time when the Garvanza Investment Company received the proceeds of the Thomas check, all the money represented by the Gilbert check was by it checked out and paid to persons not here concerned. While Thomas, between September 4, 1917, and April 5, 1918, paid plaintiff in installments the sum of $1,000, which sums were credited generally upon the forged note of Abbie Gilbert, no part thereof was from the proceeds of the Gilbert check. Neither Abbie Gilbert nor the parties hereto learned of the fraudulent nature of the transactions until September, 1918, at which time plaintiff demanded payment from defendant of his $1,000 so paid out on the Gilbert check. The court further found that plaintiff was not guilty of any negligence which contributed to the action of defendant in making said payment, and that the payment of $1,000 made by Thomas on said purported note of Gilbert "was not made at the expense of or to the injury of defendant, and that plaintiff was not (thereby) benefited beyond his total loss."

Upon these findings appellant attacks the court's conclusion of law based thereon:

"That plaintiff had a right to apply the whole sum of $1,000 paid by S. W. Thomas to plaintiff on account of the said note and mortgage in liquidation of the said check of $1,000 made and delivered by plaintiff to said S. W. Thomas on the 27th day of August, 1917, and to apply no part of the same on the said check of $1,000 payable to said Abbie Gilbert."

Defendant's unauthorized act in paying the Gilbert check upon which the indorsement was forged is conceded by appellant (Reding-

Digitized by Google

ton v. Woods, 45 Cal. 406, 13 Am. Rep. 190), who, however, insists that defendant should have the benefit of the $1,000 paid by Thomas in liquidation of any damage sustained by plaintiff on account of such unauthorized action on its part.

[1] That defendant had no right to charge plaintiff's account with the $1,000 so paid out upon the forged indorsement of the Gilbert check is not open to controversy, but in fact conceded by appellant, which, however, insists that equitably it is entitled to have the $1,000 paid plaintiff by Thomas applied in liquidation of its liability, and hence, if so applied, defendant has been reimbursed for the loss sustained by its unwarranted act. Its argument in support of this contention is predicated chiefly upon the claim that the loss was due to plaintiff's negligence, which, in the absence of the evidence, is fully answered by the finding of the court that defendant's action was not due to any negligence on the part of plaintiff.

[2] The action is not based upon the fraud practiced by Thomas upon plaintiff. That is no concern of defendant. It is true that plaintiff, for some reason not appearing, delivered to Thomas a check payable to his order for $1,000, which Thomas in due course cashed; but such act (whatever plaintiff's intention, since the Gilbert note was a nullity) created a personal liability on the part of Thomas, who was the only person answerable therefor, and if not paid an action for recovery would lie against him alone. The payment of any judgment obtained thereon could not be deemed the liquidation of defendant's liability to plaintiff in paying the Gilbert check. If this argument is sound, it follows that the situation is not changed by the fact that Thomas, without a judgment therefor, and from funds other than the proceeds of the Gilbert check (Andrews v. Northwestern National Bank, 107 Minn. 196, 117 N. W. 621, 780, 122 N. W. 499, 25 L. R. A. [N. S.] 996; Shipman v. Bank of State, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821), paid to plaintiff the sum so received by him, and for which he alone was liable. As found by the trial court, the payment was not made at the expense or to the injury of the defendant. The payment was not made out of any fund belonging to it, nor, as to the loss due to defendant's action, was plaintiff benefited by the payment. No equitable reason occurs to us why the sum paid by Thomas should be applied in liquidation of defendant's liability to plaintiff, from which it follows that defendant still has $1,000 of plaintiff's money.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

HINCKSMAN v. DELACOUR et al.
(Civ. 3242.)

(District Court of Appeal, First District, Division 1, California. May 10, 1920.)

1. Vendor and purchaser ⟸296—Purchaser in default cannot maintain equitable defense against seller's ejectment.

Buyers of land in possession under contract of purchase, not having performed their contract, and in default with payments, cannot maintain equitable defense to the seller's action of ejectment by setting up his misrepresentations that the property was unincumbered, etc.

2. Vendor and purchaser ⟸296—Purchasers must either perform or rescind.

Purchasers of land in default must either pay the purchase price according to contract and receive whatever title seller is able to give, if they choose to retain possession, or may rescind, seller having misrepresented his title, and restore possession to him and recover price paid, with expenses, less rental value, and, having adopted neither course, but retained possession while in default in payments, are liable to the seller in ejectment wherein judgment restoring him to possession without decreeing return of the price to the purchasers is not erroneous.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Ada Hincksman against Ernest Walter Smith Delacour and Kathleen Fielding Delacour. From judgment for plaintiff, defendants appeal. Affirmed.

Clarence S. Preston and E. H. Lamme, both of San Diego, for appellants.

Fred O'Farrell, of San Diego, for respondent.

WASTE, P. J. This is an action brought by plaintiff, as vendor in a contract for the sale of real estate, against the defendants, who were vendees in possession, to recover possession of the land, and damages for the retention thereof, after alleged breach of the contract in failing to make payments, and for a judgment declaring the contract to have been broken, quieting plaintiff's title to the land, and for general equitable relief.

The defendants in their amended answer to the complaint denied a willingness on the part of the plaintiff to carry out the terms of the contract, and pleaded an affirmative equitable defense, based upon the ground of false and fraudulent representations, made to induce them to purchase the land. The same affirmative matter was set up in an amended cross-complaint, with a prayer for a rescission of the contract, and for an accounting of moneys paid to the plaintiff, and a finding as to the amount cross-complainants had expended in the necessary and proper care and maintenance of the property,

Digitized by Google

and for judgment therefor. Plaintiff demurred to the amended answer, and amended cross-complaint, and moved to strike out all the affirmative matter contained therein. The demurrer to the amended cross-complaint was sustained without leave to amend, and the court struck from the answer all of the affirmative matter pleaded as a defense.

By the judgment of the lower court plaintiff was awarded the immediate possession of the land, the contract of sale was canceled, and the plaintiff was given nominal damages for the detention. Defendants appeal on the judgment roll, claiming error on the part of the lower court in sustaining the demurrer to the amended cross-complaint, and in striking from the answer the matter alleged by way of an equitable defense. They also contend that the judgment was erroneous in giving the plaintiff possession of the land without a return of the purchase price.

Under the contract of sale entered into by the parties on February 8, 1912, the defendants agreed to pay the plaintiff the sum of $18,000 for the land, $6,000 of which sum was paid when the contract was executed, the balance to be paid in semiannual installments of $500 each until the entire purchase price was paid, the first payment to be made on August 8, 1912. The defendants took immediate possession of the land, and have continued in possession thereof ever since. They made the payment of $500, due August 8, 1912, a payment of $250 on February 10, 1913, and a payment of $250 on August 8, 1913, since which time they have paid nothing on the contract. On December 27, 1916, the plaintiff, in writing, notified the defendants that they were in default, and that she insisted upon full compliance with the contract, and payment within 10 days, of all unpaid installments and interest. No payments being made by the defendants, the plaintiff made demand, in writing, for the possession of the premises, which being refused, she brought this action in ejectment, and for damages.

By way of their attempted equitable defense, the defendants alleged that at the time of the making of the contract the plaintiff stated that the title to the property was unincumbered, whereas it was subject to certain easements for pipe lines; misrepresented the amount of the annual income from the place; represented the amount of land to be 32.63 acres, whereas a highway dedicated to public use required and occupied 2 acres; and misrepresented the real purpose for which she desired to sell the property. Defendants further averred that upon discovering the alleged falsity of these representations they demanded of the plaintiff a rescission of the contract, and that they would make no more payments thereon, but would continue to demand an immediate rescission of the contract and repayment of all sums of money paid thereunder, at the same time offering to surrender the possession of the property, together with everything received by the defendants from the plaintiff, under the terms of the agreement. This demand of rescission, and offer in connection therewith, was rejected by the plaintiff. Defendants further allege that they have at all times offered, and do now offer, and are ready and willing, upon the repayment to them of the amount paid to plaintiff under the contract, and any other sums that the court may find to be legally due for money expended on the property, to return to plaintiff the possession of all of said property, together with all things received from her, the said plaintiff, by these defendants under said contract. They have not done so, however, and no other reason is given for withholding possession of the land from the plaintiff.

[1] From the situation thus presented by the pleadings, it is at once seen that the defendants, vendees in possession, under a contract of purchase, not having performed their contract, and being in default with their payments, are attempting to maintain an equitable defense to an action of ejectment by the vendor. Such a defense may not be maintained. The case is very similar in its essentials to Garvey v. Lashells, 151 Cal. 526, wherein, at page 530, 91 Pac. 498, at page 500, the court said:

"So far as the defense made by the answer is concerned, the case is simply that of a vendee who has received possession of the property from the vendors under a contract of sale, attempting to retain possession against the vendors without fulfilling his covenants as to payment."

As was said in another decision:

"It appears to be well established that, under such circumstances, the vendee cannot retain possession of the land, while neglecting to pay the price when due, and that the failure of the title does not give him the right to continue in possession by merely keeping good an offer to perform on his part conditioned upon performance by the vendor." Gervaise v. Brookins, 156 Cal. 103, 106, 103 Pac. 329, 331; Hoffman v. Remnant, 72 Cal. 1, 4, 12 Pac. 804.

The action of the trial court in sustaining the demurrer to the amended cross-complaint, and in striking the affirmative matter from the answer, was therefore correct.

[2] Appellants urged that the judgment of the trial court, restoring plaintiff to the possession of the land, without decreeing the return of the purchase price to the defendants, was erroneous. There is no merit in this contention. As before stated, the defendants received possession of the land from the plaintiff under the contract, and can retain possession only by fulfilling their covenants which they therein made. It was not necessary for the purposes of this case, an action in ejectment, to determine whether or not

Digitized by Google

the respondent had a good and sufficient title, or whether or not defendants had been led to enter into the contract by false representations. If they desired to retain the possession acquired under the contract, they should have complied with their part of it. If they concluded not to comply, because the title was not satisfactory to them, or for any other reason, they were bound to restore possession to the plaintiff. Whatever cause of action they may have for the purchase money which they paid and for money expended in the preservation and maintenance of the property is another matter. It constitutes no defense to the present action. Either they must pay the purchase price, according to the contract, and receive such title as the vendor is able to give, if they choose to retain possession of the land, or they may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the other expenditures, after deducting therefrom the fair rental value of the premises. Having refused to adopt either course, they are liable to an action of ejectment by the vendor. Haile v. Smith, 128 Cal. 415, 419, 60 Pac. 1032. The law required them to surrender possession of the property or prove an eviction therefrom, before permitting the defense of failure of consideration, or a suit to recover the purchase price, or damages. Rhorer v. Vila, 83 Cal. 51, 55, 23 Pac. 274; Hannan v. McNickle, 82 Cal. 122, 126, 23 Pac. 271.

The judgment is affirmed.

We concur: RICHARDS, J.; GOSBEY, Judge pro tem.

KINNEY et ux. v. KING. (Civ. 3309.)

(District Court of Appeal, First District, Division 1, California. May 7, 1920.)

1. **Appeal and error ⟸856(5)—Scope of review of order granting new trial limited by form of court's order.**

Where court granted defendant a new trial "solely on ground that, conceding the evidence given by the plaintiffs to be true, plaintiffs were not as a matter of law entitled to recover," defendant, on appeal by plaintiff from such order, cannot show that there were other errors occurring at the trial which entitled him to a new trial.

2. **Municipal corporations ⟸705(10)—Automobilist, colliding with one having right of way, held guilty of contributory negligence.**

An automobilist, traveling at about 12 miles per hour when approaching a crossing, was guilty of contributory negligence as a matter of law, where he continued to cross the intersection and collided with defendant's automobile, which had the right of way under a city ordinance, the automobiles approaching the intersection simultaneously, and could not recover, though defendant was driving at an unlawful and excessive rate of speed.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. E. Kinney and wife against Joseph M. King. From an order granting a new trial, after verdict for plaintiffs, they appeal. Affirmed.

E. E. Morris and W. I. Gilbert, both of Los Angeles, for appellants.

Duke Stone, Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from an order granting a new trial in an action for damages resulting from an automobile collision. The plaintiffs, upon the trial of the action before a jury, were awarded a verdict in the sum of $5,000 damages. The defendant moved for a new trial upon several statutory grounds. The court granted said motion by an order which read as follows:

"Defendant's motion for a new trial is granted solely upon the ground that, conceding the evidence given by the plaintiffs to be true, plaintiffs were not as a matter of law entitled to recover."

[1] The plaintiffs have appealed from this order, and upon such appeal urge the single point that the trial court was in error in holding that the plaintiffs were guilty of contributory negligence, which, as a matter of law, would bar their recovery in this action. The respondent maintains that the trial court was right in so holding, and also undertakes to contend that there were certain other errors occurring at the trial which entitled him to a new trial, and devotes much space to a discussion of these alleged errors. We are of the opinion, however, that these matters are not proper subjects of discussion upon this appeal, in view of the limited form of the court's order in granting the motion for a new trial. We shall therefore confine ourselves to the single point urged by the appellants as a ground of reversal upon this appeal.

The facts of the case, as testified to by the plaintiffs, were these:

On the 9th day of January, 1916, the plaintiffs were proceeding in their Ford roadster automobile easterly on West Ninth street in the city of Los Angeles, approaching the intersection of said street with Lake street. West Ninth street is 50 feet wide between the curbs. Lake street is 44 feet wide between the curbs. At the same time the defendant was proceeding in a Cadillac car northerly on Lake street approaching its intersection with West Ninth street. There was a retaining wall on the southwest corner of these two streets which would ob-

Digitized by Google

struct the view of persons driving easterly on West Ninth street or northerly on Lake street, until each was within a few feet of the respective lines of intersection. The plaintiffs were familiar with the conditions at that particular intersection, since they lived but a few blocks westerly and passed there frequently. The plaintiff F. E. Kinney was driving his car, and as he came to the point of intersection was traveling at the rate of 10 or 12 miles an hour. As he came into view of Lake street he saw the defendant traveling northerly on Lake street somewhere between 30 and 50 feet from the line of intersection and going at a rate of from 30 to 35 miles an hour. The said plaintiff proceeded across Lake street, swinging to the left in an attempt to avoid a collision, but failing in this effort, since his car collided with that of the defendant at a point east and north of the center of the intersecting square of the two streets, from which collision the injuries resulted which give rise to this action.

The traffic ordinances of the city of Los Angeles, which it was stipulated were applicable to this intersection of these two streets and to the parties to this action, read as follows:

"Any person who shall ride, drive or propel, or who shall cause or permit to be ridden, driven or propelled, any vehicle at a rate of speed greater than 20 miles per hour * * * along or upon any street in the city of Los Angeles [outside of certain business districts] * * * shall be guilty of a misdemeanor."

"The driver of every vehicle * * * shall drive such vehicle * * * in a careful manner with due regard to the safety and convenience of pedestrians and of vehicles and cars upon the streets upon which such vehicle or car is driven or operated."

"The drivers of all vehicles must look out for and give right of way to vehicles approaching simultaneously from their right at street intersections."

[2] Under these terms of said ordinances it may be taken as established by the plaintiffs' evidence in the case that the defendant, in approaching the intersection of the two streets in question at a rate of speed exceeding 30 miles per hour, was guilty of negligence per se; but, conceding this to be true, it must also be admitted, in view of the plaintiffs' own evidence, that when the plaintiff, F. E. Kinney, driving his automobile, approached the westerly line of intersection of these two streets, he saw the defendant's automobile traveling at such rate of speed and at such a point on Lake street as would bring the defendant's car in collision with his own, if each proceeded along his respective line of approach at his respective rate of speed across such intersecting streets. This being so, the plaintiffs and the defendant must be held to have been "approaching simultaneously such intersection," within the meaning and intent of the provision of the ordinance above set forth. It was therefore the plaintiff's plain duty under such ordinance to give to the defendant the right of way across such intersection, and this duty would be rather intensified than diminished by the fact that the defendant was seen by the plaintiffs traveling at an excessive and illegal rate of speed in making his approach to the point of intersection of these two streets, since the ordinance expressly requires drivers in the plaintiffs' position to "look out for" such vehicles as were entitled to the right of way. Clearly the plaintiffs, in attempting to proceed on their way across Lake street, were, under the circumstances as detailed by themselves, acting in direct violation of the terms of said ordinance, when, before entering upon such intersection, they saw the defendant approaching simultaneously such intersection on Lake street at an excessive rate of speed and having the right of way. The same doctrine which renders the defendant's breach of this ordinance through exceeding the speed limit negligence per se renders also the plaintiffs guilty of negligence per se in essaying to cross Lake street in front of the defendant and in disregard of his right of way. The plaintiffs offer as an excuse for their attempt to cross Lake street in front of the defendant's car that, after seeing him, they would be unable to stop their car in time to avoid a collision; but this excuse is not adequate, since the plaintiffs were bound to so operate their car in making their approach to an intersection, across which others had the right of way, as to be able to stop within such distance as would permit said right to be exercised by those entitled to it and approaching simultaneously the intersection.

The case of Bullis v. Ball, 98 Wash. 342, 167 Pac. 942, deals aptly with the precise question involved in this case in construing a similar ordinance. It says:

"The purpose of the ordinance giving to vehicles moving in a northerly or southerly direction the right of way at street intersections was to prevent collisions, to obviate the very exigency which here arose. It was foreseen that at some time vehicles approaching street intersections would very probably meet and collide. To prevent this the ordinance above referred to was enacted. Its purpose demands no explanation. It is quite clear. The rights and duties which it creates are equally clear. The driver on the street running north and south must exercise that degree of care which is ordinarily commensurate with the safety and welfare of others with whom he may come in contact at street intersections. But, while it is true that he must exercise ordinary care, the superior right to passage over the intersection is his. It is a right expressly conferred upon him by authoritative enactment, a right which must be observed and respected by others using streets at the points of intersection. This priority of right naturally and necessarily creates a cor-

Digitized by Google

responding duty on the part of the traveler using the street running east and west, a duty which consists in the exercise of a degree of care commensurate with the superior right of the person traveling the street running north and south. The duty necessarily implies that the driver of a vehicle on a street running east and west shall slacken speed for the purpose of observing vehicles approaching the intersection on the street running north and south, and, should such vehicle be within a reasonable distance of the intersection, to wait until they have passed before attempting to continue across the intersection. The greater duty and the higher degree of care to be observed in such a situation is upon the person using the easterly and westerly street, if the ordinance in question is to be given any meaning, and any violation of this duty by the person injured which contributes in an appreciable degree to causing the collision in which his injuries are sustained will operate as a bar to his recovery."

Adopting these views, we are constrained to hold that the trial court was correct in ruling that the plaintiffs, in failing to yield to defendant the right of way under the circumstances of the instant case, were to be held guilty of negligence as a matter of law directly contributing to their injury, and hence were not entitled to recover in this action. The case of Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679, relied upon by the appellants, does not present a state of affairs similar to that in the case at bar, since in that case there was evidence showing that the plaintiff, who was injured, had already entered upon and was nearly across the intersecting street at the time when the defendant approached it at an illegal rate of speed. It was not, therefore, a case of simultaneous approach.

The case of Lawrence v. Goodwill, 186 Pac. 781, also presents a dissimilar situation from that disclosed in the case at bar, and does not involve the right of the trial court to determine upon the uncontradicted testimony proffered by the plaintiffs whether their failure to yield to defendant, approaching simultaneously the intersection in question, the right of way across the same, was negligence per se sufficient to prevent a recovery.

Order affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

HYNES v. WHITE. (Civ. 3355.)

(District Court of Appeal, First District, Division 2, California. May 19, 1920. Hearing Denied by Supreme Court July 17, 1920.)

1. Gifts ⟸49(6)—Evidence held to establish gift of bonds.

Evidence of defendant, if true, *held* sufficient to establish a gift inter vivos of bonds, even though it showed that donor was immediately given absolute possession of them.

2. Evidence ⟸588—Court may not disregard unimpeached evidence.

A court may not arbitrarily disregard the unimpeached evidence of a single witness.

3. Gifts ⟸4—Intention, delivery, and acceptance are essential.

The three requisites of a valid gift are donor's intention to make it, delivery of thing given to donee, and donee's acceptance thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

4. Evidence ⟸313—Declarations held to show donor's intention to make an unconditional gift.

Donor's declarations, both before and after the gift, held to tend to show an intention on his part to make an absolute and unconditional gift.

5. Gifts ⟸41—Mere possession by donor after completed gift does not revest title.

Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that donor immediately thereafter comes into physical possession and control of the property without any retransfer of the ownership by the donee.

6. Gifts ⟸28(2)—Donor's retention of key to deposit box held not inconsistent with gift.

Donor's retention of key to deposit box, in which donee kept the gift bonds, donee having made donor her deputy to visit the box, *held* not inconsistent with the idea of a gift, since donee had the possession, power, and right to take away the subject-matter of the gift, as well as the physical power and opportunity.

7. Gifts ⟸34—Donor's arrangement to repossess if donee died first held not inconsistent with gift.

Where donee of bonds gave donor, as her deputy, a key to her deposit box containing them, his intention to take them in case she died first, to prevent their going to her aunt, was not inconsistent with a gift to her, since a gift upon condition of reversion if donee died before donor would be valid, and also since the arrangement to repossess in such case was made after the gift had been completed.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit by W. J. Hynes as administrator of the estate of Alexander Hay, deceased, against Peggy White, also known as Mrs. Douglas White. Judgment for plaintiff for part of items claimed, new trial denied, and defendant appeals. Reversed.

David E. Bergman, of Los Angeles, for appellant.

Cullinan & Hickey, of San Francisco, for respondent.

Digitized by Google

BRITTAIN, J. The respondent, as the administrator of the estate of Alexander Hay, deceased, sued the appellant to recover certain bonds, or their value. In a second count the plaintiff sought to recover $500 with interest claimed to have been loaned by Hay to the defendant. The defendant denied the allegations of ownership of the bonds by the estate, and alleged affirmatively that Hay had canceled the note given by her to evidence the $500 loan. The case was tried without a jury. The trial court found that the defendant was not entitled to certain of the bonds claimed to have been given her May 31, 1913, because it was further found that they were intrusted to her without the intent on the part of Hay to make a gift. It was found that other securities claimed to have been given to the defendant in January, 1914, were given her, and also that Hay forgave her the $500 debt. It further found that the bonds found to belong to the estate had been sold by the defendant, and that their value was $5,874.50, for which amount judgment was rendered against her. A motion for new trial was denied, and it is claimed that the court erred therein, as also in certain proceedings during the trial concerning the tender of the oral evidence of the defendant to explain her evidence given on her deposition, on which alone the plaintiff rested his case. It is claimed the evidence does not support the findings, and because this court has reached that conclusion, it is unnecessary to consider the new trial ruling or the tender of the defendant's oral testimony.

The only evidence introduced on behalf of the plaintiff was the deposition of the defendant taken at the instance of the plaintiff. On the part of the defendant there was evidence introduced, strongly tending to support the evidence given by her at the taking of the deposition. Reduced to narrative form, the evidence concerning the claimed gift was that Alexander Hay at the time of the gift was about 70 years old. He was divorced many years before. His former wife had remarried twice, and at the time of the gift was living with her sister. After the divorce Hay took up his home with another sister, who was not living at the time of the gift, and the defendant and her brother were the children of that sister of the divorced wife. Hay was fond of the children, particularly of the defendant, and frequently assured her mother that in the event of her death, he would take care of his niece. She grew to young womanhood and married Douglas White, who at the time of the trial was general industrial agent of the Salt Lake Railroad. His business required him to travel a great deal, and apparently his wife at times traveled with him. There was no intimacy between the defendant and her two aunts. After the marriage of the defendant, who lived in Southern California with her husband, Hay visited their home on one or two occasions, and when they were in San Francisco, they visited him. He was an employé of the Custom Service in San Francisco, earning from $125 to $150 a month. He had no one dependent upon him and no near relatives. In 1913 Douglas White, who was in San Francisco, met Hay, who requested him to telegraph for his wife to come to San Francisco. On White telling him he was returning to Los Angeles that evening, and would send her up, Hay said, "Well, send her up just as quick as you can, because I wish to make arrangement regarding what little property I have."

In response to this request of Hay Mrs. White came to San Francisco, where she met Hay, and according to her evidence he asked her to go with him to the safe deposit vaults of the Union Trust Company, saying he had something to give her. Prior to that time he had kept a box in these vaults for his own use. Before the visit of Mrs. White he had rented a second box, which he took in her name, but for which she paid the rental. On receiving the box, he directed her to take it into one of the customer's rooms to which he also took his own deposit box. Taking from it the bonds found by the court not to have been given her, he said, "I want you to have these." She was asked if he did not say, "'You are to have these bonds after my death,' or something like that?" To this she responded: "He said, 'I give them to you now—they are yours. They belong to you.'" She was asked if he did not say, "I will use the income of these bonds and stocks during my lifetime, and you can have them after my death?" to which she responded, "No; but in the conversation he said, 'I am going to take you over to-morrow to see Mr. ———, of Sutro's, a brokerage firm, and introduce you, so he will know you and you will know him, and you can collect the money on the coupons.'" She put the securities in her box and they went to the desk, where she signed an order, making Hay her deputy to visit her box, and gave to him one of the two keys delivered to her. This arrangement was made pursuant to a conversation, which she stated was after the gift of the securities and manual delivery of them. She testified that he remarked, "You and Douglas are traveling around so much—suppose you get in a wreck or something—then this box would be closed to me, and, of course, I don't intend to give this to your heirs. I am giving it to you." The understanding of both parties at the time was that the reference to her heirs was to her two aunts, one of whom was Hay's former wife. The evidence introduced on behalf of the defendant was that of a number of people who knew Hay, and to whom he had stated after this transaction that he had given his property to Mrs. White. Mrs. White also testi-

Digitized by Google

fied that she had borrowed $500 from Hay, and had given her note for it; also that he had redelivered the note to her and told her she need not repay that $500, and directed her to cancel the note. Some time in 1914, she testified, she met Hay, and they again went to the safe deposit vaults, when he gave her another bond which she placed with those given her first. The day following the first transaction at the safe deposit vaults, Hay did introduce her to a young man in the banking house of Sutro & Co., and a day or two later he took her back to the safe deposit vaults to assure himself that she knew how to open the box. Prior to his death she cut the coupons from the bonds, giving them to Hay to collect, and, she testified, he paid her the interest collected.

[1, 2] From this evidence the trial court made the finding that Hay had no intention of giving the first bonds to the defendant because of the arrangement by which he was appointed her deputy to go into the box for the avowed purpose of preventing the bonds being taken by her two aunts in the event her death should occur before his own. The same conditions surrounded the gift of the bond in 1914, and he had the same right of access to it as he had to the first bonds, yet the trial court believed the evidence of Mrs. White in regard to that gift, as he believed her evidence in regard to the gift of the $500 note. To reach this conclusion, he must have rejected her positive statement that the conversation which led to her appointing Hay her deputy took place after the gift, although in close connection with it. The only evidence bearing on the intention of Hay to make the first gift was that of Mrs. White. A court may not arbitrarily disregard the unimpeached evidence of a single witness. If her statement was true, all the elements of a gift inter vivos were present, and if the gift was made, even though the donor was immediately given absolute possession of the property, it did not militate against the gift.

[3] The cases are uniform regarding the three requisites of a valid gift: First. An intention on the part of the donor to make it. Knight v. Tripp, 121 Cal. 674, 54 Pac. 267; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Beaumont v. Beaumont, 152 Fed. 55, 81 C. C. A. 251; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Stewart v. Whittemore, 3 Cal. App. 213, 84 Pac. 841. Second. A delivery to the donee of the thing given. Civ. Code, § 1147; Beaumont v. Beaumont, supra; Beebe v. Coffin, 153 Cal. 174, 94 Pac. 766; Knight v. Tripp, supra; Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531. Third. Acceptance by the donee of the thing given. Beaumont v. Beaumont, supra; Holmes v. McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; Beaver v. Beaver, supra; Frazier v. Perkins, 62 N. H. 69.

[4] The declarations of the donor both before and after the gift tended to show an intention on his part to make an absolute and unconditional gift. Estate of Hall, 154 Cal. 527, 98 Pac. 269; Ruiz v. Dow, supra; Stewart v. Whittemore, supra; Thornton on Gifts and Advancements, § 222 et seq.; Garrison v. Union Trust Co., 164 Mich. 345, 129 N. W. 691, 32 L. R. A. (N. S.) 219; Waite v. Grubbe, 43 Or. 406, 73 Pac. 206, 99 Am. St. Rep. 764; Reese v. Phila. Trust, etc., 218 Pa. 150, 67 Atl. 124, 120 Am. St. Rep. 880.

[5] Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that the donor immediately thereafter comes in physical possession and control of the property without any retransfer of the ownership by the donee. Beaumont v. Beaumont, 152 Fed. 55, 81 C. C. A. 251.

[6] In this case, as in that, it is contended that the retention of the key of the safe deposit box by the donor with the right to resort to it, in that case for the purpose of getting the coupons, was such a retention of control and possession as would enable him to carry the bonds away, and was therefore inconsistent with the idea of a gift of the same. But the donee had the same possession and the same power of taking away the subject-matter of the gift, and not only so, but she had the rightful power to do so as well as the physical opportunity. The cases are practically uniform in support of this rule of law. Reese v. Phila. Trust, etc., supra; Calkins v. Equitable, etc., 126 Cal. 531, 59 Pac. 30; Stewart v. Whittemore, supra; Pink v. Church, 14 N. Y. Supp. 337;[1] Martin v. Martin, 170 Ill. 18, 48 N. E. 694; Garrison v. Union Trust (Mich.), supra; Gilkinson v. Third Ave. R. Co., 47 App. Div. 472, 63 N. Y. Supp. 792; Waite v. Grubbe, supra; Marston, Adm'r, v. Marston, 64 N. H. 146, 5 Atl. 713; Blanchard v. Sheldon, 43 Vt. 512; Riegel v. Wooley, 81 Pa. 227.

[7] On the part of the respondent it is argued that the intention to enable the donor to repossess himself of the bonds upon the death of the donee was inconsistent with a gift to her. The court cannot accept this view of the case for two reasons: In the first place, the gift would have been a valid one if coupled with a condition that upon the death of the donee the property should revert to him; and, secondly, in this case the trial court was bound, as is this court, by the positive and uncontradicted evidence of the only witness to the matter that the arrangements for the donor to repossess himself of the property in the event of the death

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 60 Hun, 580.

Digitized by Google

of the donee before his own was made after the gift had been completed. Neither this court, nor the trial court, could reach a determination that the first gift was invalid because, if the donee had died first, the donor might not have been able to establish his right to the bonds. The only evidence in the case fails to support the finding of the trial court against the existence of an intent on the part of the donor to make the gift.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

HEATH v. JUDSON FREIGHT FORWARDING CO. (Civ. 2661.)

(District Court of Appeal, Second District, Division 2, California. May 10, 1920.)

1. Carriers ⟸72—Telegram sufficient notice to withhold shipment.

A telegram to a forwarding company, "Hold shipment further instructions if not shipped wire my expense whether shipped or not," was sufficient notice to charge the forwarding company with the duty of withholding the goods from shipment.

2. Carriers ⟸4—Forwarding company when a carrier.

If goods are deposited with a forwarding agent merely as the initiatory step towards starting them in itinere, the forwarding agent having undertaken to do no more than to safely keep the goods and forward them when the opportunity offers itself, and being in no wise interested in their carriage after delivery to the carrier, such agent cannot be regarded as a common carrier; but where the forwarding agent undertakes to transport the property from its location in one city to another city, for through rates less than the published rates of the railroad company for broken lots, and a carload is billed to a distributing agent of the forwarding agent at the point of destination, such forwarding agent assumes, while holding the property for accumulation, the liability of a common carrier.

3. Carriers ⟸72 — Forwarding agent must withhold goods from shipment on owners' orders.

A forwarding agent, whether treated as a forwarder or as a common carrier, must obey any reasonable order to withhold the goods from shipment, and a forwarding agent, that for hire undertakes the carriage of goods of another in a car of its own selection and delivery to the owner at the place of destination through its own distributing agent, cannot carry the goods on to its place of destination as contracted for against the owner's consent.

4. Carriers ⟸72—A forwarding company must unload goods on order to withhold.

A forwarding company, given an order to withhold shipment of goods which had been loaded with other goods in a car of which it still had control, was liable to the owner of the goods, where it failed to unload and withhold the same, where, although expense of unloading would be $20, an expense not out of proportion to the value of the goods.

5. Carriers ⟸188 — Entitled to reasonable charge for unloading on order to withhold shipment.

Where a forwarding company, whether considered as a forwarder or a carrier, unloads a car on the order of the owner of the goods to withhold same from shipment, there is an implied agreement on the part of the owner to pay a reasonable charge for the unloading, to secure which the forwarder has a lien on the goods, under Civ. Code, §§ 1856, 2144.

6. Carriers ⟸157—Limitation for filing claim with forwarder inapplicable to claims arising from forwarder's own dereliction.

A clause in a receipt given by a forwarding company, "Claim for any loss or damage must be presented within thirty (30) days from date of arrival of shipment at destination," etc., referred to claims for loss or damage while the goods were in transit due to some fault of the railroad company, and was not intended to cover a claim for damages due to the forwarder's failing to withhold the goods from shipment on shipper's order.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Frank Heath against the Judson Freight Forwarding Company. Judgment for defendant, and plaintiff appeals. Reversed.

W. A. Alderson, of Los Angeles, for appellant.

E. T. Sherer and Bicksler, Smith & Parke, all of Los Angeles, for respondent.

FINLAYSON, P. J. Defendant, a New York corporation, is engaged in the business of shipping and forwarding freight of all kinds, especially household furniture, from New York City to all points in the United States. For this purpose, defendant, at its loading station in Newark, N. J., assembles goods of various ownership that are to be shipped to a common destination. This is done for the purpose of making up a carload, that thereby a through rate may be obtained that is less than the published rates of the railroad company for broken lots. The accumulated carload, so assembled for any given destination, is billed to defendant's distributing agent at the point of destination, and such distributing agent distributes the goods to the various owners at that place.

In the month of December, 1916, plaintiff, who then resided in New York, desiring to ship his household furniture to Los Angeles, which city he contemplated making his home, entered into a contract at New York with defendant, whereby defendant agreed to pre-

Digitized by Google

pare plaintiff's household furniture for shipment and ship it from New York to Los Angeles. Plaintiff left the city of New York and arrived in Los Angeles about December 11, 1916. On December 18, 1916, defendant wrote a letter to plaintiff, addressed to the latter at Los Angeles, wherein defendant informed plaintiff that, owing to a freight congestion, plaintiff's household goods had not, as yet, arrived at the defendant's loading station at Newark.

On December 29, 1911, at Los Angeles, plaintiff, having decided to return to New York, sent to defendant, addressed to it at its New York office, a telegram reading as follows:

"Hold shipment further instructions if not shipped wire my expense whether shipped or not."

This telegram was received by defendant at its New York office on December 30, 1916, at 9:30 o'clock a. m. At that time plaintiff's household furniture had been loaded on a car at Newark, but, as yet, the car had not started on its journey to California. When the car was finally loaded, the carload consisted of 124 packages, 43 of which contained plaintiff's household furniture, the remaining packages containing goods belonging to other persons. Plaintiff's 43 packages were the first to be loaded on the car. So that, to unload plaintiff's household furniture, it would have been necessary to unload the entire car. This would have involved an expense of about $20.

At 9:45 a. m. on December 30, 1916, which was a Saturday, defendant telegraphed from New York to plaintiff at Los Angeles as follows:

"Your shipment loaded today do you authorize unloading cost about twenty dollars must have reply one o'clock New York time."

It is claimed by plaintiff that this telegram was not actually received by him at Los Angeles until 11:55 a. m. of December 30th, which would be 2:55 p. m. at New York.

As we have said, December 30, 1916, was a Saturday. The regular time for closing defendant's office on Saturdays is 1 o'clock p. m. On this occasion, however, an employé of defendant remained at its office on December 30th until 6 o'clock to receive any telegram that plaintiff might send in reply to that sent by defendant to plaintiff at 9:45 a. m. of that day. Plaintiff did send a telegram to defendant in reply to that which, he says, was delivered to him at 11:55 a. m. That telegram, filed at Los Angeles at 11:58 a. m. of December 30th, reads:

"Please unload goods and put in storage."

For some reason this telegram was not delivered to defendant on December 30th. Because the next day was Sunday, and the following day, January 1st, a holiday, plaintiff's telegram of December 30th was not received by defendant until Tuesday, January 2, 1917. Upon its receipt defendant sent plaintiff a telegram as follows:

"Unfortunately your goods forwarded Saturday evening your wire not received until this morning through error or negligence of telegraph company no reply to wire Saturday afternoon. Compelled to forward car."

We infer from the facts disclosed by the record that the car, loaded with plaintiff's household furniture and other shipments destined for Los Angeles, left Newark at about 6 o'clock p. m. of Saturday, December 30, 1916. On January 4, 1917, defendant wrote to plaintiff, addressed to him at Los Angeles, a letter which reads:

"We beg to advise that your shipment of household goods was forwarded on Dec. 30, 1916, in a through car from Newark, N. J. consigned to our distributing agent, Los Angeles Warehouse Co., 316 Commercial St. Los Angeles, Calif. The charges on this shipment amount to $270.66 which you should pay to the distributing agent above named, and with whom you should make arrangements for taking possession of your goods as soon as car arrives. The distributing agent will gladly answer any inquiries which you may wish to make relative to the matter. Usual storage charges will be assessed on goods which are not removed from freight house within forty-eight hours after arrival."

Upon these facts the trial court found that defendant had not disregarded plaintiff's instructions, and gave judgment for defendant. From that judgment plaintiff appeals.

[1, 2] Respondent contends that the first telegram received by it from appellant, that filed by appellant at Los Angeles on December 29th and received by respondent on the morning of December 30th, was so uncertain that respondent was not obliged to withhold the goods from shipment. With this contention we cannot agree. We think that, regardless of any delay in the receipt by respondent of appellant's telegram of December 30th, replying to that sent to appellant by respondent at 9:45 o'clock a. m. of that day, appellant's first telegram—that filed in Los Angeles on December 29th and received by respondent at New York on December 30th at 9:30 a. m.—was alone sufficient to charge respondent with the duty of withholding appellant's goods from shipment, and that because respondent did not do so it is liable for all damages proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

It seems that respondent undertook as a forwarder to transport appellant's goods from New York to Los Angeles as part of a carload consigned to respondent's distributing agent at Los Angeles; the shipment being handled in that way in order that respondent might obtain the benefit of the re-

Digitized by Google

duced rate which is made where goods are shipped in a carload lot instead of less than carload lots. We are inclined to the view that respondent's liability is that of a common carrier. If goods are deposited with a forwarding agent merely as the initiatory step towards starting them in itinere, the forwarding agent having undertaken to do no more than to safely keep the goods and forward them when the opportunity offers itself, and being in no wise interested in their carriage after delivery to the carrier, such agent cannot be regarded as a common carrier; but where, as here, the forwarding agent undertakes to transport the property from its location in one city to another city, for through rates less than the published rates of the railroad company for broken lots, which it is enabled to do by accumulating property for the given destination until a car can be filled, which is billed to its distributing agent at the point of destination, such forwarding agent assumes, while holding the property for accumulation, the liability of a common carrier. Judson Freight Forwarding Co. v. Delaware, L. & W. R. Co., 163 Ill. App. 22; Ingram v. Am. Forwarding Co., 162 Ill. App. 476; Bare v. Am. Forwarding Co., 146 Ill. App. 388, affirmed in 242 Ill. 298, 89 N. E. 1021; Kettenhofen v. Globe Transfer & S. Co., 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902, and note, Ann. Cas. 1914B, 776.

[3] However, whether respondent be treated as a forwarder or as a common carrier, we think the law is clear that it was its duty to obey any reasonable order to withhold the goods from shipment that it might receive from appellant, the owner of the property. We also are of the opinion that appellant's first telegram to defendant—filed in Los Angeles on December 29th and received by respondent at New York the next morning at 9:30 o'clock—was sufficient as a definite instruction to hold the shipment.

Irrespective of whether its relation to the owner of the shipment be that of a common carrier or a mere forwarder, we are satisfied that a forwarding company that for hire undertakes the carriage of goods of another in a car of its own selection, and delivery to the owner at the place of destination through its own distributing agent, cannot carry the goods on to the place of destination, as contracted for, against the owner's consent. In this regard the obligation of the forwarder is not different from that of a common carrier; and what is said by the courts in cases against railroads and other indubitable common carriers is, we think, equally applicable to the situation presented here, whether respondent be regarded as a common carrier or as a forwarder only. Though we have found no case involving the duty of a forwarding agent to obey the owner's instructions not to ship, we think the case is controlled by the rule announced in an almost unbroken line of authorities, some of which are cited infra, that the true owner of goods to be transported by a common carrier retains some right of control, and, at any reasonable time before transportation has commenced, may order his goods to be withheld from shipment.

The owner does not renounce his right of all control over his goods by their delivery to a common carrier or to a forwarder. The latter stands in the relation of one employed as a bailee of goods for the purpose of obeying instructions of the true owner regarding them. The owner's right to control the shipment is an incident of his title. The title of the carrier or forwarder, whichever it may be, is subordinate to that of the owner. Aside from its lien for lawful charges, a forwarding company cannot be allowed to defeat the owner's right to control the shipment. Subject to the payment of a reasonable charge for the services necessitated by his order, the owner has the right either to stop the goods in transit or to stop their shipment before actual transportation has commenced. Scothorn v. South Staffordshire R. Co., 8 Exch. 341; Lewis v. Galena, etc., R. Co., 40 Ill. 281; Cincinnati, etc., R. Co. v. Steele, 140 Ky. 383, 131 S. W. 22, 140 Am. St. Rep. 388; Wente v. C., B. & Q. R. Co., 79 Neb. 179, 115 N. W. 859, 15 L. R. A. (N. S.) 756, and extended note; Virginia & Southwestern R. Co. v. Sutherland, 138 Tenn. 266, 197 S. W. 863, L. R. A. 1918B, 77, and note. In Scothorn v. South Staffordshire R. Co., supra, goods intended for shipment were marked originally, "East India Docks, London, by Melbourne Ship to Australia." Later the shipper notified the carrier to deliver the goods at Bell Wharf, Radcliffe, London. There was a failure to comply with the request, and the goods were forwarded to Melbourne and lost. In allowing the plaintiff to recover, the court said:

"It is argued that that is a contract. It is no contract in one sense; it is a person taking goods to be disposed of according to the directions of another, and is it to be contended that if, an hour afterwards, the owner has come back and said he wanted the goods again, the company could have said, 'No; you have made a contract for them; they shall go to the ship'? The contract with a carrier is that he is a bailee of the owner's goods to obey his directions respecting them; and I have no hesitation in saying that generally at any period of the transit he may have them back; and the saying that a railroad company could carry a man's goods on against his consent is a proposition not supported either by law or common sense. It may be different when the subsequent direction to the bailee is an unreasonable one. I can conceive a case where a man may have authorized goods being put in a place where it would be very inconvenient to take them out; but, generally speaking, it is otherwise. Suppose a man travels with luggage in a railway

Digitized by Google

train and becomes dissatisfied with his journey, and says, 'I wish to go out of the train;' he has a right to do so, and take his luggage with him; but, if Mr. Gray is right, the company would be justified in saying, 'You have delivered your luggage to us, and we will take it on.' I apprehend the real circumstances of such cases as these are that, when a man delivers his goods to a carrier, he employs him as a bailee for reward; the man may be entitled to the reward, but the owner is entitled to have the goods back if he pleases."

[4, 5] It doubtless is true that, if the owner's goods have been put in a place where it would be very inconvenient to take them out, as, for example, if a trunk has been placed deep in the hold of a ship, under other cargo, and the ship is about to sail, so that taking the trunk out would delay the vessel's sailing, and thus involve an expense out of all proportion to the value of the trunk and its contents, the owner would not have the right to redelivery of his trunk at the port of departure. But here appellant's goods, without any very great inconvenience, could have been taken from the car at an expense not to exceed $20—an expense not out of proportion to the value of the articles. For its services in taking his property from the carload, in obedience to appellant's instructions, respondent would not be allowed to charge more than a reasonable sum to compensate it for its trouble. Had it obeyed appellant's instructions, the law would have implied an agreement on the latter's part to pay a reasonable charge for the unloading. Carr v. Penn. Ry. Co., 92 N. Y. Supp. 799. To secure such charge, respondent would have had a lien on the goods. Civ. Code, §§ 1856, 2144.

The telegram upon which appellant must rest his case, the telegram filed in Los Angeles on December 29th and received by respondent on the morning of December 30th, was not punctuated. We quote it again:

"Hold shipment further instructions if not shipped wire my expense whether shipped or not."

Respondent says that this telegram, by different punctuations can be interpreted in at least four different ways. This may be so. But, regardless of how punctuated, or how interpreted, the telegram always contains the definite instruction, "Hold shipment." It may be that the telegram should be read as directing respondent to hold appellant's shipment until further instructions were received or to hold the shipment if the goods had not already been shipped. The goods had not been shipped, and, under any interpretation, respondent is definitely directed to "hold shipment." This it did not do. Having received a definite instruction to "hold shipment," respondent could not justify its course merely because it did not receive, until January 2, 1917, a reply to its telegram of December 30th, asking appellant if he "authorized unloading," and notifying him that the unloading would cost about $20.

It is claimed that respondent could not be required to unload appellant's household furniture in order to "hold shipment," unless appellant entered into a new contract with respondent to pay the latter for unloading the car, which, according to respondent's telegram of December 30th, would amount to about $20. This insistence overlooks the fact that the owner's right to control the goods, and, if he pleases, to stop the shipment and direct and receive a redelivery of the goods, is, by law, implied in the shipment contract itself as a part thereof (Virginia & Southwestern R. Co. v. Sutherland, supra), and further, that the law implies an agreement by the owner to pay a reasonable charge for any extra services that may be necessitated by his exercise of the right thus to control the shipment.

There is no merit in the contention that appellant himself could have stopped the goods before their arrival at Los Angeles. It appears from respondent's letter of January 4, 1917, that the goods were consigned by respondent, as consignor, to itself, or to its distributing agent at Los Angeles, as consignee. Appellant, therefore, could have done nothing save through respondent.

[6] Finally, it is contended that appellant cannot recover because he did not present a claim for his damages within 30 days. This contention is based upon a clause in the receipt that respondent gave the warehouseman from whom it received appellant's goods. That clause reads:

"* * * Claim for any loss or damage must be presented within thirty (30) days from date of arrival of shipment at destination. All particulars and proof of loss or damage required by railroad companies or other transportation agency to be furnished by the claimant. If goods are placed in storage, claim, if any, must be made before storing."

The "claim" referred to in this clause of the receipt is a claim for loss or damage, while the goods are in transit, due to some fault of the railroad company. The clause was not intended to cover a claim for damages due to respondent's own dereliction.

The judgment is reversed.

We concur: THOMAS, J.; WELLER, J.

Digitized by Google

McCONNELL v. GAUT'S ESTATE et al.
(Civ. No. 3200.)

(District Court of Appeal, Second District, Division 2, California. May 12, 1920. Hearing Denied by Supreme Court July 8, 1920.)

1. **Husband and wife ⇐138(9)—Wife signing undelivered mortgage on husband's property and note not ratifying his previous acts as agent.**

A wife, who merely signed her name to a note and mortgage on real property standing in her husband's name, as a dutiful wife, to facilitate his business, did not thereby ratify previous acts of her husband in his own behalf as having been done as her agent; the note and mortgage not being delivered.

2. **Husband and wife ⇐138(1)—Previous signing of notes by wife did not make husband agent.**

The fact that on previous occasions husband had procured his wife's signatures to notes, and that she had thereby become personally obligated thereon, did not of itself operate to constitute him her agent for all time.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Emmet McConnell against Helen Lukens Gaut, individually and as administrator of the estate of Jas. H. Gaut, deceased. From a judgment against the administratrix for the amount prayed for, but denying relief as against her individually, the plaintiff appeals. Affirmed.

Simpson & Simpson, of Pasadena, for appellant.

J. H. Merriam, of Pasadena, for respondents.

WELLER, J. This action was brought to recover judgment against Helen Lukens Gaut, as administratrix of the estate of Jas. H. Gaut, deceased, and in her individual capacity, in the sum of $6,700, on account of certain moneys alleged to have been loaned by plaintiff to the decedent and his wife, the said Helen Lukens Gaut. The court below rendered judgment against the administratrix for the amount prayed, but denied relief as against her individually. From the latter portion of the judgment plaintiff appeals.

The following facts are shown by the findings: On December 15, 1913, the decedent, Jas. H. Gaut, was the owner of certain real property in Riverside county, subject to five incumbrances, aggregating $15,300, one, a mortgage in the sum of $6,000, signed by Gaut and wife, being held by plaintiff. On or about that date plaintiff and Jas. H. Gaut entered into a contract whereby they agreed that the property should be cleared of the incumbrances, that plaintiff would loan Gaut $6,700, that the latter should execute to plaintiff two promissory notes, each for $6,350, secure their payment by a mortgage upon the above-mentioned property, and procure his wife, the defendant, Helen Lukens Gaut, to sign the notes and mortgage. Prior to this, Gaut had borrowed the sum of $1,200 from plaintiff, and had given him a note signed by himself and wife, securing the payment thereof by a grant deed to the property, plaintiff, in turn, giving a receipt which, after stating that the deed was held as collateral security for the payment of the note, reads:

"I have accepted this deed with the understanding in event said James H. Gaut should fail to pay said note then I am at liberty to record said deed and take possession of said property. In event, however, said note is paid, I agree to return said deed to James H. Gaut or assigns. [Signed] E. McConnell."

Subsequently, plaintiff gave checks to Jas. H. Gaut, amounting to some $5,500, which, together with the $6,000 mortgage and the $1,200 note, made up the sum of $12,700, for which the notes and mortgage mentioned in the agreement were to be executed. Plaintiff then deposited releases of the mortgages held by him with the Title Insurance & Trust Company, with instructions to record them on delivery of the $12,700 note and mortgage. These instructions were approved by Jas. H. Gaut, who also agreed to pay to the depositary the sum of $2,500 for the purpose of satisfying other liens and clearing title to the property. Before the deal was consummated, Jas. H. Gaut died, and the $12,700 note and mortgage were never delivered to plaintiff.

The court found that Helen Lukens Gaut, respondent, received no part of the consideration for the $1,200 note, but that she signed it at the request of Jas. H. Gaut, as his wife, and not otherwise, and that she received no part of the moneys borrowed by Jas. H. Gaut, which made up the $12,700 in notes.

The complaint, as originally framed, prayed for a decree requiring the defendant, individually and as administratrix, to execute and deliver the $12,700 note and mortgage, or, in case this could not be done, that plaintiff have judgment in the sum of $6,700. While the action was pending, the prayer for specific performance was abandoned by stipulation and the case proceeded for the recovery of a personal judgment.

Appellant attacks the portion of the judgment which exonerates the respondent from personal liability, claiming that she is bound by the acts of her husband as her agent.

[1, 2] Plaintiff testified to several transactions had with Jas. H. Gaut, covering a period of some months, and in each case speaks of dealing with Jas. H. Gaut only. All checks were payable to Gaut, and all memoranda were made in his name alone. The receipt above quoted is an instance. It will

Digitized by Google

be noted that no mention of Mrs. Gaut is made therein. Her only connection with the dealings between plaintiff and her husband was the signing of the $1,200 note—in which plaintiff apparently did not consider her interested, as he ignored her entirely in his receipt, and also when, at her husband's request, she signed the undelivered note and mortgage. Nowhere does it appear that Gaut assumed to act for his wife as her agent, or that he attempted to bind her in any way. Whatever obligation attached to her individually was the result of her own actions. She merely signed her name to the documents affecting the title to real property standing in her husband's name, as a dutiful wife, to facilitate his business. To hold that such actions on her part constituted ratification by her of all previous acts of her husband in his own behalf, as having been done as her agent, would transcend the limits of precedent and reason. The fact that on previous occasions Gaut had procured his wife's signature to notes, and that she had thereby become personally obligated thereon, could not of itself operate to constitute him her agent for all time and for all purposes; and the record discloses no other act or omission on her part that could be construed either as precedent authorization or subsequent ratification. If the notes and mortgage for $12,700 had been delivered, she no doubt would have been liable for any deficiency after a sale of the mortgaged property under decree of foreclosure. But that was the extent of her obligation. There being no delivery of the notes and mortgage, she did not become obligated to pay anything on the notes.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

BARR LUMBER CO. v. JOY CONST. CO. et al. (Civ. 2816.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1920.)

1. **Appeal and error ⇐1011(1)—Finding on conflicting evidence not reviewable.**

A finding by the trial court based on conflicting evidence cannot be reviewed.

2. **Municipal corporations ⇐373(3)—Wetting curb held done under contract so as to extend time for lien notices.**

Where a contract for a concrete curb required wetting down the curb for 7 days, and that the work be done to satisfaction of street superintendent, and the latter required wetting down for 10 days, which the contractor did under his protest that work for the last 3 days was nevertheless done under the contract, so that the time for filing lien notices dates from its completion.

3. **Municipal corporations ⇐373(3)—Verification of lien claim of corporation for materials furnished contractor held sufficient.**

Where a lien claim for materials furnished contractor by a corporation was signed with the corporation named by the president and verified by the individual who signed as president, who swore that he was president and knew that the facts stated were true, the affidavit sufficiently showed that the verification was made on behalf of the corporation.

4. **Municipal corporations ⇐373(3)—Statement of nonpayment in claims held sufficient.**

Statement in lien claim for materials furnished contractor that the amounts claimed were due and unpaid, that the contractor had agreed to pay for the materials, but that no part had been paid except a stated sum, *held* sufficient statement of nonpayment.

5. **Municipal corporations ⇐373(3)—Unnecessary statement in claim held not to defeat lien for material furnished contractor.**

A statement in lien claim for material furnished contractor that it was a lien on any moneys, warrants, or bonds on account of material furnished for a public improvement, even though not required in the notice, could not have misled or prejudiced the sureties on the contractor's bond, and do not defeat the lien.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Barr Lumber Company against the Joy Construction Company and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

Newmire & Watkins, of Los Angeles, for appellants.

Behymer & Craig, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the defendants W. R. Hefley and Charles C. Hayes from a judgment entered against them as sureties on a bond given by a contractor under the street improvement law known as the Vrooman Act (Deering's Gen. Laws, Ed. of 1915; Act 3930, p. 1714). The plaintiff sued on a claim for materials furnished by it, and on two assigned claims of a similar nature, all being for materials used by the contractor in performance of the work. After the work had been actually completed, verified statements were filed with the street superintendent of the city of Whittier, with whom the contractor had made his contract, as follows: On May 24, 1916, by the plaintiff; on May 25, 1916, by plaintiff's assignor A. H. Gregg; and on May 24, 1916, by plaintiff's assignor C. Forsyth & Son. It is claimed by plaintiff that these notices were filed in conformity with the requirements of section 6½ of said statute. The street superintendent accepted the work constituting said improvement on the 23d day of June, 1916. Additional notices of claim were filed with the street

Digitized by Google

superintendent by the plaintiff and by Gregg on July 21, 1916, and by C. Forsyth & Son on July 28, 1916. As to these July notices, their sufficiency need not be discussed, if the earlier notices were filed within time and in due form.

Appellants claim that all of the notices were filed more than 30 days from the time the improvement was completed, and that therefore, under the terms of said section 6½, they were all filed too late, and that for that reason any right of action on said claims was lost. In the case of Pacific Sewer Pipe Co. v. United States Fidelity & Guaranty Co., 192 Pac. —,[1] in which the decision of this court has this day been filed, it is held that the 30 days, not later than the end of which the claimant was required to file his statement with the board of public works (street superintendent, in the instant case) begins to run from the date of the actual completion of the work, and not from the date of the acceptance of the work by the board of public works or street superintendent.

[1] The principal question then is whether or not the notices filed with the street superintendent on May 24th and May 25th were filed within 30 days from the time the improvement was completed. The finding of the court is that the construction work under the contract was completed on the 25th of April, 1916, and not earlier than that date. Appellants claim that this finding is not supported by the evidence and that, as shown by the evidence, the work was completed not later than April 21, 1916. There is positive testimony that the work of construction, exclusive of what is known as the wetting down process, which follows the laying of the cement, was completed on April 15th. It was stipulated by plaintiff's counsel that the specifications called for the wetting down of the curbing for a period of 7 days, and that the work was to be done in a good and workmanlike manner, and to the satisfaction of the street superintendent of the city of Whittier. At about the time when the work was ready for the wetting down process to begin, a conversation occurred between Wilson, the contractor's foreman, and Stevens, the street superintendent, in which conversation the superintendent insisted that the specifications required that the cement be wet down for 10 days, whereas the foreman contended that they called for 7 days. The testimony of the foreman is that he acquiesced in the superintendent's demand to wet it for 10 days, and did so, and that he finished the wetting of the curb on April 24th. The street superintendent testified that this work was done up to and including April 25th.

[2] On this conflicting evidence we must accept the court's finding that the work was completed on and not before April 25th, unless we accept appellant's contention that the last 3 days of the wetting down process are not to be considered as a part of the completion of the contract, and that therefore the work must be held to have been completed at least as early as April 22d. But with this contention we do not agree. Since the work was to be done to the satisfaction of the street superintendent, and since there was a controversy between the parties as to what would constitute a sufficient wetting down process to make the work satisfactory, and since that controversy was actually settled by continuance of the work for the period required by the street superintendent in order to make the work satisfactory to him, it is our opinion that the work should not be deemed to have been completed until the 25th day of April. This being so, the notices of May 24th and May 25th were filed with the street superintendent within due time.

Finally it is contended that the first set of notices and claims filed did not comply with the requirements of section 6½ of the statute, because the form of verification in each of the claims was defective, in that the verified statements did not contain an allegation that the plaintiff's claim, or some part thereof, has not been paid, and did not show when the various items of materials were furnished.

[3] It is also claimed that the Barr Lumber Company's claim was defective, in that the affidavit of verification does not show that the verification was made by O. H. Barr on behalf of the corporation; also that the claims do not purport to hold the bondsmen responsible. The Barr Lumber Company's claim was signed, "Barr Lumber Company, by O. H. Barr, President." The affidavit of verification is signed "O. H. Barr," and the said O. H. Barr, "being first duly sworn, deposes and says that he is the president of the Barr Lumber Company, the corporation claimant above named, that he has read the foregoing claim, and that the facts therein stated are true." In each of the other claims the affiant, who was one of the claimants, stated in his affidavit of verification that he had read the foregoing claim, "and that the facts therein stated are true."

[4] In each of the claims a statement of the demand was made, and that the amount so claimed "is now due, owing and unpaid." The plaintiff's claim further stated that of the total amount which the contractor had agreed to pay for the materials furnished, "no part of the same has been paid," except a stated sum. The other claims filed specifically stated "that no part of the same has been paid." We think that these statements of the verified claims were sufficient to comply with the requirements of the statute.

[5] We further hold, contrary to the contention of appellants, that these claims as filed were not rendered insufficient by the statement made in each of them "that the

[1] Hearing in Supreme Court pending.

Digitized by Google

said undersigned claims a lien upon any moneys, warrants, or bonds for the said sum as aforesaid on account of said material so furnished for said improvement." Conceding that the last-quoted words were not required to be in the notice, we cannot see that appellants, sureties on the contractor's bond, could have been in any manner misled or otherwise prejudiced thereby.

The judgment is affirmed.

I concur: JAMES, J.

I concur in the judgment: SHAW, J.

SCHMIDT v. PURSELL et al. (Civ. 3362.)

(District Court of Appeal, First District, Division 2, California. May 11, 1920. Hearing Denied by Supreme Court July 8, 1920.)

1. Evidence ⟸46—Judicial notice not taken of order of Industrial Accident Commission.

Court cannot take judicial notice of a general order of the Industrial Accident Commission.

2. Master and servant ⟸352—Noncompliance with safety order not "gross negligence" within Compensation Act.

Failure of master to comply with general safety order of the Industrial Accident Commission of which he had no notice would not of itself constitute "gross negligence" within the meaning of Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gross Negligence.]

3. Master and servant ⟸352—Safety order of Industrial Accident Commission not conclusively presumed reasonable in action for damages.

In an action by a servant for damages for gross negligence under Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2, general safety orders of the Industrial Accident Commission are not conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety, under section 66 of the act.

4. Master and servant ⟸352—General Safety orders of Industrial Accident Commission must be served upon employer under Compensation and Safety Act.

Safety orders of the Industrial Accident Commission do not become effective until served upon the employer, under Workmen's Compensation, Insurance, and Safety Act, § 59.

5. Master and servant ⟸352—Essentials for recovery for gross negligence under Compensation Act stated; "willfully disregard."

It is incumbent upon a servant suing for personal injuries caused by gross negligence, under Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2, to prove that injury resulted both from gross negligence and from willful disregard of life, limb, or bodily safety; the term "to willfully disregard" meaning to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Frederick A. Schmidt against Henry Pursell and Arthur Pursell, doing business under the name and style of Pursell Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

Warren L. Williams, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondents.

NOURSE, J. Plaintiff appeals from a judgment in favor of defendants in an action for damages for personal injuries sustained by plaintiff while in the employ of the defendants. Plaintiff chose to avail himself of section 12 (b) of the Workmen's Compensation, Insurance, and Safety Act, as amended in 1915 (Stats. 1915, p. 1081, § 2), and effective at the time of the injury, and waived compensation under the act. Section 12 then provided that, when conditions of compensation existed, the right to recover pursuant to the provisions of the act should be the exclusive remedy against the employer, "except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury * * * indicated a willful disregard of the life, limb, or bodily safety of employés, any such injured employé may, at his option, either claim compensation under this act or maintain an action at law for damages." The complaint alleged that the accident was the result of the gross negligence of the defendants in failing to properly equip a jointer machine upon which plaintiff was employed with the necessary safety appliances, and also that it was the result of the willful disregard of the life, limb, and bodily safety of the plaintiff on the part of said defendants in refusing and neglecting to equip said machine with such safety appliances. It was also alleged that the cylinder head and guard was a necessary equipment and part of said machine to prevent the operator thereof from coming in contact with the knife and mangle. These allegations were all denied by the answer, and the court found that the defendants were not guilty of gross negligence nor of a willful disregard of the life, limb, or bodily safety of the plaintiff in refusing to equip said machine with such

Digitized by Google

safety appliances, and also that such safety appliances were not at the time a necessary equipment to prevent the operator thereof from coming in contact with the knife or mangle of the machine. It was also found, in accordance with the allegations of the answer, that plaintiff was thoroughly familiar with the workings and the danger incident to the use of the machine. The appeal is confined solely to an attack upon that portion of the findings which negative gross negligence on the part of the defendants.

The facts material to the opinion are that plaintiff had been in the employ of defendants for some five months prior to the accident and had become thoroughly familiar with the machine upon which he received the injury. He was an experienced operator and had worked for many years on machines of this nature, some of which had guards or safety devices; others had not. On July 20, 1917, five days prior to the date of the injury, an employé of the Industrial Accident Commission notified defendants that the machine should be equipped with a safety device, and, acting upon such notice, the defendants placed an order for such equipment, which, however, had not been received at the time of the injury. In this connection one of the defendants testified that they had not been notified prior to the 20th of July to equip the machine with a safety device, and that it was impossible to obtain one within the five days.

[1] The theory of appellant is that the failure of respondents to comply with the general order of the Industrial Accident Commission relating to the equipment of similar machines with safety devices, after having been personally instructed so to do in this instance by one of the employés of the commission, constitutes gross negligence entitling appellant to recover in this case. The argument in this connection is based upon a misunderstanding of the record, in that the record fails to disclose that any general order of the Industrial Accident Commission was offered or received in evidence. In the briefs it is argued that a certain general order of the commission required the equipment of similar machines with cylindrical cutter heads, but this order was not offered in evidence, and, though it may have been referred to in argument before the trial judge, it is not such a matter as can be given judicial notice. Thus the argument of appellant resolves itself into this, that the failure of defendants to equip the machine with safety devices immediately upon the direction of the employé of the Industrial Accident Commission constitutes gross negligence on their part. In his opening brief it is said:

"We would not be understood as insinuating that violation of the statute in itself constituted 'gross negligence.' That is not our position here."

[2-4] If the violation of a statute in itself does not constitute gross negligence (and there is respectable authority to that effect, though in reserving decision upon that point in an order denying a hearing after judgment in the District Court of Appeal of the Second District in Helme v. Great Western Milling Co., 185 Pac. 510, our Supreme Court has cast some doubt upon the extent of the rule in this state), surely the failure to comply with some general safety order of the Industrial Accident Commission of which the employer may have had no notice would not constitute gross negligence. Section 66 of the act (St. 1913, p. 309), as in effect at the time of the injury, provided that every order of the commission should be admissible as evidence in any prosecution for the violation of certain provisions of the act, and that in every such prosecution they should be conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety. But by this section the orders are conclusively presumed to be reasonable only in prosecutions for violations of the act. The presumption does not apply to an action for damages instituted by an employé under section 12 (b). Furthermore these orders do not become effective until served upon the employer. Section 59. The record discloses that no service was made of any order upon defendants other than the oral instruction given to them by an employé of the Industrial Accident Commission on July 20th. As to this instruction it does not appear what time was given the employers to comply, and the reasonableness of the order having been directly put in issue by the allegations of the complaint of the necessity of equipping the machine with a certain safety device, and the court having found that such was not necessary, it must follow that the finding of the court upon the issue of gross negligence and willful disregard of the safety of the employé was proper, and that any other finding under the circumstances would have had no support in the evidence.

[5] Furthermore, appellant having waived his right to compensation afforded him by the Workmen's Compensation, Insurance, and Safety Act, and chosen to proceed in this action at law for damages, it was incumbent upon him to prove that the injury resulted both from the gross negligence (or willful misconduct) of respondents and from the willful disregard of the life, limb, or bodily safety of appellant. The willful disregard of the safety of an employé means something more than mere negligence or carelessness. To willfully disregard the safety of an employé is to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge. The trial court found that respondents did not know

Digitized by Google

that the machine was dangerous to operate without a safety device, and this finding is not attacked. Such being the case, the willful disregard of life, limb, or bodily safety, which is a necessary element to recovery in an action of this nature, was not shown.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

RAISCH et al. v. HELFRICH et al.
(Civ. 3337.)

(District Court of Appeal, First District, Division 1, California. May 14, 1920. Hearing Denied by Supreme Court July 12, 1920.)

1. Mechanics' liens ⟸75(4) — "Constructive notice" of work sufficient to bind owner.

The knowledge on the part of an owner which will subject land to lien for improvements, is not alone actual knowledge; constructive notice—i. e., notice of circumstances which would put a prudent man on inquiry—being sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Notice.]

2. Mechanics' liens ⟸78—Statute relating to estoppel against owner applies to street work.

Code Civ. Proc. § 1192, requiring owner to file notice of nonresponsibility to avoid a lien on land, applies to street work liens under section 1191.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. G. Raisch and Thomas A. Clark, copartners doing business under the firm name and style of Raisch & Clark, against George Helfrich and the American Land & Trust Company. Judgment for plaintiffs, and last-named defendant appeals. Affirmed.

W. H. Barrows, of San Francisco, for appellant.

J. E. Manning, of San Francisco, for respondents.

KOFORD, Judge pro tem. This is an appeal from a judgment and decree of the superior court foreclosing a lien for street work done under private contract. Plaintiffs, the contractors, secured the signature of defendant Helfrich to a written contract for the street work. Defendant Helfrich, or at least his wife, was at the time in possession under a written installment contract of purchase, under which the appellant company was selling the lot in question. After obtaining the signature of Helfrich to the street work contract, plaintiffs, at the suggestion of Helfrich, called upon the president and general manager of the appellant company, informing him of the contract with Helfrich and other property owners on the street, and of the nature and kind of the intended street work. The president and manager did not sign the contract, but expressed himself as pleased, and said "it was a fine thing to do, to have the street paved with asphalt, and to go ahead and do the work."

The street work was thereafter done according to the contract, was accepted, and in due time a notice of claim of lien was duly filed of record. Before this action was tried, the purchaser of the lot, Helfrich, defaulted in his payments, and the appellant retook the lot and became the owner thereof.

The action resulted in a judgment against appellant on the theory of the estoppel created by Code of Civil Procedure, § 1192, namely, on account of the owner's failure to file a notice of nonresponsibility.

[1] Appellant attacks the judgment on two grounds: First, that there was no evidence that it had knowledge that said work was being done at any time, but that the evidence only established that it knew the work was going to be done. The finding on this point is that appellant "had knowledge before, at, and during the course of the performance of the contract." We think the evidence sufficient. As was said in Harmon Lumber Co. v. Brown, 165 Cal. at page 197, 131 Pac. 368, at page 369:

"The knowledge which will subject the owner to this burden is not alone actual knowledge. Constructive knowledge, i. e., notice of circumstances which would put a prudent man on inquiry as to the fact in question (Civ. Code, § 19), is equally potent to bind the owner"—citing cases.

We think the evidence measures up well to this test.

[2] Appellant next contends that Code of Civil Procedure, § 1192, does not relate to street work. This section, as amended in 1911, reads:

"Every building or other improvement or work mentioned in any of the preceding sections of this chapter constructed, altered or repaired upon any land with the knowledge of the owner," etc.

Appellant draws attention with emphasis to the words "upon any land," and says that street work is not done on the land. He also cites Santa Cruz Rock Pavement Co. v. Lyons, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174. This case was decided before Code of Civil Procedure, § 1192, was amended in 1911, and at that time it read:

"Every building or other improvement mentioned in section 1183 of this Code, constructed

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

upon any lands with the knowledge of the owner," etc.

It is quite obvious that the Legislature by the amendment of 1911, by striking out "mentioned in section 1183 of this Code," and inserting "mentioned in any of the preceding sections of this chapter," intended to extend the operation of this statutory estoppel to street work liens under section 1191 of the Code of Civil Procedure. The construction contended for by appellant would violate the express language of the section as amended.

The judgment appealed from is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

CONTINENTAL CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3251.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1920.)

1. Master and servant ⟸371—Accident "arising out of employment" within Compensation Act defined.

Accidents "arising out of the employment" within the Workmen's Compensation Act are those in which it is possible to trace the injury to the nature of the employé's work, or to the risks to which the employer's business exposes the employé, and they must result from a risk reasonably incident to the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant ⟸371—Accident during vacation held not one "arising out of employment" within Compensation Act.

Where a sales' manager while spending his vacation at a ranch went by horseback to a post office to answer a military questionnaire, and was thrown from his horse and injured while riding over a trail in returning after writing and mailing a reply to a business letter from his employer received at the ranch, the injury was not the result of an accident arising out of his employment within the Workmen's Compensation Act.

Proceedings by Grey M. Skidmore under the Workmen's Compensation Act (St. 1917, p. 831) to obtain compensation for personal injuries, opposed by the Golden State Portland Cement Company, the employer, and the Continental Casualty Company, insurer. There was an award of compensation by the Industrial Accident Commission and the Casualty Company brings certiorari. Award annulled.

Joe Crider, Jr., of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SHAW, J. In this proceeding upon writ of review we are asked to annul an award of compensation made by the Industrial Accident Commission to Grey M. Skidmore for injuries alleged to have been sustained while employed as sales manager by the Golden State Portland Cement Company, of which company petitioner was the insurer.

Petitioner attacks the award upon the ground that the evidence is insufficient to sustain the finding of the commission that the injury to Skidmore as such employé arose out of and in the course of his employment.

In September, 1918, Skidmore, accompanied by his family, went from his home in Los Angeles county to a mountain ranch of a relative in Northern California, located some five miles from a railway station and post office, known as Island Mountain, to spend a week or more in hunting, horseback riding, and like diversion, as a vacation. He arrived at the ranch on September 25th, and on the two following days, free from any duties to his employer, engaged with marked success in hunting deer and other game abounding in the vicinity. On September 26th he received a letter from his employer, dated September 23d, pertaining to a request made by a customer for an adjustment of freight upon a bill of goods sold him, and which it was claimed Skidmore had agreed to grant, as to which Skidmore made reply the same day; but, having learned that some mail, among which was his questionnaire, awaited him at Island Mountain, he held this letter unsealed, and on the morning of September 27th, took his rifle, and, by horseback, following a trail representing a shorter route to the station and along which game was plentiful, went to Island Mountain, to which place his wife, accompanied by his uncle, proceeded in a vehicle over the road. Upon arriving at the station he received another letter from his employer, dated September 26th, containing information of general interest as to the progress of the business, but nothing calling for answer, though at the station, in finishing his letter in reply to that of September 23d, he made such comments and suggestions as might be expected from a sales manager on his vacation, referred to his success in hunting, and ended his letter by saying "am riding down to the station horseback 5 miles to fix up my questionnaire." After answering the questionnaire, he assisted his uncle in loading some grain and then went to his horse, which he mounted to return to the

Digitized by Google

ranch, when he was thrown therefrom and his leg broken.

[1, 2] It thus appears that the accident occurred at a time when Skidmore was relieved from duty as an employé of the Golden State Portland Cement Company and while he was engaged in the diversions incidental to the vacation granted him, among which was horseback riding and hunting. His time was his own, to use as he pleased. His purpose in going to the station, as stated by him in his letter, was to answer his questionnaire. For his own diversion he went horseback, and, since deer were plentiful along the trail, he took his rifle. The mailing of the letter to his employer was a mere incident of the trip; but, conceding the writing and mailing of the letter was within the scope of his employment, he was not injured while engaged in such act, but afterwards, and when, upon his own time, free from any duties to his employer, he had engaged in the diversions of his vacation. Gernhardt et al. v. Industrial Accident Commission of California, 185 Pac. 307. He is no more entitled under the law to claim compensation from his employer for the injury which happened to him in thus returning to the ranch than he would have been had it occurred while he was traveling from his home in Los Angeles to the place where his vacation was to be spent. "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes the employé. The accident must be one resulting from a risk reasonably incident to the employment." Coronado Beach Co. v. Pillsbury et al., 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164. There was nothing in the nature of Skidmore's duties to his employer which required him to ride horseback over this trail, carrying a rifle, in traveling from the station back to the ranch; and hence it is impossible to trace the injury to the nature of the employé's work or the risks to which the employer's business exposed the employé as its sales manager. Ward v. Industrial Accident Commission, 175 Cal. 42, 164 Pac. 1123, L. R. A. 1918A, 233. The nature of his employment was not such as to expose him to the dangers incidental to the means adopted for his pleasure while on his vacation, and could not have been contemplated in connection with the employment. McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

In our opinion, the injury sustained did not arise out of the employment, which fact must be made to appear in order to entitle an employé to compensation.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

LOS ANGELES TRUST & SAVINGS BANK v. BORTENSTEIN et al. (Civ. 3182.)

(District Court of Appeal, Second District, Division 2, California. May 10, 1920.)

1. Conversion ⟸4—Money awarded for land taken for public use deemed the land for purpose of discharging liens.

It is a well-recognized rule of equity based upon the doctrine of equitable conversion that, when land is taken for public use, the money awarded for such land remains, and is to be considered as land in respect to all rights and interests relating thereto, and the money, in such case, will be applied in equity to discharge the legal or equitable rights of creditors or incumbrancers in respect to such land.

2. Eminent domain ⟸154—Damages for destruction of mortgaged property an equitable fund for satisfaction of mortgage.

Money recovered as damages by owner of mortgaged premises for destruction of the buildings thereon *held* a substitute for so much of the land as was destroyed in so far as mortgagee's rights were concerned, entitling mortgagee to recover, in foreclosure action, the difference between the value of the land and the amount of the mortgage; the money awarded being an equitable fund for the satisfaction of mortgage lien notwithstanding that it was awarded to owner.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Los Angeles Trust & Savings Bank, against Herman Bortenstein and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

J. Mack Love, of Los Angeles, for appellant.

William L. Kuehn, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to foreclose a mortgage on real property. Herman Bortenstein and the city of Los Angeles are defendants. Bortenstein alone appeals from the decree of foreclosure. The chief question on the appeal is whether plaintiff has any lien, legal or equitable, upon certain moneys that in another action were adjudged to be due from the city to Bortenstein for injury to the mortgaged property. Bortenstein filed a demurrer to the complaint in the present action. The demurrer was overruled, he was given ten days to answer, and, failing to answer, his default was entered. The city filed an answer admitting all the allegations of the complaint.

It appears from the complaint and recitals in the foreclosure decree that originally the mortgaged property, together with an adjoining strip of land ten feet wide, were

Digitized by Google

owned by one Clarke and wife. The Clarkes, while the owners of the mortgaged property, mortgaged it to plaintiff to secure the payment of a promissory note for $6,000 executed by them to plaintiff as the payee. Thereafter the Clarkes conveyed the mortgaged property to Bortenstein, subject to the mortgage. At the same time they conveyed to Bortenstein the adjoining ten-foot strip of land. Thereafter the mortgaged property, together with the buildings thereon, and the adjoining ten-foot strip, were greatly damaged by a flood. The buildings on the mortgaged property were carried off by the flood waters, and the surface of the land was washed away. Bortenstein, who had become the owner of the premises under his grant from the mortgagors, claiming that the city was responsible for the destructive effects of the flood, brought an action against the city wherein he recovered a judgment for damages. In that action Bortenstein sued not only for damage to the real property that the Clarkes had previously mortgaged to this plaintiff, but also for damage to the adjoining ten-foot strip and to certain personal property that was on the premises at the time of the flood. The judgment against the city was for the total sum of $12,500. By its judgment in that action the court adjudged that the bare land itself, without the improvements, was damaged in the sum of $1,500, that the buildings and improvements on the mortgaged property were damaged in the sum of $10,000, and that the personal property was damaged in the sum of $1,000. The plaintiff here was not a party to that action. By its decree of foreclosure in the present action the trial court found that the damage to the personal property and to the ten-foot strip is $^{229}/_{2500}$ of the total amount of damage to all the property so owned by Bortenstein and that the damage to the property covered by plaintiff's mortgage is $^{2271}/_{2500}$ of the total damage sustained by all the property. The court, therefore, by its decree in this foreclosure suit, adjudged: (1) That the mortgaged premises be sold by the sheriff in the manner prescribed by law; (2) that the sheriff apply the proceeds of such sale to the payment of his fees, to plaintiff's costs of suit, and to the satisfaction of the mortgage debt; (3) that if, after such payments, there be any surplus, he pay the same to Bortenstein; and (4) that if the proceeds of such sale be insufficient to satisfy the mortgage indebtedness, then, if and when said judgment against the city shall become final, the city pay to plaintiff the amount of such deficiency out of $^{2271}/_{2500}$ of the moneys that it had been adjudged to pay to Bortenstein; and that, if the judgment for damages in the action by Bortenstein against the city should be reversed on appeal, then, out of $^{2271}/_{2500}$ of any damages that might be awarded Bortenstein by any judgment that might thereafter become final in the action by him against the city, the latter pay plaintiff any deficiency there might be after such sheriff's sale of the mortgaged property.

Appellant makes no complaint of that part of the foreclosure decree which directs a sale of the mortgaged property. His attack is against that part of the decree which gives to plaintiff the right to satisfy the mortgage indebtedness out of any moneys recoverable from the city by reason of the partial destruction of the mortgaged property. There is no merit in this contention.

[1] If, by condemnation proceedings, the city had appropriated any part of the mortgaged property, it could not have cut off the lien of the mortgage by paying to Bortenstein, for the latter's sole use and benefit, damages for the part of the premises so appropriated. As a mortgagee, plaintiff could have claimed so much of such damages as might be necessary to satisfy the indebtedness secured by the mortgage, if the part of the mortgaged property not taken or damaged by the city should prove insufficient for that purpose. It is a well-recognized rule of equity, based upon the doctrine of equitable conversion, that when land is taken for public use, the money awarded for such lands remains, and is to be considered as, land in respect to all rights and interests relating thereto. The money, in such cases, is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance with the legal or equitable rights of creditors or incumbrancers in respect to such land. Bank of Auburn v. Roberts, 45 Barb. (N. Y.) 407; 19 R. C. L. p. 343; 88 Am. St. Rep. 363; Jones on Mortgages, § 708.

[2] In the instant case, though no part of the mortgaged property was actually appropriated by the city, the property by reason of the city's tortious acts, was partially destroyed or extinguished. The money awarded for this injury is an equitable fund for the satisfaction of plaintiff's lien on the mortgaged property, just as much so as if it had been money paid by the city for land taken or damaged in condemnation proceedings. It is a substitute for the land, or for that part thereof destroyed or damaged by the flood.

The fact that the money was awarded to Bortenstein does not change plaintiff's rights. The sum awarded to Bortenstein in his action against the city for damages arises from or grows out of the land, by reason of the injury that diminished its value. It is a fair inference from the averments of the complaint, the allegations of which are admitted by Bortenstein's default, that the damages awarded by the court in the action against

Digitized by Google

the city were not limited to Bortenstein's interest, which was that of an owner of land subject to a mortgage, but covered all the damage done by the flood to the freehold. Therefore the money so awarded by the court as damages to the realty must be treated, in equity, as the land itself. It takes the place of the reduced value of the land. The mortgaged land, in its present damaged condition, together with such portion of all the moneys awarded for the total injury as represents the damage to the mortgaged premises, stand now in the place and stead of the original uninjured mortgaged premises. Bank of Auburn v. Roberts, supra; Id., 44 N. Y. 192.

Appellant relies confidently upon the doctrine announced in Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90. There is nothing in that case that militates against the views we have expressed. In the present case the city caused damage to real property that Bortenstein's grantors had mortgaged to plaintiff. When the floods came the buildings on the mortgaged property were a part of the realty. The damage to the buildings, as well as to the land, was damage to the realty. The fact that, in the action against the city for damages, the court awarded Bortenstein $10,000 as and for damage to the buildings and improvements, does not detract from the fact that the damage so awarded was damage for injury to the freehold. In such cases the measure of damages is the value of the improvement as it was in place, as a part of the realty, immediately preceding the time when it was washed away or injured by the flood, not what it would sell for in the open market as personal property after its severance from the land. Rhoda v. Alameda County, 58 Cal. 357. In the Buckout Case the mortgagee was seeking to follow and impress with his mortgage lien the house that, by being served from the land, had become personalty. Here the mortgagee is but seeking to impress with its mortgage lien a fund that has taken the place of so much of the mortgaged realty as was destroyed by the flood.

The foreclosure decree makes no attempt to fasten upon appellant a personal liability for a deficiency judgment. The "deficiency" referred to in the decree is a deficiency that may remain after the sheriff's sale of the partially destroyed mortgaged premises, and that "deficiency," if any there may be, is to be made good out of so much of a fund as, in equity, is deemed to represent that part of the mortgaged property that was destroyed by the flood.

No other points made in the briefs require discussion. We have discussed the points upon which appellant's brief presents any argument. We find no error in the record.

Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

Ex parte JOHNSON. (Cr. 511.)

(District Court of Appeal, Third District, California. May 13, 1920.)

1. Municipal corporations ⟸120—Title of ordinance not conclusive.

The title of an ordinance is not conclusive as to its legal effect, and the court will look to the substantive provisions for determining that question.

2. Licenses ⟸6(3)—Ordinance imposing license tax on attorneys held a revenue measure.

An ordinance imposing a license tax on attorneys, though entitled "An ordinance providing for the licensing, regulating and carrying on of certain professions and trades," etc., *held*, in view of absence of regulatory provisions, a revenue measure. and hence not void as being regulatory and beyond the powers of the municipality.

3. Municipal corporations ⟸112(1)—Title is not an indispensable part of the ordinance.

The title is not an indispensable part of an ordinance, and it may have a defective title.

4. Municipal corporations ⟸111(4)—Failure to pay license fee being misdemeanor under general statute, validity of ordinance immaterial; "law."

An ordinance is deemed a law within Pen. Code, § 435, making failure to take out a license as required by law a misdemeanor, so that it is immaterial whether the provisions in an ordinance imposing license fee that failure shall be a misdemeanor be invalid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

5. Constitutional law ⟸83(3)—Imprisonment for practicing law without license not "imprisonment for debt."

Where petitioner practiced law without first securing license as required by a municipal ordinance, his imprisonment for the misdemeanor committed was not an imprisonment for debt in violation of Const. art. 1; the imprisonment being deemed a punishment for failure to comply with a public duty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Imprisonment for Debt.]

6. Licenses ⟸6(3)—Municipality has power to impose a license fee.

While attorneys are licensed by the court, a municipality may impose a license fee on one carrying on the business of attorney and maintaining an office within city limits; for there is no distinction except degree between the protection, etc., necessary for one maintaining a law office and one running a mercantile establishment.

In the matter of the application of Waldo S. Johnson for writ of habeas corpus prayed to be directed to the Chief of Police of the City of Marysville to secure release of petitioner after commitment for failure to pay

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

license tax. Writ dismissed, and petitioner remanded.

M. T. Brittan, Waldo S. Johnson, and W. E. Davies, all of Marysville, for petitioner.
W. P. Rich, of Marysville, for respondent.

PREWETT, Presiding Judge pro tem. The petitioner was convicted under section 1 of Ordinance No. 188 of the city of Marysville, and he seeks his discharge from the imprisonment which followed such conviction. Section 1 requires that every person carrying on certain specified callings shall, before commencing the same, procure a license therefor, and section 80, so far as pertinent to this inquiry, reads as follows:

"Section 80. Every person engaged in business as a lawyer, maintaining an office in said city, shall pay a license of $2.50 per month."

The petitioner, a lawyer by occupation, maintains an office in said city, and he neglected to take out the license demanded by said section 1. No point is made as to sufficiency of the judgment in mere matters of form.

[1-3] 1. It is contended that the ordinance in question is regulatory in its nature, and therefore beyond the powers of the municipality. It is conceded that the business in question is not one that can be "regulated" under the police powers of cities and counties. Unless, therefore, the ordinance is a revenue measure, it cannot be upheld. The title of the ordinance is cited to the court as an evidence that the municipality, in adopting the ordinance intended it as a regulatory provision. The title reads: "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations." It is true that this title contains the word "regulating," but this is not conclusive. The court will look to the substantive provisions of the ordinance to determine its legal effect. It happens that this title is copied in precise words from that considered by the court in Ex parte Braun, 141 Cal. 204, 74 Pac. 780. The court, in arriving at the conclusion that the ordinance considered in that case was for revenue and not for regulation, uses the following language:

"It is devoid of regulating provisions, being devoted entirely to the imposition of a license tax upon various trades and occupations and the collection thereof. It imposes a license tax upon a great majority of callings and occupations, and in several instances the amount of the tax is based upon the amount of business transacted. It includes numerous callings which are in no degree subject to regulation. * * * Taking into consideration the absence of regulatory provisions, the amounts of the several taxes imposed, and the nature of many of the subjects of taxation named in the ordinance, including the particular business here involved, it is very clear that the license tax upon the business alleged to be conducted by petitioner was imposed solely for the purpose of raising revenue."

The language just quoted is peculiarly applicable to the ordinance now under examination. Although two justices dissented from the opinion in that case, their dissent was based upon other points. The case has been often cited in later reports and, so far as we are informed, its doctrines have never been questioned. A title is not an indispensable part of an ordinance. It may have a defective title. Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; Ex parte Young, 154 Cal. 321, 97 Pac. 822, 22 L. R. A. (N. S.) 330. It clearly appears that the ordinance in question is a revenue measure.

[4] 2. The petitioner insists that the city has no power to provide that a violation of the ordinance shall constitute a misdemeanor. It is immaterial whether or not it has such power or has attempted unsuccessfully to exercise it. An ordinance is deemed to be "a law" in this state. Section 435 of the Penal Code provides that a failure to take out a license when required by a law of this state shall constitute a misdemeanor. This section covers a violation of an ordinance. Ex parte Lawrence, 69 Cal. 608, 11 Pac. 217; Ex parte Christensen, 85 Cal. 211, 24 Pac. 747.

[5] It is further insisted in the brief of petitioner that imprisonment on conviction for nonpayment of a license tax is an imprisonment for debt, and therefore unlawful, though no authorities are cited in support of this claim. It has been so long conceded in this state that imprisonment for failure to pay a license tax is not an imprisonment for debt within the meaning of article 1 of the Constitution that the question can scarcely be deemed to be open for discussion. Failure to procure a license in a case required by law is a neglect of a duty due to the public. For such neglect the offender may be punished by imprisonment. In such case the punishment is penal, and not merely in the nature of a remedy. It is not auxiliary to a civil action. Even after the offender shall have suffered the specified number of days' imprisonment, the money obligation is still unpaid. The penalty imposed is a mere punitive burden exacted as a means of deterring the offender and others from the commission of like delinquencies in the future. In Ex parte Bagshaw, 152 Cal. 701, 93 Pac. 864, the court, through its Chief Justice, uses the following language:

"The Legislature of the state has seen fit to make it a crime under the state law for any one to carry on a business for which a license is required by any law or ordinance, without procuring such license, and one who does so not only disobeys the ordinance, but violates the state law, and is guilty of a crime by reason of the express provision of such law."

Digitized by Google

The petitioner is not charged with a failure to pay his license tax. The charge is that he carried on a certain business without first procuring the necessary license. The section of the Penal Code above cited does not purport to fix a license fee nor does it provide for the issuance of a license. It would be unprofitable to multiply authorities to show that our courts have again and again upheld the power of the Legislature to prescribe a punishment for failure to procure a license before carrying on certain lines of business.

[6] 3. The chief claim of the petitioner is that the city has no power to license the business of a lawyer. It is pointed out that a lawyer is licensed as such by the courts, that his license is in the nature of a vested right, and that any act of the Legislature curtailing this right would impair the obligation of a contract. Without conceding that these claims are well founded, they are, nevertheless, inapplicable to the case. It is true that a license cannot be imposed upon a lawyer, nor can his business be regulated by ordinance. But the petitioner is not charged with practicing law without a license, but with "carrying on a trade, calling, profession, or business" without first procuring a license. Sections 1 and 4 of the ordinance, when read in connection with section 80, above quoted, show clearly that the license is exacted for "carrying on the business of a lawyer at a fixed place of business." The propriety of exacting revenue from one who maintains an office and carries on a business within a city is apparent. Many expenditures by the city are rendered necessary by reason of an office or other place of business within its limits. Petitioner relies with much confidence upon City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674. This case, however, is not in point. The defendant, Curtin, was charged with failure to pay a license tax under an ordinance which provided that "every lawyer shall pay a license of three dollars per quarter." It was held in that case that a license tax cannot be levied upon a person nor upon such of his acts as fall short of carrying on a business. The distinction was sharply drawn by the court between a license upon the business of practicing law and a license upon a person because he is an attorney at law. There appears to be no inherent difference between carrying on the business of practicing law and carrying on any other business or pursuit. It is not questioned that the state may, in the exercise of its sovereign powers, levy license taxes upon merchants and manufacturers who maintain places of business, and this, too, for the sole purpose of raising revenue. A lawyer's office makes certain demands upon the various fire, police, street, and other functions of a city, which differ from above classes only in quantity, and not in quality. If the one should be required to assist in keeping up the revenues of a city, no reason is apparent why the other should not. Whether a license might be enacted for carrying on a law business without maintaining an office is a question that is not before the court. We entertain no doubt that a state license issued to a lawyer authorizing him to practice law is not a bar to the claim of a city to levy a license for maintaining an office in connection with such practice. For many years the state has licensed druggists, but it has not been suggested that a druggist's license is the equivalent of a license to run a drug store. No adequate reason is discovered why the commitment should be disturbed.

Writ dismissed, and petitioner remanded.

We concur: HART, J.; BURNETT, J.

BHUMGARA et al. v. GAZVINI. (Civ. 2956.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920. Hearing Denied by Supreme Court July 15, 1920.)

1. Appeal and error ⟸110—Separate appeal does not lie from order denying new trial.

Under Code Civ. Proc. § 963, a separate appeal does not lie from an order denying a new trial.

2. Appeal and error ⟸1041(2) — Defendant held not prejudiced by leave to plaintiffs to amend.

Where defendant did not object to plaintiff's having leave to amend by adding another party plaintiff, and was offered by the court further time to answer, which his counsel refused, he was not prejudiced by plaintiff's permission to amend.

3. Trover and conversion ⟸40(1)—Circumstantial evidence of receipt and conversion admissible.

Circumstantial evidence may be competent to support findings as to receipt and conversion of plaintiff's goods by defendant.

4. Appeal and error ⟸1011(1)—Trial court's findings on conflicting evidence conclusive.

Where the evidence was conflicting, the trial court's determination whether plaintiff produced the preponderance of evidence is final; the decision being as to facts.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by M. J. Bhumgara and another against J. Gazvini. From a judgment for plaintiffs and from an order denying a new trial, the defendant appeals. Appeal from order dismissed, and judgment affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

C. Ibeson Sweet and W. D. Van Nostran, both of Los Angeles, for appellant.

W. R. Law, of Los Angeles, for respondents.

JAMES, J. [1] Plaintiff M. J. Bhumgara sued to recover an amount of money alleged to be the value of certain goods, wares, and merchandise. The property is asserted to have been converted by the defendant to his own use. Judgment was in favor of plaintiff, and defendant appeals therefrom. An appeal was also attempted to be taken from an order denying a motion for new trial, but under the Code provision in force at the time that motion was made and ruled upon no separate appeal was authorized to be taken from the order. Code Civ. Proc. § 963.

[2] At the trial the plaintiff asked and obtained leave to amend his complaint by adding the name of J. S. Bhumgara as party plaintiff. Appellant now claims that the granting of this permission was error. An examination of the record shows that appellant did not object to the amendment at the time. It is shown that the court offered to allow further time to answer, if appellant desired, after the amendment adding the name of the party was made, but that appellant's counsel replied that he did not care for any time, and, at his suggestion, it was stipulated by respondent that, "if the defense is good against either one, it is good against both." We cannot perceive how in the slightest degree the appellant was prejudiced by the amendment.

[3, 4] The only other claim is that the evidence was insufficient to sustain the findings of the court as to the receipt of plaintiffs' goods by defendant and their alleged conversion. We have examined the transcript of the evidence with much care, and, without entering into a detailed statement of the testimony, we consider that the evidence was sufficient to fully sustain the findings. Some of the evidence was circumstantial, but it was none the less competent and material. It was for the trial court to determine whether plaintiffs produced the preponderance of evidence, and its decision, in the presence of a conflict, is final as to the facts.

The appeal from the order denying a new trial is dismissed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

TULARE COUNTY v. FENN. (Civ. 2937.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1920.)

Bail ⇐96—Cash bail to answer felony charged forfeited by recorder belongs to county.

A city recorder, in forfeiting a cash bail taken under authority of Pen. Code, §§ 1268, 1295, for the appearance of defendant charged with felony, acts as a magistrate under the power given by Pen. Code, § 808, and Municipal Corporation Act, §§ 882, 883, not as a judge of recorder's court, so that the amount forfeited is not payable to the city under Pen. Code, §§ 1457, 1570, requiring payment of forfeitures in police or justice courts of the city into the city treasury, even though they are for violation of a state law, but such money must be paid to the county under Pen. Code, § 1307.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by County of Tulare against R. W. Fenn. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. W. Braswell, of Lindsay, and Middlecoff & Feemster, of Visalia, for appellant.

Fred C. Scott, Dist. Atty., of Visalia (Frank Lamberson, of Visalia, of counsel), for respondent.

CONREY, P. J. In December, 1917, while the defendant was acting as a magistrate of the county of Tulare under and by virtue of his office as recorder of the city of Lindsay in that county (said city of Lindsay being a city of the sixth class), he received a complaint in writing made to him as such magistrate, charging one Ah Wong with the commission of a felony. Such proceedings were had that said magistrate received from the said Ah Wong the sum of $500 as bail and undertaking that the said Ah Wong would appear, etc., as required. At the time set for the examination of Ah Woug before the defendant upon said charge of felony Ah Wong did not appear. Thereupon the said Fenn, acting as magistrate, entered the fact of such nonappearance upon the minutes of the recorder's court of the city of Lindsay, and did declare said sum of $500 to be forfeited by the said Ah Wong. That forfeiture has become final; nevertheless, the defendant has not paid said sum to the treasurer of the county of Tulare. On these facts, which are pleaded more fully in the complaint, the county of Tulare brought this action to recover judgment against the defendant for said sum of $500. By his answer to the complaint the defendant admitted the allegations of the complaint, except that the defendant denied that there is due, owing, and unpaid from the defendant to the plaintiff the said sum, or any sum whatever. An affirmative defense was also pleaded, under which it was claimed that the money forfeited as aforesaid was forfeited to the city of Lindsay, and not to the county of Tulare, and the money paid over to the said city of Lindsay. On the pleadings above mentioned, the plaintiff moved for a judgment on the pleadings. Said motion having been grant-

Digitized by Google

ed, judgment was entered accordingly, and the defendant appeals therefrom.

In support of the plaintiff's claim of right to the money in question, we are first required to consider certain sections of the Penal Code in the chapter which relates to the taking of bail. "Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail." Pen. Code, § 1268. Section 1295 permits the deposit of money instead of an undertaking in writing. Section 1307 reads as follows:

"If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, at the end of thirty days, unless the court has before that time discharged the forfeiture, pay over the money deposited to the county treasurer."

Notwithstanding the provisions of section 1307 of the Penal Code, appellant contends that the money deposited with him by Ah Wong was rightfully forfeited to the city of Lindsay under and by virtue of the provisions of section 1457 of the Penal Code, which section is a part of the chapter entitled "Proceedings in Justices' and Police Courts," being chapter 1 of title 11 of part 2 of that Code. It is provided in that section "that all fines and forfeitures collected in any police court or city justice's court that is maintained, and the salaries of the officers thereof paid by the city, whether prosecuted for a violation of a state law or a city ordinance shall be paid to the city treasurer of the city in which such court is located." See, also, section 1570, Penal Code, to like effect. It is conceded that defendant's salary as recorder was payable by the city of Lindsay.

The money in question here was not payable to the city treasurer of the city of Lindsay, unless as a forfeiture it was collected in the recorder's court in its character as a police court and in connection with an action prosecuted therein. But it was not so collected. The recorder's court in a city of the sixth class has jurisdiction concurrently with justices' courts "of all actions and proceedings, civil and criminal, arising within the corporate limits of such city or town, and which might be tried in such justice's court." The recorder is judge of the recorder's court, and it is provided that he "shall have the powers and perform the duties of a magistrate." Municipal Corporations Act, §§ 882, 883; Deering's Gen. Laws, 1915 Ed., p. 1132. "A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense." Pen. Code, § 807. "The following persons are magistrates: 1. The Justices of the Supreme Court; 2. The judges of the superior court; 3. Justices of the peace; (4) Police magistrates in towns or cities." Pen. Code, § 808.

Since the charge on which Ah Wong was held under arrest was not for a misdemeanor triable in the recorder's court, but was a charge of felony, the defendant Fenn could not act in that matter except as a magistrate. The power of justices of the peace and police judges to hold examinations and commit persons to be held on charges of felony or misdemeanor triable in the superior court is derived from the character of those officers as magistrates, and not as justices of the peace or judges of police courts. This office of magistrate is purely a statutory one, "and the powers and duties of the functionary are solely those given by statute." People v. Cohen, 118 Cal. 74, 78, 50 Pac. 20, 21; People v. Crespi, 115 Cal. 50, 46 Pac. 863. Even a justice of the Supreme Court, or a judge of the superior court, if he sees fit to assume the duties of a committing magistrate, "is not accompanied in the discharge of those functions by any of the general or implied powers * * * which surround him when sitting as a judge of a court of record." People v. Cohen, supra.

In acting as custodian of bail money, and in paying out such money to the public treasury after the forfeiture, the magistrate is an agent of the state, not acting in a judicial capacity. Therefore the decisions referred to by counsel for appellant, to the effect that a judge is not to be held responsible in a civil suit for any judicial determination made by him, are not applicable to this case. The defendant is liable to the county, in an action prosecuted by the district attorney, for money held by defendant which is by law payable into the treasury of the county. It is immaterial to the plaintiff's cause of action that the defendant has mistakenly paid out that money, even in good faith, to some other person or corporation.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

Digitized by Google

PIERCE OIL CORPORATION et al. v. PHŒNIX REFINING CO. et al.
(No. 10550.)

(Supreme Court of Oklahoma. May 25, 1920. Rehearing Denied July 6, 1920.)

(Syllabus by the Court.)

1. Carriers ⟸18(5)—Finding of corporation commission that pipe line is common carrier not disturbed when supported by evidence.

A finding by the Corporation Commission that a pipe line extending between two points within the state, has been transporting oil for hire, and is a common carrier within the meaning of section 4309, Rev. Laws 1910, will not be disturbed on appeal to this court, when there is evidence reasonably tending to support such finding.

2. Constitutional law ⟸42—Pipe line company held not entitled to contend that statute making it a common carrier is unconstitutional.

A pipe line company, which has built and constructed its pipe line since the passage of article 2, chapter 53 (sections 4304 to 4318, Rev. Laws 1910), or those that have acquired pipe lines since said time, and have thereby received the benefits of said law, cannot contend that section 4309 of said law, which makes said pipe lines a common carrier, is in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and the Constitution of Oklahoma, in that it amounts to the taking of property without due process of law.

Appeal from State Corporation Commission.

Action by the Phœnix Refining Company and another against the Pierce Oil Corporation and another before the Corporation Commission. Judgment for plaintiffs, and defendants appeal. Affirmed.

Boyle & Priest, of St. Louis, Mo., and West, Sherman, Davidson & Moore, of Tulsa, for plaintiffs in error.

Stuart, Cruce & Cruce, of Oklahoma City, for defendants in error.

McNEILL, J. This action was commenced before the Corporation Commission by the Phœnix Refining Company against the Pierce Oil Corporation and Clay Arthur Pierce. The complaint alleged: The Phœnix Refining Company was a corporation operating a refinery at Sand Springs, Okl., and owned certain oil leases in the Cushing oil fields, which were producing oil. The Pierce Oil Corporation was the owner of a pipe line extending from the Cushing oil fields to Sand Springs, and for several years had been transporting the oil of the complainant from the Cushing oil fields to Sand Springs, and had transported the oil for various other parties for hire, and the company in the operation of its pipe line was a common carrier, and subject to the rules and orders of the Corporation Commission. The petition further alleged that complainant had entered into certain contracts with the defendant for transportation of its oil each year, but the defendant had notified plaintiff that it would no longer carry oil for the complainant, and it was further alleged that there was no other pipe line connecting the Cushing oil fields to Sand Springs whereby the complainant could have adequate service for transporting its oil to its own refinery. The complainant prayed for the Corporation Commission to make an order compelling the defendant to continue to transport the oil of the complainant.

The corporate defendant answered, admitting it was a corporation, and alleged the complaint did not state facts sufficient to constitute a cause of action. It admitted the company was engaged in the refining business, but denied that in operating its pipe line it was a common carrier, or ever had been, and was not subject to the orders of the Corporation Commission, and pleaded the line running from the Cushing fields to Sand Springs was constructed to carry its own oil to its own refinery, and it alleged that it had increased its refinery at Sand Springs, and it would be necessary to utilize all of its space in the pipe line to carry its own oil. It also alleged that it had been exempted from being a common carrier by the Corporation Commission, and further pleaded that the only oil that it had ever transported was simply as an accommodation, and there were other common carrier lines from which the complainant could receive adequate service.

Upon hearing before the Corporation Commission, the Corporation Commission ordered the defendant Pierce Oil Corporation to carry oil offered to it by the Phœnix Refining Company from the producing wells of the Phœnix Refining Company, which wells were producing about 30 barrels per day, to the refinery of the Phœnix Refining Company located at Sand Springs, and to carry such other oil as the Phœnix Refining Company may have to offer so long as space in the line was available.

The second order appealed from was the order setting aside a previous order of the Corporation Commission, whereby the Corporation Commission had exempted the Pierce Oil Corporation and Clay Arthur Pierce pipe line, extending from the Cushing fields to Sand Springs, from being a common carrier, as provided in section 4308, Revised Laws 1910.

To reverse the orders of the Corporation Commission, the Pierce Oil Corporation and Clay Arthur Pierce have appealed to this court and rely upon two propositions:

[1] The first question presented goes to the sufficiency of the evidence to support the

Digitized by Google

finding of the Corporation Commission that the pipe line of the Pierce Oil Corporation and Clay Arthur Pierce was a common carrier and subject to the rules and orders of the Corporation Commission. In considering this question the finding of fact of the Corporation Commission must be considered in the light of the former opinions of this court, wherein this court has held that the finding of fact by the Corporation Commission will not be reversed on appeal, if there is any evidence reasonably tending to support its finding. Such was the holding in Ft. Smith & W. Ry. Co. v. State, 25 Okl. 866, 108 Pac. 407, and A., T. & S. F. Ry. v. State, 47 Okl. 237, 148 Pac. 144. Section 4309, Revised Laws 1910, defines what oil pipe lines are common carriers. Section 4308, R. L. 1910, provides what companies may be exempt from the orders of the Corporation Commission.

An examination of the record discloses that there was evidence that the Pierce Oil Corporation and Clay Arthur Pierce had been carrying oil of the Phœnix Refining Company for some four or five years under contract for a fixed rate. There was evidence that they had also carried oil for the Constantin Refining Company, and it was stated by one of the witnesses for the company that they had contracted from year to year with various refineries, and had carried oil for those refineries located at Sand Springs and a few at Tulsa. While the Pierce Oil Corporation and Clay Arthur Pierce contended they had carried oil other than their own, in doing so the charges were nominal, and they were transporting the oil more as an accommodation for the other refineries than for the purpose of profit, and that the line was built and constructed, not for the purpose of being a common carrier, but simply to supply their own refinery. We think the evidence, such as heretofore stated, was sufficient to support the finding of the Corporation Commission that the pipe line of the Pierce Oil Corporation and Clay Arthur Pierce was a common carrier, as defined by section 4309, Revised Laws 1910, and therefore subject to the rules and regulations of the Corporation Commission; therefore this finding will not be disturbed by this court on appeal.

The Corporation Commission further found that the plaintiffs in error were not utilizing the full capacity of their pipe line and that the pipe line could take care of the oil offered or tendered to it for transportation by the complainant. There was also sufficient evidence to support this finding. The order of the Corporation Commission only requires the Pierce Oil Corporation and Clay Arthur Pierce to receive and transport the oil offered so long as there was space available in their pipe line.

[2] The next question presented by the plaintiffs in error is stated as follows:

"That such a construction of the statutes as would make the Pierce Oil Corporation a common carrier, and amenable to the jurisdiction of the Corporation Commission, under the conceded facts, would render such legislation invalid and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and also in violation of the Constitution of Oklahoma."

We do not believe that plaintiffs in error are in a position to test the constitutionality of the statute, which makes the pipe line a common carrier of oil, for the reason the record discloses that the statute which gave to pipe line companies the right of eminent domain and the right to build said line upon and across the highways was an act dealing exclusively with oil pipe lines, and was passed by the Legislature and became effective in 1909. The plaintiffs in error's pipe line was not built or constructed until 1913. This court, in the case of Noble State Bank v. Haskell, 22 Okl. 48, 97 Pac. 590, on page 74 of 22 Okl., on page 601 of 97 Pac., stated:

"It is doubtless true that such a law could be enforced as to banks chartered after its passage, because then it would be optional with the persons desiring to organize a bank to incorporate or not, as they liked. If they chose to avail themselves of the law, they could not then object to it; but as to banks already in existence, that have no choice in the matter, the law does not operate upon them by their consent, but purports to compel them to act under its provisions."

The Supreme Court of the United States, in passing upon the constitutionality of similar legislation, wherein the law was being attacked as unconstitutional by pipe line companies built and constructed prior to the passage of the law and those constructed or acquired after the passage of the law. In the case of the Pipe Line Cases, 234 U. S. 548, on page 561, 34 Sup. Ct. 956, on page 958 (58 L. Ed. 1459), the court stated:

"So far as the statute contemplates future pipe lines, and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation."

The Supreme Court of California, in the case of Associated Pipe Line Co. v. R. R. Commission of California, 176 Cal. 518, 169 Pac. 62, L. R. A. 1918C, 849, wherein the same question was involved, the law being attached by pipe line companies constructed prior to the passage of the legislation and those built or constructed after the legislation, the court stated as follows:

"Subdivision (d) of section 1 and section 2 of the act are, except perhaps as to corporations acquiring such pipe lines after the passage thereof, unconstitutional and in violation of the Fourteenth Amendment to the federal Constitution, in that they contemplate the taking of

Digitized by Google

private property, in the absence of any provision made for compensating the owners, and without due process of law."

It is true plaintiffs in error contend that they did not exercise the right of eminent domain in building the pipe line in question, but purchased all of their right of way. While this may be true as to the land owned by individuals, yet there are other rights granted to said company by virtue of section 4305, Revised Laws 1910, relating to the highways, and rights under and by virtue of other sections of the statute, that they have received the benefit therefrom.

By applying the same rule to the facts in the case at bar, the Pierce Oil Corporation and Clay Arthur Pierce having built and constructed their pipe line after the passage of the legislation which dealt exclusively with the subject of oil pipe lines and declared that certain lines were common carriers, the company having built and constructed its line in accordance with the provisions of said law, and having received any and all benefits that might be derived from said law, cannot now contend that one section of the same, to wit, 4309, which makes said line a common carrier, is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, nor the Constitution of the state of Oklahoma, in that it amounted to the taking of property without due process of law.

The determination of this question also settles the question as to the error committed by the Corporation Commission in setting aside its previous order exempting the Pierce Oil Corporation and Clay Arthur Pierce from being a common carrier.

For the reasons stated, the orders of the Corporation Commission will be affirmed.

RAINEY, C. J., and HARRISON, JOHNSON, and BAILEY, JJ., concur.

AUFDER HEIDE v. KISKADDON et al.
(No. 10910.)

(Supreme Court of Oklahoma. June 15, 1920.)

(Syllabus by the Court.)

Habeas corpus ⇐99(3)—Judgment of sister state not conclusive as to custody of children, their welfare being paramount consideration.

A judgment of a sister state in a divorce proceeding giving the father the right to the care and custody of minor children is not, under the full faith and credit clause of the federal Constitution, binding in a habeas corpus proceeding upon the courts in this state, to which the children and mother removed, and where they have taken up their domicile. In such cases the paramount consideration is the welfare of the children.

Error from District Court, Tulsa County; Owen Owen, Judge.

Proceedings in habeas corpus by George F. Aufder Heide against Anna W. Kiskaddon and another. Judgment for defendants, and plaintiff brings error. Affirmed.

B. B. Blakeney and J. H. Maxey, both of Tulsa, and Leslie B. Hutchison, of Vienna, Mo., for plaintiff in error.

W. A. Sipe and J. P. O'Meara, both of Tulsa, for defendants in error.

RAINEY, C. J. This is a habeas corpus proceeding instituted in the district court of Tulsa county by George F. Aufder Heide, a resident of Missouri, against Anna W. Kiskaddon and Harry W. Kiskaddon, her husband, to obtain from them and to have awarded to him the custody and possession of Clara Louise Aufder Heide and Gladys Rose Aufder Heide, minor female children, ages 13 and 10 years, respectively, who at the time of the institution of the action were in the custody of and residing at the home of the defendants in the city of Tulsa, Okl. The children are the daughters of the defendant Anna W. Kiskaddon and the plaintiff, Aufder Heide, who were husband and wife until the 13th day of January, 1917, when they were divorced by decree of the circuit court of Gasconade county, Mo. That decree was entered in an action instituted by Anna W. Aufder Heide against George F. Aufder Heide after a trial at which both were present in person and by counsel, the court finding that the plaintiff was without fault, and the decree was awarded her on account of the wrongdoing of the defendant, but he was awarded the custody of the children.

From the time of the entry of the judgment Mrs. Kiskaddon continued to reside in Gasconade county, at the home of her father, and the girls resided with her with the consent of their father, except for brief visits to his home at Bland, in the same county. With the aid of her relatives she supported the children, save $50 in money, a hat, and a pair of shoes which were contributed by Mr. Aufder Heide. In explanation of the children being left with their mother, Mr. Aufder Heide testified that he agreed to leave them with her in order not to interrupt their schooling, and that she agreed to surrender their custody to him at the expiration of their school year in May, 1917. Mrs. Kiskaddon testified that they were left with her pursuant to an agreement between her and her husband made during the trial of the divorce proceedings, which was that she was to have the permanent possession of the children in consideration of her conveying to Mr. Aufder Heide their home place, which

Digitized by Google

she owned, and all interest that she might have in his property. She further testified that she carried out the agreement, and her testimony in this respect was not denied by Mr. Aufder Heide. Mrs. Kiskaddon was married to Harry W. Kiskaddon in July, 1917, and immediately went to his home in the city of Tulsa, Okl., with her children, where they resided, and were still residing at the time of the trial of this habeas corpus proceeding.

On December 28, 1919, Mr. Aufder Heide filed in the circuit court of Gasconade county, Mo., a motion setting forth that in the decree of divorce theretofore entered by said court dissolving the marital relations between him and his wife he was awarded the custody of their children, that she had since removed to Oklahoma, and praying for an order requiring her to comply with the decree awarding him the children by returning the children to the jurisdiction of the Missouri court, and that the court again readjudicate the right of the custody of said children and that their custody be awarded to him. He attempted to get service on Mrs. Kiskaddon by posting a certified copy of his motion and notice thereof in the office of the clerk of the circuit court of Gasconade county, Mo., by serving a copy of his motion in the same state on one Robert Walker, who was Mrs. Kiskaddon's attorney in the divorce action, and by having the sheriff of Tulsa county serve a certified copy of his motion and notice on Mrs. Kiskaddon in the city of Tulsa, Okl. She did not make an appearance in said circuit court of Missouri, in which the application was filed, either in person or by counsel, and neither she nor her children were present on the date set for hearing the motion. On January 13, 1919, said circuit court entered an order directing her to return the children to Gasconade county, Mo., and to deliver them to the custody and possession of their father, Mr. Aufder Heide, within ten days, and again decreeing that he was entitled to their custody and possession. Mrs. Kiskaddon did not obey the order, and on February 6, 1919, Mr. Aufder Heide instituted this proceeding in the district court of Tulsa county, as above stated.

Considerable evidence was taken at this hearing, at the conclusion of which the court found that the defendants, Mr. and Mrs. Kiskaddon, were "well fitted morally, financially, and in every other way for the custody of the children, who are happy and contented at their home and wish to remain with them, and that these children are being well educated and cared for by them."

Findings 8 and 9 of the court are as follows:

"(8) The court further finds that since the divorce decree of the Missouri court the situation and circumstances affecting the welfare and proper custody of these children have changed to such an extent as to require for the best interests of the children that their care and custody should be awarded to their mother, Anna W. Kiskaddon, at whose present home they are better situated and cared for than can be expected at the plaintiff's home in Missouri.

"(9) The court further finds that the situation and circumstances affecting the welfare and proper custody of these children have not changed since January 13, 1919, the date that the last order of the circuit court of Gasconade county, Mo., was made and entered, but that the situation and circumstances affecting said welfare and custody has changed since the rendition of the original divorce decree as above stated."

The court concluded, as a matter of law. First, that the second and last order of the circuit court of Gasconade county, Mo., entered on January 13, 1919, was void for want of jurisdiction of said court to make said order, and was therefore not determinative as to the question of the custody of the children; second, that Mr. Aufder Heide had the power to relinquish to the children's mother their custody awarded to him by the Missouri court decree, and, having received the consideration for such surrendered possession, that he was precluded from claiming any right to their custody either under the decree of divorce or the last order of the Missouri court; third, that that part of the decree of divorce of the Missouri court awarding the custody of the children to their father was not conclusive as to the rights or of the proper custody of the children at this time, "by reason of the change of situation and circumstances affecting the children's welfare and proper custody occurring since that decree was rendered," and that the welfare and best interest of the children required that they remain with defendants. The writ of habeas corpus was dismissed. It is from this judgment that the plaintiff, Aufder Heide, has appealed to this court.

It is conceded by counsel for plaintiff in error that the situation and circumstances of the parties have changed since the original decree of divorce in which Mr. Aufder Heide was awarded the custody of the children, and that the evidence adduced at the habeas corpus proceeding in this state, though conflicting, is sufficient to sustain the findings of the trial court, but they insist that, since the circumstances and conditions of the parties have not changed since the last order or decree of the circuit court of Gasconade county, Mo., entered on January 13, 1919, as found by the district court of Tulsa county, said decree is entitled, under the federal Constitution, to full faith and credit in Oklahoma, and that as a matter of comity the courts of this state will recognize it, since it is a valid decree of a court of a sister state having jurisdiction to enter it.

Under section 1, art. 4, Constitution of the

Digitized by Google

United States, providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, * * *" a great many of the states hold that a judgment of a sister state granting a divorce and awarding the custody of the children of the parties rendered by a court having jurisdiction of the parties and subject-matter is conclusive as to the fitness of the parties and the interest of the children at the time of the decree. People ex rel. Allen v. Allen, 40 Hun, 611; Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60; Wilson v. Elliott, 96 Tex. 472, 73 S. W. 946, 75 S. W. 368, 97 Am. St. Rep. 928.

Such decrees are not res adjudicata as to facts and conditions arising subsequent thereto to which they have no controlling force, and the courts of other states are not bound thereby. Ex parte Mylius, 19 N. M. 278, 142 Pac. 918, L. R. A. 1915B, 154, Ann. Cas. 1916B, 941; In re Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; 15 Ruling Case Law, § 417, p. 940.

Other courts, however, hold that, while such a decree may be binding as to conditions at the time of the decree as between the parents in the state where rendered and elsewhere, it does not conclude the court as to the best interests of the children, and that whenever the possession and custody of minor children is sought by habeas corpus the court will make such order for their care and custody as the best interests of the children may require. In re Bort, 25 Kan. 308, 37 Am. Rep. 255; Avery v. Avery, 33 Kan. 1, 5 Pac. 419, 52 Am. Rep. 523; People v. Hickey, 86 Ill. App. 27; Keenan v. Keenan, 5 Ohio N. P. (N. S.) 12; In re Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

In the early case of In re Bort, supra, the petitioner, as here, invoked the benefit of the full faith and credit clause of the federal Constitution, and contended that a decree of a circuit court of Wisconsin granting a divorce and awarding the custody of the children to the father was res adjudicata of the question of the right of the parents to said children, and was binding in Kansas. Relative to this contention, the Supreme Court of Kansas, in an opinion by Justice Brewer, said:

"This claim seems to rest on the assumption that the parents have some property rights in the possession of their children, and is very justly repudiated by the courts of Massachusetts. 2 Bish. on Mar. and Div. (5th Ed.) 204.

"We do not, however, propose to place our disposition of this case upon the decision of any such question as that. We shall concede that, as between the parents, that decision is a finality, and still we do not feel warranted in sustaining the petition of the plaintiff.

"We understand the law to be, when the custody of children is the question, that the best interests of the children is the paramount fact. Rights of father and mother sink into insignificance before that. Even when father and mother are living together, a court has the power, if the best interests of the child require it, to take it away from both parents and commit the custody to a third person. In other words, a court of chancery stands as a guardian of all children, and may interfere at any time and in any way to protect and advance their welfare and interests. Now in a divorce suit the court is limited to the question: Which of the two parents is the better custodian of the children? The decision only determines the rights of the parties inter sese. But in this proceeding the question is: What do the best interests of the children require?"

It seems to us that no useful purpose would be subserved by further quoting from or discussing the authorities supporting these divergent views; for we are in thorough accord with the rule prevailing in the state of Kansas, and hold that in habeas corpus proceedings the interests of the children to be affected by the decree is of paramount importance.

The judgment is affirmed.

HARRISON, KANE, PITCHFORD, JOHNSON, McNEILL, BAILEY, and RAMSEY, JJ., concur.

SELLS et al. v. MOONEY. (No. 9600.)

(Supreme Court of Oklahoma. May 25, 1920. Rehearing Denied July 6, 1920.)

(Syllabus by the Court.)

1. Champerty and maintenance ⟸7(3)—Second conveyance after removal of restriction not champertous.

Where a restricted Cherokee Indian during such restrictions attempts to convey by deed a portion of his allotted lands and his grantee enters into and holds possession thereof for more than one year, and subsequently, after the removal of such restrictions, said Indian by warranty deed conveys to another, the validity of the second conveyance is not affected by the champerty statute (section 2260, Rev. Laws 1910), as the alienation of such land is controlled by congressional enactment.

2. Courts ⟸93(1)—Rule of property cannot be applied to valid conveyances violating governmental policy.

The doctrine of "rule of property" cannot be applied to render valid conveyances made in violation of governmental policy, nor can decisions of this court rendered subsequent to the execution and delivery of the deeds relied upon be invoked to establish a rule of property to validate such deeds.

Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Warren Mooney against Pearl Sells, née Hayes, and others, for possession

Digitized by Google

of land, to quiet title, and for rents, with cross-petition by defendants. Judgment for plaintiff on demurrer to defendants' answer and cross-petition, and defendants bring error. Affirmed.

B. B. Blakeney, J. H. Maxey, and Christy Russell, all of Tulsa, and Hubert Ambrister, of Oklahoma City, for plaintiffs in error.

W. L. Curtis, of Sallisaw, and R. B. Butts, of Muskogee, for defendant in error.

BAILEY, J. This action was instituted in the district court of Sequoyah county, by Warren Mooney as plaintiff, against Pearl Sells and others, as defendants, to recover possession of a certain tract of land, together with rents for the use thereof. The lands involved were allotted to Udine Simpson, a one-fourth blood Cherokee Indian. The plaintiff claimed title under and by virtue of a deed executed by the allottee to him on July 27, 1908.

Defendants' answer denied generally the allegations of plaintiff's petition, and then alleged that the allottee, on the 26th day of November, 1904, for a consideration of $1,000, executed to the mother of the defendants, one Vicey S. Hayes, two warranty deeds conveying the lands here involved, which deeds were never placed of record; that under these deeds Mrs. Hayes took possession, claiming title, and remained in possession until her death, when the property descended to the defendants; who were her heirs at law and devisees; that defendants continuously occupied the same, openly and notoriously, claiming adversely to the allottee and others. They further admitted the execution of the deed to the plaintiff by the allottee on July 27, 1908, under which plaintiff claimed the lands in question. They alleged that said deed was void for the reason the allottee had not been in possession for more than one year next preceding the execution and delivery thereof, and that the defendants had been in open and notorious possession of said land, claiming title adverse to the allottee, all of which they charge plaintiff knew. To this answer and cross-petition the plaintiff filed his demurrer, which was sustained. The defendants thereupon elected to stand upon their answer and cross-petition, and refused to plead further.

The plaintiff offered evidence as to the rental value of the property, and judgment was thereupon entered by the court in favor of the plaintiff and against the defendants for the possession of the lands, cancellation of deeds as prayed for in plaintiff's petition, and for rents, from which judgment defendants appealed, and their brief under the assignments of error present two questions:

First, "the court erred in holding that the champerty statute had no application in this case, for the reason the allottee was not a restricted Indian at the time of the making of the deed to plaintiff, and the deed was not made under the regulation and supervision of the Indian Department"; and, second, "that the rule of law announced by this court in the case of Miller v. Fryer, 35 Okl. 145, 128 Pac. 713, and other cases had become and were rules of property."

In discussing the first proposition, counsel for plaintiffs in error admit that their contention is in conflict with the more recent cases of this court, such as Murrow Indian Orphans' Home v. McClendon, 166 Pac. 1104, Miller v. Grayson, 166 Pac. 1077, Hammett v. Montgomery, 170 Pac. 689, and Thompson v. Riddle, 171 Pac. 331, the first of which cases expressly overrules the cases upon which counsel rely, but it is insisted that these last decisions of the court have overlooked the effect of the champerty statute of Oklahoma as it relates to and applies to the sale of lands from which all restrictions are removed and the sale of restricted Indian lands made under the supervision of the governmental agency, and according to the rules and regulations of the Indian Department. But we think the rule announced in Murrow Indian Orphans' Home v. McClendon, supra, and which specifically overrules Miller v. Fryer, supra, and other similar cases, applies with equal force to deeds executed by allottees from whom all restrictions are removed, and deeds of allottees executed under the supervision of governmental agencies.

[1] In Nivens v. Adams, 170 Pac. 473, it is held:

"Where a Cherokee freedman during his minority attempts to convey by deed a portion of his allotted lands, and his grantees enter into and hold possession thereof for more than one year, and subsequently, after attaining his majority, he, by warranty deed, conveys to another, the validity of the second conveyance is not affected by the champerty statute (section 2260, Rev. Laws, 1910), as the alienation of such land is controlled by congressional enactment."

In Thompson v. Riddle et al., 171 Pac. 331, it is said:

"The purpose and intent of Congress is to make all conveyances and transactions in regard to these restricted lands in contravention of the acts of Congress an absolute nullity, and to protect the rights of the Indian and his lands to the end that, when the disabilities of an Indian allottee and the restrictions upon alienation are removed, he might hold said lands himself or convey them to others free and unincumbered and in absolute disregard of any transaction he might have consummated during the period of restriction or disability. To hold that the champerty statute applied would diminish the rights of the Indian in the exercise of control and ownership over his lands after the restrictions had been removed. He would be limited to sell only to the person in adverse possession, or to go into court and by action oust the person in adverse possession before he could sell his lands to another.

Digitized by Google

* * * This would be giving force and effect to these attempted conveyances and transactions which the law denounced as absolute nullities."

We see no reason why the suggestions as above quoted do not apply with equal force to both those who sell either with or without governmental supervision. A deed executed by an allottee of the Five Civilized Tribes before the removal of restrictions is a nullity, and, if the person in possession under such deed claiming adversely to the allottee is permitted to acquire rights or advantageous position by reason of the champerty statute as against the purchaser receiving a deed after the removal of restrictions, such rule would have the effect of in part at least validating that which was invalid. We do not understand that such is the intent or policy of the law relating to the disposition of allotted lands.

[2] Relative to the second proposition suggested by plaintiffs in error, we think it is a sufficient answer to suggest that the cases upon which they rely to establish a rule of property aside from the fact that they have been expressly overruled by the decisions of this court were not rendered until long after plaintiffs in error had received the conveyance relied upon in this action and it is difficult to understand how any right or claim could be predicated thereon. McCray v. Miller, 78 Okl. 16, 186 Pac. 1089. A further consideration is that, as was said in Gannon v. Johnston, 40 Okl. 695, 140 Pac. 430, Ann. Cas. 1915D, 522:

"The doctrine of rule of property cannot be applied to render valid conveyances made in violation of governmental policy."

For the reasons assigned, the judgment of the trial court is affirmed.

RAINEY, C. J., and HARRISON, McNEILL, and JOHNSON, JJ., concur.

SELLS et al. v. MOONEY. (No. 9601.)

(Supreme Court of Oklahoma. May 25, 1920. Rehearing Denied July 6, 1920.)

(Syllabus by the Court.)

Champerty and maintenance ⟸7(3)—Courts ⟸93(1).

Same as in cause No. 9600, Pearl Sells, née Hayes, v. Warren Mooney, 190 Pac. 861.

Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Warren Mooney against Pearl Sells, née Hayes, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

B. B. Blakeney, J. H. Maxey, and Christy Russell, all of Tulsa, and Hubert Ambrister, of Oklahoma City, for plaintiffs in error.

W. L. Curtis, of Sallisaw, and R. B. Butts, of Muskogee, for defendant in error.

BAILEY, J. The pleadings, evidence, and judgment in this cause being in all material respects identical with the pleadings, evidence, and judgment considered by this court in No. 9600, Pearl Sells, née Hayes, et al. v. Warren Mooney, 190 Pac. 861, and it having been agreed by counsel that this cause might be considered and consolidated with said cause No. 9600, for the reasons assigned in the last-named cause, the judgment is affirmed.

RAINEY, C. J., and HARRISON, JOHNSON, and McNEILL, JJ., concur.

SELLS et al. v. BUTTS. (No. 9602.)

(Supreme Court of Oklahoma. May 25, 1920. Rehearing Denied July 6, 1920.)

(Syllabus by the Court.)

Champerty and maintenance ⟸7(3)—Courts ⟸93(1).

Same as in cause No. 9600, Pearl Sells, née Hayes, v. Warren Mooney, 190 Pac. 861.

Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by R. B. Butts against Pearl Sells, née Hayes, and others. Judgment for plaintiff, and defendants oring error. Affirmed.

B. B. Blakeney, J. H. Maxey, and Christy Russell, all of Tulsa, and Hubert Ambrister, of Oklahoma City, for plaintiffs in error.

W. L. Curtis, of Sallisaw, and R. B. Butts, of Muskogee, for defendant in error.

BAILEY, J. The pleadings, evidence, and judgment in this cause being in all material respects identical with the pleadings, evidence, and judgment considered by this court in No. 9600, Pearl Sells, née Hayes, et al. v. Warren Mooney, 190 Pac. 861, and it having been agreed by counsel that this cause might be considered and consolidated with said cause No. 9600, for the reasons assigned in the last-named cause, the judgment is affirmed.

RAINEY, C. J., and HARRISON, JOHNSON, and McNEILL, JJ., concur.

Digitized by Google

WAGNER et al. v. KEECHI OIL & GAS CO. (No. 10181.)

(Supreme Court of Oklahoma. June 15, 1920. Dissenting Opinion June 29, 1920.)

(Syllabus by the Court.)

1. **Escrows ⟸6—Active drilling held condition precedent to enforcement of assignment of lease in escrow.**

Where an assignment of an oil and gas lease was placed in escrow on conditions that, if the assignee fail to start active drilling on a certain piece of land within 15 days from the date of said escrow agreement, the contract shall be null and void, *held*, that the commencement of active drilling within 15 days was a condition precedent, and the failure to commence drilling within said time rendered said agreement null and void.

2. **Contracts ⟸346(5) — Waiver of breach must be pleaded and proved.**

In order that a party may avail himself of a waiver of a breach of a contract, it is necessary for him to plead and prove said waiver.

Ramsey, J., dissenting.

Appeal from District Court, Caddo County; Will Linn, Judge.

Action by the Keechi Oil & Gas Company against Elmer T. Wagner and others. Judgment for plaintiff and defendants appeal. Reversed and remanded, with instructions to grant a new trial.

Riddle & Hammerly, of Chickasha, for plaintiffs in error.

Bond, Melton & Melton, of Chickasha, for defendant in error.

McNEILL, J. This action was commenced in the district court of Caddo county by the Keechi Oil & Gas Company against Elmer Wagner, W. H. Vann, Farmers' State Bank of Cement, and F. E. Riddle, to require the bank to deliver a certain assignment of an oil and gas lease executed by Wagner and Vann, deposited in escrow in the Farmers' State Bank, to the Keechi Oil & Gas Company. The petition alleged that on or about the 3d day of June, 1916, Wagner and Vann, for a valuable consideration, executed an assignment of an oil and gas lease to the Keechi Oil & Gas Company and deposited the same to be held by the bank according to the terms of a written escrow agreement.

The escrow agreement, after setting out certain conditions that were to be performed by the Keechi Oil & Gas Company, contained the following provision:

"The Farmers' State Bank of Cement, Okl., shall deliver said assignment to the second party, but, in the event that said second party should fail to start active drilling within a period of 15 days from this date, or shall fail to drill continuously thereafter, unless prevented by some act of God, then this contract shall be null and void, and said Farmers' State Bank shall surrender this contract and assignment to the first party."

This escrow agreement was dated June 1st, and signed by all the parties on said date except the secretary of the Keechi Oil & Gas Company, who did not sign it until June 12th. The plaintiff alleged that it had complied with all the terms of the contract and was entitled to possession of the assignment. The defendant bank answered that it had no interest in the controversy, but was merely holding the assignment of the lease in escrow and was willing to deliver the same to whoever the court decided was entitled to the same; but alleged that it was informed that the plaintiff had not complied with the escrow agreement. The defendants Vann and Wagner filed a separate answer, and denied that the plaintiff had complied with the escrow agreement, and alleged that the plaintiff had not commenced active drilling of said well mentioned in said escrow agreement within 15 days from the date of the escrow agreement as provided in said agreement, and did not begin active drilling until about the 12th day of July, and set up numerous other defenses. To said answer the plaintiff filed a reply, which consisted of a general denial.

At the trial of the case the court made certain findings of fact. The court found that the escrow agreement was dated the 1st day of June, 1916, and signed by Wagner and Vann and executed by the Keechi Oil & Gas Company by Bailey, its president, on said date, but the secretary did not attest his signature and affix his seal thereto until the 12th day of June, 1916. The court further found that the assignment of the lease was executed the 3d day of June, but the acknowledgment of the assignment was not taken until the 1st day of July, 1916. The court found that the plaintiff did not begin active drilling on said well until between the 5th and 8th days of July, 1916. The court further found that under the contract the plaintiff had 15 days after the 1st day of July, 1916, to begin active drilling on said well. The court made other findings which are immaterial. After making the findings the court concluded from said findings, as a proposition of law, that the plaintiff was entitled to the assignment of the lease.

The defendants for reversal of this case contend that the provision in the escrow agreement that plaintiff should commence active drilling within 15 days from the date of the contract was a condition precedent to its right to recover, and when the court found as a fact that active drilling did not commence until between July 5th and July 8th the same was a finding that the condition

Digitized by Google

precedent had not been complied with, and therefore plaintiff was not entitled to a delivery of the assignment.

The rule announced in 10 R. C. L. 635, in relation to escrow contracts, is as follows:

"The performance of the condition must be absolute and accurate and cannot be dispensed with on any otherwise substantial performance. * * * Where time is of the essence of the contract, the escrow holder has no authority to receive payment after the stipulated time has expired without the consent of both parties."

That the conditions in an escrow agreement upon which the delivery of the escrow article is to be delivered are conditions precedent has been the holding of this court in the cases of Powers et al. v. Rude et al., 14 Okl. 381, 79 Pac. 89; Hallam v. Bailey, 166 Pac. 874; Swift v. McAlester Trust Co., 55 Okl. 379, 154 Pac. 1175. The contract provided in plain and unambiguous terms that if active drilling was not commenced within 15 days from the date of the contract the escrow agreement would be null and void. The court having found that drilling did not actually begin until more than 15 days after the date of the contract, it follows that plaintiff had not complied with the terms of the escrow agreement, and therefore was not entitled to recover by reason of said agreement. While the court found that the assignment of the lease was not deposited until the 1st day of July, and the plaintiff should have 15 days from that date to begin active drilling, yet in this the court committed error, as the plaintiff founded his cause of action upon a written escrow agreement and contended that he had complied with the terms of that agreement. The defendants denied this fact, and admitted the contract was dated June 1st, but alleged that plaintiff had not commenced active drilling within 15 days from date of contract, and to this answer the plaintiff replied by general denial, so the issue in the trial of the case was clear upon this point. To support the holding of the trial court that the plaintiff was to have 15 days after the assignment was placed in the bank, if it was placed there on the 1st day of July, 1916, it would be necessary for the court to make a contract for the parties different from what they themselves had made, as no such construction can be given to the written escrow agreement. The defendant in error, however, contends that the plaintiffs in error had waived the provision in the contract in relation to active drilling to begin within 15 days, but in order to avail themselves of such a waiver, if there were any, it would have been necessary for them to have pleaded the same. This court, in the case of St. L. & S. F. Ry. v. Ladd, 33 Okl. 160, 124 Pac. 461, speaking through Justice Kane, had under consideration the waiver, and stated:

"The question of whether the carrier intends to waive the notice clause as a defense is a question of fact for the jury."

The plaintiff in this case neither attempted to plead a waiver nor to prove one. At the close of the trial of the case the plaintiff asked permission of the court to amend his petition to conform to the proof with respect to the time of the deposit of the assignment of the oil and gas lease in the bank. This was objected to by the defendants for the reason it would involve a new issue in the case. The court failed to pass upon said motion, neither granting nor refusing the same. But we think this is immaterial. The motion to amend, in any event, was not sufficient to plead a waiver, nor that an additional agreement had been entered into between the parties at the time the escrow agreement was deposited. The evidence as to who deposited the agreement or the assignment of the lease is not clear, and there is no evidence that there was any conversation or agreement had between the parties when the papers were deposited, nor is it clear whether they were all deposited at the same time. In order for the plaintiff to recover it would require an allegation that at the time of filing the contract it was understood that the plaintiff would have additional time from said date to begin active drilling, and the motion did not contain such an allegation, and there is no evidence in the case that such was the fact, nor is there any evidence that the plaintiff waived the provisions of the terms of the written agreement, unless it can be said it was waived by the conduct of the parties, and that question was not an issue in the case.

[1] The parties hereto have made a written escrow agreement, and provided in said agreement if active drilling was not begun on a certain well not located upon this leased premises, but on other property in the same vicinity by a certain date, that this assignment to this lease should be null and void. Now when the plaintiff asked for specific performance of his agreement he contended that he had complied with all the conditions of the escrow agreement, and the defendants denied that the plaintiff had complied with said agreement, and the court finds that the agreement had not been complied with. Under those facts the plaintiff was not entitled to recover.

[2] This court is unable to change the terms of a written escrow agreement made by parties or to make contracts for them different from what they have agreed upon themselves. If the plaintiff asked for relief under his contract and admitted that he has not complied with the same in order for him to recover, it would be necessary for him to plead that the provisions of the agreement that had not been complied with were waived, or, in the case at bar, if the assignment

Digitized by Google

of the lease was not deposited until the 1st day of July, it is necessary to plead some new agreement to disclose that the plaintiff should have until the 15th day of July to commence active drilling of a well, or that said provision in the contract was waived.

For the reasons stated, the judgment of the court is reversed and remanded, with instructions to grant plaintiff in error a new trial.

RAINEY, C. J., and HARRISON, PITCHFORD, and JOHNSON, JJ., concur.

RAMSEY, J. (dissenting). I find myself unable to agree to a reversal of this case. With profound deference to the views of my Associates, I think the case should be affirmed for these reasons: Briefly, the escrow agreement provided for its delivery to the bank concurrently with the delivery of the assignment of the lease. The escrow agreement made the commencement of actual drilling on a certain tract of land within 15 days from its date, to wit, June 1st, the condition to the delivery of the assignment. As I understand the record neither the assignment nor the escrow agreement was delivered to the bank until about July 1st. After they were deposited in the bank, and about July 8th, the defendant in error commenced the actual drilling of the well required by the escrow agreement. The time limit in the escrow agreement expired before either the assignment or the escrow agreement was deposited in the bank. During the latter part of June and near the first of July, and after the 15 days had expired, Wagner, one of the plaintiffs in error (at that time engaged in the supply business), actually sold some of the material used by the plaintiffs in error in commencing and drilling the well. Wagner knew at the time he sold the material that it would be used in connection with the drilling of the well. I think the plaintiffs in error induced the defendant in error to believe that they had waived the time limit prescribed in the escrow agreement; in fact, it seems all parties proceeded upon that theory. No waiver was alleged by defendant in error, as plaintiff below, and while it is true that a waiver should be pleaded, the defendant in error, at the close of all the evidence in the trial court, moved the court to consider its petition amended to conform to the facts. While there was no express ruling on that motion, the findings of the trial judge show that he treated the pleadings as amended so as to allege a waiver. The trial judge found that the assignment and escrow agreement were delivered to the bank about July 1st, and that defendant in error commenced actual drilling on the well about the 8th of July. He found the facts in favor of the defendant in error and entered a decree in its favor. I think the findings by the trial judge conclusively show that he treated the pleadings as amended to conform to the evidence, as moved for by defendant in error. No one seems to have been taken by surprise during the trial. The time stipulated for performance of a condition prescribed in an escrow contract may be waived by conduct as well as by words. 16 Cyc. 578. I think the equities are with the defendant in error, and that the judgment of the trial court should be affirmed.

CHOCTAW LUMBER CO. v. WALDOCK.
(No. 7866.)

(Supreme Court of Oklahoma. Feb. 24, 1920. Rehearing Denied May 25, 1920.)

(Syllabus by the Court.)

1. **Jury ⟹13(14)—In action on secured notes involving amount due defendant is entitled to a jury trial.**

In an action for the recovery of money on promissory notes, although involving the foreclosure of a mortgage on real estate, issue being joined as to the amount due, defendant is entitled to a trial by jury as a matter of right.

2. **Appeal and error ⟹1170(1)—No new trial unless for substantial violation of constitutional or statutory right.**

Where an examination of the record does not show that the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right a new trial will not be granted. Section 6005, Revised Laws 1910.

3. **Trial ⟹25(7)—Admissions by defendant held to entitle him to open and close.**

The trial court did not err in permitting defendant to open and close the case where the defendant admitted the execution, delivery, and assignment of the notes sued upon, and pleaded a separate agreement between himself and the assignor of the notes as a defense to payment of the notes, and where the notes show on their face they were past due when the assignment was made.

4. **Contracts ⟹238(1)—Contract in writing may be altered by contract in writing.**

A contract in writing may be altered by a contract in writing. Section 988, Rev. Laws 1910.

5. **Appeal and error ⟹992 — Determination that secondary evidence of lost writing is admissible not disturbed.**

The determination of the trial court, based upon supporting evidence that a written agreement is lost, and that secondary proof of the terms of the lost writing is admissible, will not be disturbed on appeal.

6. **Appeal and error ⟹1011(1)—Judgment on conflicting evidence reasonably supported by evidence affirmed.**

Where the judgment of the trial court is reasonably supported by the evidence this court

Digitized by Google

will not weigh conflicting testimony, but will affirm the judgment.

(Additional Syllabus by Editorial Staff.)

7. New trial ⊂⊃65—Motion calls for court's re-examination of issues of fact.

A motion for a new trial where there has been a verdict by jury calls for a re-examination by the same court of the issues of fact, as each party is entitled to have the intelligent opinion of both the court and the jury upon the evidence introduced.

Error from District Court, McCurtain County; Summers Hardy, Judge.

Action by the Choctaw Lumber Company against A. J. Waldock to recover money on four promissory notes and to foreclose a mortgage securing the payment of these notes. Judgment for defendant, and plaintiff brings error. Affirmed.

John S. Kirkpatrick and H. M. Kirkpatrick, both of Kansas City, Mo., and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error.

McPherren & Cochran, of Durant, for defendant in error.

PER CURIAM. Action was begun by plaintiff February 24, 1913, to recover on four certain promissory notes and to foreclose a mortgage upon certain timber lands in McCurtain county, securing the payment of these notes. These notes were dated December 21, 1909, and were for $10,000, $20,000, $10,000, and $10,000, respectively, with 6 per cent. interest from date, due one, two, and three years, respectively, after date; it being provided in the fourth note that should Waldock pay the three first-mentioned notes, aggregating $40,000, on or before December 21, 1910, that the fourth note for $10,000 should be void and of no effect.

The material allegations of the plaintiff's petition are that the defendant, A. J. Waldock, executed and delivered the promissory notes sued upon, and the mortgage securing the payment of same, to the Paine Lumber Company, Limited, a corporation, and became liable and bound to pay to the said Paine Lumber Company, Limited, the amount of said notes; that certain payments had been made to the Paine Lumber Company, Limited, on said notes; that the said notes by written agreement all matured and became payable upon the failure of the defendant to pay any part of the principal or interest when due; that on the 5th day of June, 1912, the said notes and mortgage securing the same were sold, indorsed, transferred, and delivered to the plaintiff, the Choctaw Lumber Company, for value, in the usual course of business; that the said notes and mortgage were assigned to the plaintiff by the Paine Lumber Company in writing and a copy of the written assignment is attached to the petition as an exhibit; that the conditions of the said notes and mortgage as to payment of principal and interest had been broken, and the whole of the principal and interest was due and unpaid to the plaintiff, and the plaintiff prays judgment upon the said notes, and a decree of foreclosure, and sale of the property covered by the mortgage to pay the said judgment.

The material part of the answer of the defendant is as follows:

"The defendant admits the execution of the notes and mortgage described in the petition of the plaintiff, and states the fact to be that the said notes were executed by the defendant to the said Paine Lumber Company in consideration of certain stock then owned and held in the Choctaw Lumber & Veneer Company, a corporation, with a veneer plant located at Garvin, Okl., and which was transferred by the said Paine Lumber Company to the defendant; that it was agreed and contracted in writing by and between the defendant, A. J. Waldock, and the said Paine Lumber Company that in consideration of the purchase of the said stock and certain indebtedness held by the said Paine Lumber Company against the said Choctaw Lumber & Veneer Company, that the Paine Lumber Company would take the entire output of the said plant of the Choctaw Lumber & Veneer Company for two years at the price of $20 per thousand feet; that by reason of the said agreement on the part of the Paine Lumber Company to so take the said entire output of the said plant the defendant was induced to purchase the said stock of and from the said Paine Lumber Company in the amount of $179,000, being almost the entire capital stock of the said Choctaw Lumber & Veneer Comany; that the entire output of the said plant would average the amount of 20,000 feet per day and the cost of manufacture would not exceed $10 per thousand feet, making a profit of about $200 per day in operating the said plant under the contract with the said Paine Lumber Company. That defendant cannot attach contract as same is lost.

"The defendant further states that the Paine Lumber Company under the said contract by and between the said company and the defendant did take less than one-half of the output of the said plant and refused to take all the output or to pay for the amount taken upon the inspection of the person agreed upon by the defendant and the said Paine Lumber Company.

"The defendant further states that by reason of the said refusal of the Paine Lumber Company to take the entire output of the said plant and to pay for the same as per the said contract the said stock so purchased by the defendant in the said plant of and from the said Paine Lumber Company was rendered worthless, and the said indebtedness held by the Paine Lumber Company against the said Choctaw Lumber & Veneer Company and transferred to the defendant in consideration of the notes herein sued upon was rendered uncollectible.

Digitized by Google

"That by reason of the failure and refusal of the said Paine Lumber Company to fulfill the said contract the said plant was forced to remain idle for more than one-half of the time during the said two years at a cost of $1,000 per month, or a total cost of $24,000, and a large amount of timber and material ruined, and the said Choctaw Lumber & Veneer Company was forced into involuntary bankruptcy, and the stock therein was a total loss, and was and is worthless, and no part of the unpreferred debts of the said company was or could be paid.

"The defendant states that the above facts were known to the plaintiff, the Choctaw Lumber Company, at the time the said notes were assigned to the plaintiff; that the said notes were due and unpaid at the said time of the alleged transfer, and that the plaintiff took the same charged with the defense herein alleged."

The trial was had to a jury, and a verdict was rendered for defendant. Thereafter motion for new trial was filed by plaintiff and overruled by the court; but, in overruling the motion for new trial, the court, while not reversing his ruling that the case was a proper one for a jury, proceeded to review the testimony, and, after adopting the verdict of the jury, made additional findings of fact and stated his conclusions of law, and rendered judgment for the defendant in accordance with the verdict of the jury.

An additional motion for new trial was filed and was thereafter overruled by Judge Dudley, the successor to Judge Hardy, who tried the case. Plaintiff contends that it was the duty of Judge Dudley to grant a new trial as a matter of course.

[1] This being an action for the recovery of money on promissory notes, although involving the foreclosure of a mortgage on real estate, and issue having been joined as to the amount due, defendant was entitled to a trial by jury as a matter of right. Sherman v. Randolph, 13 Okl. 224, 74 Pac. 102; Maas v. Dunmyer, 21 Okl. 434, 96 Pac. 592; Brewer et al. v. Martin, 40 Okl. 350, 138 Pac. 166; Holmes v. Halstid, 76 Okl. 31, 183 Pac. 969.

[7] A motion for a new trial, where there has been a verdict by a jury, calls for a re-examination in the same court of the issues of fact. Price & Miller v. Ratcliffe, 47 Okl. 370, 148 Pac. 153. Judge Dudley, in overruling the additional motion for a new trial, stated that the matters urged had been passed upon by Judge Hardy, and that the evidence had been reviewed by him. Whether this motion called for a re-examination of the issues of fact is immaterial so far as the results of the case are concerned. Each party to the trial is entitled to have the intelligent opinion of both the court and the jury upon the evidence introduced. This has been had herein. The judge who tried the case thoroughly reviewed the evidence and rendered his decision in accordance therewith.

[2] Where an examination of the record does not show that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right, a new trial will not be granted. Section 6005, Revised Laws 1910; Muskogee Electric Traction Co. v. Cox, 49 Okl. 365, 153 Pac. 125; Reader v. Farriss, 49 Okl. 459, 153 Pac. 678, L. R. A. 1916D, 672.

[3] The second contention of plaintiff is that the court erred in permitting the defendant to open and close the case over plaintiff's objection. Defendant having admitted the execution, delivery, and assignment of the notes, and having pleaded the defense alleged, the burden shifted to him, and the trial court did not therefore err in permitting defendant to open and close the case. Congdon v. McAlester Carriage & Wagon Factory, 56 Okl. 201, 155 Pac. 597; Bass & Harbour Furniture Co. v. Harbour, 42 Okl. 335, 140 Pac. 956.

[4] The third contention, and the one most persistently urged by plaintiff, is that the trial court erred in admitting secondary evidence as to the terms of the written agreement without sufficient proof of the loss or destruction of the original. The introduction of testimony as to the second agreement, or as to a part of the original agreement executed after the first part of the agreement was put in writing, was competent. Section 988, Rev. Laws 1910, reads:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Mullen v. Thaxton, 24 Okl. 643, 104 Pac. 359; Smith-Wogan Hardware & Implement Co. v. Moon Buggy Co., 26 Okl. 161, 108 Pac. 1103; Brown et al. v. Coppage et al., 54 Okl. 88, 153 Pac. 817.

[5] The determination of the trial court, based upon supporting evidence, that a written agreement is lost, and that secondary proof of the terms of the lost writing is admissible, will not be disturbed on appeal. Marker v. Gillam, 54 Okl. 766, 154 Pac. 351; 17 Cyc. 542, and cases cited therein; Wigmore on Evidence, vol. 2, p. 1405.

[6] Plaintiff's fourth contention is that the verdict and decision are not sustained by, and are contrary to, the evidence. Where, as here, the judgment is reasonably supported by the testimony the presumption is in its favor, and the court will not weigh conflicting testimony, but will affirm the judgment. Bruce v. McIntosh et al., 57 Okl. 774, 159 Pac. 261; Bd. of County Commissioners of Woodward County v. Thyfault, 43 Okl. 82, 141 Pac. 409; Alfred v. St. L., I. M. & S. Ry. Co., 42 Okl. 4, 140 Pac. 415; Elwell v. Purcell, 42 Okl. 1, 140 Pac. 412.

Plaintiff also insists that the verdict, findings, and judgment are contrary to law, and that the inference should be that if the

Digitized by Google

second contract was made it was for the benefit of the veneer company and not for the benefit of the defendant. But the general finding is to the effect that whatever agreement or agreements were made were between the Paine Lumber Company and the defendant, and that, without the agreement to take the product of the mill, the stock purchased by the defendant was valueless. Therefore this contention of the plaintiff does not seem to be well taken.

It is next contended that the court erred in refusing to admit competent, relevant, and material evidence offered by the plaintiff. It is not apparent from the record or from the brief of the plaintiff wherein the sustaining of objections to the evidence offered could have affected the result of the trial. Where an examination of the record does not show that the errors complained of probably resulted in a miscarriage of justice a new trial will not be granted. Section 6005, Rev. Laws 1910. Muskogee Electric Traction Co. v. Cox, supra; Reader v. Farriss, supra.

It is further urged by plaintiff that the damages awarded the defendant were excessive, appearing to have been given under the influence of passion and prejudice. What has been said as to plaintiff's fourth contention, as designated herein, applies to the amount of the verdict or judgment. Nothing has been pointed out to indicate passion or prejudice on the part of either the court or the jury in the conduct of the trial, and passion or prejudice could be inferred only from the amount of the damages awarded. This part of the findings and judgment will not be disturbed. Woodward County v. Thyfault, supra, and other cases cited under the discussion of plaintiff's fourth contention.

The other assignments of error have been disposed of by what as already been said.

From a review of the record the case seems to have been fairly tried. We find no reversible errors.

The judgment of the trial court is, therefore, affirmed.

RAINEY, J., did not participate in this opinion.

UNION SAV. ASS'N v. CUMMINS et al.
(No. 8409.)

(Supreme Court of Oklahoma. May 4, 1920.)

(Syllabus by the Court.)

1. Corporations ⟸639 — Foreign corporation cannot exercise rights not conferred on domestic corporations.

By reason of article 9, § 44, Constitution, foreign corporations cannot exercise in this state any greater or different rights, powers, or privileges than are conferred on similar domestic corporations.

2. Contracts ⟸101(2)—Corporations ⟸639—Courts will not enforce foreign contracts repugnant to its public policy; comity does not require that foreign associations be given greater privileges than domestic corporations.

Comity does not require the courts of this state to enforce a foreign contract which is repugnant to the public policy of this state, nor does it require that foreign associations be granted any greater privileges in making contracts within this state than are accorded to similar domestic associations.

3. Building and loan associations ⟸31(3)—Prior law required association to fix premiums for loan by competitive bidding.

Prior to the enactment of chapter 200, Sess. Laws 1913, p. 445, the laws of this state required building and loan associations to fix premiums for the loan of money by competitive bidding.

4. Appeal and error ⟸1010(1)—Trial court's findings of fact, reasonably supported by evidence, will not be disturbed.

In a law action, if the evidence reasonably tends to support the findings of fact of the trial court, these findings will not be disturbed on appeal.

5. Building and loan associations ⟸23(4)—Finding that loan solicitor was agent of association held justified.

Where a solicitor for a building and loan association presented to the applicant for a loan of money a printed form, with the amount of the premium printed thereon, and represented that such amount was the premium to be paid, the trial court correctly found that the solicitor was in fact the agent of the association, and such association was bound by the acts of its solicitor.

6. Building and loan associations ⟸33(13)—Finding that loan was made without competitive bidding held correct.

Where the facts were as stated in the preceding paragraph of the syllabus, and the loan shows upon its face that it in fact required the premiums printed in the application, the trial court was correct in finding that the loan was made without competitive bidding.

7. Building and loan associations ⟸33(13)—Failure to fix premium by competitive bidding prevents charge of more than legal interest.

The failure of the building and loan association to make loans by competitive bidding when required by law destroys the right of such association to charge premiums and to collect more than the legal rate of interest on its loan, and premiums and dues paid under the loan arrangement without bids will be applied on the loan.

8. Usury ⟸78—Where usury is reserved by contract, but not paid, the only penalty is the forfeiture of entire interest.

Section 3, art. 14, of the state Constitution, was the law in force in this state on

Digitized by Google

March 1, 1909, against making contracts for usurious interest, and provided that "the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," and means that where usury is reserved by the terms of the contract, but not paid, the only penal consequence is the forfeiture of the entire interest.

9. Mortgages ⟸144—Mortgagor's payment of taxes cannot defeat lien.

A transaction which amounts to the payment of the taxes by the mortgagor cannot thereby defeat the lien of the mortgagee.

10. Taxation ⟸734(9)—Tax deed without due notice to owner did not convey title.

A tax deed secured through a sale for delinquent taxes and penalty thereon, when it is shown that notice has not been mailed to the owner of the property by the county treasurer, as required by section 2, c. 73, S. L. 1910, will not convey title to the grantee.

11. Taxation ⟸750—Notice of application for deed essential.

For a tax deed to be valid, application for such deed must have been served on the owner of the property as prescribed by law.

Error from District Court, Jefferson County; Cham Jones, Judge.

Action by Union Savings Association against B. V. Cummins and others to recover on a certain note and mortgage upon certain real estate securing the same. Judgment for defendants, and plaintiff brings error. Reversed, with directions to set aside the judgment.

George M. Nicholson, of Sulphur, for plaintiff in error.

W. D. Hereford, of Oklahoma City, and Bridges & Vertrees and Guy Green, all of Waurika, for defendants in error.

JOHNSON, J. To the petition of plaintiff defendant H. W. Lemons filed a disclaimer.

Defendants B. V. Cummins and Laura Cummins answered, admitting the execution of the note and mortgage, and by way of cross-petition alleged that the note and mortgage were given to secure a loan of money, and that the rate of interest exacted by plaintiff was usurious, and the amount of usury reserved and charged by said note and mortgage exceeded the balance due thereon. The defendant Chubbuck, after a general denial, as a further defense, alleged that he was the owner of the legal and equitable title to the premises by virtue of a tax deed under which he had been in possession for more than a year, prior to the filing of plaintiff's petition.

On March 1, 1909, B. V. Cummins, made application for certain shares of stock in plaintiff company and on March 10 executed the note and mortgage in controversy. The note upon its face stipulated for interest thereon at 6 per cent. per annum and a premium of 50 cents per month on each $100 named in the note, interest and premium payable monthly on or before the 1st day of each month.

The court found that defendant B. V. Cummins was arbitrarily required to submit a bid of 50 cents per month as a premium for the preference right to the loan of the money, and that said defendant was informed by the agent of the plaintiff that unless he made said bid that said loan would not be made; and further found that said defendant made no competitive bid for the preferential right to a loan of said money, but that plaintiff arbitrarily fixed said premium, and that by reason thereof said note and mortgage were usurious.

Judgment was rendered for defendant against plaintiff in the sum of $87.83.

[3] This contract was entered into prior to the enactment of chapter 200, Sess. Laws 1913, at a time when the laws of this state required premiums to be fixed by competitive bidding, and prohibited the fixing thereof by an arbitrary rule. Ætna Building & Loan Ass'n v. Harris, 170 Pac. 700.

[1] While the contract provided that it was to be performed in South Dakota, and was to be governed by the laws of that state, the plaintiff corporation could not exercise in this state any greater or different rights, powers, or privileges than were conferred on similar domestic corporations. Article 9, § 44, Constitution.

[2] While comity between the states requires that valid contracts made in any jurisdiction may be enforced in the several states, it does not require courts of this state to enforce a foreign contract which is repugnant to the public policy of this state, nor does it require that foreign associations be granted any greater privileges in making contracts within this state than are accorded to domestic associations. Midland Savings & Loan Ass'n v. Deaton, 57 Okl. 622, 157 Pac. 285; Washington National Building, Loan & Investment Ass'n v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793.

[4] If the evidence reasonably tends to support the findings of the trial court they will not be disturbed. Choctaw Lbr. Co. v. Waldock (No. 7866) 190 Pac. 866 (not yet officially reported); Bruce v. McIntosh et al., 57 Okl. 774, 159 Pac. 261; Board of Commissioners of Woodward County v. Thyfault, 43 Okl. 82, 141 Pac. 409; Alfred v. St. Louis, I. M. & S. Ry. Co., 42 Okl. 4, 140 Pac. 415; M., O. & G. Ry. Co. v. Smith, 55 Okl. 12, 155 Pac. 233.

Digitized by Google

[5-7] Defendant B. V. Cummins testified that he made no bid, but that the agent of the plaintiff presented to him a printed form or application with the request that he sign same. Although the application for the loan contained the statement that the agent was representing Cummins, and contained the further statement, "I make this application for stock irrespective of any representations which may have been made to me by any solicitor or other person," the court correctly found that the solicitor was in fact agent of plaintiff. Allison v. Crummey, 166 Pac. 691; Bates v. American Mortgage Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340.

The statement in the application that the loan was applied for irrespective of the representations made by the solicitor is ineffectual to give plaintiff any greater rights than if the loan had been negotiated by the principal under the same circumstances as it was by the agent. Langely v. Ford, 171 Pac. 471.

If it be assumed that section 2, art. 7, of the by-laws authorizes the lending of money for less than 12 per cent., still said article permits the amount of premium bid to be printed in the application, and where, as the court found to be the case herein, there was no competitive bidding the corporation did not have the right to charge premiums or to collect more than 6 per cent. interest, and premiums and dues paid under such arrangement will be applied on the loan. Ætna Building & Loan Ass'n v. Rouch et al., 32 Okl. 735, 124 Pac. 24.

The trial court found that the contract was usurious and that the defendant borrower was entitled to offset against the plaintiff's demand the total amount of interest reserved. In so holding we think the trial court was in error. The contract sued upon was made March 10, 1909. On that date the law in force in this state against usury was section 3, art. 14, of the Constitution, which is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."

These provisions of our Constitution are identical with those contained in act of Congress, Feb. 18, 1875, Rev. St. § 5198 (Comp. St. § 9759), and provides two penalties: (1) The forfeiture of all the interest remaining unpaid; and (2) the recovery of twice the amount of interest that has been paid. These provisions have been frequently construed by the federal courts and the courts of last resort of the various states, concerning which Mr. Webb in his Law of Usury, section 519, p. 602, says:

"The provision of the federal statute above quoted, as to 'reserving' usury, has been uniformly construed to mean that where usury is reserved by the terms of the contract, but not paid, the only penal consequence is the forfeiture of the entire interest. And this construction is applicable to interest accruing by law, by reason of the nonpayment of the loan after maturity.

"But with reference to the next sentence in the section, providing that 'in case the greater rate of interest has been paid,' etc., some judicial differences have arisen. While it is established that, 'the difference between the offenses is the difference between exacting an agreement to pay and exacting actual payment; and the difference between the consequences imposed is the liability to lose once the interest in the former case and twice the interest in the latter.'"

The author cites numerous decisions of various state courts and federal courts. One of the leading cases cited in support of the rule announced is that of Citizens' National Bank of Danville v. Gentry, 111 Ky. 206, 63 S. W. 454, 757, 56 L. R. A. 673.

Section 1100 of the Civil Code of Dakota is substantially the same as our constitutional provision supra. The Supreme Court of that state construing the provision of the statute supra, in Wood v. Cuthbertson, 3 Dak. 328, 21 N. W. 3, in paragraph 2 of the syllabus, said:

"Section 1100 of the Civil Code of Dakota, declaring all interest upon a usurious contract forfeited, and providing that the excess paid over 12 per cent. may be recovered from the person taking it, does not give the right to maintain a counterclaim by reason of such forfeiture for the whole interest in an action to collect the principal. Only the excess over 12 per cent., and when illegal interest has been stipulated for and not paid, then only the principal, without interest, can be recovered."

The eighth and ninth findings of the trial court were as follows:

"Eighth. The court further finds that said defendant B. V. Cummins paid all premiums and interest and stock payments up to and including the first day of January, 1910, and that no other payments have been made by said defendant."

"Ninth. The court further finds that the note and mortgage sued upon provided for interest at the rate of 6 per cent. and for the premium of 50 cents upon each $100 per month loaned and the said interest at 6 per cent. and the premium as aforesaid equal 12 per cent., and that said 12 per cent. is in excess of that allowed by law for the said plaintiff to charge the defendants, for the use of said money, said contract is usurious, and that the charging, receiving, taking, and reserving said interest was knowingly done by the plaintiff, and that the defendants B. V. Cummins and Laura Cummins have set up as a defense the charging of usurious interest, and the court finds that by reason thereof said defendants B. V. Cummins and Laura Cummins are entitled to recover from said plaintiff the amount of interest

Digitized by Google

charged upon said loan, amounting to $937.83, which is in excess of the amount loaned by said plaintiff to said B. V. Cummins and Laura Cummins to the amount of $87.83, for which sum defendants B. V. Cummins and Laura Cummins are entitled to judgment over and against said plaintiff."

To these findings the plaintiff saved an exception.

The court rendered judgment in favor of the defendant in the sum of $87.83. This, we find, was clearly erroneous. Under the findings of the trial court the contract sued upon was not void, but as has been frequently held by the courts such usurious contracts destroy the interest-bearing quality of the paper only. Shafer v. First National Bank, 53 Kan. 614, 36 Pac. 998; Quint v. First National Bank, 9 Kan. App. 474, 58 Pac. 1010; Third National Bank of Phil. v. Miller, 90 Pa. 241; Guthrie v. Reid, 107 Pa. 251; Melton v. Snow, 24 Okl. 780, 104 Pac. 40.

"A debt contracted or obligation given for a usurious loan made by a state or national bank is not void, but the forfeiture is limited to the interest." Hintermister v. First National Bank, 64 N. Y. 212; First National Bank v. McCarthy, 18 S. D. 218, 100 N. W. 14; Haseltine v. Central Bank of Springfield, 183 U. S. 132, 22 Sup. Ct. 49, 46 L. Ed. 118.

Counsel for the defendants contend in their brief that section 1005, R. L. 1910, applies in this case. We cannot agree with this contention. To so hold would be to give this provision a retroactive effect, which would be contrary to the general rule as announced by this court in Adair v. McFarlin et al., 28 Okl. 633, 115 Pac. 787. This court speaking through Turner, C. J., said:

"Generally a statute will be construed as applying to conditions that may arise in the future. An act will not be given a retrospective operation unless the intention of the Legislature that it shall so operate is unequivocally expressed"—citing in support Potter's Dwarris on Stat. Con. 162, note 9, and numerous decisions to the same effect; Walker v. Daharsh et al., 52 Okl. 766, 153 Pac. 880.

[8] Counsel for defendants cite in support of their contention, that the judgment in favor of the defendants for $87.83 should be sustained, the decisions of this court in the cases of Daniels v. Bunch et al., 172 Pac. 1086; Gunness v. Shear et al., 60 Okl. 24, 158 Pac. 568; Anderson v. Tatro, 44 Okl. 219, 144 Pac. 360; Miller v. Oklahoma State Bank of Altus, 53 Okl. 616, 157 Pac. 767. An examination of these cases will disclose that they are not in point. This case comes squarely under the first provision of section 3, art. 14, of the Constitution, the interest forfeiture provision.

[9] The evidence shows that the property was sold for taxes; that the defendant Lemons, a creditor of defendant Cummins, came into possession of the tax certificates without paying any consideration therefor, and that he later transferred these certificates to defendant Chubbuck, a brother-in-law of B. V. Cummins, without being paid any consideration therefor; that Chubbuck had never resided in Oklahoma, but was a resident of Kansas.

Plaintiff insists that this transaction was fraudulent and to deprive of its rights to foreclose its mortgage. If, as appears, the transaction amounted to the payment of the taxes by Cummins the lien of the mortgagee could not thereby be defeated. Manley v. Debentures, "B" Liquidation Co., 64 Kan. 573, 68 Pac. 31; Carithers v. Weaver, 7 Kan. 110; Duffitt v. Tuhan, 28 Kan. 292.

[10, 11] But, regardless of the foregoing the deed is void for the reason that the sale price of the land in question included penalty for nonpayment of taxes when notice had not been mailed to the owner by the county treasurer, as then required by section 2, c. 73, S. L. 1910. Williams v. McGill et al., 169 Pac. 1074.

It also appears to be void for the further reason that notice of application for tax deed dose not appear to have been given to the owner, as required by section 7415, R. L. 1910. Dawson v. Anderson, 38 Okl. 167, 132 Pac. 666.

For the reasons stated, the cause is reversed, with directions to set aside the judgment and proceed in accordance with the views herein expressed.

RAINEY, C. J., and HARRISON, PITCHFORD, McNEILL, and HIGGINS, JJ., concur.

HOLT et al. v. ÆTNA BUILDING & LOAN ASS'N. (No. 7428.)

(Supreme Court of Oklahoma. June 8, 1920. Rehearing Denied July 6, 1920.)

(Syllabus by the Court.)

1. Corporations ⇐639 — Foreign corporation cannot exercise other rights than those conferred on similar domestic corporations.

By virtue of section 44, art. 9 (section 261, Williams' Ed.) Constitution, a foreign building and loan association cannot exercise in this state any greater or different rights, powers, and privileges than are conferred on similar domestic corporations.

2. Corporations ⇐657(2)—Comity does not require that foreign corporations enforce contracts conflicting with state law.

The rule of comity does not require that foreign corporations be allowed to enforce contracts in conflict with the laws of this state, or the enforcement of which would give to the

Digitized by Google

citizens of another state an advantage which a resident of this state would not have.

3. Building and loan associations ⊂=46(3)—Foreign corporation cannot do business in state unless it complies with state laws.

For a foreign corporation to be entitled to exercise the rights, powers, and privileges accorded building and loan associations under article 16, §§ 1487–1532, Comp. Laws 1909, and to enforce contracts entered into by it with citizens of this state in the courts of this state, it must clearly appear that it is being operated in compliance with the laws of this state pertaining to such associations, and that the business conducted by it is in keeping with the purposes and aims of such associations as defined by these laws, and that the character of its business is in keeping with that permitted to be conducted by domestic building and loan associations.

4. Building and loan associations ⊂=6(2)—Law in force required mutuality in transactions, and did not discriminate against borrowing members.

Under the laws of this state pertaining to building and loan associations at the time of the transaction herein involved, mutuality was required, and the borrowing members were entitled to share equally in the profits with the nonborrowing members, and they cannot be required to bear more than their proportionate amount of the losses and expenses of the association.

5. Usury ⊂=12—Whether usury was charged by collateral instruments or devices held a question of intent.

Where a contract is apparently fair on its face, and the interest thereby, as disclosed by the terms of the instrument sued on, is within the legal limit, but the claim is made that usury was in fact retained, and that such usurious charge is evidenced by other collateral instruments or by some agreement or device intended as a cloak for such usurious transaction, it then becomes a question of fact as to whether there was a usurious charge made by such collateral instruments or by such agreement or device, and in such case the intent of the parties at the time the contract was entered into is a question to be determined from all the facts and circumstances in the case.

6. Interest ⊂=31—Where rate contracted for is set aside, legal interest is allowable.

Where an attempted contract as to the rate of interest is set aside, interest should be allowed at the legal rate of 6 per cent. per annum.

7. Building and loan associations ⊂=46(9)—Contract held not a building and loan contract.

Evidence examined, and *held*, that upon the facts stated in the case plaintiff's loan was not a building and loan contract within the purview of our law, and that plaintiff was not entitled to exercise the rights, powers, and privileges of a building and loan association under the laws of this state.

(Additional Syllabus by Editorial Staff.)

8. Building and loan associations ⊂=1—Nature and status.

A building and loan association is an organization created for the purpose of accumulating a fund by the monthly subscription of savings of its members to assist them in building or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the association upon good security.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Building and Loan Association.]

Appeal from District Court, Oklahoma County; Jas. R. Talbert, Special Judge.

Action by the Ætna Building & Loan Association against L. M. Holt and E. I. Holt to recover on a note, and to foreclose a real estate mortgage upon land in Oklahoma county. Judgment for plaintiff, and defendants appeal, and plaintiff took a cross-appeal. Reversed, with directions.

Wright & Blinn, of Oklahoma City, and Ferry, Doran & Dean, John S. Dean, and John D. Rogers, all of Topeka, Kan., and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiffs in error.

William P. Harper, of Oklahoma City, for defendant in error.

Fred G. Dennis, Bank Com'r, S. P. Freeling, Atty. Gen., and William H. Zwick, Asst. Atty. Gen., Amicus Curiæ.

RAINEY, C. J. The Ætna Building & Loan Association, a corporation of the state of Kansas, hereinafter referred to as plaintiff, sued L. M. Holt and E. I. Holt, hereinafter referred to as defendants, in the district court of Oklahoma county, to recover upon a promissory note in the sum of $3,200, and to foreclose a real estate mortgage upon land in that county. Defendants pleaded that the contract was usurious, and prayed for judgment against the plaintiff for the amount that the penalties alleged exceeded the claim of the plaintiff. Trial was had to the court without a jury, and judgment was entered for the plaintiff for $2,449.39, with interest thereon at 10 per cent. and $25 attorney's fees. Just how the court treated the payments made, or upon what basis credits were allowed the defendants, is not clear. Defendants appealed, seeking to have twice the whole amount of interest contracted for adjudged against the plaintiff. The plaintiff brought a cross-appeal, seeking to recover the full amount of the note and interest, less the value, as computed by it, of certain stock subscribed for by defendants as a condition to the loan made by plaintiff and assigned to plaintiff as collateral for the loan.

It appears that Lucy M. Holt and E. I.

Digitized by Google

Holt, her husband, desiring to build a home on certain lots in Oklahoma City, the former applied through a local agent to plaintiff for a loan of $3,200. As a condition precedent to the loan she was required to subscribe for seven shares of stock of plaintiff's corporation, denominated installment stock, in the sum of $500 each, payable in monthly payments of $17.50, which stock she was required to assign to the plaintiff as collateral. The loan was further secured by a real estate mortgage upon the lots. The note given by the defendants purports to bear interest at 10 per cent. per annum, payable monthly, and is as follows:

"$3,200.00. First Mortgage Real Estate Note. No. 1874. For value received, we do hereby promise to pay to the Ætna Building & Loan Association, of Topeka, Kansas, on or before ten years after date thirty-two hundred dollars, with interest thereon from date thereof, in monthly installments of twenty-six and $^{67}/_{100}$ dollars, also monthly dues on seven shares of stock in the sum of seventeen and $^{50}/_{100}$ dollars, both interest and dues payable on the 5th day of each and every month until sufficient assets accumulate to pay each shareholder five hundred dollars per share for every share held by him, in accordance with the by-laws of said association, and in case of default in the payment of interest or dues or any part thereof, at the stated times, or failure to comply with any of the conditions or agreements contained in the first mortgage on real estate given to secure the payment thereon, then this note shall immediately become due and payable at the option of the legal holder thereof, and shall after such default bear ten per cent. interest per annum, and if collected by a suit, an attorney fee of twenty-five dollars may be attached as costs in said case. Dated at Oklahoma City, Oklahoma, on the 8th day of August, 1911.

"Lucie M. Holt.
"E. I. Holt."

Plaintiff deducted from the amount advanced to the defendants the sum of $98.25, a part of which was for a membership fee. Defendants paid interest on the note in the sum of $241.46, and stock installments in the sum of $157.50. Plaintiff also claimed $42.42, with interest thereon on account of insurance paid on the mortgaged property.

The plaintiff corporation was organized as a building and loan association under the laws of the state of Kansas, and has secured a certificate of authority from the state banking commissioner to transact business in this state, as required by section 1517, Comp. Laws 1909 (article 8, Rev. Laws 1910). We will consider the contract as an Oklahoma contract, since the laws of Kansas were not pleaded or proved.

The by-laws of the plaintiff corporation provide for making loans without premiums and without bids, and bids were not received, nor premiums charged on this loan.

[1, 2] The plaintiff corporation cannot exercise any greater or different rights, powers, or privileges than are conferred upon similar domestic corporations. The rule of comity does not require that foreign corporations be allowed to enforce contracts in conflict with the laws of this state, or the enforcement of which would give to the citizens of another state an advantage which a resident does not have. Section 44, art. 9, Const.; Midland Savings & Loan Co. v. Deaton, 57 Okl. 622, 157 Pac. 285; Midland Savings & Loan Co. v. Summers, 58 Okl. 641, 160 Pac. 488; Midland Savings & Loan Co. v. Nicoll, 76 Okl. 27, 183 Pac. 731; Washington National Building, Loan & Investment Association v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; Falls v. United States Saving, Loan & Building Co., 97 Ala. 417, 13 South. 25, 24 L. R. A. 174, 38 Am. St. Rep. 194; Rhodes v. Missouri Savings & Loan Co., 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93.

Defendants contend that plaintiff is not a building and loan association within the purview of the laws of this state, and that the transaction between plaintiffs and defendants was a mere lending and borrowing of money, subject to the laws governing such transactions. It is urged by defendants that the essence of a building and loan association under the laws of this state is mutuality, and that a failure of mutuality or of the stockholders to share alike destroys the character of a building and loan association.

[3-5] The building and loan association laws in effect at the time the contract was made are found in Comp. Laws 1909, art. 14, §§ 1487–1532, both inclusive. Section 1488 provides:

"The capital stock of any corporation created by virtue of this act shall at no time consist of more than two thousand five hundred shares, of two hundred dollars each, or five thousand shares of one hundred dollars each, the installments on which stock are to be paid at such time and place as the by-laws shall appoint, no periodical payment to be made exceeding two dollars on each share. Every share of stock shall be subject to a lien for the payment of unpaid installments and other charges incurred thereon, under the provisions of the charter and by-laws, and the by-laws may prescribe the form and manner of enforcing such lien. New shares of stock may be issued in lieu of the shares withdrawn or forfeited. The stock may be issued in one or more successive series, in such amount as the board of directors or stockholders may determine, and any stockholder wishing to withdraw from the said corporation shall have power to do so by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, and such proportion of the profits as the by-laws may determine, less all fines and other charges: Provided, that at no time shall more than one-half of the funds in the treasury of the corporation be applicable to the demands of withdrawing stockholders

Digitized by Google

without the consent of the board of directors, and that no stockholder shall be entitled to withdraw whose stock is held in pledge for security. * * *"

[8] A building and loan association is an organization created "for the purpose of accumulating a fund by the monthly subscription of savings of its members to assist them in building or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the association upon good security." 2 Am. & E. Enc. 604; Rhodes v. Missouri Savings & Loan Co., supra. To secure the benefits of the law pertaining to building and loan associations, it must be shown that the business conducted is in keeping with the aims and purposes of such associations as defined by the laws of this state. It must be apparent that the association claiming the benefits of the building and loan association laws was formed and is being maintained for the purpose of enabling the members thereof to provide a fund, by means of small periodical payments, which can be loaned to members upon advantageous terms for the purpose of enabling them to become home owners, and thus encourage thrift and economy, and thereby promote good citizenship. Midland Savings & Loan Co. v. Nicoll, supra. The members of these associations are presumed to be people of limited means, who are unable to borrow money by the usual and ordinary methods, and the underlying idea is to accommodate the poorer and less fortunate members of society by permitting them to make payments of small sums out of their current wages, and thus obtain the means of owning modest homes. Such associations were usually local in their operations, and were supposed to be prudently and economically managed, and when so organized and managed were productive of industry and frugality upon the part of the members, and were entitled to the confidence of the classes of persons for whose benefit they were organized. Midland Savings & Loan Co. v. Nicoll, supra; 9 Corpus Juris, 921; Endlich on Building and Loan Associations (2d Ed.).

By section 1511, Comp. Laws 1909, in effect at the time this contract was made, these associations were granted certain exemptions for the reasons, as stated in said laws, that such associations were aggregations of laborers, mechanics, working men, working women, and tradesmen, who start without any paid-up capital and pay in on their stock only small weekly or monthly assessments, which assessments are immediately loaned to one of the members of the association for the purpose of building a home for such member.

The plan and purpose of the organization contemplates mutuality, and that the stockholders share, and share alike, in the benefits and profits, as well as the losses, of the association. The corporation has no power to issue stock that will give the holders thereof a preference over the other stockholders, unless empowered to do so by law. 9 Corpus Juris, 936; King v. International Bldg., etc., Union, 170 Ill. 135, 48 N. E. 677.

Under our law, as it then existed, a building and loan association was bound to treat its members equally and any contract in contravention of the mutuality of the company was ultra vires and void. Thompson on Bldg. and Loan Ass'ns (2d Ed.), § 314; Wierman v. International Bldg., etc., Union, 67 Ill. App. 550; Rhodes v. Missouri B. & L. Ass'n, supra.

"The building association idea implies absolute co-operation. The theory, as first understood and practiced, was that the common fund should be made up by all the members upon a common ground. The ownership of this fund was absolutely in the members according to the amount of their shares of stock. Payments into this common fund were made at the same time and upon the same number of shares in the same amounts by all the members; the fund, when at a divisible size as fixed by the charter of the association, was then divided according to the claims of the respective members based upon their share holdings. Great simplicity and absolute mutuality were the strong characteristics of the scheme." Thompson on Bldg. and Loan Ass'ns (2d Ed.) 124.

See, also, 2d Ed., § 129; Endlich on Bldg. and Loan Associations, §§ 39, 119.

It seems clear that under the laws of this state, as they existed at the time of the transactions herein involved, mutuality was required, and that the borrowing members were entitled to share equally in the profits with the nonborrowing members, and they could not be required to bear more than their proportionate amount of the losses and expenses of the association.

With the foregoing in mind, let us examine the facts in the present case. Membership in the association was open to any person, firm, or corporation making proper application for the amount of stock desired, and paying an entrance fee of $2.50 per share. The authorized capital stock was $20,000,000, divided into 40,000 shares of $500 each, and classified as installment, prepaid, dividend, and deposit stock. Installment stock was that sold to the borrowers and put up as collateral for loans. It was divided into shares of a par value of $500 each, designated as "A," "C," and "D," and sold on monthly payments of $2.50 per share for 119 months, $4 per share for 88 months, and $5 per share for 74 months, respectively. The other classes of stock were purely investment stock. Under the by-laws, deposit stock was issued to suit the convenience of the depositor. Section 3, art. 3, of the by-laws of the association provided that, when dividends were declared on deposit stock, a sum equal to 50 per cent. of the earnings of all money paid on such shares should be placed to their credit; provided, that the amount so credited should not exceed

Digitized by Google

5 per cent. per annum. It was further provided that—

"Stockholders may withdraw their deposit shares at any time, and may receive all money paid on their shares, with five per cent. dividends as herein provided."

Dividend shares were issued on the payment of $500 per share, or fractional part thereof, and holders of these shares were entitled to receive 60 per cent. of all the earnings on the amount invested in such shares, provided the interest so paid and credited should not exceed 6 per cent. per annum. The by-laws further provided that—

"Dividend shares can be withdrawn after one year from date of issue and sixty days' written notice to the secretary, and the shareholder shall receive the full amount paid for such stock, with interest to date of withdrawal: Provided, that such stock may be retired and paid off whenever the board of directors may deem it to the interests of the association to do so, the same as though voluntarily withdrawn."

Full-paid deposit stock was issued in certificates of $50 or any multiple thereof on payment of 50 per cent. of the par value of the same, and was payable in full 10 years from date of issue without interest:

"Provided, the earnings shall not exceed the per cent. of profit credited to other classes of stock."

Section 13, art. 3, of the by-laws reads:

"All profits arising from the shareholders' payments shall be summed up as a whole in the months of January and July, of each year, and out of such profits shall be paid all interest due and payable on prepaid, deposit and dividend shares, taxes on the assessed stock of the association and losses, if any. The board of directors shall then declare the remainder of such profits as dividends to all installment stock pro rata to the book value thereof, and all dividends so declared shall be credited to such stock on the books of the association and shall earn dividends thereafter the same as cash payments on the stock."

From the foregoing it clearly appears that the plaintiff was not a building and loan association as contemplated by the laws of Oklahoma in existence at the time the contract was made. The stockholders were not confined to those persons mentioned in the laws of this state, and contemplated by the laws in force at the time of the contract. The stock was not necessarily purchased by those of limited means, but could be subscribed for by capitalists, corporations, or by any person desiring attractive interest on his investments, as well as by those compelled to subscribe for it in order to secure a loan. There was a want of mutuality between the borrowing stockholders and the others, in that the borrowing members—installment stockholders—were not entitled to any profits until after "all interest due and payable on prepaid, deposit, and dividend shares, taxes on the assessed stock of the association and losses, if any," were paid, whereas other stockholders were entitled to interest on their stock out of its earnings without any deduction for taxes and losses.

Moreover, loans were not let by bidding, as provided by section 1490, Comp. Laws 1909. Midland Sav. & Loan Co. v. Deaton, supra; Midland Sav. & Loan Co. v. Summers et al., supra. Nor was there any limit to the amount of stock which an individual might acquire. Midland Sav. & Loan Co. v. Nicoll, supra.

The foregoing discussion has reference to the building and loan association laws as they existed at the time of the transaction here involved. Since that time material amendments have been made to the law. See chapter 15, art. 7, and article 8, Rev. Laws 1910; chapter 200, p. 445, Sess. Laws 1913; chapter 238, p. 616, Sess. Laws 1913; chapter 283, p. 659, Sess. Laws 1915.

Since plaintiff was not a building and loan association under our law in effect at the time the contract was made, and therefore was not entitled to the rights and privileges pertaining to such associations, what was the status of the loan? It cannot be worse than that of an ordinary loan, and, considering the uncertainty of the law and the decisions relating thereto, it ought to have whatever security the law can throw around it as a loan, and not be subjected to the severe penalties imposed on those who wantonly and flagrantly violate the law. Ætna Bldg. & Loan Ass'n v. Rouch, 32 Okl. 735, 124 pac. 24; Midland Sav. & Loan Co. v. Deaton, supra; Midland Sav. & Loan Co. v. Summers et al., supra.

[6, 7] The rate of interest stipulated in the note was 10 per cent. per annum, but the entire contract, being invalid under our view, stands as if the loan had been made without reference to interest, in which case not the maximum contract rate, but the legal rate, of 6 per cent. per annum is the rate to be charged. Section 2, art. 14 (section 313, William's Ed.) Const.; 15 Ruling Case Law, 21; Washington, etc., Co. v. Stanley, supra; Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682.

It is urged by the defendants that the contract is usurious, and that therefore the plaintiff should forfeit twice the amount of the interest contracted for, but the contract itself does not, on its face, purport to be in excess of the contract rate allowed by law. It was made when sections 1492 and 1523, Comp. Laws 1909, were in effect, and those laws attempted to permit building and loan associations to make charges not permissible by ordinary loan companies.

Therefore, in the absence of evidence to impute an intent to collect greater than the

Digitized by Google

legal rate of interest, such intent will not be implied. Ætna Bldg. & Loan Ass'n v. Rouch, supra; Midland Sav. & Loan Co. v. Deaton, supra; Midland Sav. & Loan Co. v. Summer, supra; Washington, etc., Co. v. Stanley, supra. While we hold that the contract of the plaintiff was not strictly a building and loan contract under the laws in effect at the time of this transaction, there is nothing in the record to show that it did not in good faith contract, believing that its contract was valid. And in view of the sections of the Compiled Laws of 1909, cited supra, an intent to charge usury will not therefore be implied.

Having determined that plaintiff's contract is not strictly a building and loan contract, dues upon stock, fines, membership fees, and all other payments made, except interest actually due and the necessary and statutory fees for examining the title and preparing the abstract, must be credited on the loan. Midland Sav. & Loan Co. v. Deaton, supra; Midland Sav. & Loan Co. v. Summer, supra; Meroney v. Atlanta Bldg. & Loan Ass'n, 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841.

It is urged that when these items are applied on the loan that the interest rate therefor becomes greater than 10 per cent. and the contract therefore becomes usurious. Section 2, c. 119, Sess. Laws 1910, effective at the time this transaction was entered into, provides a forfeiture of twice the amount of the usurious interest charged. The position of the defendants is stated by their counsel in his brief as follows:

"The contract unequivocally calls for and requires defendants to pay 200 monthly installments on the stock in order to mature it and entitle them to a discharge of their obligation, and requires monthly payments of 200 installments of interest in the aggregate sum of $5,334. The defendants are entitled to double this sum, amounting to $10,668. Crediting the principal debt with the amount retained by plaintiff, $59.50, and the amount paid on the stock, $157.50, leaves a principal sum of $3,083. Deducting this from the forfeiture leaves the defendants entitled to a judgment against the plaintiffs in excess of the amount due plaintiff in the sum of $7,585."

While the penalty to be imposed for usury is a matter for legislative enactment, and not for judicial determination, the injustice of permitting a recovery of the amount urged, in addition to the sums already received on the loan, is so manifest that a forfeiture will not be implied from any mere irregularity of the transaction. In view of the uncertainty of the building and loan law at the time of this transaction, a corrupt intent must be shown before the penalty can be imposed, and, regardless of what the law may be where persons enter into a transaction which they both understand at the time to be a mere loan, the intent in a transaction, which both parties entered into in good faith with the belief that the transaction is in fact a building and loan transaction, is important, and the penalties of usury will not be imposed in the absence of a showing of corrupt intent to charge usury. It has been the holding of this court that in order for a contract to be usurious there must be in fact an excessive charge, and such charge must be made with the unlawful and corrupt intent to take interest in excess of the lawful rate. Garland et al. v. Union Trust Co. et al., 49 Okl. 654, 154 Pac. 676; Deming Investment Co. v. Grigsby, 163 Pac. 530. And, while the holding in Midland Savings & Loan Co. v. Tuohy, 170 Pac. 244, that whenever the usurious character of the transaction is revealed on the face of the instrument the unlawful intent to charge or receive an illegal rate of interest for the money loaned will be inferred from the instrument itself, is correct, in the absence of proof to the contrary, it is also fundamental that where the contract is apparently fair on its face, and the interest, as disclosed by the terms of the instrument sued on, is within the legal limit, but the claim is made that usury was in fact retained, and that such usurious charge is evidenced by other collateral instruments or by some agreement or device intended as a cloak for such usurious transaction, as, for instance, the charging of premiums for stock, it then becomes a question of fact as to whether such sums were in truth and in fact reserved and charged as interest, or for the collection of interest thereon, or as a device to secure an illegal rate of interest, and whether, if so charged, they, or the interest thereon, together with the amount of interest reserved in the note, would amount to usury, and in such case the intent of the parties at the time the contract was entered into is a question to be determined from all the facts and circumstances in the case. Garland et el. v. Union Trust Co., supra; Tyler on Usury, pp. 103–105.

Usury statutes that work a forfeiture are penal. Stockyards' State Bank v. Johnston, 52 Okl. 32, 152 Pac. 585; Elwell v. Daggs, supra; Poppleton v. Nelson, 12 Or. 349, 7 Pac. 492; 39 Cyc. 910, and cases cited; Tyler on Usury, p. 374. Such statutes must be strictly construed, and before one can recover the penalty therein imposed he must state specifically every fact to bring himself strictly within all their terms. Butner v. Western Union Tel. Co., 2 Okl. 234, 37 Pac. 1087.

Where transactions are penal or criminal in their nature, the intent of the parties is, in the absence of something to indicate the contrary, material.

In Tyler on Usury, pages 109, 110, it is said:

"The question of usury is always put upon the intention and purpose of the parties; and, in order to make a contract usurious, it must be apparent, either upon the face of it or by

Digitized by Google

evidence, that the intention of the parties in the creation of it was, by means of shift or device, to take more than legal interest for the loan or forbearance of money. It depends upon the intent of the parties, and they may show anything to make it appear that there was no corrupt agreement. The authorities, both ancient and modern, speak a language on this point too uniform and plain to be mistaken. We cannot know the agreement unless we look at the intention. This is the essence of every contract, as well as of every crime. There must be a criminal intention or there can be no guilt. Upon any other principle the statute against usury would operate as a snare, in which the artful and designing might intrap their neighbors by setting up and establishing usury where none was ever intended. But where a party deliberately and knowingly takes a greater rate of interest than the statute allows, the law fixes the interest, and pronounces the transaction usurious. Thus it appears that, in order to constitute usury, there must be: (1) A loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned. Unless these four things concur in every transaction, it is safe to affirm that no case of usury can be declared; and this may be regarded as a rule universally recognized in all the states."

Whatever may have been the facts in the Tuohy Case, supra, the note sued on herein is not on its face usurious. It recites a payment of $26.67 per month or 10 per cent. per annum. The defendants also purchased installment stock for which they were to pay premiums regularly, and which stock they pledged as collateral for the loan. The making of the loan without competitive bids and the failure of the plaintiff to sell installment stock to the defendants on the same, or as favorable, terms as stock was sold to other classes of stockholders, under the laws existing at the time of the transaction, made it ultra vires; but these facts, in the absence of an intent to charge more than the legal rate of interest on the money loaned, are not sufficient to fasten on the transaction the penalties of usury. If the contract had been in fact a building and loan contract, it could not consistently be argued in view of sections 1492 and 1523, Comp. Laws 1909, supra, that the transaction was entered into in bad faith, or with the intent to charge usury; and, while the motive of the plaintiff corporation is a proper subject to be submitted to the jury or to the court trying the case, this court cannot presume, in the absence of any finding of corrupt motive or from the facts shown by the record, that plaintiff did not act on the belief that the transaction was entered into in good faith as a building and loan transaction.

The defendants, having given their note in good faith to procure the loan, are morally bound to pay the debt and to return the money actually received, with interest at the legal rate. Garvin v. Linton, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569.

In this case there has been no finding of usury. The note sued on, on its face, does not show usury. The defense of usury must be made out from the collateral transactions; and, while we hold that the transaction is not a building and loan transaction, in fact, we are not prepared to say from the facts in the record that the whole transaction was a scheme to collect an illegal rate of interest. The correct rule to be followed in this case is, we think, that laid down in Ætna Building & Loan Association v. Rouch, supra. Proper credits must be given on the note, and interest should be allowed at the legal rate.

It follows that plaintiff is entitled to judgment for the principal of the note sued on and for insurance money advanced on the property, after allowing credit on said sums for payments made on stock purchased and for entrance fees collected when the loan was made, with 6 per cent. interest per annum from the time the money was received by defendants or advanced for them. This cause is therefore reversed, with directions to the trial court to render judgment accordingly.

HARRISON, KANE, PITCHFORD, JOHNSON, McNEILL, and BAILEY, JJ., concur.

CHICAGO, R. I. & P. RY. CO. et al. v. GIST. (No. 8820.)

(Supreme Court of Oklahoma. June 15, 1920.)

(Syllabus by the Court.)

1. Courts ⟸489(9)—State courts have jurisdiction in action for difference between legal and illegal freight charges.

State courts have jurisdiction in an action against a common carrier to recover the difference between illegal and excessive freight charges and the established rate prescribed by law, the issue involved being one of fact, though in passing on the facts it may be necessary for the court to construe the rate established by law.

2. Carriers ⟸200 — At common law action could be maintained to recover excess over reasonable freight charge.

At common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, or received the goods and carried them and then exacted an unreasonable charge as a condition of the delivery of the goods, an action could be maintained in court to recover the excess over a reasonable charge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

3. Carriers ⟸30—No relief from unreasonable freight charge where rate charged was fixed by Interstate Commerce Commission.

After the passage of Act Cong. Feb. 4, 1887, known as the Interstate Commerce Act, a shipper could not maintain an action against a common carrier to obtain relief from an alleged unreasonable freight charge exacted from him for an interstate shipment or shipment from one territory to a point of destination in another territory, without reference to any previous action by the Interstate Commerce Commission, where such rate had been filed with that Commission and promulgated as provided by the Commerce Act as the rate which it was the duty of the carrier under that act to enforce against the shipper until changed in accordance with the provisions of that statute.

4. Indians ⟸39—United States sovereign in Indian Territory.

The United States had full sovereignty within the Indian Territory.

5. Territories ⟸15—Right of Way Act providing for rates for transportation was abrogated by Organic Act as to shipments from Indian Territory into Oklahoma Territory.

The provisions of the Choctaw Coal & Railway Company Right of Way Act of Congress, approved February 18, 1888, prohibiting the railway from charging the inhabitants of Indian Territory a greater rate of freight than authorized by the laws of the states of Arkansas and Texas for services and transportation of the same kind, were superseded, abrogated, and annulled by Act Cong. May 2, 1890, known as the Organic Act, under which the territory of Oklahoma was carved out of the Indian Territory and became an organized territory, in so far as rates on shipments from Indian Territory to points of destination in Oklahoma Territory were concerned.

6. Territories ⟸13—Oklahoma Territory carved from Indian Territory became a separate and distinct territory.

Oklahoma Territory, by Act Cong. May 2, 1890, though carved out of the Indian Territory, became a political entity as an organized territory of the United States, and thenceforth was as separate and distinct from the Indian Territory as any other organized territory of the United States.

7. Territories ⟸18—Commerce between Indian Territory and territory of Oklahoma was within jurisdiction of Interstate Commerce Commission.

The Oklahoma Territorial Organic Act of Congress of May 2, 1890, operated to cut the Indian Territory into two separate territories, one organized and the other unorganized, and immediately and concurrently with the creation of the territory of Oklahoma the transportation of property by railroad from point of origin in the Indian Territory, as that territory existed after Act May 2, 1890, to a place of destination within the territory of Oklahoma, fell under the jurisdiction of the Interstate Commerce Commission.

8. Territories ⟸18—Interstate Commerce Act covered transportation from a territory to a territory.

The provisions of Interstate Commerce Act Feb. 4, 1887, covered transportation from a territory to a territory, without regard to the geographical boundary lines of the territories at the time it was enacted. The act looked to the future as well as the then present.

9. Constitutional law ⟸70(1)—Rate-making power is legislative and not judicial.

The rate-making power is legislative and not judicial.

10. Statutes ⟸217—History of time of enactment may be resorted to.

Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it.

11. Statutes ⟸217—History of time of enactment tends to disclose reasons for act.

The history of the times during which a law was enacted tends strongly to disclose the reasons for the act, and therefore the evils sought to be remedied.

12. Evidence ⟸11, 28—Court will take judicial notice of contemporaneous history, laws, and abuse to be remedied by act in question.

Whenever light can be derived from such sources, the courts will take judicial notice of the facts of contemporaneous history, the prior state of the law, the particular abuse or defect which the act was meant to remedy, and will then apply the language of the act to such state of affairs.

Error from District Court, Garfield County; James B. Cullison, Judge.

Action by J. T. Gist against the Chicago, Rock Island & Pacific Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff, motion for new trial overruled, and defendants bring error. Reversed and cause remanded, with direction to dismiss plaintiff's case at his cost.

The defendant in error, as plaintiff below, commenced this action against the plaintiff in error in the district court of Garfield county November 5, 1906, to recover $3,737.50, plus 7 per cent. interest as the alleged amount due plaintiff for freight overcharges on coal shipped over the lines of defendants from Alderson, Wilburton, Halleyville, Dow, Krebbs, Bakers, McAlester, and other points in the Indian Territory, to Enid, Oklahoma Territory. Counsel for defendant in error, beginning on page 2 of his printed brief, states plaintiff's case as follows:

"The petition alleged that the defendants were railway corporations operating in the Indian Territory and the territory of Oklahoma; that they were common carriers of

Digitized by Google

property, and as such carried coal to the city of Enid, Oklahoma Territory, during the three years before the filing of the petition; that the place from which the coal was transported to Enid, with the number and initial of the car transporting it, the amount of coal, the amount of freight and expenses, the date of payment, and the amount which plaintiff says was overcharged, are each correctly set out in a schedule attached to the petition, marked Exhibit A, and made a part thereof; and that the defendants, at the times named in the schedule for the transportation of the coal at Enid, collected from the plaintiff a large sum of money in excess of the legal rate.

"The petition then alleges four grounds of illegality: (1) That the charges were not reasonable and just, but were unreasonable and unjust; (2) that the sum collected subjected plaintiff to an undue and unreasonable prejudice and disadvantage; (3) that the charge received by the carrier was greater compensation in the aggregate for the transportation of like kind of property, under similar circumstances and conditions, for shorter than for longer distances, over the same line, in the same direction; (4) that the charges were unreasonable and illegal, in that the same exceed the sums allowed by law as a maximum to be charged by the railroads to the plaintiff as an inhabitant of the territory embraced within the limits of what was formerly the Indian Territory, and as to him the said defendants not being authorized by law to charge a greater amount than is authorized by the laws of the state of Arkansas, and that by the laws of the state of Arkansas a lesser sum in each instance was authorized than that charged, the amount of the overcharge calculated upon the rates authorized by the rates of Arkansas being shown in the list claimed in the schedule marked Exhibit A.

"The petition also alleged that the sums were paid by plaintiff under compulsion, as the only condition under which he could get possession of the coal, and after demanding that the coal be delivered to him at the lower legal rate.

"*It is unnecessary to consider the first, second, and third grounds of illegality above stated, because they are but different ways of pleading what is set out in greater detail in the fourth ground. In short, the whole petition was that the defendants, although authorized under the federal law to charge the inhabitants of Oklahoma Territory a rate not greater than that of Arkansas for the same service and transportation, did in fact charge a greater rate than this in the amount stated in the overcharge, and, as a consequence, the pleader deemed this unreasonable and unjust*; that it subjected the plaintiff to an undue prejudice and disadvantage, in that the same is a greater charge than is made by the carriers in other localities of other persons for similar services (meaning, of course, in the state of Arkansas); and that the same is an unjust and unreasonable charge, in that the carriers received a greater compensation in the aggregate for the transportation of a like kind of property and under similar circumstances and conditions.

"Upon the third ground no evidence was offered. The second and third grounds are the consequences that flow from the proof offered on the fourth ground, so it is only necessary to consider the fourth ground to have the entire case in hand. * * * We did entirely fail to offer any evidence under the third ground, and it may be considered *that we have abandoned* that.

"Now, the second and third causes of action are precisely like the first, except that in the second cause of action it is stated that the Enid Ice & Fuel Company *was a corporation under the laws of the territory of Oklahoma*, and that it transported coal under exactly similar facts as those alleged by the plaintiff here; that it paid similar overcharges, and before the bringing of the action the Enid Ice & Fuel Company assigned its claim for damages to the plaintiff for value, as shown by copy of the written assignment attached to the petition and made a part of it as Exhibit C. The third cause of action is just like the second cause of action, except that in this case the transporter of the coal is W. B. Johnston."

(Italics ours.)

The defendants filed separate demurrers on the ground:

"(1) That the court has no jurisdiction of the subject of the action; (2) that there is a defect of parties plaintiff; (3) that several causes of action are improperly joined; (4) that the petition does not state facts sufficient to constitute a cause of action."

Defendants' demurrers were overruled and exceptions saved, and thereupon defendants filed special pleas to the jurisdiction of the court. As special pleas are not recognized by the Code of Civil Procedure, and as the substance of the special pleas was set forth in the answers, it is unnecessary to state the substance thereof. The Rock Island filed an answer, containing (1) a general denial; (2) that the defendant Chicago, Rock Island & Pacific Railway Company is and was at all times mentioned in the plaintiff's petition a common carrier by railroad of freight and passengers, being a corporation organized and existing under the laws of the states of Illinois and Iowa, and owning and operating a line of railroad leading from the city of Chicago, in the state of Illinois, into and through the territory of Oklahoma and the territory comprising the Indian Territory, at the time the freight shipments complained of in the petition were made; that it had physical connection with its codefendant, Choctaw, Oklahoma & Gulf Railroad, at El Reno, Oklahoma Territory; that in pursuance of law it had published and filed with the Interstate Commerce Commission tariffs fixing and establishing rates on coal (being the freight hauled for plaintiff and plaintiff's assignors) between the points of origin set forth in plaintiff's petition and the city of Enid, the place of destination, as well as other points of destination; that defendant's tariff rates were open to all shippers alike and had not been suspended by the Interstate Commerce Commission at the time of the movement of the shipments detailed in plaintiff's petition,

Digitized by Google

but were in full force and effect; that the Interstate Commerce Commission is by law vested with authority to determine the reasonableness of freight rates upon shipments of freight moving between territories of the United States, to the exclusion of any other tribunal, that therefore the court was without jurisdiction over the subject-matter; that under the laws of the Congress of the United States the jurisdiction to entertain suits of the character plaintiff had commenced against defendant was at the time exclusively vested in the Interstate Commerce Commission and the District Courts of the United States, and that consequently the state court was without jurisdiction; (8) that on July 8, 1907, plaintiff filed a petition with the Interstate Commerce Commission asking that the rates assessed and charged by defendant and its codefendant on the identical shipments of coal be declared unreasonable and that defendants be required to make reparation; that the Interstate Commerce Commission heard the petition and dismissed it on the ground that it had no jurisdiction to enforce rates established by federal charters. In the ninth paragraph of the answer defendant denied that by the laws of the state of Arkansas a lesser sum in each instance was authorized than was charged for the transportation of the shipments of coal involved in this action, and averred that there were at the times the shipments involved were moved no rates authorized by the laws of the state of Arkansas and Texas for service and transportation of coal "which were capable of being applied to the shipments involved in this action at the time they were moved."

The Choctaw, Oklahoma & Gulf Railroad Company filed a similar answer and admitted that it is a corporation organized under the laws of Congress and owned a line of railway extending from the boundary line between the state of Arkansas and the Indian Territory through said Indian Territory and into Oklahoma Territory and connecting at El Reno, Oklahoma Territory, with the line of its codefendant. The plaintiff filed replies denying generally the allegations in the answers. The case was tried in February, 1916, at which time defendants demurred to plaintiff's evidence. The demurrer was overruled and exception saved. Thereupon defendants offered some evidence and a judgment was rendered in favor of the plaintiff for the sum of $3,281.55 as principal and $2,625 as interest, making a total of $5,906.55. Motion for a new trial was filed in due time and overruled and exception saved, and the case is here on petition in error.

C. O. Blake and R. J. Roberts, both of El Reno, W. H. Moore, of McAlester, J. E. DuMars, of El Reno, and K. W. Shartel, of Oklahoma City, for plaintiffs in error.

Chas. West, of Oklahoma City, for defendant in error.

RAMSEY, J. (after stating the facts as above). By the act of Congress approved February 18, 1888 (25 Stat. 35), the Choctaw Coal & Railway Company, a corporation created under the laws of the state of Minnesota, was granted the right of constructing, owning, equipping, and operating a line of railroad through the Indian Territory, beginning at a point on Red river (southern boundary line), at Rocky Cliff, in the Indian Territory, and running thence by the most practicable route through the Indian Territory to the western line of the state of Arkansas; it was also authorized to construct and operate a branch line from its main line in a northwesterly direction to the leased coal veins of the Choctaw Coal & Railway Company in the Choctaw Nation. Section 4 of said act is as follows:

"That said railway company shall not charge the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the states of Arkansas and Texas for services and transportation of the same kind: Provided, that passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a state government or governments shall exist in said territory within the limits of which said railway, or a part thereof, shall be located; and then such state government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state. * * *"

The Choctaw Coal & Railway Company becoming financially embarrassed, Congress by an act approved August 24, 1894 (28 Stat. 502), in furtherance of its reorganization, for the purpose of completing the road, provided that the purchasers of the rights of way, railroad, etc., at any sale made under or by virtue of any process or decree of court having jurisdiction—

"shall be, and are hereby, constituted a corporation and shall be vested with all the right, title, interest, property, possession, claim, and demand in law and equity, of, in, and to such rights of way, railroads, mines, coal leasehold estates, and property of the said Choctaw Coal & Railway Company, and with all the rights, powers, immunities, privileges, and franchises which have been heretofore granted to or conferred upon said company by any act or acts of Congress, or which it possesses by virtue of its charter under the laws of Minnesota."

Section 4 of that act provided that—

It would be lawful for such new corporation "to lease its railroads and mines and other

Digitized by Google

property to any company owning or operating a railroad connecting with the railroad of said new corporation on such terms and conditions as may be agreed upon."

The Choctaw, Oklahoma & Gulf Railroad Company, one of the plaintiffs in error, became the purchaser.

The coal hauled over the lines of defendants for the plaintiff and his assignors was shipped from within a radius of about 50 miles, including McAlester and Wilburton, Indian Territory, over the railroad line belonging to the Choctaw, Oklahoma & Gulf Railroad Company (successor to Choctaw Coal & Railway Company) to El Reno, Oklahoma Territory, where physical connection was made with the line of railroad owned by the defendant Chicago, Rock Island & Pacific Railway Company, and thence to Enid over the line of road belonging to the latter company. The Chicago, Rock Island & Pacific Railway Company purchased, under the authority of an act of Congress approved June 27, 1890 (26 Stat. 181), granting the Chicago, Kansas & Nebraska Railway Company power to sell and convey to the Chicago, Rock Island & Pacific Railway Company, all railway property, rights, and franchises of the Chicago, Kansas & Nebraska Railway Company "in the territory of Oklahoma and in the Indian Territory." Congress, by act approved March 2, 1887 (24 Stat. 446), granted a right of way to the Chicago, Kansas & Nebraska Railway Company, a Kansas corporation, through the Indian Territory, beginning at a point in the northern line of said territory, near the state of Kansas, crossed by the 101st meridian, thence southwesterly towards El Paso, and also a right of way beginning at a point on the south line of Kansas, near Caldwell, in Sumner county, thence to or near El Reno, and from thence in a southerly direction to the south line of the Indian Territory in the direction of Galveston, Tex. Section 4 of said Chicago, Kansas & Nebraska Railway Company Right of Way Act, approved March 2, 1887, provides:

"That said railroad company shall not charge the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the state of Kansas for services or transportation of the same kind: Provided, that passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a state government or governments shall exist in said territory within the limits of which said railway, or a part thereof, shall be located; and then such state government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state. * * *"

The coal shipped from points in the Indian Territory to Enid, for excessive freight charges on which plaintiff sues in this case, traveled over the line of the Choctaw, Oklahoma & Gulf Railroad Company to El Reno, and thence over the line of the Chicago, Rock Island & Pacific Railway Company to Enid. Before any of the shipments of coal complained of were made, the Chicago, Rock Island & Pacific Railway Company obtained a 999-year lease on the road of the Choctaw, Oklahoma & Gulf Railway Company and was operating the leased line with its other lines as a unit.

[1-5] Plaintiff's contention is this: That the act of Congress of February 18, 1888, granting the right of way to the Choctaw Coal & Railway Company, the predecessor of the Choctaw, Oklahoma & Gulf Railway Company, limited the maximum freight rate chargeable by that company and its successors to a rate equivalent to the rate for services and transportation of the same kind prescribed by the laws of Arkansas and Texas, and if there be a difference between the rates of Arkansas and Texas for the same service, "the lower of these two rates is the maximum, beyond which the railroads shall not charge," using the language of plaintiff's counsel. In other words, if Texas has a higher rate than Arkansas for the same services and transportation, the rate prescribed by Arkansas controls, and vice versa. Defendant contends that the so-called franchise rate of the Choctaw Coal & Railway Company is void for uncertainty, in that it is absolutely impracticable to apply the rates of two states or to ascertain from the language of the franchise act which state was intended to control in the event there was a conflict between the two; further, that the courts have no jurisdiction to pass on these questions, because the ascertaining of what is the correct rate is an administrative function, and not judicial. Defendants contend that by the act of Congress of February 4, 1887 (24 Stat. 379), under which the Interstate Commerce Commission was organized, authority to determine what rates controlled was conferred upon the Interstate Commerce Commission and the federal courts, and that consequently the state court has no jurisdiction. Plaintiff's theory is that he is not seeking to establish a rate but suing to recover the difference between illegal and excessive charges and the established rate prescribed by law, and if he be correct in his theory, state courts have jurisdiction to enforce his rights. If there was an established rate prescribed by law, then the question whether or not defendants charged more than that rate

Digitized by Google

is a question of fact, though in passing on the fact it may be necessary to construe the law. If plaintiff's theory is correct, the state court has jurisdiction because the relief he prays for involves merely the judicial determination of certain facts, and in no sense involves administrative functions. Plaintiff challenges the jurisdiction of the Interstate Commerce Commission to recognize rates filed by the defendants. The holding in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, is inapplicable on plaintiff's theory. Plaintiff is not seeking to recover the difference between reasonable and unreasonable freight rates. He contends that the act of Congress, by reference to the Arkansas laws, has prescribed a standard of rates, and that he has made out his case when he compares the freight charges made by the defendants and paid by him with the rates provided by the Arkansas laws. The difference is what he seeks to recover, and if he can get that far with his case the state court undoubtedly has jurisdiction. Pennsylvania R. Co. v. Puritan Coal Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Rock Milling & Elevator Co. v. Atchison, T. & S. F. Ry. Co., 98 Kan. 478, 158 Pac. 859; Spence v. Southern Ry. Co., 106 S. C. 169, 90 S. E. 750; McCullough v. Missouri Pacific Ry., 98 Kan. 710, 160 Pac. 214; Hardaway v. Southern Ry. Co., 90 S. C. 475, 73 S. E. 1021, Ann. Cas. 1913D, 266; Hilton Lumber Co. v. Atlantic Coast Line R. R. Co., 141 N. C. 171, 53 S. E. 823, 6 L. R. A. (N. S.) 225.

The first section of the Interstate Commerce Act of February 4, 1887 (U. S. Comp. St. § 8563 [1]) declares that its provisions shall apply to any common carrier or carriers engaged in the transportation of passengers or property by railway "from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, * * * or from any place in the United States to an adjacent foreign country," etc. The act authorized the appointment of commissioners and the organization of the Interstate Commerce Commission and conferred upon it certain powers and jurisdiction. The Commerce Act did not confer upon the Interstate Commerce Commission any jurisdiction over rates, passenger or freight, for the transportation of passengers or property wholly within a state or territory of the United States, but did expressly apply to carriers engaged in the transportation of passengers or property "from * * * a territory of the United States * * * to any other * * * territory of the United Sates," etc. The fact that the Commerce Act had no application to the transportation of passengers or property from one point in a territory to another point in the same territory largely accounts, in our judgment, for the provisions in the congressional railroad right of way acts, including the act approved February 18, 1888 (25 Stat. 35), granting a right of way to the Choctaw Coal & Railway Company, in which said railway company was prohibited from charging "the inhabitants of said territory [meaning the Indian Territory as it geographically existed at that time] a greater rate of freight than the rate authorized by the laws of the state of Arkansas, and Texas for services and transportation of the same kind." Likewise, it accounts for the limitations on the freight and passenger rates imposed on the Chicago, Kansas & Nebraska Railway by the act of Congress of March 2, 1887 (24 Stat. 446), declaring that—

"Said railroad company shall not charge the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the state of Kansas for services or transportation of the same kind."

[8] Likewise, other congressional acts granting rights of way through territories limited the amount of passenger and freight rates to the rate of some adjoining state prescribed for similar service. The limitation on rates prescribed by the various railroad right of way acts was evidently a makeshift; the rates of adjoining states were to be temporarily in force, not permanent, but merely to exist till a change in conditions brought the carriers under the scope of the Commerce Act. It is argued by plaintiff that, these various acts of Congress above mentioned, as well as others, having been passed after the Commerce Act, they are therefore special and cover subjects not within the scope of the Commerce Act. That is true so long as the territory remained a territory, but when it became a state, or subdivided into territories, the Commerce Act became operative, or rather, more accurately speaking, the railroads came within the scope of the Commerce Act. The Commerce Act was not stationary, fixed and bounded by geographic limitations. It was prospective; it looked to the future as well as the then present. Not until the Hepburn Act, approved June 29, 1906 (34 Stat. 584), was the Interstate Commerce Commission given jurisdiction over rates "from one place in a territory to another place in the same territory." The rate-making power is legislative and not judicial. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 480, 17 Sup. Ct. 896, 42 L. Ed. 243; Loomis v. Lehigh Valley R. Co., 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517; Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Pioneer Telep. & Teleg. Co. v. City

Digitized by Google

of Bartlesville, 40 Okl. 583, 139 Pac. 694; Shawnee Gas & Electric Co. v. Corporation Com., 35 Okl. 454, 130 Pac. 127.

[10-12] Railroad building probably reached its greatest impetus in the '80's; they wound their sinuous course across state lines, penetrated all the territories, and invaded every frontier from ocean to ocean. They tapped the great marts of trade and gathered up passengers and freight in the great metropolitan cities; at the same time they passed over vast scopes of country frequently inhabited only by rattlesnakes and prairie dogs. Thus, what was reasonable compensation for carrying freight and passengers became a vast, complex problem, involving too many details to be worked out by Congress and state Legislatures. Direct legislative control was too cumbersome and impracticable, and thus state Legislatures and Congress found it, not only expedient, but absolutely necessary, to create commissions and boards, to which legislative and administrative functions were delegated, to deal with these great carriers, so that justice might be worked out between the shippers, the public, and the railroads. Courts may appeal to the historical facts contemporaneous with the enactment of legislation by Congress or the state Legislature to aid them in arriving at the true meaning, scope, and effect of such legislation. The history of the times during which a law was enacted tends strongly to disclose the reasons for the act, and therefore the evils sought to be remedied. As said in United States v. Union Pac. R. Co., 91 U. S. 72, 23 L. Ed. 224:

"Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

Whenever light can be derived from such sources, the courts will take judicial notice of the facts of contemporaneous history, the prior state of the law, the particular abuse or defect which the act was meant to remedy, and will then apply the language of the act to such state of affairs. Davison v. Gibson, 56 Fed. 446, 5 C. C. A. 543; De Graffenreid v. Iowa Land & Trust Co., 20 Okl. 716, 95 Pac. 624; People v. Supervisors of Columbia County, 43 N. Y. 130; Lake v. Caddo Parish, 37 La. Ann. 788; United States v. Oregon & C. R. Co., 57 Fed. 426; Rector of Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

For a history of commissions created in the various states invested with legislative and administrative authority over carriers and public utilities, see the opinion of Mr. Justice Brewer in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 480, 17 Sup. Ct. 896, 42 L. Ed. 243. Neither the Interstate Commerce Commission nor any other commission or board was created and endowed by Congress with legislative and administrative authority to pass on or regulate rates of common carriers within the territories until the Hepburn Bill, passed in 1906. Realizing the difficulties confronting Congress in a direct effort to regulate rates to be charged by common carriers within the territories, and realizing that the Interstate Commerce Commission had no jurisdiction, under the Commerce Act of February 4, 1887, over passenger and freight rates from points to points within a territory, Congress left the railroads to fix their own rates not to exceed, however, the lawful rates prescribed by certain states adjoining said territories. But each of the acts granting railway rights of way and placing limitations upon the maximum rates chargeable by reference to the laws fixing rates in adjoining states reserved, unnecessarily however, the right of Congress to control such rates, and generally provided that when a state or states were erected out of said territory, intrastate rates would pass under the jurisdiction of the state government. Neither the act of Congress of March 2, 1887, granting the right of way to the Chicago, Kansas & Nebraska Railway Company, limiting the freight rates to the maximum rates prescribed by Kansas for services or transportation of the same kind, nor the act of February 18, 1888, granting the right of way to the Choctaw Coal & Railway Company, limiting the maximum rates to those prescribed by the laws of Arkansas and Texas for services and transportation of the same kind, constituted an irrevocable freight and passenger rate contract. The rates prescribed were merely limitations on the maximum amount and not a guaranty or contract for a maximum rate. Consequently, Congress, especially with the consent of the railway companies, could alter or change the rates and certainly allow a greater rate. The Choctaw Coal & Railway Company Right of Way Act of February 18, 1888, simply provided that—

The railway "shall not charge the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the state of Arkansas and Texas for services and transportation of the same kind."

[6-8] On May 2, 1890, Congress passed an act (26 Stat. 81) known as the Oklahoma Territorial Organic Act. Under that act approximately one-half of the then Indian Territory, the western half, and that part in which El Reno and Enid are located, became an organized territory with its local Legislature, with authority to pass laws pertaining to all rightful subjects of legislation "not inconsistent with the Constitution and laws of the United States." The territory was given a Governor, with authority to exercise the executive powers; territorial courts were

Digitized by Google

authorized and the territorial government had the power to tax property for the expenses of the territorial government; and, in short, the Oklahoma Territory became an organized political entity with the usual and customary powers, legislative, judicial, and executive, exercised by the various organized territories of the United States. What is now the state of Oklahoma constituted approximately Indian Territory prior to the Oklahoma Territorial Organic Act of May 2, 1890. The Indian Territory at that time was an unorganized territory without any political entity, and controlled and governed by the United States through the federal Congress and the Executive Department. After the territory of Oklahoma became an organized political entity, with certain legislative, executive, and judicial powers, all that part within the geographical limits of the remaining part of the Indian Territory—the part left after carving out the organized territory of Oklahoma—remained an unorganized territory, subject to the legislative, executive, and judicial powers of the United States, to be exercised and administered under the direction of Congress. Clause 2 of section 3 of article 4 of the federal Constitution declares that—

"Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Under that section of article 4 of the federal Constitution, and the principles announced in United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, the United States possessed full sovereignty over the Indian Territory as a territory of the United States. Light v. United States, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570; Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534; Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845; Hallowell v. United States, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750; Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. Neither the plaintiff nor his assignors were inhabitants of the Indian Territory, as that territory must be defined, at the time the shipments complained of were made. The shipments were transported from a place of origin within the Indian Territory to a place of destination in Oklahoma Territory. From its organization, Oklahoma Territory was just as separate and distinct from the Indian Territory as any other organized territory of the United States. The Oklahoma Territorial Organic Act of May 2, 1890, operated to cut the Indian Territory into two separate territories, one organized and the other unorganized, and immediately and concurrently with the creation of the territory of Oklahoma the transportation of passengers and property by railroad "from * * * territory of the United States * * * to any other territory of the United States" fell under the jurisdiction of the Interstate Commerce Commission.

The creation of a new state or new territory did not confer any new abstract jurisdiction on the Interstate Commerce Commission; the Interstate Commerce Act, however, was intended to lay hold of transportation from a territory to a territory, or from a state to a state, or from a territory to a state, or from a state to a foreign country or the District of Columbia, or a territory to the District of Columbia, without regard to the geographical boundary lines of the territories at the time it was passed. We therefore hold that the provisions of the Choctaw Coal & Railway Company Right of Way Act of February 18, 1888, prohibiting the railway from charging the inhabitants of the Indian Territory a greater rate of freight than authorized by the laws of the states of Arkansas and Texas for services and transportation of the same kind, were superseded, abrogated, and annulled by the Oklahoma Territorial Organic Act of May 2, 1890, in so far as shipments from the place of origin in the Indian Territory to points of destination in Oklahoma Territory are concerned.

The defendants complied with the provisions of the Interstate Commerce Act and filed with the Interstate Commerce Commission their tariff rates on shipments from the Indian Territory to points of destination in Oklahoma Territory. Whether the tariff rates filed were reasonable then became a question for the Interstate Commerce Commission. While it is well settled at common law that a carrier is liable in an action in court for damages on account of excessive charges, the jurisdiction of the courts to pass upon the reasonableness of rates and charges was superseded by the Commerce Act. The purpose of the Commerce Act was to bring about uniformity in freight rates. When a carrier filed its tariff with the Commission it then became a question for the Commission to determine whether or not the charges were excessive, and it had jurisdiction to investigate that question and make an order of reparation. Uniformity in rates being one of the main purposes of the Commerce Act, it is obvious that no such uniformity could be maintained if the courts continued to exercise jurisdiction to determine the reasonableness or unreasonableness of the rates charged. No uniformity of rates could be maintained if their reasonableness was left to the fluctuating verdicts of juries and the divergent views of respective courts, and, this being true, the Commerce Act must be construed as operating to oust the courts of jurisdiction to pass on this question. See Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 440, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

Digitized by Google

There being no allegation that the reasonableness of the tariff and schedule of rates filed with the Commerce Commission and charged the plaintiff and his assignors by the defendants had been passed upon and condemned by the Commission, it is obvious that the plaintiff's petition did not state facts sufficient to constitute a cause of action. Then, besides, we cannot agree with the contention of plaintiff in his construction of section 4 of the Choctaw Coal & Railway Right of Way Act of February 18, 1888, prohibiting the railway from charging inhabitants of the territory "a greater rate of freight than the rate authorized by the laws of the state of Arkansas and Texas for services and transportation of the same kind." As stated, plaintiff contends that Congress, by reference to the laws of Arkansas and Texas, intended to limit the railway to the maximum charges allowed by the laws of Arkansas, if Arkansas' laws are less than those of Texas, or Texas' rate, if the Texas rate should be less than that of Arkansas. If section 4 can be applied, which we gravely doubt on account of its uncertainty, it seems just as clear that the railroad would have the right to charge the greater rate prescribed by either of said states, that is, if Texas prescribed a greater rate than Arkansas, the railway would have the right to adopt the Texas rate. But how do we know, or how could the railroad company know, which of the two rates is to be applied? It is just as reasonable to apply the high rate of Texas as to apply a lower rate of Arkansas, and while it is the duty of the court to sustain the validity of legislation unless it is so utterly uncertain that it cannot be applied nor its meaning ascertained, nevertheless, the uncertainty in this act, coupled with the fact that the Rock Island Railway also operated under a right of way act limiting its maximum charges to the rates prescribed by the laws of Kansas over that part of its road from El Reno to Enid, renders its working application to the facts in this case impossible. The overcharges sought to be recovered by the plaintiff were made on coal shipped from the McAlester and Wilburton coal fields in the Indian Territory over the Choctaw line to El Reno, and thence over the Chicago, Kansas & Nebraska line, now owned by the Rock Island, to Enid. Plaintiff contends the Arkansas rates control, but they cannot control from El Reno to Enid, and there is neither allegation nor proof in this case showing what the overcharges amounted to from the coal fields in the Indian Territory to El Reno. The Interstate Commerce Commission in Haines v. Chicago, Rock Island & Pacific Railway Co., 13 Interst. Com. Com'n R. 216, discusses this very uncertainty in the act in an able opinion by Commissioner Lane, subsequently Secretary of the Interior. Commissioner Lane said:

"The Interstate Commerce Commission is a creature of statute, and its authority is derived from the act of Congress creating the Commission and the various amendments thereto. Its function is to administer the Act to Regulate Commerce; not to enforce conditions found in federal or other charters. And while a violation of the conditions of the acts of Congress granting the rights of way may be ground for forfeiture, the remedy would be through the courts.

"Moreover, the indefinite language of the legislation makes it impracticable to give application to its provisions. What certainty, for instance, is there in the provision that rates shall not be greater than are charged in three other state jurisdictions, when each of those states has a commission with authority to fix rates? Naturally, in the proper performance of their duties, these several commissions take into consideration in fixing rates on special commodities peculiar conditions incident to the transportation of the several commodities within their respective states. This statement makes it evident that the several standards could not be made the measure of rates in Oklahoma. Applying it to the particular case here under consideration, Kansas, Arkansas, and Texas have rates which are different for the transportation of coal for equal distances, and each of these commissions changes the rates within its jurisdiction whenever, in its judgment, the public interest requires.

"Again, the two rights of way here concerned were granted to separate and distinct corporations. In granting one right of way Congress provided that the rates should not be higher than prevailed in Kansas. In granting the other right of way it provided that the rates should not be higher than in Arkansas 'and' Texas. Since the passage of these acts, the two carriers have become consolidated into one system and are operated as a unit. In some of the instances complained of rates are made over the lines of what were formerly two carriers, but now one. Should it be held that the acts of Congress were to determine the rate, which would be the standard adopted —the Kansas, the Arkansas, or the Texas rate? And, if either were selected, could the rate in that state be applied over what was formerly two carriers?

"These are only a few of the insurmountable difficulties which would render it impracticable to give effect to the conditions under the acts of Congress referred to, even were we to hold that the provisions in such special acts conferred jurisdiction on this Commission, a position legally untenable. The only measure of the power of this Commission is found in the Act to Regulate Commerce, as amended."

It is unnecessary for us to consider the other questions discussed in the able briefs of counsel for the respective parties. In our opinion, the Interstate Commerce Commission Act of February 4, 1887, became the applicable law immediately upon the passage of the Oklahoma Territorial Organic Act of May 2, 1890. The Choctaw Coal & Railway Right of Way Act, undertaking to limit the maximum freight charges to those prescribed by the

Digitized by Google

laws of Texas and Arkansas, had served its purpose, became functus officio and no longer controlling with respect to shipments made from the Indian Territory to points of destination in the Oklahoma Territory. If not void for uncertainty (International Harvester Case, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284; Andrew Jackson, ex parte, 45 Ark. 158; Jones' Blackstone, book 1, § 127; Black on Interpretation of Laws, pp. 75 and 105), the maximum rate prescribed by section 4 of the Choctaw Coal & Railway Right of Way Act was confined in its application to the Indian Territory after Oklahoma Territory was cut off and organized, and had no application to interterritorial shipments.

The judgment is reversed and the cause remanded to the district court of Garfield county, with directions to dismiss plaintiff's case at his cost.

RAINEY, C. J., and HARRISON, PITCHFORD, JOHNSON, and McNEIL, JJ., concur.

JONES v. STATE. (No. A-3458.)*

(Criminal Court of Appeals of Oklahoma. July 10, 1920.)

(Syllabus by the Court.)

1. Criminal law ⟸404(4)—Decedent's clothing held admissible to show relative position of decedent and defendant and location of wounds.

On a trial for murder by shooting, where the plea is self-defense, the clothing worn by decedent at the time he was shot, when identified, is admissible in evidence as tending to show the relative position of decedent and defendant at the time the shots were fired, and for the purpose of showing the location of the wounds.

2. Criminal law ⟸404(4)—Witness may point out how holes in clothes worn by decedent correspond with wounds.

On a trial for murder, it is not error to permit a witness to exhibit to the jury the clothes worn by decedent at the time he was shot, and to point out and demonstrate how the holes in the garments corresponded with the wounds in the body.

3. Witnesses ⟸274(2) — Character witness may be cross-examined as to reports of acts inconsistent with good character previous to crime charged.

A witness to good character may be asked on cross-examination whether he has heard rumors of particular and specific charges of the commission of acts inconsistent with the character which he was called to prove. This is admissible, not for the purpose of establishing the truth of such reports, but to test the credibility of the witness, and to determine the weight of his evidence. However, such reports, to be admissible, must be confined to a time previous to the commission of the crime charged.

4. Homicide ⟸336—Order for view will not be reviewed, unless prejudicing defendant's substantial rights.

Where, in a trial for murder, a view of the place where the offense charged was committed is directed by the court upon the request of the county attorney under section 5897, Rev. Laws, providing that "when, in the opinion of the court, it is proper that the jury should view the place in which the offense was charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body," etc., the action of the trial court will not be reviewed by this court, unless it is made to appear that the court acted arbitrarily and abused its discretion, under circumstances which tend reasonably to indicate that the substantial rights of defendant were prejudiced thereby.

5. Criminal law ⟸829(1)—Requested instructions properly refused, when covered by those given.

The refusal to give requested instructions is not error, where those given fairly and fully present every phase of the case.

6. Homicide ⟸255(3) — Evidence sustaining conviction for manslaughter in the first degree.

In a prosecution for murder, the evidence reviewed, and *held* amply sufficient to sustain the conviction for manslaughter in the first degree.

Appeal from District Court, Muskogee County; Chas. G. Watts, Judge.

Xenophon Jones was convicted of manslaughter in the first degree, and he appeals. Affirmed.

Under an indictment which charged him with the murder of Guy F. McIntyre, in Muskogee county, on or about the 30th day of October, 1917, Xenophon Jones was convicted of manslaughter in the first degree, and sentenced to serve a term of 25 years in the penitentiary. The following is in substance the evidence in the case:

Dr. F. J. Wilkiemeyer, testified:

That he was the attending physician to Guy F. McIntyre, from October 30th until his death on November 8th; that he found an abdominal wound, which entered about an inch above the pubic bone, and a wound on the right leg just below the head of the femur, and in the back just under the left shoulder there was another gunshot wound. He identified the clothes worn by the deceased when he reached him, and pointed out rents appearing in the clothing which corresponded with the wounds; that the gunshot wound in the abdomen, which punctured the intestines, was the cause of his death.

R. Y. Edwards testified:

That "I am connected with the Muskogee Tire Repair Company, doing business at 231 North

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 7, 1920.

Digitized by Google

Fourth street, Muskogee; Guy F. McIntyre was manager. Between 5 and 6 o'clock in the evening of October 30th, defendant, Jones, came to this place to get an automobile tire. Guy F. McIntyre was sitting at a desk in the front room. C. E. Airhart and George Smith, a colored man, were working in the next room. Defendant asked for the tire that he had left there. I said it must be in the next room. I went in there, and defendant followed me. I asked George Smith where the tire was, and he said, 'Here it is.' I turned around and said, 'George will get your tire for you.' I stepped back into the front room. I heard defendant say he didn't want that tire fixed that way. Mr. Airhart said: 'That is the only way it could be fixed and fixed right.' Defendant said: 'Of course you would say that. I didn't tell anybody to fix it that way, and I am not going to pay for it.' And he asked where the proprietor was, and either Airhart or Smith said: 'He is in the other room.' Defendant came back into the front room and, addressing McIntyre, said: 'I didn't tell you to fix that tire that way; I didn't want it fixed that way.' McIntyre said: 'I understood you to say you wanted it vulcanized.' Defendant said: 'You are a God damn liar; I didn't say any such thing.' McIntyre said: 'You can't talk that way in here; I will give you your tire and you can get out.' With that McIntyre got up from the desk and went back into the next room, and defendant followed him. I heard defendant remark to McIntyre that he would talk to him any damn way he pleased, and immediately I heard four shots in rapid succession. I rushed in between McIntyre and defendant, just as the last shot was fired. McIntyre reached for the table and fell on the floor. McIntyre did not have anything in either hand, and was about six feet from defendant when he was shot. I said to defendant, 'Don't do that; don't shoot a man that way; it is an awful thing to shoot a man that way;' and he began to back out. When he got about in the middle of the front room, he turned and ran out the door, and across the street, and got into his automobile. A colored boy came into the front room with defendant and followed him out. The shooting occurred between 5:30 and 6 o'clock in the afternoon on the 30th day of October, 1917. I stepped to the phone and called Dr. Wilkiemeyer and called Mrs. McIntyre."

C. E. Airhart testified:

"I am an employé of the Muskogee Tire Repair Company, and was working for this concern on the 30th day of October last; Guy F. McIntyre was manager. Mr. Edwards and George Smith, a negro boy, were working there at the time. I saw defendant enter. I was standing in front of the rack in the second room, sometimes called the middle room. Mr. Edwards came in there with him, and asked George Smith where was his tire. George pointed up to the tire, which was hanging on an arm, and said: 'Here it is; it is cut down and cemented; it will be out first thing in the morning. Defendant said: 'I did not want it repaired that way.' George said: 'Well, you will have to see the boss about that.' I told defendant that was the only practical way to repair the tire. He said he only wanted a puncture fixed and a boot put on. I told him it would not hold that way; it would have to be vulcanized to make it hold; and he said, 'Of course, you will say that; where is the proprietor?' I told him, 'In the front room.' He walked out. I heard him say, 'Who is the proprietor here?' Some one said, 'I am;' he said, 'I didn't want my tire vulcanized; just wanted the puncture fixed, and a boot put on it;' and the reply was, 'We understood you wanted it vulcanized.' Defendant said, 'You are a God damn liar; I didn't want it fixed that way.' The partition, 7 or 8 feet high, extends half way up to the ceiling, and I could not see over it. As Mr. McIntyre walked in to the second room, he said, 'You can't talk to me like that in here; I will get your tire and you can get out.' Defendant said, 'I will talk to you as I God damn please;' he was just inside of the door of the second room, and Mr. McIntyre was walking along by the work bench, with his back to defendant. McIntyre stopped and turned partially around, and defendant pulled an automatic pistol from his right hip pocket and fired four shots. McIntyre put his hands on his abdomen and fell to the floor. Defendant held his gun for a minute, and backed out of the room; turned, and ran out, and jumped in his car, and drove off. Barnett, the colored boy who came in with him, followed and grabbed the car while it was in motion, and climbed in the back seat. McIntyre was about 8 feet ahead of the defendant when he was shot."

George Smith testified:

"I was working for the Muskogee Tire Repair Company. Xenophon Jones came there that evening to get his tire, or see about a tire, that he left there to be fixed. I was standing at the end of the work bench repairing a tube. Mr. Airhart was working at the bench. Mr. Edwards came in and asked me where Jones' tire was, and Xenophon spoke and said, 'I want to get my tire George.' I said, 'It is all cut down and cemented, and will be out the first thing in the morning.' He said, 'I didn't order anything but the tube vulcanized and the boot put back over the hole.' I said, 'I don't know anything about that; you will have to see the boss.' The next thing I saw Xenophon was standing facing Mr. McIntyre, and I heard him remark, 'Ain't my word as good as yours?' I went into the back room, and four shots were fired just as I went in the door. I came back, and saw Mr. McIntyre lying there on his side and holding his stomach; he told me to come and do something for him. Xenophon was backing out. Mr. Edwards was talking to him. I put a coat under Mr. McIntyre's head. A colored boy named Barnett came in with Xenophon and was waiting for him in the front room."

On the part of the defense J. T. Lane testified:

"I run a barber shop; during the noon hour I went to the Muskogee Tire & Repair Shop, and made an examination on the inside partition of the second room, and found two indentures in the wall, about five feet above the floor, near the jamb of the door. I picked up

Digitized by Google

a piece of iron from the table and fitted it in these indentures, and it seemed to fit perfectly. Mr. Crump was with me."

Charley Kimsey testified:

"I visited the Muskogee Tire & Repair Shop this morning, and made an examination of the partition wall, and observed a dent there, and a piece of iron that was there; it fitted the dent in the wall. Judge Leahy pointed the dent out to me."

J. P. (Creek) Barnett testified:

"I am a Creek Freedman; my age is 22 years. I went to the tire shop with Xenophon Jones. I heard George Smith say to Xenophon, 'You will have to go to the front and see the boss.' Xenophon came back into the front room and asked for the boss. Mr. McIntyre said: 'It makes not a damn to you who is boss here; what are you raising all of that hell back there for?' Xenophon said: 'I was not raising any hell back there; I told George that I ordered my tube vulcanized and not my casing.' Mr. McIntyre says, 'You are a damn liar; you didn't tell me any such thing;' and he jumped up and said, 'I want you to get that tire, and get out damn quick, before I kick you out.' Xenophon walked in to the second room, and Mr. McIntyre rushed on through. Xenophon says, 'Can't you be a damn liar as well as I; ain't my word as good as yours;' and Mr. McIntyre reached under the table and at the same time says, 'What do you mean by calling me a damn liar,' and came back and struck at Xenophon with an iron of some kind 2½ feet long, and the iron went over his head and hit the wall; at the same time Mr. McIntyre hit Xenophon with his left hand; Xenophon pushed him back, and I heard the shots. This all occurred in 30 seconds; Xenophon turned and walked out to his automobile. He says, 'Come on,' and I followed and jumped on the running board and he drove home."

As a witness in his own behalf Xenophon Jones testified:

"I live in Muskogee; I will be 17 years old next month. I am on the Creek Freedman roll. Between 12 and 1 o'clock that day I took an inner tube to the repair shop on North Fourth street to be repaired, and left it with the gentleman I later had trouble with; when I had the puncture, I wanted this colored boy George to fix it, and I came there. I told this man I wanted to get this tube repaired, and asked him what time he could get it out. He said, 'About 4 or 5 o'clock.' I went back there with this colored boy, J. P. (Creek) Barnett. On the way I stopped at home to get my sweater, and my mother told me to bring the pistol back to the barn. It was my uncle's 32 automatic pistol. I then went to the Muskogee Tire & Repair shop. George Smith was at the work table in the second room, and I said to him, 'I want to get my tire, George;' and he said, 'It is not ready; it is on the drying rack;' and he reached up to get it down, and there were two blocks of wood on the inside of the casing, and some kind of sticky substance on the tire, and I said I didn't want the casing vulcanized; I only wanted the tube fixed, and he said, 'This is the order we got from the boss; you will have to see the boss.' I turned around, and went into the office, and said: 'Which one of you gentlemen is the boss;' and one of the gentlemen sitting at the desk looked at me and said, 'What the hell difference does it make to you who is the boss?' and 'Why are you raising all that hell back there?' I says, 'I beg your pardon, I was not raising any hell;' and he said, 'You know damn well you wanted that casing fixed.' I said, 'No, sir; you are mistaken.' He said, 'You are a damn liar, and you know damn well you told me you wanted that casing fixed.' I said, 'No, sir; you are mistaken; ain't my word as good as yours;' he said, 'No, it is not; you are a damn liar, and don't you say another damn word while you are in here, and you get that tire and get it out before I kick you out.' When he said that, I stepped inside of the door, and he came by me and started on towards this table; he passed me, cursing and calling me a damn liar, and a damn black son of a bitch; that I knew damn well I wanted that casing fixed, and if I said anything else about my word being good as his he would knock my damn brains out. I said, 'I hope I don't have to be all that because you made a mistake in vulcanizing my casing;' and I said, 'Can't you be a damn liar as well as I can?' and he said, 'No, you God damn little black son of a bitch;' and he grabbed something off the table. I said, 'Don't you hit me!' and he rushed onto me and hit at me with it. I dodged it, and it hit the wall over me, and he hit me along my right cheek with his left fist. I shoved him back, and pulled out the pistol, and as I got it out it went off, and he rushed on me again, and I fired three shots as fast as I could fire, and he fell on the floor. I turned around and walked out and got into my car. Barnett was standing on the curb, and I said, 'Come on, J. C., and get in the car.'"

Johnnie Myers testified:

"I am a Creek freedman. Xenophon Jones came to my place the night Mr. McIntyre is said to have been shot, and he had a bruise about the size of a nickel on his face that evening."

Mattie Myers testified:

"Xenophon Jones came to my place that night about 10 or 11 o'clock, and on the side of his face was a scratch or bruise about the size of a quarter."

Thomas W. Leahy testified:

"I was called in this case the night of the shooting, and went to Johnnie Myers' house the morning after the shooting, to bring defendant to Muskogee and deliver him over to the sheriff. I observed a bruise on his right cheek, probably about the size of a quarter."

Several witnesses testified that they were acquainted with the general reputation of the deceased as to being a quarrelsome, contentious, and overbearing man, and it was bad. Several witnesses testified that they were acquainted with the general reputation of defendant as to being peaceable, quiet, and law-abiding, and that reputation was good.

In rebuttal Kelly Brown, J. A. Barbre, and Chas. B. Law testified that at the noon hour

Digitized by Google

that day they visited the place of business of the Muskogee Tire & Repair Company, and examined the indentations on the partition between the front and middle rooms; that there were two dents, one was more like a scratch, and the other, three or four inches from it, was the depth of the thickness of a sheet of paper; that they placed the piece of iron which was introduced in evidence thereon, and it did not fit the dents. One dent was nearly twice the width of the same, and the other was about a quarter of a inch wider.

Several witnesses testified that they well knew the reputation of the deceased as to being a peaceable, quiet, and law-abiding citizen, and that it was good.

Thomas W. Leahy, S. M. Rutherford, and W. J. Crump, all of Muskogee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. (after stating the facts as above). Xenophon Jones was indicted in the district court of Muskogee county for murder, and upon his trial the jury returned a verdict finding him guilty of manslaughter in the first degree, leaving the punishment to the court. On March 20, 1918, the court rendered judgment and sentenced him to imprisonment in the penitentiary for a term of 25 years. To reverse the judgment he prosecutes this appeal.

It appears that deceased, Guy F. McIntyre, was a resident of Muskogee; he was a young man with a family, consisting of a wife and two children. Defendant, Jones, a negro boy, lived with his parents in Muskogee. The difficulty which resulted in the tragedy arose between deceased, who was manager of the Muskogee Tire Repair Company, and defendant, over the repair of an automobile tire. Defendant shot deceased three times with a 32-caliber automatic pistol. One shot took effect in the back, another in the hip, and another took effect in the abdomen, which proved fatal. The theory of the state was that it was an unprovoked killing. Defendant's evidence suggests the theory of self-defense.

[1] The first assignment of error necessary to notice is that the court erred in permitting the witness Dr. Wilkiemeyer to testify that the wounds in the body of deceased corresponded to the holes in the clothing of deceased introduced in evidence, and in placing said clothing upon the back of another, and pointing out and demonstrating how the holes in the garments corresponded to the wounds in the body. It is urged that this was demonstrative testimony, and that there was lacking evidence of the size of the deceased in comparison to the size of the person on whose back the clothing was placed.

[2] It is the settled rule in this state that on a trial for murder, where the plea is self-defense, the clothing worn by the deceased at the time of the homicide, and which shows the point of entrance of the bullets, is admissible in evidence, for the purpose of showing the location of the wounds, and to enable the jury to form an estimate of the relative position of the parties when the shots were fired. In the case of Saunders v. State, 4 Okl. Cr. 264, 111 Pac. 965, Ann. Cas. 1912B, 766, it is held that a coat worn by deceased at the time of the homicide, and which shows the point of entrance of the fatal bullet, was admissible in evidence. In the opinion it is said:

"The coroner, who was also a physician, testified that one bullet entered about six inches below the angle of the scapula, and about four inches to the right of the spine; the other wound was in the buttock. The garments were competent in corroboration of this evidence, and for the purpose of showing exactly what was inexactly stated. Nor is the state required in such cases to stand on the oral testimony of one or two witnesses, without supporting their testimony by demonstrative evidence; nor can the state be precluded from offering such evidence by a general statement, made by the defendant's attorney in objecting to the evidence, that 'there has been no dispute raised as to the mortality or location of the wounds.'"

And see Burton v. State, 16 Okl. Cr. —, 185 Pac. 842; Brantley v. State, 15 Okl. Cr. 6, 175 Pac. 51.

[3] The next assignment is:

"Misconduct on the part of P. A. Gavin, special counsel for the state, in the cross-examination of Mrs. J. A. Green, who as a character witness testified to defendant's good reputation as to being peaceable, quiet, and law-abiding."

On her cross-examination this witness was asked:

"Question by Mr. Gavin: Well, did you ever discuss about defendant having had a fight up here with a negro in a garage, in which he pulled a gun on him? (Defendant objects as incompetent, irrelevant, and immaterial, and not proper cross-examination.)

"The Court: Sustained.

"By Mr. Gavin: Have you ever heard of that circumstance? (Same objection.)

"The Court: That would not disprove what she has testified to; the specific act does not constitute one's general reputation.

"Mr. McGinnis: This is to test the knowledge of the witness of the matters about which she offers testimony.

"The Court: I don't see that it is competent. Objection sustained."

The question involved has heretofore been decided by this court in Pope v. State, 15 Okl. Cr. 162, 175 Pac. 727. It was there held that:

"A witness to good character may be asked on cross-examination whether he has heard rumors of particular and specific charges of the commission of acts inconsistent with the character which he was called to prove. This is admissible, not for the purpose of establish-

Digitized by Google

ing the truth of such reports, but to test the credibility of the witness and to determine the weight of his evidence."

And see Stouse v. State, 6 Okl. Cr. 415, 119 Pac. 271. Russell v. State, 16 Okl. Cr. —, 192 Pac. —;[1] Underhill, Crim. Ev. par. 82.

We think the cross-examination of this character witness was proper, and that the court erred in favor of defendant in sustaining the objections made.

[4] Another assignment of error is that the court erred in permitting the jury, over the objection and exception of defendant, to visit the scene of the difficulty and examine and view the marks or indentations on the wall, about which testimony had been given. Our Code of Criminal Procedure (section 5897, Rev. Laws) reads as follows:

"When, in the opinion of the court, it is proper that the jury should view the place in which the offense was charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by a person appointed by the court for that purpose, and the officers must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time."

It appears from the record that in the course of the trial the county attorney requested the court that in the manner prescribed by law the jury be sent to view the place where the offense was committed and to view the indentations on the partition about which testimony has been offered. Defendant objected, for the reason that the room where the homicide was committed had been changed since the shooting, which objection was overruled, and exception allowed. The action of the trial court in permitting a trial jury to view the scene of a homicide will not be disturbed by this court, unless it is made to appear that such court acted arbitrarily and abused its discretion, under circumstances which tend reasonably to indicate that the substantial rights of defendant were prejudiced thereby. Starr v. State, 5 Okl. Cr. 440, 115 Pac. 356; Seigler v. State, 11 Okl. Cr. 131, 145 Pac. 308. It was the privilege of the defendant and his counsel to accompany the jury, and we presume they did so. If they did not, the privilege was waived. We find nothing in the record that tends to show that the court abused its discretion in overruling defendant's objections.

[5] Other errors assigned are based on exceptions taken to certain instructions given and to the refusal of the court to give instructions requested. The court, among other instructions, gave the following:

"(13) You are further instructed that evidence has been introduced to the effect that the deceased in his lifetime bore a general reputation as being a man of a quarrelsome, contentious, and overbearing disposition, and that the defendant, prior to the fatal difficulty, bore a general reputation as a peaceful, quiet, and law-abiding man. You are therefore instructed that this evidence is competent and proper, tending to show who was the probable aggressor at the time of the fatal difficulty."

(Given, and excepted to by defendant. Chas. G. Watts, Judge.)

The court then refused the following instruction, asked by defendant:

"You are instructed that the defendant has introduced proof to the effect that he has always had the reputation of being a peaceable, quiet, respectful, law-abiding boy, and you are instructed that such evidence is proper for your consideration, together with all the other evidence in the case, and should be considered by you in determining the guilt or innocence of the defendant, and as to who was probably the aggressor in the difficulty."

Thus it appears the requested instruction was substantially embodied in the instruction given, and defendant had the full benefit of the principle involved. The court, therefore, committed no error in refusing to repeat it. Taken as a whole, the instructions given covered every phase of the case, and were more favorable to defendant than he had any legal right to demand.

One of the grounds of the motion for new trial, and which is assigned as error, is newly discovered evidence to the effect that the mark or indentation on the wall, about which testimony was given, was tampered with after having been examined by defendant's witnesses, and before it was viewed by the jury. The affidavits filed by defendant in support of his motion for a new trial are to the effect that the indentations were tampered with, in that they had the appearance of having been rubbed over, which indicated a difference in the original depth of one thirty-second of an inch. There is nothing to show that they were tampered with before the verdict in this case was returned, and the motion for new trial was properly overruled.

[6] Upon the merits, the evidence for the state establishes an unprovoked murder, and as to defendant's testimony in support of the self-defense theory the proof was overwhelmingly the other way. In our view, the jury were exceedingly lenient under the circumstances in fixing the degree of the crime. As shown by the record, defendant has had a fair and impartial trial under the laws of the state.

The judgment of the lower court is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

[1] Rehearing granted.

Digitized by Google

WILLIAMS v. STATE. (No. A-3018.)

(Criminal Court of Appeals of Oklahoma. Nov. 1, 1919. Rehearing Denied May 29, 1920.)

(Syllabus by the Court.)

1. **Criminal law ⟸1151—Application for continuance in discretion of trial court.**

Applications for a continuance on the ground of the absence of material witnesses are addressed to the discretion of the trial court; and, unless there appears to be a manifest abuse of such discretion, the judgment of conviction will not be reversed because a continuance was denied.

2. **Criminal law ⟸594(1)—Denial of continuance proper where no probability of different result.**

For reasons showing no abuse of discretion in overruling the application for a continuance in this case, see body of opinion.

3. **Rape ⟸3—Proof of defendant's age a matter of defense—Statute.**

Section 2415, Rev. Laws 1910, providing, "Nor can any person be convicted of rape on account of an act of sexual intercourse with a female over the age of fourteen years, with her consent, unless such person was over the age of 18 years at the time of such act," construed, and *held*, that proof that the defendant was over the age of 18 years at the time of the commission of the alleged act is not indispensable to a conviction; the age of the defendant being a matter of defense, and not a material element of the crime.

4. **Criminal law ⟸1144(½, 17) — Presumption of regularity of proceedings below—Session of court.**

On appeal, all presumptions favor the regularity of the proceedings in the trial court. Where judgment was pronounced against the defendant less than two days after the rendition of the verdict, without objection on his part, the presumption will be entertained in this court that the trial court did not intend to remain in session for two full days after the rendition of the verdict, and that the judgment was pronounced at as remote a time as could reasonably be allowed; the record being silent as to the length of time the court remained in session after the rendition of the verdict.

Appeal from District Court, Tillman County; Frank Matthews, Judge.

Odie Williams was convicted of the crime of rape in the second degree, and sentenced to serve a term of four years in the state reformatory, and he appeals. Affirmed.

Mounts & Davis, of Frederick, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. A statement of the facts is not necessary in this case. It is sufficient to say that after an examination of the transcript of the testimony of the witnesses the court finds that there is ample evidence to support the judgment of conviction.

[1, 2] It is first contended that the trial court erred in overruling defendant's motion for continuance, based upon the absence of three witnesses, who were alleged to be residents of Tillman county, young men who it is averred in the application would testify, if present, that they had each had sexual intercourse with the prosecuting witness after she had reached the age of 16 years and prior to the commission of the act of sexual intercourse upon which this conviction is based. As this is a conviction for statutory rape in the second degree upon a female between the ages of 16 and 18 years, of previous chaste and virtuous character, the evidence of prior sexual intercourse by the prosecuting witness with other male persons than the defendant after she had attained the age of 16 years, and prior to the commission of the alleged act upon which the conviction in this case is based, was competent evidence in behalf of the defendant.

This court has repeatedly held that applications for a continuance, based upon the absence of material witnesses, is a matter addressed to the discretion of the trial court, and unless there appears to be a manifest abuse of such discretion, the judgment of conviction will not be reversed on this ground alone. Reed v. State, 14 Okl. Cr. 651, 174 Pac. 800.

There was no abuse of discretion in this case. The defendant had notice for some months prior to the trial that he was being prosecuted for this alleged offense. The evidence shows that at least two of the alleged absent witnesses lived in the vicinity of the defendant in Tillman county. No effort was made to procure the attendance of these two witnesses until a day or two before the case was called for trial, when the defendant caused a subpœna for them to be issued and placed in the hands of the sheriff. At that time, the witnesses were not found, but the sheriff left a copy of the subpœna at their usual place of residence. The third witness it appears had not been seen in Tillman county for some time, having apparently left there shortly after the defendant was arrested. There is no showing of any probability of ever procuring the attendance of this third witness, or of taking his deposition for use on a subsequent trial of this case. The application does not show that the defendant, or anybody else, knew his whereabouts at the time the application was made. On the hearing of the motion for a new trial, the state produced the other two alleged absent witnesses, who swore positively that they had never had intercourse with the prosecuting witness at any time.

It is apparent, therefore, that as to two of these witnesses the defendant would not be able to prove the facts set out in his ap-

Digitized by Google

plication for a continuance should another trial be granted him. As to the third, no probability of obtaining his attendance at the trial or of securing his deposition is shown, even if it be admitted that he would testify to the facts set forth in the application.

Unless there is a reasonable probability that upon a subsequent trial of the cause a different result would likely occur by reason of the evidence to be obtained from such absent witnesses, the judgment of conviction should not be reversed. Clearly in this case it appears, not only that proper diligence was not used to obtain the attendance of these witnesses at the trial, but also that there is no likelihood that upon a subsequent trial a different result would ensue.

For the reasons stated, we find no merit in this contention.

[3] It is next contended that the verdict is not supported by the evidence, in that there is no competent proof that the defendant was a male person over the age of 18 years when the offense was committed.

This assignment of error is wholly without merit. It was held by this court, in the case of Penn v. State, 13 Okl. Cr. 367, 164 Pac. 992, L. R. A. 1917E, 668, that the provision in section 2415, Revised Laws 1910, "nor can any person be convicted of rape on account of an act of sexual intercourse with a female over the age of fourteen years, with her consent, unless such person was over the age of eighteen years at the time of such act," was a matter of defense to the crime of statutory rape, and that it was not necessary to negative such defense in the indictment or information charging the crime.

It follows from the holding in that case that such provision is not a material element of the crime of rape upon a female over the age of 14 years with her consent, and need not be alleged in the information nor proved upon the trial. In this case, no defense was interposed on the ground that the defendant was under the age of 18 years at the time of the alleged commission of the offense.

[4] Lastly, it is contended that the court erred in pronouncing judgment on the 30th day of November, 1916, upon a verdict rendered on the 29th day of November, 1916. Section 5942, Revised Laws 1910, provides:

"After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, if the judgment is not arrested or a new trial granted, the court must appoint a time for pronouncing judgment."

Section 5943, Id., is as follows:

"The time appointed must be at least two days after the verdict, if the court intend to remain in session so long; or, if not, at as remote a time as can reasonably be allowed."

In the cases of Howard v. State, 2 Okl. Cr. 201, 101 Pac. 132, and McCord v. State, 2 Okl. Cr. 209, 101 Pac. 135, this court held:

"Defendant is not entitled * * * to two days after the rendition of a verdict of guilty against him before pronouncing sentence upon him, unless it appears affirmatively from the record that the court expected to and did remain in session that long after the rendition of such verdict. In the absence of such showing in the record, it will be presumed by the appellate court that the court below acted in conformity with the law, and, if two days had not expired after the rendition of the verdict and before sentence, the time was as remote as could reasonably be allowed, and the court complied with said statute as nearly as the time remaining of the session permitted."

In Kerkendall v. State, 5 Okl. Cr. 570, 115 Pac. 612, the third paragraph of the syllabus is as follows:

"A defendant may waive the time allowed by law after his conviction before judgment can be pronounced against him."

In Dalton v. State, 6 Okl. Cr. 368, 118 Pac. 1101, in construing the foregoing statutes, this court held:

"Where it is not shown by the record that the court appointed a time for pronouncing judgment, or that for this reason objection was made by defendant before judgment was rendered, it will be presumed that the judgment was pronounced at a time appointed by the court in conformity with the requirements of the statutes."

The record in this case is silent as to the date of the adjournment of court for that term. Sentence was pronounced against defendant on the 30th day of November, 1916, without any objection on his part that the court had not allowed him the two days' time after the rendition of verdict. It is apparent from the record in this case that this assignment of error is an afterthought, to which no objection was made or exception taken in the court below.

All presumptions favor the regularity of the proceedings in a trial court. Killough v. State, 6 Okl. Cr. 311, 118 Pac. 620; Thornsberry v. State, 8 Okl. Cr. 88, 126 Pac. 590; Hess v. State, 9 Okl. Cr. 516, 132 Pac. 505; Stark v. State, 10 Okl. Cr. 177, 135 Pac. 441.

This court will not indulge the presumption that the trial court deliberately violated the provisions of the foregoing statutes, where the record is silent upon the subject, and where the defendant made no objection to the proceedings in the lower court.

The conclusion is reached that the judgment of the district court of Tillman county, imposing a sentence upon the defendant of four years' imprisonment in the state reformatory at Granite, Okl., should be affirmed; and it is so ordered.

DOYLE, P. J., and ARMSTRONG, J., concur.

Digitized by Google

PRUITT v. STATE. (No. A-3256.)

(Criminal Court of Appeals of Oklahoma. March 8, 1920. Rehearing Denied May 20, 1920.)

(Syllabus by the Court.)

1. **Criminal law ⇐883 — Verdict sufficiently definite and in effect a verdict of guilty of assault with intent to do bodily harm.**

On an information under Penal Code, first clause (section 2336, Rev. Laws), for shooting another with a pistol with intent to kill, where the instructions of the court submitted the included offense of shooting another with intent to do bodily harm, but without intent to kill, as defined by second clause of section 2344, Rev. Laws, the verdict was, "Guilty of an assault with intent to do bodily harm, as charged in the information herein." *Held*, that the verdict was responsive and sufficiently definite and certain as to the offense of which defendant was convicted, and was in effect a verdict of guilty of assault with intent to do bodily harm by shooting with a pistol.

2. **Criminal law ⇐894 — Informal verdict should be objected to when returned.**

An informal verdict should have been objected to when returned, which would have called the attention of the court to its defective form and given an opportunity for its correction.

3. **Homicide ⇐173 — Evidence as to subsequent finding of weapons near place of assault admissible.**

Evidence of the finding of weapons at or near the scene of an assault with intent to kill, subsequent thereto, which are apparently connected with and tend to explain the crime, is admissible.

4. **Criminal law ⇐404(3)—Knife not identified as the one claimed to have been in the hands of person assaulted inadmissible.**

On a trial for assault with intent to kill by shooting with a pistol, a knife, not identified as the one claimed to have been in the hands of the person assaulted when the shooting occurred, is not admissible.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Claude Pruitt was convicted of shooting with intent to do bodily harm, and he appeals. Affirmed.

J. B. Champion and Norman & Mathers, all of Ardmore, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Claude Pruitt, was tried and convicted upon an information which in substance charges that in Carter county on or about the 7th day of January, 1917, he did then and there unlawfully, feloniously, and intentionally shoot one Monroe Mahurin with a pistol, said pistol being then and there a deadly weapon, with the unlawful and felonious intent on the part of him the said Claude Pruitt to kill the said Monroe Mahurin. The verdict was as follows:

"We, the jury drawn, impaneled, and sworn in the above-entitled cause, do upon our oaths find the defendant, Claude Pruitt guilty of an assault with intent to do bodily harm, as charged in the information herein, and leave it to the court to assess the punishment."

The court sentenced him to serve a term of two years' imprisonment in the penitentiary. From the judgment he appeals.

In order to understand the various questions raised by the errors assigned, we will briefly state the material testimony in the case.

Monroe Mahurin testified:

"I was 21 years of age February 2, 1917, and about sundown on the date alleged I was standing in front of the drug store in the town of Springer. Pruitt hollered at me and said, 'Come here a minute, Monroe; I want to see you;' and we turned and walked to the back end of the drug store. He asked me if I knew who broke into his house and got that quart of alcohol. I told him that I didn't know anything about the alcohol at all. He said I was a God damn liar; that I got it myself. I told him he was a damn liar; I did not get it. I had my hands in my hip pockets at the time, and started to take them out, and Pruitt said, 'Come on out with it.' I told him I didn't have anything to come out with, I pulled up my coat this way (indicating), and turned each hip to him and Pruitt said, 'If you did have a gun, I would make you eat it.' I told him he would not make me eat anything. He said, 'You can't stand up and come back at me after breaking into my house; God damn you; I will kill you.' When he made that remark I turned, looking to see who was around there. As I turned my head facing him he struck me with a gun and jabbed it that way (indicating) and shot me. I did not have a knife or pistol, and had nothing in my pockets but a pocket handkerchief and a shoe buttoner. The ball struck me here in the breast [indicating], and came out here in my back [indicating]. After he shot me Pruitt still held his gun on me with one hand and jerked my coat away and said, 'Let me see where I shot you,' and then said, 'Oh, I done that accidentally.' When he struck me with the gun it knocked one of my jaw teeth loose."

Ed Ball testified:

"I was about 15 feet from the defendant when he fired the shot. I heard Claude say, 'You did go in,' and Monroe says, 'I didn't.' Monroe turned around and held up his coat to show him that he didn't have anything. I started away; then I turned around and saw the gun fire. Claude was about 3 feet from Monroe at the time."

Bob Pierce testified:

"I was standing near the corner of the drug store porch. I heard Claude Pruitt tell Monroe

Digitized by Google

Mahurin that he had broken into his house and stole some alcohol. Monroe said he didn't do it, and Claude told him he was a damn liar; he did; and Monroe said, 'You are a liar; I didn't.' Monroe was showing him that he did not have a gun by pulling up his coat. About a minute afterwards I heard the report of a pistol."

Lowell Owens testified:

"I heard Claude say to Monroe, 'Come around here a minute; I want to show you something.' Then I heard Claude accuse him of breaking into his house, and Monroe told him he didn't do it. I was standing about 15 feet from them, and I walked to the front of the drug store; then heard the shot."

J. M. Arnold testified:

"I am a merchant at Springer, I heard Pruitt and Mahurin talking behind the store. I went around back of the store to get some coal oil. I heard one say something about fighting the other. I was 35 feet away; it was dark. I saw one raise his hand like he was going to strike the other one—I could not tell which. Four or five seconds later I heard a pistol fire; I started to where they were, and met Claude about halfway, and Claude said, 'I shot Monroe; he tried to use a knife on me, and I tried to knock it off with a pistol; I was afraid he would kill me,' and that it was an accident."

Dr. L. D. Gellespie testified that he was called to attend Monroe Mahurin, and his examination disclosed that the bullet passed through the middle lobe of the right lung.

On the part of the defense the material testimony was as follows:

Lester White:

"I walked around there, and there was Claude Pruitt and Monroe Mahurin. Claude accused Monroe of breaking into his house, and Monroe said he was a damn liar, and Claude told him he was another one, and Monroe struck at him with something in his hand. Claude jerked out his gun to knock his lick off, and struck at him and hit Monroe on the jaw. Monroe struck at him again, and Claude struck him on the right arm with the gun, and it went off and shot Monroe, Claude said, 'I shot him accidentally,' and started to put out the fire on Monroe's clothes. Monroe told him to let him alone, and I put the fire out while it was blazing."

The cross-examination of this witness shows that he had been convicted in Carter county on a plea of guilty of the crime of seduction.

The defendant testified:

"I teach school some, farm and handle cattle, and am engaged in the mercantile business. On returning that evening from Ardmore to my home at Springer I learned that my house had been entered in my absence by Monroe Mahurin; I went down to get a loaf of bread, and was standing on the drug store porch talking when Monroe Mahurin walked up and spoke to me; I said to him, 'Come around here; I would like to talk to you a minute;' and we went behind the barber shop. I didn't want to spring this conversation about him breaking into my house before the crowd and embarrass him; I said to him, 'I heard that you entered my house while we were gone.' He told me I was a 'damn liar.' I went on talking to him, directly he called me a 'God damn liar,' and I told him he was another. At that he came out of his hip pocket with a knife and struck at me with it. I jerked my gun and hit him on the side of the head. He came back quick, and struck at me with a knife; I struck at him and caught his arm, knocking the gun up, and the gun went off. I struck at him to keep him from cutting me; I didn't want to have to kill him; his coat caught fire from the gunshot; I tried to put the fire out, and said, 'Did I shoot you?' He said, 'Sure you shot me.' I told him it was an accident. I went home; saddled my horse and rode to my father's about six miles from Springer, from there I went to see my lawyers, then I surrendered to Horace Kendall, deputy sheriff, and requested him to go and look for the knife."

Horace Kendall testified:

"I am and have been deputy sheriff of this county for 7 or 8 years. I heard of this shooting, and went out there between 7 and 8 o'clock. There was a big crowd there, and I didn't make an examination of the ground where the shooting occurred. Defendant sent for me to come to his home. I went there and arrested him and returned to Ardmore in a car with him and his counsel and put him in jail. I went back out to Springer between 11 and 12 o'clock that night, and found the knife, and kept it until I gave it to you to-day. The big blade was open when I found it.

"Counsel for the Defendant: We offer it in evidence.

"The County Attorney: We object for the reason that it is incompetent, irrelevant, and immaterial.

"The Court: I will sustain the objection at this time. (Exception allowed.)

"I went out to look for the knife that was supposed to have been dropped there, and found this knife. (The knife is again offered in evidence. Same objection. Same ruling.)"

On cross-examination he stated that he returned to the scene of the shooting the second time at the request and with Byrd Pruitt, father of the defendant.

In rebuttal the state offered the following testimony:

Ed Elmore:

"I am constable for Berwyn township. Springer is in Berwyn township. I was called to the scene shortly after the shooting occurred, and with Mr. Arnold, Mr. Gains, and Mr. Wilson searched the ground with a lantern and searchlight. It was then about half past 8 that evening. Within an hour we made another examination, Buck Garrett, the sheriff, was with us. We had a searchlight and a lantern, and searched all around looking for a weapon, and nothing was found."

A. W. Gains, deputy sheriff, testified that he was with Mr. Elmore, and with others participated in making an examination of the

Digitized by Google

ground where the shooting occurred; that there was a big crowd there; that Buck Garrett and Horace Kendall were there; and nothing was found.

[3] It is contended that the judgment should be reversed "because the court erred in refusing the defendant the privilege of introducing in evidence the knife found by the deputy sheriff at the scene of the crime." We think it abundantly settled that evidence of the finding of weapons at or near the scene of an assault with intent to kill subsequent thereto, which are apparently connected with and tend to explain the crime, is admissible. It must appear, however, that the conditions at the scene of the crime have not so materially changed as to render the evidence unreliable because of possible tampering with the conditions as they existed at the time of such assault, and that a weapon used by, or in the possession of, the person assaulted at the time of the assault is admissible when sufficiently identified.

[4] It appears that the testimony of the witness Kendall was not rejected. The court held his testimony admissible. In the light of his statements that he did not find anything at the scene of the crime when he first visited the place, but at the request of the defendant's father he went there with him at the hour of midnight, and there picked up a knife, we think that the court did not err in refusing to allow the knife to be introduced in evidence.

Several assignments of error are based on exceptions taken to the instructions given by the court, and on the refusal to give two instructions requested. In criticizing the instructions given it is urged that the court "nowhere gave the defendant the benefit of being proven guilty beyond a reasonable doubt, and the defendant did not receive the benefit of the presumption of innocence." It is a sufficient answer to the complaint made to quote the instruction given, which reads as follows:

"To the offense charged in the information, the defendant has entered his plea of not guilty, and you are instructed that by the said plea of not guilty the defendant is presumed to be innocent of the crime charged against him, and this presumption of innocence continues with him throughout the trial and until it is overcome by competent evidence admitted by the court for your consideration.

"It is incumbent upon the state to prove every material fact necessary to the conviction of the defendant beyond a reasonable doubt, and if the state makes such proof, then the presumption of innocence with which the law clothes the defendant no longer exists."

The instruction requested was to the effect that:

"It is immaterial whether the prosecuting witness had a knife or not. If the defendant believed, or had a right to believe as a reasonable man, that the prosecuting witness was assaulting him with a knife, then said defendant had the right to act upon appearances of danger."

Which instruction was by the court properly refused, as the instructions given fairly cover the law of the case, including the defense interposed.

[1, 2] Finally, it is insisted that the verdict rendered is too indefinite and uncertain to sustain the judgment rendered. While the verdict in the case is technically informal, it is sufficiently definite and certain as to the offense of which the defendant was convicted, and it is in effect a verdict of guilty of assault by shooting with a pistol without intent to kill, but with intent to do bodily harm. The defendant was convicted of assault with intent to do bodily harm by shooting another with a pistol under an information charging an assault with intent to kill by shooting. The instructions given submitted the law of the offense charged, and the included offense of which the defendant was found guilty, and the language of the verdict, "Guilty of an assault with intent to do bodily harm as charged in the information herein," is sufficiently direct and certain, and the defendant, having failed to object to the verdict when returned, waived any defect in the form of the same. Simpson v. State, 16 Okl. Cr. ——, 185 Pac. 116; Coleman v. State, 15 Okl. Cr. 682, 179 Pac. 617.

A careful examination of the record has failed to disclose any error affecting a substantial right, and we are fully convinced that the defendant had a fair and impartial trial, and that the verdict of the jury is upon the testimony a just one. The judgment of the district court of Carter county is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

Digitized by Google

JOHNSON v. STATE. (No. A-3370.)

(Criminal Court of Appeals of Oklahoma. July 6, 1920.)

(Syllabus by the Court.)

1. **Criminal law ⟸193½, 1167(1)—Conviction of lesser offense bars prosecution for greater; defendant cannot complain that prosecutor elected to try him for lesser offense.**

A defendant will not be heard to complain that the prosecuting officer elected to try him for the lesser grade of the offense included within the same criminal transaction, as a conviction for such grade of offense, procured without fraud, connivance, or collusion of the defendant, is a bar to any subsequent prosecution for any other grade of the offense growing out of the same criminal act.

2. **Criminal law ⟸1159(2)—Conviction not reversed if supported by competent evidence.**

Where there is competent evidence in the record from which the jury might reasonably conclude that the defendant is guilty of the crime charged, a judgment of conviction will not be reversed on appeal on the sole ground that the evidence is insufficient.

Appeal from District Court, Pottawatomie County; Charles B. Wilson, Jr., Judge.

Andrew Johnson was convicted of an assault with a sharp and dangerous weapon with intent to do bodily harm and without justifiable or excusable cause, and he appeals. Affirmed.

G. A. Outcelt, of Tecumseh, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. The defendant, Andrew Johnson, was charged by information filed in the district court of Pottawatomie county with an assault with a dangerous weapon, to wit, a knife with a blade about two inches long, upon the person of one Ewers White, with intent to do great bodily harm, and without justifiable or excusable cause. The trial resulted in a verdict of "Guilty as charged in the information," the jury fixing the punishment at 90 days' imprisonment in the county jail. From this judgment of conviction the defendant has appealed to this court, and contends that the evidence is wholly insufficient to sustain the conviction, and also that if it shows the defendant guilty of any crime at all it is of some grade of assault and battery, which said crime was not included within the charge filed against him.

The latter contention is based upon a holding of this court in the case of Parks v. State, 14 Okl. Cr. 413, 171 Pac. 1129. The Parks Case has no bearing upon the questions involved in this appeal. In that case, while the defendant was charged with assault with intent to do bodily harm, there was no evidence which would authorize the jury to find the defendant Parks guilty of such crime, while in this case there is evidence which would support a conviction either of some grade of assault and battery or merely of an assault with intent to do bodily harm, as the testimony of the prosecuting witness shows conclusively that the defendant assaulted him at least one time without inflicting any wounds upon his person. While the prosecutions (Parks Case and this) were each based on the same section of the statute, the facts are dissimilar. Here the evidence will support the charge, and for that reason there is no fatal variance, although there is some evidence that later in the difficulty a battery was accomplished by defendant.

[1] Furthermore, the defendant will not be heard to complain that the prosecuting officer elected to try him for the lesser grade of the offense included within the same criminal transaction, as the conviction here is a bar to a subsequent prosecution for any grade of assault and battery growing out of the defendant's acts toward the prosecuting witness on that occasion, as there is no showing that this conviction was procured by the fraud, connivance, or collusion of the defendant. 8 Ruling Case Law, p. 146, § 131.

[2] The contention also that there is no evidence in the record sufficient to support the verdict is without merit. This court has repeatedly held that where there is any competent evidence in the record from which the jury might reasonably conclude that the defendant was guilty of the crime charged a judgment of conviction will not be reversed on appeal on the ground that the evidence is insufficient. Bell v. State, 14 Okl. Cr. 167, 168 Pac. 827; McDaniel v. State, 14 Okl. Cr. 219, 169 Pac. 1128; Prather v. State, 14 Okl. Cr. 327, 170 Pac. 1176; Crilley v. State, 15 Okl. Cr. 44, 181 Pac. 316; Garrett v. State, 15 Okl. Cr. 475, 178 Pac. 269; Clingan v. State, 15 Okl. Cr. 483, 178 Pac. 486.

The evidence of the prosecuting witness is positive to the effect that the defendant assaulted him, and there are numerous circumstances from which the jurors were authorized to conclude that such assault was made with a knife as alleged in the information; that the same was committed with intent to do bodily harm; and that there was no justifiable or excusable cause for its commission. While the evidence is conflicting on some of the material elements of the offense, the conflicts were for the jury to determine, and this court would not be authorized to substitute its judgment for that of the exclusive triers of the facts.

Finding no reversible error in the record, it is the opinion of the court that the judgment should be affirmed; and it is so ordered.

DOYLE, P. J., and ARMSTRONG, J., concur.

Digitized by Google

ARMSTRONG v. STATE. (No. A-3439.)

(Criminal Court of Appeals of Oklahoma. Aug. 28, 1920.)

(Syllabus by the Court.)

Criminal law ⇐1159(2)—Conviction supported by some testimony will not be reversed.

This court will not reverse a conviction upon the ground that the evidence is insufficient to sustain the same, unless there is no testimony in the record from which the jury could reasonably conclude that the defendant was guilty; there being no contention that the jury was influenced by improper motives in arriving at the verdict.

Appeal from District Court, Beckham County; Thomas A. Edwards, Assigned Judge.

Bud Armstrong was convicted of grand larceny, and appeals. Affirmed.

A. M. Beets, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Beckham county, wherein the defendant, Bud Armstrong, was convicted of the crime of grand larceny, and his punishment assessed at imprisonment in the state reformatory at Granite for a period of two years.

But one question is presented for review in this appeal. Counsel for plaintiff in error has filed a lengthy brief, contending that the evidence is wholly insufficient to sustain the conviction, and for such reason the trial court erred in refusing to direct the jury to return a verdict of not guilty at the conclusion of the state's evidence, and also erred in overruling the motion for a new trial because of insufficient evidence.

The evidence is largely circumstantial. The defendant was convicted of stealing approximately 1,000 pounds of seed cotton, the property of R. M. and W. L. Harris, which was located on certain farms belonging to said Harris brothers, situated a few miles west of the town of Elk City, in Beckham county. The cotton had been picked, and was left in wagons in these fields preparatory to being hauled to the gins, and the evidence discloses, and it is admitted by counsel representing defendant, that the larceny of this seed cotton was sufficiently proven, but the contention made is that the evidence is not sufficient to connect this defendant with the commission of the crime.

The cotton was stolen on the night of the 16th of October, 1917, and the evidence on the part of the state's witnesses is to the effect that somebody, driving a wagon with wide tires with a groove in the center, came up to these respective fields and stole from 140 to 295 pounds of cotton out of four different wagons, carried the same to the public highway, loaded it upon a wagon with wheels having tires as above described, and the said wagon was tracked by different witnesses directly to the house of Bud Armstrong, and there was found, early the next morning after the larceny, a wagon with wheels identical with that which was tracked, loaded with approximately the same amount of seed cotton stolen the night before. The state's witnesses, on cross-examination, said that they could not be mistaken in tracking this wagon to the home of this defendant.

The defendant was found at his home, and made certain contradictory statements concerning how he came into possession of said cotton, claiming to some of the officers that morning that he had got some of it from a fellow by the name of Red Hawkins, and had picked some of it out of a field that belonged to defendant. Defendant also stated that he had been to Red Hawkins' house the evening before playing cards.

Upon the trial, the defense interposed was an alibi, and the defendant and members of his family, and another witness, who claimed to have been at the defendant's home the night of the larceny, testified that defendant was at home the entire evening of the larceny, and the defendant testified that he had gathered the cotton found in the wagon off a patch that belonged to him, and that he had not stolen the same from anybody.

The principal argument advanced in support of the contention that the evidence is insufficient to sustain the conviction is that the witnesses for the state were mistaken in tracking the wagon from the scene of the larceny to the defendant's home, and were confused by other similar tracks made by other wagons, passing along the same highway, having broad tires of a similiar make, and there was some evidence to the effect that on the morning after the larceny wagons of this description had passed along said highway over the route alleged to have been traversed by the defendant after the commission of the crime.

The attack made upon the sufficiency of the evidence is directed against its weight. It was the sole province of the jury to judge of the weight of the evidence and of the credibility of the witnesses. The evidence on the part of the state and that adduced by the defendant and his witnesses is in direct conflict. The jury accepted as true the testimony of the state's witnesses, and, having done so, it is not within the province of this court to substitute its judgment for that of the jury on the credibility of the witnesses.

Digitized by Google

A careful examination of the testimony of the state's witnesses convinces the court that the circumstantial evidence against the defendant was sufficient to authorize the jury to reasonably conclude that the defendant was guilty of the crime charged.

Taking such view of the evidence in this case, the court is impelled to conclude that the judgment should be affirmed; and it is so ordered.

DOYLE, P. J., and ARMSTRONG, J., concur.

WASHOE COUNTY BAR ASS'N v. SCOULAR. (No. 2455.)

(Supreme Court of Nevada. Sept. 3, 1920.)

1. Attorney and client ⟸54—Disbarment proceeding not a civil action, and findings unnecessary.

The Legislature has conferred on the Supreme Court the sole power to find accused guilty or not guilty in a proceeding to remove or suspend an attorney, and the proceeding is not a civil action, but one peculiar to itself, and, as the statutes do not mention findings, they need not be made, since the judgment speaks all that is necessary.

2. Attorney and client ⟸53(2)—Evidence of subornation of perjury held insufficient to warrant disbarment.

In a disbarment proceeding, evidence of defendant's client, who had pleaded guilty to perjury in his divorce action, to the effect that the defendant had suborned and procured him to commit perjury, *held* insufficient as against the defendant's denial to warrant disbarment.

3. Attorney and client ⟸58—Misrepresentation of immaterial matter to procure order is misconduct warranting suspension.

An attorney's misrepresentation to the court of the date when certain papers were actually signed, deliberately intended to produce a false impression, and thereby obtain an order for publication of summons, was misconduct in office warranting suspension from practice, even conceding that the misrepresentation did not result in harm to the litigants, and was of an immaterial matter.

Original proceeding by the Washoe County Bar Association against Robert Scoular, for disbarment. Defendant suspended from the right to practice law for six months.

George Springmeyer and Benj. J. Henley, both of Reno, for complainant.

Robert Scoular, of Reno, for defendant.

SANDERS, J. The Washoe County Bar Association, through two of its duly delegated members, presented to this court two accusations, in the form of an ordinary complaint in a civil action, charging Robert Scoular, a member of the bar of Washoe county, and duly licensed to practice in the courts of this state, with unprofessional conduct in his office as attorney, and asking that he be forever deprived of the right to practice as an attorney in the courts of this state.

The court, being of the opinion that the charges, were such as required it, made an order, citing the accused to appear and answer. At the time appointed in the order, the accused, without objection to the form or sufficiency of the accusations, answered by denying the truth of the same. The court, without ordering a reference to a committee to take depositions in the matter and report, at the time appointed in the order proceeded to try the truth of the accusations.

[1] As the procedure prescribed by the statute in such cases makes no mention of findings, it might be said that there is no reason for the practice heretofore followed of filing an opinion setting forth the facts and conclusions of the court upon the trial of the truth of the charges. No good can result from collating the testimony of the witnesses or reviewing the evidence. The judgment speaks all that is necessary. The Legislature has conferred upon this court the sole power and authority, where proceedings are instituted to remove or suspend an attorney, to find the accused guilty or not guilty. It is not a civil action. The procedure is peculiar to itself, and is clearly outlined by the statute.

[2] Upon conviction of the accused, the statute prescribes the judgment that must be pronounced. In this case, admitting the respect due to the views of the Washoe County Bar Association, we are not satisfied with the guilt of the accused as to the particular accusation, charging him, in substance, with being guilty of having suborned or procured his client, one Frank Rhoden, to commit perjury by making oath to the truth of facts stated in an affidavit prepared by the accused for an order of summons by publication in a divorce action instituted by said Rhoden against his then nonresident wife, Elizabeth Rhoden, in the district court of Washoe county, and charging the accused with thereafter having suborned or procured said Rhoden to commit perjury in the trial of the case. True, the evidence of Rhoden supports the charges, but it is in direct conflict with that of the accused, and is impaired by reason of the fact that Rhoden is a convicted felon, upon his plea of guilty to a charge of perjury in the district court of Washoe county, growing out of his divorce action.

[3] The other accusations presented, when analyzed, seems to consist of three charges

Digitized by Google

of misconduct in office on the part of Scoular as an attorney, but so stated as really to amount to but one accusation, namely, that said Robert Scoular, on the 18th day of November, 1919, holding a commission as notary public, and as attorney for the plaintiff in the divorce action entitled George W. Davis v. Ethel M. Davis, presented to the judge presiding in department No. 1 of the district court of Washoe county a duly verified complaint, and together therewith an affidavit of plaintiff, with the filing marks thereon, and requested the judge, upon due consideration of the matters stated therein, to make an order in the cause for summons by publication, and that in the course of the proceeding the accused stated to the presiding judge, in answer to a query propounded by the judge as to when the papers had been actually subscribed by the plaintiff and affiant, that the papers had been signed on the day previous, to wit, November 17, 1919, when in fact and in truth Scoular then and there well knew that the papers had been signed on the 11th day of November, 1919, and that on the 17th day of November, 1919, his client, the affiant, was then and there without the state of Nevada. It is charged that the statement was made for the purpose of deceiving the judge into making the said order.

Conceding for the purposes of this proceeding that the date inserted in the jurat was immaterial to the validity of the verification, or that the time when the papers were actually signed was unimportant if the affidavit was otherwise sufficient, and that no injury could have resulted from inserting the wrong date in the jurat to either paper, nevertheless the fact remains that the misrepresentation as to when the papers were actually signed was deliberately intended by Scoular to produce a false impression upon the court or judge, and thereby obtain the order for publication of summons. Such action on the part of an attorney is misconduct in office, which cannot be tolerated, countenanced, or passed unnoticed.

However, we are of the opinion that the offense, under the particular and attending circumstances, is not of such gravity as to warrant us in depriving the accused permanently of his right to practice his profession. We, therefore, in the exercise of the authority vested in us by the statute, order that Robert Scoular, the accused, be, and he is hereby, deprived of his right to practice law in the courts of this state for a period of six months from the date hereof.

The present proceeding, and the judgment of conviction, will have served a useful purpose if it shall in some measure at least, tend to uphold the integrity and dignity of our courts.

COLEMAN, C. J., and DUCKER, J., concur.

SHELTON v. POWERS et al.

ROBERTSON et al. v. SHELTON.

(No. 15802.)

(Supreme Court of Washington. June 22, 1920.)

1. Appeal and error ⟸743(2)—Assignments of error to evidence must refer to statement of facts.

Where assignments of error as to rejection of evidence were indefinite, and appellant failed to furnish any reference or citation to the pages of the statement of facts for the purpose of disclosing prejudicial error in the rejection of evidence, the Supreme Court was not called upon to search the record in this respect.

2. Appeal and error ⟸265(1)—Findings must be excepted to in law case.

In a law action, it being mandatory that findings of fact and conclusions of law be made upon request, under Rem. Code 1915, § 367, the failure of appellant to except to the findings will prevent the Supreme Court from inquiring into the sufficiency of the evidence to sustain them.

3. Appeal and error ⟸265(1)—Findings must be excepted to in equity case.

Where findings of fact are made in an equity case, exceptions must be taken to such findings in order to secure a review of the trial court's conclusions reached therein.

Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Actions by Chauncey W. Shelton against Walter W. Powers and others and by W. W. Robertson and others against Chauncey W. Shelton, consolidated for trial. From adverse judgments in both cases, Chauncey W. Shelton appeals. Affirmed as to both cases.

W. F. Hays, of Seattle, for appellant.

Bronson, Robinson & Jones, of Seattle, for respondents.

MITCHELL, J. These two actions were consolidated for the purpose of trial, and were tried to the court without a jury, resulting in a judgment in both cases against Chauncey W. Shelton, who has appealed.

By agreement they were consolidated for the purpose of the appeal. The suit by Shelton was for the cancellation of instruments. The suit against him was upon promissory notes made and delivered by him. Formal findings of fact and conclusions of law covering both cases were signed and filed, which clearly support the judgment. No exceptions were taken to the findings of fact or conclusions of law, nor were any findings proposed by the appellant.

[1] The two first assignments of error relate to the rejection of evidence. The assignments are indefinite, and appellant has

Digitized by Google

not furnished any reference or citation to the pages of the statement of facts for the purpose of disclosing any prejudicial ruling in the rejection of evidence. While under the case of Morrisey v. Schultz, 68 Wash. 237, 122 Pac. 1065, we are not called upon to search the record in this respect, we have, however, because of its being a small record, examined it with care and fail to find any support for the claim of errors.

[2] The other assignments are that the court erred in its findings, conclusions, and judgment. Indeed, this is the only assignment argued either orally or in the brief. As to the action against the appellant, it being a law action, the statute (section 367, Rem. Code) is mandatory that findings of fact and conclusions of law shall be made upon request, as was done in this case at the instance of respondents. Western Dry Goods Co. v. Hamilton, 86 Wash. 478, 150 Pac. 1171; Wilson v. Aberdeen, 25 Wash. 614, 66 Pac. 95. The failure to except to the findings prevents us from inquiring into the sufficiency of the evidence to sustain them. Harbican v. Chamberlin, 82 Wash. 556, 144 Pac. 717; Nichols v. Capen, 79 Wash. 120, 139 Pac. 868.

[3] As to the action by appellant, it is true it is an equity case wherein it was not necessary for the trial court to make findings of fact, but "we have repeatedly held that, where findings of fact are made in an equity case, exceptions must be taken to such findings in order to secure a review of the trial court's conclusions reached therein." Ready v. McGillivray, 186 Pac. 902.

Affirmed as to both cases.

HOLCOMB, C. J., and PARKER, MAIN, and MACKINTOSH, JJ., concur.

SKAGIT MILL CO. v. GREAT NORTHERN RY. (No. 15882.)

(Supreme Court of Washington. June 29, 1920.)

Railroads ⟸216—Expense of building spur tracks governed by contract.

Where railway company, before putting in temporary side tracks for lumber mill company, required it by contract then made to pay the estimated cost of putting in the tracks, the mill company could not, by virtue of Rem. Code 1915, §§ 8626—13, 8626—62, recover the excess of the price paid over the actual cost to the railway.

Department 1.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Skagit Mill Company against the Great Northern Railway Company. From judgment for defendant, plaintiff appeals. Affirmed.

E. C. Million, of Seattle, for appellant.

F. V. Brown and J. A. Laughlin, both of Seattle, for respondent.

MITCHELL, J. This action was instituted to recover $327.17 as money had and received by the defendant—alleged overpayment for the construction by the defendant of three spur tracks under agreement between the parties. Plaintiff has appealed from a judgment sustaining a general demurrer to the second amended complaint and a dismissal of the action upon the refusal of the plaintiff to plead over.

The complaint alleges that for ten years the appellant had been the owner of and operating a sawmill on respondent's line of railroad, and made application to the respondent for the construction on the latter's property of side tracks or switch connections with its railway to enable the mill company to load logs it was cutting nearby on the railroad for shipment to the mill; that respondent required pay in advance and that appellant sign, as it did sign, a written contract which, among other things, provided that the appellant should pay in advance an amount stated as to each spur track as the agreed value of the material required (excepting ties), cost of labor, engineering, and supervision, which were to be furnished by respondent; that the actual cost of putting in the three spur tracks was $327.17 less than the contract price, which excess was so had and received by the respondent without consideration; and that its business necessities would not permit of delay, but compelled it to enter into the contract and make the payments provided therein.

It is appellant's contention that notwithstanding its contract it is entitled to recover the difference between the contract price and the actual cost of constructing the spur track, by virtue of the provisions of the public service commission law and the case of State ex rel. C., M. & P. S. R. Co. v. Public Service Commission, 77 Wash. 529, 137 Pac. 1057, L. R. A. 1918B, 786, Ann. Cas. 1915D, 202. Upon this subject section 8626—13, Rem. Code, provides that a railroad company shall, upon the application of any shipper, provide upon its own property a side track and switch connection with its line of railway, whenever such a side track and switch connection is reasonably practicable, and can be put in with safety and the business therefor is sufficient to justify the same. Section 8626—62 of the Code provides that whenever the commission shall find, after a hearing had, that application has been made by any shipper for the installation of a side track upon the property of such railroad, that the same is reasonably practicable, can be put in with reasonable

Digitized by Google

safety, and the business therefor is sufficient to justify the same, and that the railroad company has refused to install the same, the commission shall enter an order requiring the construction of a spur track, provided the shipper so to be served shall pay the legitimate cost and expense of the construction as shall be determined in separate items by the commission, and before the railroad company shall be compelled to incur any cost in connection therewith the same shall be secured to the railroad company in such manner as the commission shall require.

These two sections of the law were before this court in the case of State ex rel. C., M. & P. S. R. Co. v. Public Service Commission, supra. It was a case in which an appeal had been taken to the courts from the order made by the public service commission requiring the railroad company to construct a spur track. The principal questions presented by the railroad company in that case were: (1) That a sufficient demand for the service had not been made by the shipper upon the railroad company and refused by it prior to complaint to the commission; (2) that the enforcement of the statute violated the due process of law clauses of the state and federal Constitutions; and (3) that the construction of the spur ordered would constitute an interference with interstate commerce, and hence the order was void. In resolving all three contentions against the railroad company it was said a railroad company could be lawfully required, after a hearing on notice as to the reasonableness of the application to build upon its own right of way, at the entire but least expense of the applicant, a spur track to provide the means indispensable to a participation in the public service, whenever such means do not unreasonably interfere with the general service or operation of the public utility and whenever such means so provided are open to the use of the public on equal terms.

But we find nothing in that case or the statutes which authorizes the claim that the complaint here states a cause of action. It appears that the three spur tracks built, one after another, were only for the temporary use of the appellant. As between themselves, the parties may make a contract in such cases, and neither the policy of the law nor good morals is violated by the requirement of payment in advance. Manifestly the exact cost and expense of such construction could not be calculated beforehand, if at all, with mathematical certainty, and there is no allegation in the complaint that the respondent attempted to take any advantage of the appellant on account of the urgency of the mill business, or that it was aware of any urgency therein. For aught that appears in the complaint the agreement was entirely voluntary. There is no allegation that the price agreed upon was not a fair and bona fide estimate of the cost and expense of each spur track at the time the agreement was made; it only being stated that it cost the respondent less to construct it, without alleging when the construction took place or that values continued the same. In view of possible changes from time to time, in the market prices of labor and material, the difference between the alleged cost price and that agreed upon does not suggest fraud on the part of the respondent, and, indeed, none is charged. The contract conferred rights and imposed obligations upon both parties. It expressed the valuation agreed to by both parties. It was an executory contract, and no doubt had labor and material advanced in price before the construction was completed respondent nevertheless could have been held to the price fixed in the contract, and we are satisfied that the appellant was likewise bound.

Judgment affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MACKINTOSH, JJ., concur.

NUDD et ux. v. ROWE et ux. (No. 15884.)

(Supreme Court of Washington. June 23, 1920.)

Joint adventures ⟹5(1)—No cause of action for accounting held to lie between the parties.

Where owner of heavily incumbered property, in order to save it, mortgaged it, and thereafter conveyed it to the mortgagee to carry it until such time as a sale might be made to net at least the amount of the incumbrances, and later, alleging a failure to carry out the agreement, sued the mortgagee for an accounting, and mortgagee cross-complained for sale of the property and accounting as a partnership transaction, *held* that, in view of evidence not disclosing a breach by either party, both complaint and cross-complaint would be dismissed.

Department 2.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by Edwin Fuller Nudd and wife against Owen A. Rowe and wife, in which the latter filed cross-complaint. From judgment of dismissal of both complaint and cross-complaint, both parties appeal. Affirmed.

W. F. Hays, of Seattle, for appellants.

John P. Gallagher and Edward Judd, both of Seattle, for respondents.

TOLMAN, J. In February, 1917, the appellant Edwin Fuller Nudd was the owner of a tract of land, consisting of approximately 4.19 acres situated near the business center

Digitized by Google

of the city of Centralia, but one block from the main street of the city, wholly unimproved except for an old frame warehouse building and certain fruit trees which were situated thereon. A mortgage for a considerable amount upon this property had been foreclosed, a number of judgments had been rendered against appellant which were liens thereon, and appellant's equity of redemption in the land was about to be lost by reason of the expiration of the statutory redemption period. The land was also subject to taxes and assessments delinquent and unpaid, the whole of the incumbrances at that time aggregating approximately $15,000. For the purpose of saving something out of the property the appellant sought to obtain a loan in an amount sufficient to pay off the liens against the property, which would enable him to make redemption and retain the title subject only to the lien of such new loan. After considerable unsuccessful effort, appellant was led, by reading an advertisement, to go to respondent Owen A. Rowe, and succeeded in interesting him so that the parties entered into the following arrangement: Appellant made an application to respondent for a loan of $15,000, to be secured by mortgage, in which application he agreed to pay a commission of $1,000 for obtaining the loan. He, together with his wife, executed 12 notes for $1,000 each, and six notes for $500 each, all bearing date March 10, 1917, and executed a mortgage on the same date upon the property, which, by its terms, secured the payment of the 18 notes referred to, all of which bore interest at the rate of 7 per cent. per annum, payable semiannually, and matured in 5 years after date. Thereupon and as a part of the same transaction, the appellant and his wife, by a deed, conveyed the property to respondent Owen A. Rowe, subject only to the $15,000 mortgage just mentioned, and the parties entered into the following agreement in writing:

"In consideration of Edwin Fuller Nudd and Jennie Nudd, his wife, conveying to Owen A. Rowe this day a certain tract containing 4.19 acres of land, situated in Centralia, Lewis county, Washington:

"It is understood and agreed by and between the parties signing this agreement, that Owen A. Rowe is to have absolute control of and is to use his best endeavors in the management and sale of said land, leaving it optional with him as to platting into lots and disposition of same; that all expenses incurred in taking care of the principal and interest on one certain mortgage of fifteen thousand ($15,000.00) dollars, this day executed by said Edwin Fuller Nudd and Jennie Nudd, his wife, to said Owen A. Rowe, together with taxes, assessments and all other expenses incidental to the platting of said property and sale of the same, allowing a reasonable amount for advertising said property, and commission on sale of said property shall be first deducted from the proceeds of the moneys received from sale or sales therefrom, after which the net proceeds shall be divided at the rate of forty per cent. (40%) to Edwin Fuller Nudd and Jennie Nudd, his wife, and sixty per cent. (60%) to Owen A. Rowe.

"In other words, all expenses and charges against said property and all expenses incurred and to be incurred in connection with the handling and disposing of same to be first paid, and thereafter the net proceeds to be divided as above stated.

"Dated this 10th day of March, 1917.

"Edwin Fuller Nudd.
"Jennie Nudd.
"Owen A. Rowe."

Respondent caused the mortgage and deed to be duly recorded, and immediately upon the closing of the transaction proceeded to Centralia, and on March 12, 1917, paid out in redemption from the judgment sale of the property $3,100.92, and in satisfaction of certain judgments which were liens, $266.82, $86.20, and $23.10. Thereafter, on July 12, 1917, respondent paid to redeem from the mortgage foreclosure $10,480.22, and on May 31, 1918, paid, in satisfaction of a special assessment which was a lien upon the property, $718.55. General taxes which were then a lien were not paid, and at the time of the trial below evidence was introduced showing that the 1916 general taxes, amounting to $386, the 1917 taxes, amounting to $408, and the 1918 taxes, amounting to $443, with interest on each, were delinquent and unpaid, as well as a local improvement assessment for $232.35. Appellants, in their complaint, in addition to alleging the foregoing facts, allege that the respondent represented that he was possessed of ample means of his own to take up and discharge all of the liens against said lands, would do so within a reasonable time, and that he would plat the property into lots, advertise the same for sale, and thus realize for appellants upon their interest in the property. They further allege a total failure to plat of sell, that respondent is misrepresenting the value of the property in order to prevent a sale and to defeat the purpose of the agreement heretofore set forth, and they pray for an accounting and for the cancellation of the warranty deed, mortgage, and promisssory notes, that title to the property be quieted in them, and for general relief.

By way of an answer and cross-complaint, respondents, after appropriate denials of all allegations of misconduct, allege that the transactions hereinbefore referred to created a partnership, and pray for an accounting, that the partnership be dissolved, the real estate sold under order of the court, the proceeds devoted to the payment of the indebtedness of the partnership, and any surplus be divided in proportion of 40 per cent. to the appellants, and 60 per cent. to the respondents. From that part of the judgment

Digitized by Google

dismissing the complaint and the cause of action therein set forth, without costs, appellants appeal, and likewise from that part of the judgment dismissing the cross-complaint and the cause of action therein set forth, without costs, the respondents appeal.

In addition to the facts hereinbefore set forth it appears from a careful examination of the record that the respondent has, since the execution of the notes and mortgage referred to, sold the notes to his customers, none of whom are parties hereto, and has, since negotiating the notes, paid five semi-annual interest payments thereon, each aggregating the sum of $525, so as to keep the notes in good standing and prevent a default. He has likewise received some small amounts from renting the property for circus and exhibition grounds, paid out some small items for advertising and the like, in addition to those hereinbefore mentioned, and submits an account of which the first item is $1,000 commission for obtaining the loan, which, whether this item be considered or not, shows that he has paid out more money on account of the property than he has received from the sale of the mortgage notes and rentals. At the trial it was attempted to be shown that respondent had disposed of the building on the property for a matter of $9 or $10, when it was really worth $800 or $900, and caused or permitted 26 fruit trees to be cut down and removed from the land, which one witness says were or might have been worth $100 per tree. In view of the terms of the contract which gives to respondent absolute control of the property it is sufficient to say that from the evidence as a whole it does not appear that respondent acted in bad faith in disposing of the building and in permitting the cutting down of the trees. If he erred therein it was an error of judgment, and even that will not appear until the property is sold. So manifestly he cannot now be held accountable therefor. The evidence entirely fails to show that there has ever been a time since the inception of this transaction when respondent could have sold the property for sufficient to meet the incumbrances. Indeed it is to be gathered from the record that the property lies near enough to the center of the city to be somewhat undesirable for residence purposes, and yet not within the business district and desirable for business purposes, and its value is uncertain and speculative. Notwithstanding the interesting argument presented as to the fair dealing which equity requires of one who acts as trustee, we find nothing in the record which indicates that the respondent has so far failed in any duty which he owes to the appellant, or that any facts are shown which entitle the appellants to any part of the relief asked for in their complaint, or any relief at this time. It might be that issues could be framed, if appellants should elect to so proceed and proof could be adduced, which would warrant a court of equity in finding that the property cannot be sold in the manner contemplated by the agreement between the parties, in which event the court might, upon the prayer of appellants, direct a judicial sale and accounting. But we cannot think that the respondent is entitled to ask for that relief under the conditions shown. The intent of the contract hereinbefore set forth, in the light of what was contemplated by the parties at the time it was entered into, seems to be that the respondent shall carry the property until such time as a sale may be made which will net at least the amount of the incumbrances, and since appellants have no right of control, enjoyment of the use, or right to fix the price, or even to be consulted with reference thereto, we see no element of partnership except the division of the net proceeds as provided in the contract, which division is entirely consistent with the relation of principal and agent, trustee and cestui que trust, grantor and grantee, and other possible relations. In any event, no breach is shown on the part of the appellants, or either of them, which would justify the granting of any relief to the respondents.

The judgment of the trial court was right, and is affirmed.

Since both parties have appealed, neither will recover costs on this appeal.

HOLCOMB, C. J., and MOUNT, FULLERTON, and BRIDGES, JJ., concur.

DI LUCK v. BRADNER CO., Inc., et al.
(No. 15752.)

(Supreme Court of Washington. June 15, 1920.)

1. **Appeal and error ⇐1012(1) — Findings must be confirmed unless evidence preponderates against them.**

Where the Supreme Court cannot say the evidence preponderates against the findings of the trial court, they must be confirmed.

2. **Damages ⇐124(4)—Measure for cancellation of contract difference between price and what performance would have cost.**

The measure of damages of a contractor whose contract is canceled by the other party is the difference between the contract price and what it would have cost him to perform the work.

3. **Damages ⇐124(4)—Contractor constructing floors not entitled beside regular damages to allowance for personal services.**

A contractor to construct floors, though he intended himself to work on the job, and would

Digitized by Google

have been provided with 34 days' work at $7 per day, in addition to the difference between the contract price and what performance would have cost him, was not entitled to recover from the other party for breach by cancellation of the contract the difference between what he would have received for his personal services and what he actually earned in other work.

4. Principal and agent ⟸136(2)—Agent not liable for owners' breach of contract made through him.

Where the general contractor for a building in letting a contract for the construction of floors merely acted as agent for the owners, it was error to include the general contractor in the judgment against the owners in favor of the contractor for floors for breach by wrongful cancellation of his contract by the owners.

Department 1.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by J. Di Luck against the Bradner Company, Incorporated, and others. From judgment for plaintiff, defendants appeal. Reduced as against the named defendant, and affirmed.

Byers & Byers, of Seattle, for appellants.
G. E. Steiner, of Seattle, for respondent.

MACKINTOSH, J. Action to recover damages for breach of contract.

On April 4, 1918, the respondent entered into a contract for the construction of terrazo floors in an apartment house in Seattle owned by the appellant Bradner Company. By the contract it was provided that the respondent was to commence work on May 1st. On April 29th the respondent was notified that the building was ready for him to commence operations. On May 6 appellants notified respondent that his contract was canceled. As items of damage the respondent claimed loss of profits in the sum of $400, and the value of the work he would have performed had he been allowed to undertake the contract, in the sum of $238. Upon the trial judgment was rendered in respondent's favor in the sum of $332.85 on the first item and $133 on the second item.

[1] The appellants contend that, on account of the inactivity of the respondent from April 29 until May 6, they were justified in canceling his contract, and further claimed that in any event the court proceeded upon a wrong basis in assessing damages. Reading over the entire record, which is short, leaves us in doubt as to the question of fact involved in this case, and, as we cannot say that the evidence preponderates against the findings of the trial court, under the well-recognized rule, the findings must be confirmed.

[2] Upon the question of damages the trial court, however, was in error. The testimony shows that the profits which might reasonably be anticipated upon the contract as awarded would amount to $332.85; this being the difference between the contract price and what it would have cost the respondent to have performed the work called for in the contract. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 213. The testimony also shows that, had the contract been performed, the respondent intended to work thereon, and he would have been provided with 34 days of work at $7 per day, and that during the period that respondent would have been performing the contract he diligently sought for other work and secured it, for which he earned $105, and the judgment allowed him the difference between $238 and $105, or $133.

[3] This second item of damages was erroneously allowed for the reason that the contract was a building contract, and not a contract for services, and respondent is not entitled to double damages by treating it as both sorts of contracts. When the work was done, had he completed it, he would only have received the contract amount, which would have included his own work or the work of whomever he had employed in his stead; for all the work was to be done for the price of the contract. When the appellants let the contract, they were not hiring the respondent, nor was it material to them whether he labored himself or secured and paid for the labor of others.

[4] The judgment ran against the Bradner Company, which was the owner of the premises, and E. J. Rounds, doing business as E. J. Rounds Construction Company, the general contractor, who, in making the contract, acted as agent for the Bradner Company; the contract showing on its face that it was signed, "The Bradner Company, Inc., by E. J. Rounds Construction Company, Agent." All the correspondence which constitutes the contract between the parties is conclusive that E. J. Rounds Construction Company was merely acting as agent of the owners, therefore including them in the judgment was error.

The judgment of the trial court will be reduced to $332.85 against the appellant the Bradner Company, and affirmed for that amount.

HOLCOMB, C. J., and PARKER, MITCHELL, and MAIN, JJ., concur.

Digitized by Google

STATE ex rel. LA GRAVE v. CITY OF SEATTLE et al. (No. 15717.)

(Supreme Court of Washington. June 23, 1920.)

1. **Municipal corporations ⟸217(5)—Rule of civil service commission relative to transfers of employés effective.**

A rule of the civil service commission providing that transfers may be made from a position in one department to a similar position of the same class, grade, and character of work, and having the same pay, in another department, if heads of the two departments shall request, passed in conformity with authority given by charter, is effective, and to be construed to produce harmonious body of civil service regulations, which include provisions of charter and rules of civil service commission.

2. **Municipal corporations ⟸217(5)—New civil service positions may be filled from eligible lists or by transfer.**

Under rule 10 of the civil service commission of the city of Seattle (section 5, subd. B), when new civil service positions are created, they may be filled from the eligible list on which are the names of those not then in the city's employ, or, with consent of commission and heads of departments interested, an employé may be changed from one department to another, if transferred to a similar position of same class, grade, and character of work, and having same pay.

3. **Municipal corporations ⟸217(5)—Transfer of accountant from one department to another not violative of civil service commission rule.**

Transfer of an accountant in city of Seattle from city comptroller's department, where his position carried a salary of from $230 to $250 a month, to the legislative department as auditor of appropriations in such department, with a salary of $250 a month, *held* not in violation of rule 10 of the civil service commission (section 5, subd. B); the change leaving him in same class, grade and character of work, carrying same pay.

Department 1.

Appeal from Superior Court, King County; King Dykeman, Judge.

Mandamus by the State of Washington, on the relation of C. A. La Grave, against the City of Seattle and others. From judgment for relator, defendants appeal. Reversed.

Walter F. Meier, Geo. A. Meagher, and H. R. Fullerton, all of Seattle, for appellants.

Jas. A. Dongan, of Seattle, for respondent.

MACKINTOSH, J. The respondent seeks by mandamus to compel the city council of Seattle to appoint him to the position of auditor of appropriations in the legislative department, which position was created by ordinance approved 23d of June, 1919. July 8, 1918, this position was defined by the civil service commission as "accountant, class B, grade 7." At that time the respondent was the only one whose name was on the eligible list for appointment as "accountant, class B, grade 7." This eligible list constitutes the list from which appointees not already in the city's employ under civil service are appointed to civil service positions. At that time one A. T. Drake occupied in the department of city comptroller the position of "accountant, class B, grade 7." July 18 the president of the city council, as the head of the legislative department, made application to the civil service commission for the transfer of Drake from his position in the city comptroller's department to the legislative department, to fill the position created by the ordinance. The city comptroller consented to the transfer, and on July 19 the civil service commission granted the request for the transfer, and on July 21 Drake was appointed to the position, at the salary of $250 per month provided for in the ordinance. Drake while in the city comptroller's department, was receiving a salary of $230 per month, under a salary ordinance which provided that "accountants, class B, grade 7," should receive a minimum of $230 and a maximum of $250 per month. The respondent claims that the appointment to the position created by the ordinance should have been made from the eligible list, and that he, being the only person on said list, was entitled to the appointment, and that the transfer of Drake from one department to another, at an increase of salary, was not authorized by charter and civil service commission rules.

[1, 2] The city charter as it relates to civil service contains no provision for transfers, but provides, in section 4, article 16, that the civil service commission can make rules to carry out the purposes of the article and for "examination, appointment, promotions, and renewals," in accordance with its provisions, and that it may from time to time make changes in the existing rules. The civil service commission by rule 10, section 5, subd. B, has provided that transfers may be made "from a position in one department to a similar position of the same class, grade, and character of work, and having the same pay, in another department, providing the heads of the two departments concerned shall make request therefor." It cannot be contended that this rule is not effective, as it was passed in conformity with the authority given by the city charter, and is to be so construed as to produce a harmonious body of civil service regulations, which include the provisions of the city charter on the subject and the rules of the civil service commission. State ex rel. Washington W. P. Co. v. Savidge, 75 Wash. 116, 134 Pac. 680; White v.

Digitized by Google

North Yakima, 87 Wash. 191, 151 Pac. 645. The rule was passed with the intention of carrying out the purposes of the city charter and provide a means for the city to transfer from one department to another efficient employés as they may be needed in the different departments, and is in accordance with civil service theory in that it protects city employés in their employment, and also affords to the city the opportunity of availing itself of the services of employés in the positions where they will be the most efficient. When new civil service positions are created, they may be filled from the eligible list upon which are the names of those who are not then in the city's employ, or, with the consent of the civil service commission and the heads of the departments interested, an employé may be changed from one department to another, provided, that the employé is transferred to a similar position of the same class, grade, character of work, and having the same pay.

As was said in Jenkins v. Gronen, 98 Wash. 128, 167 Pac. 916, L. R. A. 1918A, 839:

"The evident purpose of the framers of the charter was to make free and open the opportunity to enter the public service, and to secure from the persons applying those shown by tests to be the best qualified for the service. These purposes are not accomplished if anything is left to the whim or caprice of the appointive power."

It was not the intention that the city's pay roll should be added to by new employés, if there were already on the roll those whose services could be used in some other department, thus securing trained men as well as preventing the increase of needless employés. Contrary to quite general results, the primary purpose of civil service is not to provide unnecessary permanent positions for theoretically competent incumbents.

The respondent bases his contention that Drake was improperly transferred for the reason that in the new position he received a compensation of $250 per month, whereas in the old position he received but $230. Under the facts of the case, we cannot agree with this contention, as we have come to the conclusion that neither the letter nor the spirit of the rule was violated in this instance. As we look at the rule, it, in spirit, was in part intended for the protection of employés, and aimed to provide that, by the subterfuge of transferring from one department to another, a civil service employé was not to be subjected to a decrease of pay, but provided his new position must be of the same class and character as that in which he was then employed, and that he should receive no less compensation in the new position than he was receiving in the old; in other words, the rule was passed in conformity with the general spirit permeating the civil service theory of public employment, and was intended to prevent the accomplishment indirectly of what was prohibited directly. It was meant to forbid the demoting of employés or decreasing their pay so that by an indirect method they might be compelled to relinquish their employment, when no reason sanctioned by the civil service regulations provided for their direct removal. So much for the spirit of the rule.

[3] Nor do we think that the action taken by the heads of the departments in this instance violated the letter of the rule. Drake, at the time he was changed from the city comptroller's department to the legislative department, was occupying a position in the former department which was listed as carrying a salary of from $230 to $250 per month, and was removed into a department which paid $250 per month. It is conceded that the change left him in the same "class, grade, and character of work," and it would seem that the new position carried the "same pay." The record shows that the work he was to perform in the new position was identically the same as that he had been performing in the old, that merely the authority over the position was transferred from one department of government to another, and had he remained in the city comptroller's office under the salary list it would have been proper to have increased his pay there to $250 per month without the violation of any rule or regulation, and this increase might have been made by the city comptroller previous to the comptroller's giving his consent to the transfer, and then there could have been no question but what the transfer could have been made without raising any question as to the "same pay." The rule as to transfers is applicable for the reason that Drake was transferred from a position the pay of which had been fixed by ordinance at from $230 to $250 per month to another position, which paid $250 per month, and the transfer therefore took place to another position of the same "class, character of work, and grade" and having the "same pay," and therefore was legal. That being true, the respondent was not entitled to the position, and his application for a writ of mandate should have been denied.

Judgment reversed.

HOLCOMB, C. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

Digitized by Google

INGLIS v. MORTON. (No. 15816.)

(Supreme Court of Washington. June 29, 1920.)

1. **Malicious prosecution ⇐64(2)—Evidence of disclosure to counsel held sufficient.**

In an action for malicious prosecution upon a charge of insanity, where the defense of full disclosure to the prosecuting attorney was interposed, that defendant did not in his testimony disclose the exact words which he spoke to the prosecutor did not make the evidence insufficient, where plaintiff had an opportunity to cross-examine.

2. **Malicious prosecution ⇐71(2)—Probable cause held question for court.**

Whether the facts shown by undisputed evidence constitute probable cause for a charge of insanity is a question for the court.

3. **Malicious prosecution ⇐59(2)—Statement of facts in prior civil suit held properly excluded.**

In an action for malicious prosecution upon a charge of insanity, refusal to admit in evidence a statement of facts in a civil case previously tried between the parties *held* not erroneous.

Department 2.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Mrs. M. W. Inglis against A. G. Morton. From judgment of dismissal, plaintiff appeals. Affirmed.

P. L. Pendleton, of Tacoma, for appellant.

Bates & Peterson and Remann & Gordon, all of Tacoma, for respondent.

TOLMAN, J. Appellant, as plaintiff, brought this action against the respondent, as defendant, to recover damages for the alleged malicious prosecution of the appellant upon a charge of insanity. The complaint alleges that the respondent swore to a complaint upon an insanity charge; that the appellant was arrested thereunder, incarcerated in the county jail, thereafter tried on the insanity charge, and a verdict of "not insane" rendered by the jury. It is further charged that the respondent caused the warrant charging insanity to be issued maliciously and without probable cause for the purpose of procuring the plaintiff's commitment to an insane asylum, all because of a feeling engendered by former quarrels and litigation between the parties. The answer of the respondent admits the signing of the complaint charging the appellant with insanity, admits that the jury returned a verdict of "not insane" upon the hearing, and denies each and all of the other allegations of the complaint. At the close of appellant's testimony the trial court sustained a challenge to the legal sufficiency of the evidence and granted respondent's motion to discharge the jury and enter a judgment of dismissal, from which judgment this appeal is taken.

Both parties concede that a proceeding of this kind is analogous to a case where a party is charged with a crime out of which an action for malicious prosecution arises, and that the same rule should apply where the prosecuting witness makes a full, fair, and complete statement to the prosecuting attorney or to any other reputable attorney, and is advised that the facts are sufficient upon which to base a complaint of insanity. Since the parties are so agreed, and perceiving at this time no reason why their position is not correct, we have made no independent investigation to determine whether in other jurisdictions it has been so held, but assume for the purposes of this case that they are right.

[1, 2] This simplifies the issues to be here determined, and the only substantial question to be decided is, Did the undisputed facts at the close of appellant's case below show that the respondent acted upon the advice of the prosecuting attorney after making a full, fair, and truthful statement of all of the facts relating to probable cause existing for the charge of insanity? At the close of appellant's case the undisputed evidence as brought out by the examination of the respondent, who was called as a witness by appellant, upon the question of probable cause, was that on Saturday afternoon, May 25, 1918, while he was absent from his office, the appellant went to his place of business armed with a prospector's pick, and smashed up a glass showcase belonging to respondent attached to the wall at the street entrance to his office, together with the exhibits therein; that after so destroying the showcase and its contents appellant made a speech to the crowd which had assembled; that she was apprehended by a policeman and taken to the police station; that this situation was detailed to respondent when he returned to his office and he then went to the police station to investigate further and was directed by the police officers to the prosecuting attorney for Pierce county. It being Saturday afternoon, the prosecutor's office was closed, and he then telephoned and went to the home of Mr. Gordon, one of the deputies, where he consulted with Mr. Gordon for something like an hour; that in such consultation he went minutely into details concerning all of his dealings and transactions with the appellant, including the history of the prior litigation between them, told him her history and the history of her troubles with other dentists of the city of Tacoma, and, as he says:

"I told him everything about it. He was familiar with some of the things about it because

Digitized by Google

he had been at my office and asked about it. I told him everything. I kept nothing back. I put the whole matter up to the prosecuting attorney and followed his advice, and that is the reason I signed the complaint."

And on redirect examination he further testified:

"I told him about the damage suit. I went through as much of it as I remembered. Mr. Gordon was already familiar with it. I told him as fully the statement for Mrs. Inglis as I did for myself. I do not think I omitted anything. * * * I told him about all the trouble I had in the dentist chair that led up to our disagreement."

After this conference with the prosecuting attorney on Saturday afternoon respondent, according to his testimony, again went to the prosecuting attorney's office on Monday morning, further consulted with Mr. Gordon and with another deputy in the same office, and thereupon, acting wholly upon their advice and at their suggestion, he signed and swore to the insanity complaint. Appellant seems to complain that this was insufficient because respondent in his testimony did not disclose the exact words which he spoke to the prosecutor in making his statement to him, though it nowhere appears that there was any limitation placed upon the appellant's right by redirect examination to test the accuracy of witness' testimony and the fullness and fairness of his statement to the prosecutor, by going into details and inquiring specifically as to what was said upon any and all points. We cannot hold this contention to be well founded. Appellant deliberately called the respondent to the witness stand, and went into the question of his reasons and motives for signing the complaint on direct examination, thereby opening the door for the cross-examination which followed, and on redirect examination he had full opportunity to test the witness' statements, both general and specific, and might have inquired in detail as to the disclosures made upon any and all points and the language used in making such disclosures. The evidence upon this point as it stood at the close of appellant's case was wholly undisputed, and therefore it became the duty of the court to pass upon that evidence and to find therefrom probable cause as a matter of law and to direct a verdict accordingly. Borg v. Bringhurst, 105 Wash. 521, 178 Pac. 450, and cases there cited.

[3] Error is also assigned upon the refusal to admit in evidence the statement of facts in the civil case between the parties theretofore tried. Appellant does not advance any reason for the admission of this evidence, and from an examination of the record we perceive none. Appellant did not, in the examination of the respondent, direct his attention to such statement of facts or anything therein contained, and our attention is directed to nothing therein which could in any wise contradict the respondent's testimony as to making a full, fair, and complete statement to the prosecuting attorney.

Finding no error, the judgment appealed from is affirmed.

HOLCOMB, C. J., and MOUNT, FULLERTON, and BRIDGES, JJ., concur.

CUDDY v. STURTEVANT et al. (No. 15558.)

(Supreme Court of Washington. June 22, 1920.)

1. Usury ⟸95—Party seeking to be relieved must return what he has received.

A party seeking to be relieved in equity from a usurious contract must at least offer to return what he has received under it.

2. Usury ⟸134—Waterworks bonds of city not subject to penalty provisions.

Waterworks bonds of city bearing 6 per cent. on their face, but sold at a discount, and therefore carrying in fact a greater rate of interest than the 6 per cent. allowed by Rem. Code 1915, § 8008, under which they were issued, *held* not subject to the penalty provisions of the usury statute (sections 6250–6256), because the section providing such penalties refers only to a greater rate of interest than "hereinbefore" provided for, while the statute permits 8 per cent. on city warrants.

3. Municipal corporations ⟸921(1)—Sale at discount requiring more than statutory interest a mere irregularity.

A sale of bonds by a municipality at a price requiring the payment of more interest than provided by statute is a mere irregularity, and does not affect the power of the municipality to issue the bonds.

4. Municipal corporations ⟸943(1)—City estopped by recitals of waterworks bonds.

Recitals of city's waterworks bonds payable from a particular fund, and therefore not negotiable under Rem. & Bal. Code, § 3394, that the bonds were issued in strict compliance with statute and the ordinances of the city referred to and printed thereon, *held* to estop the city in favor of innocent purchasers to deny their validity because sold to the original purchaser at a discount, and therefore in fact carrying more interest than authorized rate of 6 per cent. shown on their face.

5. Municipal corporations ⟸944—Purchasers not required to examine records to determine whether bonds originally sold at discount.

Purchasers in open market for value without notice of infirmity of city's waterworks bonds copying statute authorizing issuance, ordinance submitting question to voters, and ordinance providing for issuance and sale *held* not required to examine in city records the contract made with the underwriters of the issue

Digitized by Google

to determine whether the bonds were sold at a discount so that more interest would be paid than allowed by law.

6. Municipal corporations ⟸920—Specific authority in officers to determine whether conditions precedent to issuance of bonds performed not necessary.

Specific authority in the officers of a city to determine whether the conditions precedent necessary to the issuance of waterworks bonds had been performed was not required, though given by Rem. & Bal. Code, § 8008; full control of the matter being given the corporate authorities.

En Banc.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by E. D. Cuddy, Vera M. Cuddy substituted as plaintiff, against the City of Centralia, etc., Carstens & Earles, Inc., and C. K. Sturtevant and another. From judgment for plaintiff, defendants Sturtevant and another appeal. Reversed, and cause remanded, with directions to dismiss the action.

Preston, Thorgrimson & Turner and Peters & Powell, all of Seattle, for appellants.

C. D. Cunningham, Dysart & Ellsbury, and H. E. Grimm, all of Centralia, and P. M. Troy, of Olympia, for respondent.

MAIN, J. This action was brought by a taxpayer for the purpose of having certain municipal water bonds declared illegal and void. The defendants were the city of Centralia and its officers, the original purchaser of the bonds and two of the present bondholders. From the judgment entered by the superior court holding that the bonds were not void, but applying the penalty provision of the usury statute thereto, the two bondholders appeal. Carstens & Earles, Inc., was dismissed out of the action apparently on the ground that the statute of limitations had run against any right of this corporation, and all parties seemed to have acquiesced in that ruling. The essential facts to be stated are not in substantial dispute.

On December 10, 1912, the voters of the city of Centralia authorized the city officers to acquire a water system and to issue bonds therefor in the sum of $300,000, bearing interest at the rate of not to exceed 6 per cent. per annum. The election was called and held pursuant to Ordinance No. 281 of the city. After the proposition had been approved by the voters, the city advertised for bids for the sale of the bonds, and on March 18, 1913, the entire issue was sold to Carstens & Earles, a corporation, for the sum of $287,326 and accrued interest. After the bonds had been delivered to Carstens & Earles, they were sold by that corporation to various purchasers. As above stated, two of such purchasers are parties to this action. C. K. Sturtevant, of Seattle, was the owner of bond No. 250, and Samuel P. Strang, of Portland, Or., was the owner of bonds Nos. 587 and 588. In all, 600 bonds were issued by the city, each in the sum of $500, and each carrying coupons evidencing the semiannual interest due thereon. From the time the bonds were delivered until the institution of this action, which was on the 16th of October, 1918, the city had regularly paid the semiannual interest coupons as they became due. On the back of each of the bonds is printed chapter 150 of the Laws of 1909, which is an act giving power to cities and towns to acquire and operate certain public utilities, and providing for the modes of payment therefor. There was also printed on the back of each of the bonds Ordinance No. 281 which submitted the matter of acquiring a water system to the voters of the city, and also Ordinance No. 302, which provided for the issuance of $300,000 of special water bonds in accordance with the proposition submitted by Ordinance No. 281. Ordinance No. 302 provides that bonds 1 to 12, inclusive, shall be payable on May 1, 1919, bonds 13 to 26 on May 1, 1920, and a certain number of bonds shall be payable on May 1 each year thereafter until May 1, 1938, when bonds Nos. 551 to 600 shall become payable. The ordinance sets out an exact copy of the bond to be issued. In the bond there is a recital as follows:

"It is hereby found and declared that said bonds are issued pursuant to and in strict compliance with chapter 150 of the Laws of 1909 of the state of Washington, and of the ordinances of said city of Centralia, referred to in this bond and printed hereon, and that all acts, things, elections, ordinances, resolutions, and conditions precedent, precedent to the right to issue and deliver this bond, as prescribed by said statute and ordinances, have happened, existed, and been done and performed prior to the issuance hereof."

The bonds bore interest at the rate of 6 per cent. per annum. The total issue of the face value of $300,000, as above stated, was sold to Carstens & Earles for the sum of $287,326. The taxpayer claims that, since the bonds were sold at a discount, which would cause the payment of interest upon the amount of money the city received to be at a rate greater than 6 per cent. per annum, they are void, and asks to have their payment enjoined. Under section 8008 of Remington's Code, which is one of the sections of the act under which the bonds were issued, the city was not authorized to sell the bonds at a discount, which would result in the payment of interest at the rate of more than 6 per cent. per annum upon the money re-

Digitized by Google

ceived therefor by the city. Sturtevant and Strang, the appellants, contend that by reason of the recital in the bonds the city is now estopped to question their validity in the hands of purchasers who acquired them for value and without knowledge or notice that they had been sold at a discount not authorized by law.

The trial court adopted neither of these contentions, but entered a judgment in favor of Sturtevant and Strang after applying to each bond the penalty of the provision of the usury statute. The bonds were not due at the time of the trial and are not yet due, and neither of the bondholders asks for a judgment thereon. The prayer in their answer was for a dismissal of the action.

[1] In applying the usury statute to the bonds in question, we think the trial court was in error. The rate of interest which the city was required to pay by reason of the fact that the bonds were sold at a discount, while greater than 6 per cent., did not equal 8 per cent. This was an action in equity, and one of the equitable doctrines is that a party coming into equity must offer to do equity. In applying this doctrine the courts, so far as we are advised, have uniformly held that a party seeking to be relieved from an usurious contract must at least offer to return what he has received under the contract. There is no such offer in this case. There is another reason why the usury statute is not applicable to the bonds. The bonds, as already stated, were issued payable out of a special fund as authorized by section 8008 of the Remington 1915 Code. In this section there is a provision that bonds issued thereunder shall bear interest "not exceeding six per cent. per annum." Neither the section nor the act of which it is a part makes any provision for a penalty when bonds have been sold so that the rate of interest which the city would be required to pay is greater than 6 per cent. In 1899 the Legislature passed a law establishing the legal rate of interest and fixed the penalty when a greater rate of interest than that there specified was contracted for. Laws of 1899, c. 80. This law is codified in Remington's 1915 Code in sections 6250 to 6256, inclusive, and has not, subsequent to its passage, been amended. Section 4 of the act is as follows:

"All county, city, town and school warrants, and all warrants or other evidences of indebtedness, drawn upon or payable from any public funds, shall bear interest at a rate not greater than eight per centum per annum, unless a less rate be specified therein."

[2] Section 7 of the act provides that, if a greater rate of interest than is "hereinbefore" allowed shall be contracted for, the contract shall not be void. The section also fixes the penalties which may be visited upon a party to an usurious contract when an action is brought thereon. Under this section the penalties refer to cases where the rate of interest has exceeded that "hereinbefore" provided for. As applied to city bonds under section 4, the penalty could not be invoked unless such bonds bore interest at a rate greater than 8 per cent. per annum. Section 7 does not provide that, if any rate of interest be exacted greater than that allowed by law, the penalty provisions of the act shall be applicable. While the bonds in the present case were sold at a rate greater than that allowed by the act under which they were issued, they are not subject to the penalty provisions of the usury statute, because the section providing for such penalties refers only to a greater rate of interest than is "hereinbefore" provided for. In support of the position that the penalty provision of the usury statute should be applied to these bonds, the cases of Uhler v. Olympia, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, and Spear v. Bremerton, 90 Wash. 507, 156 Pac. 825, are cited. In neither of those cases was the court construing the usury statute. There is language in them, especially in the former, which refers to a rate of interest greater than that allowed under section 8008 as usurious, but the language was used as describing a rate of interest greater than that allowed by the law under which the bonds were proposed to be issued, and had no reference to the question whether the penalty provision of the usury statute proper was applicable. The question of usury, however, in this case is largely incidental, and is not one of the primary questions about which the controversy is waged. The bonds here involved in the hands of parties who had purchased them for value with no knowledge of any infirmity therein are either valid or void.

Upon this branch of the case the two questions which seem to us controlling are: First, does the doctrine of estoppel by recitals apply to these bonds? and, second, if it does, were the purchasers, Sturtevant and Strang, required to examine the records of the city of Centralia for the purpose of ascertaining at what price the bonds were sold to Carstens & Earles? In considering these questions it must be remembered that it is not the original purchaser that is here involved, but those that acquired the bonds in the open market from, or after they had been sold by the original purchaser, and who took them without knowledge or notice that they were sold at a discount not authorized by law. The question as to when the doctrine of estoppel by recitals in the bonds will prevent a municipality from raising certain defenses after the bonds have passed into the hands of a bona fide holder for value has frequently been before the United States

Digitized by Google

Supreme Court. In fact, most of the adjudications are from that tribunal; the question having generally arisen between the municipal corporation issuing the bonds and a nonresident holder.

In Dillon on Municipal Corporations it is said the decisions of the United States Supreme Court on the question are practically controlling. After reviewing certain decisions of that court, the author, in volume 2 (5th Ed.) § 914, states the rule to be as follows:

"The cases referred to in the last two sections afford, perhaps, a more striking illustration than any previously decided by that court, that the purchaser may implicitly rely upon the recitals in the bonds, made by the proper officers, that the authority to issue them has arisen, and that he is under no obligation, unless the statute so prescribes, to consult the records of the municipality, and is not charged with constructive notice of their contents; and this, too, it will be observed, where the recital in the bonds was general and not specific in its nature, and where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township."

In Sutliff v. Lake County Commissioners, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145, the court had before it an issue of bonds by Lake county in the state of Colorado. In that state the amount of debt which a county could incur was limited by the Constitution and by statute. The statute required the county commissioners to publish and enter upon the public records of the county semiannual statements showing the whole amount of the county debt. The bonds issued were in excess of the debt limit fixed by the Constitution and statute. The bonds contained a recital that all of the provisions of the act under which they had been issued had been fully complied with by the proper officers. There was no specific recital that in issuing the bonds the constitutional debt limit of the county had not been exceeded. It was there held that the recital in the bonds that all of the provisions in the statutes had been complied with did not estop the county from defending against the bonds on the ground that they were issued in violation of the Constitution.

In Gunnison County Commissioners v. Rollins, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, bonds issued by Gunnison county, Colo., were involved. The county defended on the ground that it had no right to issue the bonds because in so doing it had exceeded the debt limit fixed by the statute and the Constitution of the state. In the bonds there involved there was a recital that their issue did "not exceed the limit prescribed by the Constitution of the state of Colorado." It was held that this specific recital that the constitutional debt limit had not been exceeded by the issuance of the bonds estopped the county from defending on that ground. In that case the previous decisions of that court upon the question were considered, reviewed, and distinguished. The same statute and constitutional provision was involved as in the Sutliff Case.

The rule stated in Dillon on Municipal Corporations, above quoted, as well as the decision in each of the cases just referred to, has reference to applying the doctrine of estoppel to municipal bonds which are negotiable under the law merchant or the Negotiable Instruments Act. The taxpayer in this case argues that the doctrine should not be here applied because the bonds involved are not negotiable in the full sense, for the reason that they are payable out of a particular fund, to wit, the revenue from the water system. Under section 3394 of Remington & Ballinger's Code, an order or promise to pay only out of "a particular fund is not unconditional," and such a bond is therefore not a negotiable instrument as defined in that act. Admitting that the bonds here in question are not negotiable instruments under the law merchant or the Negotiable Instruments Act, the question arises whether the doctrine of estoppel by recital should be applied to bonds such as these. On their faces the bonds are made payable to "bearer," and therefore passed from hand to hand by delivery. The statute under which they are issued provides that the holder thereof shall have a valid claim against the special fund created for their payment, and that the holder may bring an action thereon against the city issuing them.

[3] While the adjudicated cases deal largely with bonds negotiable in the full sense, it is not the fact of negotiability that causes the estoppel, but the recitals. Even negotiable bonds, if issued by a municipality without power, are not subject to the doctrine of estoppel by recitals when the bonds are in the hands of a bona fide holder. The estoppel operates upon the irregularity in the issuance of bonds, and not upon the power of the municipality to issue them. A sale of bonds by a municipal corporation at a price which will require the payment of a greater rate of interest than that provided by statute is a mere irregularity, and does not affect the power of the municipality to make and issue the bonds.

In Dillon on Municipal Corporations (5th Ed.) vol. 2, p. 1401, it is said:

"A sale of the bonds at less than par, contrary to the statutory direction, does not affect the fundamental power of the municipality to make and issue the bonds; it is a mere irregularity in the exercise of its powers, and the validity of the bonds is not affected thereby in the hands of innocent purchasers for value."

Digitized by Google

In Clay County v. Society for Savings, 104 U. S. 579, 26 L. Ed. 856, two classes of bonds were involved, one negotiable and the other not negotiable because payable upon a condition. The doctrine of estoppel was there applied to both classes of bonds, but the question as to whether it should be applied in one case and not the other was not suggested or discussed in the opinion. The holding cannot therefore be considered an authority for applying the doctrine to nonnegotiable bonds. As relating to individuals the doctrine of estoppel by recitals has been applied to instruments not negotiable in the full sense. Weyh v. Boylan, 85 N. Y. 394, 39 Am. Rep. 669; Musselman v. McElhenny, 23 Ind. 4, 85 Am. Dec. 445. Where the question is one between individuals it appears that the estoppel operates even though the bonds are not negotiable in the full sense.

[4] This court has announced the doctrine that the same rule or standard which measures the rights and liabilities of individuals should be applied to the business contracts of municipal or public corporations. Since it is not the negotiability that works the estoppel, but the recitals, it seems to us that the doctrine should be applied to the bonds in this case. When it becomes a question between an innocent purchaser of bonds in the open market and the city purporting to issue them, as to which should be the loser by a breach of duty on the part of the city officers, such question should be solved in favor of the innocent purchasers. Schmidt v. City of Defiance (C. C.) 117 Fed. 702. The bonds in question have all the characteristics of negotiability, except that they are made payable out of a particular fund.

It is true that in Ruling Case Law, vol. 19, p. 1014, the rule is stated to be that the doctrine of estoppel by recitals does not apply to nonnegotiable municipal bonds. In support of this statement there is cited Gunnison County Commissioners v. Rollins, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, and Goose River Bank v. Willow Lake School Township, 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605. In the case first cited the question was not involved or discussed. In the North Dakota case the question did not involve bonds, but warrants. There a teacher had been employed who did not hold a lawful certificate, and under the express terms of the statute her contract was void. That case cannot be regarded as controlling.

In Washington County v. Williams, 111 Fed. 801, 49 C. C. A. 621, there is a statement that the purchaser in the open market of nonnegotiable bonds of a municipal corporation cannot invoke for his protection the doctrine of estoppel by recitals. Not only was the question not necessarily involved in that case, but the court there was considering a case where it was claimed that the bonds had been issued without power. If issued without power, as above stated, it is the general rule that the doctrine does not apply.

This brings us to the second question, which is whether the purchasers in the open market for value and without knowledge or notice of any infirmity in the bonds were required to examine in the city records the contract made with Carstens & Earles and determine whether the bonds were sold so that a greater rate of interest would be paid than that allowed by law. The bonds, as above stated, contain a copy of the act of the Legislature which authorized their issuance, a copy of the ordinance submitting the question to the voters of the city, and a copy of the ordinance providing for the issuance and sale of the bonds. This last ordinance recites that the bonds had been sold to Carstens & Earles, and that a contract for such sale had been entered into. The bonds on their faces recite that—

"All acts, things, elections, ordinances, resolutions, and conditions precedent to the right to issue and deliver this bond, as prescribed by said statute and said ordinances, have happened, existed, and been performed prior to the issuance hereof."

[5] This is a specific recital that every condition precedent to the issuance of the bonds had been performed, and under the rule stated by Judge Dillon was sufficient to work an estoppel, and the purchasers in the open market were not required to look into the records of the city and examine the details of the contract which had been made with Carstens & Earles.

[6] The statute under which the bonds were issued (section 8008, Remington & Ballinger's Code) authorizes the officers of the city upon the conditions there specified to issue and sell bonds. It is further provided that such bonds "shall be sold in such manner as the corporate authorities shall deem for the best interest of the city." Here was general authority to the officers of the city to determine whether the conditions precedent necessary to the issuance of the bonds had been performed. Specific authority to that effect was not required, since full control of the matter was given to the corporate authorities. McQuillin on Municipal Corporations, vol. 5, p. 4891: Section 7642 of Remington & Ballinger's Code, which is one of the sections under the general title of "Municipal Corporations," requires that all orders of a city council shall be entered upon the journal of its proceedings. The fact that the price at which the bonds had been sold could have been discovered by examining the records of the city council will not prevent a bona fide purchaser from relying upon the doctrine of estoppel.

In McQuillin on Municipal Corporations, vol. 5, § 2335, it is said:

"Recitals in municipal bonds are binding notwithstanding that they are contrary to matters

Digitized by Google

appearing of public record. This is the rule in force at present."

In Waite v. Santa Cruz, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552, municipal bonds had been issued which contained the recital that all "acts, conditions and things required by law at which time precedent to and in the issuance of said bonds had been properly done, happened and performed in legal and due form, as required by law." The bonds in that case referred to a certain ordinance of a municipality. If the ordinance had been examined by the purchasers of the bonds, it would have disclosed a portion of them invalid. The court there applied the doctrine of estoppel and used this language:

"The city of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

The case of Presidio County v. Noel-Young Bond Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402, is to the same effect. There is nothing on the face of the bonds involved in the present action that indicates that the recitals therein are untrue. The city council had general authority to determine whether the conditions precedent had been performed. The defects in the bonds constituted a matter peculiarly within the knowledge of the corporate authorities. The fact that the statute under which the bonds were issued and the two ordinances were printed in full upon the backs of the bonds would indicate that the city council intended thereby to convey to the purchaser in the open market that he would thereby get all the information which was necessary for him to have to determine the validity of the bonds.

The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss the action.

HOLCOMBE, C. J., and FULLERTON, MOUNT, MITCHELL, PARKER, TOLMAN, BRIDGES, and MACKINTOSH, JJ., concur.

STATE ex rel. SHAUGHNESSY et al., Public Service Commission v. BOYLE, Governor, et al. (No. 2443.)

(Supreme Court of Nevada. July 6, 1920.)

Mandamus ⟸102(1)—State board of examiners cannot be compelled to approve payment out of certain fund where another fund is available.

A writ of mandamus will not be issued to compel the board of examiners to approve claims for payment out of appropriations under Act March 22, 1919 (St. 1919, c. 81) §§ 23, 24, and state comptroller to draw warrants, where there is a fund available for payment of such claims under Act March 28, 1919 (St. 1919, c. 109) § 46, out of which the board is willing to authorize payment of claims, since if payments may be made out of either of the two funds, the selection of the particular fund involves an exercise of discretion which cannot be controlled by mandamus.

Mandamus by the State of Nevada on the relation of John F. Shaughnessy and others, members of, and constituting the Public Service Commission of the State of Nevada, against Emmet D. Boyle, Governor of the State of Nevada and others, members of and constituting the State Board of Examiners of the State of Nevada, and others. Peremptory writ denied, alternative writ quashed, and proceedings dismissed.

Leonard B. Fowler, Atty. Gen., and Robert Richards, Deputy Atty. Gen., for plaintiffs.

Forman & McKnight, of Tonopah, for defendants.

DUCKER, J. By this proceeding John F. Shaughnessy, Wm. H. Simmons, and James G. Scrugham, members of and constituting the Public Service Commission of the state of Nevada, seek a peremptory writ of mandamus to compel Emmet D. Boyle, Governor, and George Brodigan, secretary of state, as members of the state board of examiners of the state of Nevada, to allow and approve certain claims presented to said board of examiners to be paid out of specific funds alleged to have been appropriated for such purpose by sections 23 and 24 of an act of the Legislature of the state of Nevada (St. 1919, c. 81), entitled, "An act making appropriations for the support of the civil government of the state of Nevada for the years

Digitized by Google

1919 and 1920, approved March 22, 1919." The writ is also sought to compel Geo. A. Cole as state controller of the state of Nevada to draw his warrants upon the state treasurer of the state of Nevada for the payment of said claims from said specified funds, and to direct Ed Malley, as state treasurer of the state of Nevada to pay said warrants therefrom.

The claims which gave rise to this controversy are the claims of F. O. Broili in the sum of $100 for services as engineer for the Public Service Commission during the months of April and May, 1919, and the claim of the commission for and on behalf of the National Association of Railway Commissions for $500 for the year 1919 and $500 for the year 1920. These claims were duly approved by the commission, and presented to the state board of examiners, and, as alleged in the petition, were rejected by said board by the votes of the Governor and secretary of state, solely on the ground that there was no appropriation therefor. It is also alleged in the petition that the only member of said board who voted to allow the claims is Leonard B. Fowler, Attorney General of the state of Nevada, and that prior to the presentation of the claim of said Broili to the board said Leonard B. Fowler at the request of the commission rendered an opinion, holding that the appropriation is valid, and that said claim should be paid from the money so appropriated; that the opinion of the Attorney General has been repudiated and rejected by the Governor and secretary of state as members of the board, and by Geo. A. Cole, state controller of the state of Nevada; and it is alleged that the latter will decline to draw warrants in payment of said claims from the specific sums said to have been appropriated.

The defendants filed an answer to the petition, and a summary thereof is to the effect that by the enactment of that certain act of the Legislature of the state of Nevada St. 1919, c. 109), entitled "An act defining public utilities, providing for the regulation thereof, creating a public service commission, defining its duties and powers, and other matters relating thereto," approved March 28, 1919, and effective April 1, 1919, said sections 23 and 24 of the General Appropriation Act have ceased to be of force since last-mentioned date, and are inoperative, and that no claims can be allowed from, nor any warrants be drawn upon, said alleged appropriations.

It is admitted in the answer that said Boyle, Brodigan, and Cole have declined to accept the opinion of the Attorney General, but denied that either of these members of the board voted to reject the claims.

The regular presentation and validity of the claims are not denied in the answer, and it is alleged that said Emmet D. Boyle and George Brodigan, as members of the state board of examiners, have been at all times, and now are, ready and willing to approve the same, and to authorize their payment out of the fund of $10,000 appropriated by section 46 of the said act of March 28, 1919; and that George A. Cole, as state controller of the state of Nevada, has at all times been, and now is, ready and willing to draw his warrants in payment of said claims upon the appropriation authorized by the statute last mentioned.

This is not a proper case for the issuance of the extraordinary writ of mandamus. Section 46 of the said act of March 28, 1919, provides as follows:

"For the purpose of carrying out the provisions of this act, the sum of ten thousand ($10,000) dollars is hereby appropriated out of any moneys in the treasury not otherwise appropriated."

The contention is nowhere made that this fund is not available for the payment of the claims, or that it does not constitute an appropriation out of which the claims might be legally paid. But it is claimed by the commission that there are specific appropriations created by item 3 of section 23 and item 1 of section 24 of the General Appropriation Act of 1919, which should be drawn upon for their payment. The act carrying these items of appropriation was passed March 22, 1919, and defendants contend that they were repealed by the act of March 28, 1919. We may assume, for the purposes of this decision merely, that no such repeal was effected by the latter act, and still the writ may not issue. For, if the items mentioned in said sections 23 and 24 constitute valid subsisting appropriations available for the payment of the claims, there is then, by reason of the additional appropriation made by said section 46, more than one fund out of which they may be paid; and the right of the board of examiners to allow and approve the claims, as payable out of either, would involve an exercise of discretion which could not be controlled by mandamus.

The peremptory writ prayed for is denied, the alternative writ heretofore issued quashed, and the proceedings dismissed.

COLEMAN, C. J., and SANDERS, J., concur.

Digitized by Google

Ex parte GODDARD. (No. 2435.)

(Supreme Court of Nevada. July 6, 1920.)

1. **Statutes ⟸64(1)—Partial invalidity does not invalidate independent portions.**

Though a portion of a statute is null and void, no other portion thereof will be affected thereby, unless it is dependent on the portion which is null and void.

2. **Constitutional law ⟸42—Only persons affected can attack constitutionality.**

If a party's rights are not affected by a statute, or a part thereof, its constitutionality will not be considered upon his application.

3. **Commerce ⟸8(12)—Sheep Commission Law not interference with interstate commerce.**

The Sheep Commission Law *held* not violative of Const. U. S. art. 1, § 8; Congress not having covered the whole subject of the transportation of live stock from one state to another.

4. **Constitutional law ⟸207(6)—Sheep Commission Law not discriminatory against citizens of other states.**

The Sheep Commission Law *held* not violative of Const. U. S. art. 4, §§ 1, 2, providing that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states; the law being properly construed as referring to sheep brought into Nevada whether owned by citizens of Nevada or of a sister state.

5. **Animals ⟸29—Sheep Commission Law not unreasonable, arbitrary, or discriminatory.**

The Sheep Commission Law *held* not unreasonable, arbitrary, or discriminatory.

6. **Habeas corpus ⟸92(1)—Correctness of statement of facts in Governor's proclamation under Sheep Commission Law not reviewable.**

In habeas corpus proceeding by one convicted of violating the Sheep Commission Law by driving sheep into Nevada from a state which the Governor had by proclamation scheduled as a locality where scabies was epidemic, the correctness of the statement of facts contained in the Governor's proclamation cannot be inquired into.

7. **Constitutional law ⟸48—Every presumption in favor of validity.**

Every presumption is in favor of the validity of a statute.

Original proceeding in habeas corpus by Lee Goddard. Proceeding dismissed, and petitioner remanded to custody.

Richard W. Young, Jr., of Salt Lake City, Utah, for petitioner.

Leonard B. Fowler, Atty. Gen., Robert Richards, Deputy Atty. Gen., and Hoyt, Norcross, Thatcher, Woodburn & Henley, of Reno, for respondent.

COLEMAN, C. J. This is an original proceeding in habeas corpus, to procure the discharge of the petitioner from the custody of the sheriff of Elko county, who holds him pursuant to proceedings had upon three separate complaints charging him with violating what is commonly known as the Sheep Commission Law (Stats. 1919, c. 82, p. 134). The statute in question creates the state board of sheep commissioners, which is empowered to make and enforce rules and regulations for the quarantining, dipping, or other treatment of sheep. Section 11 of the act provides:

"All sheep which are kept or herded within the limits of the state of Nevada shall, between the fifteenth day of April and the first day of November of each year, be dipped under the supervision of an authorized sheep inspector in one of the dips which have been recommended by the board; the said dip to be specified by the board and to be of a strength sufficient to eradicate scabies, ticks or lice."

Section 12 reads, in part, as follows:

"Whenever the Governor of the state shall have good reason to believe that any disease covered by this enactment has become epidemic in a certain locality in any other state or territory, or that conditions exist that render sheep liable to convey disease, or whenever the board shall certify to the Governor that conditions exist that render sheep likely to convey disease, the Governor shall forthwith, by proclamation, schedule such locality or localities and prohibit the importation from them of any sheep into this state until such time as the said proclamation shall be raised or modified by the Governor. Any person, company, or corporation, or any agent, servant, or employé thereof, who after the publication of such proclamation shall knowingly receive in charge any sheep from any of the prohibited districts, or transport, convey, or drive the same within the boundaries of any county of this state, shall be deemed guilty of a misdemeanor, and shall be punished as provided in section 26 of this act."

Section 15 of the act provides:

"All sheep or bucks imported to Nevada from any state, territory, or District of Columbia, or from any foreign country, shall, upon entering the state, irrespective of the time of such entry, be dipped twice under the supervision of an inspector of the board, the first dipping to be performed within ten days after the said sheep or bucks arrive in the state, and within a period of not less than ten days or more than fourteen days after the said first dipping the said sheep or bucks shall again be dipped; and after the second dipping, if the said sheep or bucks are free of disease, they shall be released and shall thereupon become subject to the laws, rules, and regulations governing other sheep in the state; provided, however, that the board may make reasonable rules and regulations, under which sheep and bucks free from disease may enter the state without dipping, or by being dipped only once. The board is hereby authorized to take charge of and dip

Digitized by Google

as soon as possible any sheep and bucks imported into the state of Nevada not previously dipped within the period required by this section, and the expenses for so doing shall be paid by the owner of said sheep or bucks and the same shall become a lien upon such sheep or bucks until paid. Any person, firm, or corporation, or any servant, agent, or employé thereof, who is the owner or in charge or control of any sheep or bucks imported into the state of Nevada, violating the provisions of this section, shall be deemed guilty of a misdemeanor and shall be punished as provided for in section 26 of this act."

Section 9a of the rules adopted by the state board of sheep commissioners, and in force during all times mentioned herein, reads:

"All sheep other than bucks imported or driven into the state of Nevada, from any other state, shall be accompanied by a health certificate not more than ten (10) days old, signed by a state veterinarian, deputy state veterinarian, inspector of bureau of animal industry or any authorized sheep inspector, stating the sheep are free of disease or exposure thereto, and have not been in any district infected with scabies for the period of six (6) months. Sheep accompanied by the above-described certificate may be admitted without dipping."

One of the complaints upon which the petitioner is held alleges that on or about April 12, 1919, the Governor of the state of Nevada did, by proclamation, schedule the state of Idaho as a locality where scabies, a contagious disease, was epidemic, and thereby prohibited the driving into or transporting of sheep from any part of Idaho into the state of Nevada, and that such proclamation was in force and effect at the time the petitioner is charged with driving the sheep in question from said state of Idaho into the state of Nevada.

[1, 2] Counsel for petitioner says in his brief that if the arrest and detention of the petitioner under either of the complaints in question is in violation of his constitutional rights he must be discharged, since the act in question must be considered as a whole, and if a part thereof is bad, it must all be held null and void. This court has repeatedly held that, even though a portion of a statute is null and void, no other portion thereof will be affected thereby unless it is dependent upon the portion which is null and void (State v. Commrs. Humboldt County, 21 Nev. 235, 29 Pac. 974; Ex parte Arascada, 44 Nev. ——, 189 Pac. 619); and it is also a well-established rule that if a party's rights are not affected by a statute, or a part thereof, its constitutionality will not be considered upon his application (State v. Beck, 25 Nev. 68, 56 Pac. 1008; 6 R. C. L. p. 89); and if the petitioner must be held for violating either of the sections of the act in question, even though there be a section which is void, but of which the section he violates is independent, we do not deem it our duty to consider the constitutionality of any other section thereof, for he certainly could be punished only once for the same act.

From a written stipulation entered into between counsel, and on file herein, it appears that the proclamation of the Governor of Nevada is a "lawful" one. This concession, taken broadly, it would seem, necessarily disposes of the matter; for if it is a lawful proclamation, we must assume that the law authorizing such action on the part of the Governor is constitutional, and that he had good reason to believe that the state of Idaho was an infected territory. But in view of the contention of counsel for petitioner, we are at a loss in reaching a conclusion as to just what is meant by the stipulation mentioned.

In the written brief, as well as in the oral argument, counsel bases petitioner's right to a discharge upon three grounds: (1) That the act in question is contrary to and in violation of that portion of section 8, article 1, of the federal Constitution, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states; (2) that the act is repugnant to the provisions of sections 1 and 2 of article 4 of the federal Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states; and (3) that the arrest is unlawful for the reason that the provisions of the act under which petitioner was arrested and detained are arbitrary, unreasonable, and discriminatory.

[3] Taking up the first ground urged by counsel for petitioner, we need only to say that, while Congress has power to regulate commerce among the several states, it has not covered the whole subject of the transportation of live stock from one state to another, and has left it to the several states to legislate upon this very question; and hence our Legislature had authority to enact appropriate legislation upon this branch of the law, subject to the limitations stated in Asbell v. Kansas, 209 U. S. 251–258, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101, which do not affect this matter.

[4] As to the second point, it does not appear that the act is more favorable to citizens of this state than to those of our sister states. We construe the act to refer to sheep which are brought into this state, whether they belong to citizens of this state or of a sister state; and, as we construe the decisions of the Supreme Court of the United States, such an act does not violate either the letter or the spirit of the federal Constitution. Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 45 L. Ed. 108.

[5] We are now brought to a consideration

Digitized by Google

of the last point urged by counsel, to the effect that the statute in question is unreasonable, arbitrary, and discriminatory. It appears that scabies is one of the oldest known, most contagious, and most injurious diseases affecting sheep, and that it spreads very rapidly after being introduced into a flock, but that it is communicated through the medium of infected ranges, trails, pastures, corrals, and watering places, and that there are frequent cases of a stray from an infected flock being found in another flock 20 miles distant; that, when allowed to spread, the disease causes great financial loss; that under certain conditions the mites will lie dormant for several months; that when a sheep becomes infected the female mite will lay some 15 eggs, which hatch after a 3 or 4 days' period, and the young mites grow to maturity in 7 to 10 days and in 3 or 4 more days begin to deposit eggs; that in Nevada the usual time before the disease, under painstaking inspection, can be detected, after exposure, is between 90 and 180 days, and that the sheep in question upon coming into Nevada were unaccompanied by a health certificate not more than 10 days old, stating that the said sheep were free from disease or exposure thereto, and had not been in any district infected by scabies within six months prior to their being driven into this state.

Our attention is invited to the cases of State v. Duckworth, 5 Idaho, 642, 51 Pac. 456, 39 L. R. A. 365, 95 Am. St. Rep. 199, Hannibal, etc., Ry. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, and Adams & Bryson v. Lytle (C. C.) 154 Fed. 876, as authorities in support of petitioner's contention. There is such a wide difference between the Nevada statute, and rules made in pursuance thereof, and the Idaho statute construed in the Duckworth Case, that the decision in that case is not an authority in point. Nor is the exclusion of the sheep under the act and rules in question absolute, as in the Husen Case, and it is this feature which differentiates that case from the instant one. Nor do we think that Adams & Bryson v. Lytle, supra, an authority supporting petitioner's contention. The statute under consideration in that case is similar to ours, and the learned judge who rendered the opinion expressly says:

"I am not disposed to question the reasonableness of any of the provisions" of the act considered.

From that opinion it also appears that the Governor of Oregon issued his proclamation, declaring the states of Washington, Nevada, and California presumably infected with scabies, and prohibited the importation of sheep from any of said states. The court, referring to the proclamation of the Governor of Oregon, said:

"It is quite true that, because of the proclamation of the Governor, sheep coming from the state of Washington are presumably infected."

[6] In a proceeding of this kind, the question as to the correctness of the statement of facts contained in the Governor's proclamation cannot be inquired into. At any rate, there is nothing before us tending to show that the proclamation of the Governor was not well founded, and we must presume that it was. The case of Adams & Bryson v. Lytle was an action in equity to restrain certain officers from interfering with the driving of certain sheep from Washington into Oregon, and in that case certain testimony was considered to enable the court to determine as a matter of fact whether the section of Washington from which the sheep in question were being driven was territory infected with scabies, and the court expressly says:

"Now, the testimony adduced by affidavit and orally shows beyond cavil that the sheep which the complainants propose bringing into the state are entirely free from scabies or infectious diseases of any kind; that there has been no disease or contagion within the counties or localities from which the sheep are being driven for at least nine years; and that the sheep are not to pass through any infected territory before reaching the state line. * * * Here, therefore, is a case where sheep, perfectly healthy, being driven from localities not infected in any way and through uninfected territory are about to enter the state."

A distinguishing feature between that case and the one at bar is that in that case the sheep were not only perfectly healthy, but were being driven from localities not infected in any way, while in the case before us the sheep came from a locality admittedly infected.

But we see no occasion for a long drawn out discussion of this case, for to our mind it is controlled by that of Asbell v. Kansas, 209 U. S. 251–258, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101, which, apparently, was overlooked by counsel for petitioner. It appears from the opinion in that case that the statute of Kansas makes it a misdemeanor, punishable by fine and imprisonment, for any person to transport into the state cattle from any point south of the south line of the state, except for immediate slaughter, without first having caused them to be inspected and passed as healthy by certain officials. Asbell was convicted of violating the statute mentioned, and from a judgment of the Supreme Court of Kansas affirming the judgment of conviction he took a writ of error to the Supreme Court of the United States, and that court upheld the right of a sovereign state to adopt in good faith such reasonable regulations, as a police measure, as might be

Digitized by Google

necessary to protect the health of its own animals. In that case, in a unanimous opinion, the court says:

"Cattle, while in the course of transportation from one state to another * * * may * * * be the conveyance by which disease is brought within the state to which they are destined, and in that respect subject to the power of the state exercised in good faith to protect the health of its own animals and its own people. In the execution of that power the state may enact laws for the inspection of animals coming from other states with the purpose of excluding those which are diseased and admitting those which are healthy. Reid v. Colorado, 187 U. S. 137 [47 L. Ed. 108, 23 Sup. Ct. 92]."

That some regulations to protect the sheep of this state from sheep infected with scabies or coming from an infected section in another state are amply justified is clear from a consideration of the character of the disease, the manner and ease of its communication, the difficulty of detecting it, and the further fact that it may not be detected for 180 days after a flock has been exposed. It is clear from a reading of the statute, and the rules adopted in pursuance thereof, that they were adopted purely as a police measure for the protection of the sheep of this state. This is manifest from the fact that section 9a of the rules, above quoted, expressly provides that sheep from another state, accompanied by a health certificate, may be admitted without dipping.

[7] Every presumption is in favor of the validity of the statute, and were there a doubt upon the question it would be our duty to resolve that doubt in its favor; but we are of the opinion that the reasonableness of the statute and the rules, and the good faith of the Legislature and of the board in adopting the rules, are so apparent that there can be no question as to their validity.

We are of the opinion that these proceedings should be dismissed, and that the petitioner should be remanded to the custody of the sheriff; and it is so ordered.

SANDERS and DUCKER, JJ., concur.

McKENNA et al. v. GRUNBAUM et al.

(Supreme Court of Idaho. April 8, 1920. On Petition for Rehearing, June 26, 1920.)

1. Trial ⟸165—Motion for nonsuit admits truth of plaintiff's evidence, with inferences.

A motion for nonsuit admits the truth of plaintiff's evidence, and of every fact which it tends to prove, or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor, which the jury would have been justified in drawing from the evidence, had the case been submitted to it.

2. Negligence ⟸136(26)—Contributory negligence a question of fact.

Contributory negligence is generally a question of fact for the jury, and only becomes one of law, authorizing a nonsuit, when the evidence introduced on behalf of the plaintiff is reasonably susceptible of no other interpretation than that the conduct of the injured party contributed to his injury, and that, because of his negligence and carelessness, he did not act as a reasonably prudent person would have acted under the circumstances.

3. Landlord and tenant ⟸162 — Landlord held liable for death of subtenant, falling down elevator shaft.

It is the duty of the landlord to use reasonable care to keep an elevator, which remains under his control and is used in common by his tenants, or by himself and his tenants, in as safe condition as it was apparently in when the tenancy began.

4. Landlord and tenant ⟸162, 164(5) — If lessor improves property, he may be liable for damages from negligence.

The owner of leased property, in the absence of a contract to the contrary, is not bound to improve or repair it; but, if he does so voluntarily, he may be liable for damages resulting from lack of reasonable care in so doing.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by Helen A. McKenna and another against Leo P. Grunbaum and another. Judgment of nonsuit, and plaintiffs appeal. Reversed.

J. B. Eldridge and Chas. F. Reddoch, both of Boise, for appellants.

Hawley & Hawley, A. A. Fraser, and Chas. M. Kahn, all of Boise, for respondents.

MORGAN, C. J. On February 24, 1915, Frank J. McKenna, husband of Helen A., and father of Frances Palmer McKenna, was killed by falling down an elevator shaft in a building owned by Leo P. Grunbaum and leased by him, in 1909 and 1910, to Studebaker Bros. Company of Utah, a corporation, hereinafter called the company.

The building consisted of two stories and a basement and on March 30, 1914, the company leased certain rooms on the first and second floors to McKenna. At that time there was no entrance to the freight elevator from the room on the first floor, let to him and thereafter used as a garage. It was stipulated in the lease that McKenna should have the free use of the elevator for carrying heavy freight, and, until the company should provide an entrance from the room above mentioned, he should have a right of way thereto through a portion of the prem-

Digitized by Google

ises retained by it. The instrument also contained an option that McKenna might, at a future time, lease additional space in the building.

The entrance, thereafter constructed, consisted of a passageway, wide enough for an automobile and 5 or 6 feet long, extending from the garage room on the first floor to the elevator. There was also an entrance from a room on the same floor, occupied by the company, and its employés and those of McKenna used the elevator in common. These entrances were equipped with doors, which were usually closed in winter, and, there being no artificial light therein, the shaft was dark. The floor of the entryway leading from the garage was on an incline, there being a fall of 11¼ inches from the door to the shaft, which Grunbaum, after the accident, caused to be reconstructed and made level.

On September 14, 1914, Grumbaum caused a gate to be installed at the elevator shaft in the entrance leading from the garage. This gate was 4½ or 5 feet high and as long as the entry was wide. It was intended to work automatically, in slots attached to the walls, in such a way that, when the elevator was at the first floor, the gate would be up, but, when the elevator left the floor, the gate would drop down and obstruct passage from the entry into the shaft. Part of the time this device worked satisfactorily, and at other times, due probably to the material from which it was constructed being too light, and it being insufficiently braced, and one of the slots, which had not been properly fastened to the wall, getting sprung out of position, the gate would catch and hang, and, when the elevator was at the second floor, the gate would remain suspended so far above the first floor that it would leave the opening in the shaft unobstructed.

On January 16, 1915, the company leased to McKenna the property occupied by him, together with other portions of the building. At that time the lease of March 30, 1914, was in full force, with more than 4 years yet to run, and it is not clear whether it was the intention of the parties that the new lease should supersede the old one, or whether it was intended to continue the relation of landlord and tenant then existing in force, so far as it affected the part of the premises then in possession of the lessee. The case seems to be presented on the theory that the second lease supplanted the first, and that theory will be adopted for the purposes of this opinion.

While McKenna conducted a garage and machine shop business in the building in question, he did so by agents and employés; he being employed elsewhere. It was his custom to visit the premises occasionally, for a few minutes at a time, usually early in the forenoon or late in the afternoon. The record does not disclose that he was in the elevator on more than two occasions, once a month or more before, and again a day or two before, his death. On these occasions the gate was not working properly and gave trouble. On one or two occasions an employé of McKenna complained to the company's manager that the gate was not working properly, and the latter promised to have it corrected. This promise was communicated to McKenna a short time before the accident.

On the morning of the accident McKenna came into the garage at about 8 or 8:30 o'clock; it was a dark, cloudy morning, and the sliding door on the garage wall at the entrance of the elevator shaft was partly closed, leaving an open space about 2½ or 3 feet wide. The shaft was dark, the elevator was at the second floor, and the gate was stuck and suspended near the ceiling. McKenna called to a companion, who had accompanied him to the garage, to come with him, walked rapidly down the incline, fell down the shaft, and was killed.

The lease of January 16, 1915, after describing the property let, stating the term for which it was to run, the amount of rent, and when the same was payable, recites:

"It is a further consideration of this lease that the said party of the second part [McKenna] shall have the free use of the elevator for carrying heavy freight up to the machine shop."

Thereafter, as theretofore, the employés of the parties used the elevator in common, and control of it did not pass from the company. Ellis v. Waldron, 19 R. I. 369, 33 Atl. 869. After introducing evidence tending to establish the foregoing facts, and tending to prove the amount of damage they suffered by reason of McKenna's death, appellants rested. Respondents moved for a nonsuit, which was granted, and a judgment of dismissal was entered.

The motions for nonsuit were based on a number of grounds, all of which have been considered, but only two of which will be discussed: First, contributory negligence, in that McKenna walked into the elevator shaft, knowing the defective condition of the gate; second, when McKenna leased the premises, the gate was defective, and neither of the defendants owed him a duty to put or maintain it in a better condition than it was when his tenancy commenced.

[1] In Donovan v. City of Boise, 31 Idaho, 324, 171 Pac. 670, this court said:

"A motion for nonsuit admits the truth of plaintiff's evidence, and of every fact which it tends to prove, or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor, which the jury would have been justified in drawing from the evidence, had the case been submitted to it."

Digitized by Google

[2] In that case we also held:

"Contributory negligence * * * is generally a question of fact for the jury, and only becomes one of law, authorizing a nonsuit, when the evidence introduced on behalf of the plaintiff is reasonably susceptible of no other interpretation than that the conduct of the injured party contributed to his injury, and that, because of his negligence and carelessness, he did not act as a reasonably prudent person would have acted under the circumstances."

See, also, Smith v. O. S. L. R. R. Co., 32 Idaho, 695, 187 Pac. 539.

Even though McKenna knew the gate had not been in working order a day or two before his accident, it cannot be said, as a matter of law, he was guilty of negligence. In Davis v. Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156, it is said:

"People are liable to lapses of memory with reference to facts with which they are daily confronted. It would be for the jury to say whether such lapse of memory was negligence, taking into consideration all the circumstances."

[3] With respect to the second proposition, it may be said that whether or not there was evidence which should have been submitted to the jury as to the liability of the company is to be determined by application of the rule that it is the duty of the landlord to use reasonable care to keep an elevator, which remains under his control and is used in common by his tenants, or by himself and his tenants, in as safe condition as it was apparently in when the tenancy began. Flanagan v. Welch, 220 Mass. 186, 107 N. E. 979; Bogendoerfer v. Jacobs, 97 App. Div. 355, 89 N. Y. Supp. 1051; Ward v. Blouin, 210 Mass. 140, 96 N. E. 61; Green v. Pearlstein, 213 Mass. 360, 100 N. E. 625; Olea v. Dubinsky, 231 Mass. 447, 121 N. E. 405; Andrews v. Williamson, 193 Mass. 92, 78 N. E. 737, 118 Am. St. Rep. 452. In the case last above cited it is said:

"The phrase 'in such condition as it was in, or purported to be in, at the time of the letting,' means such condition as it would appear to be to a person of ordinary observation, and has reference to the obvious condition of things existing at the time of the letting."

The gate was a mechanical device, which worked satisfactorily at times, and at other times it did not. It is true a casual observer could see how it was constructed, and the material of which it was built; but, if we are to conclude from this he would be bound with notice of its defects, we must also conclude its builder knew it could not be relied on to work when he built it, for no one could be more familiar with its material and construction than was he.

Although there is evidence in the record from which it may be said to be established that McKenna knew the gate had failed to work on one occasion before the lease was made it does not follow the jury was bound to find he had knowledge of its defective condition. There is also evidence which would justify the conclusion it would have required an experiment, or, perhaps, a series of experiments to have discovered the real condition of that gate at the time the lease was entered into, and the question of whether it would or not, as well as whether a reasonably prudent person, situated as McKenna was at the time, would have made such experiments, if they were necessary, in order to discover whether or not defects existed, should have been submitted to the jury.

[4] There is nothing in the leases from Grunbaum to the company which obligated him to improve the premises or keep them in repair, and he was not bound to do so by reason of his ownership of the building; but, having voluntarily constructed the gate, if the jury should find the death of McKenna resulted from lack of reasonable care in its construction, and that the latter did not have notice of its defects when he entered into the lease, and was free from contributory negligence at the time of the accident which resulted in his death, it would be justified in finding a verdict against the former. Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Gregor v. Cady, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; Wertheimer v. Saunders, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146; Barman v. Spencer, 49 N. E. 9, 44 L. R. A. 815; Horton v. Early, 39 Okl. 99, 134 Pac. 436, 47 L. R. A. (N. S.) 314, Ann. Cas. 1915D, 825; Peerless Mfg. Co. v. Bagley, 126 Mich. 225, 85 N. W. 568, 53 L. R. A. 285, 86 Am. St. Rep. 537. He could not excuse want of care in constructing the gate, on the ground that it was the duty of the company to make and keep the elevator safe. Poor v. Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272.

The judgment is reversed. Costs are awarded to appellants.

RICE, J., concurs.

BUDGE, J., did not sit with the court, nor participate in the opinion.

On Petition for Rehearing.

MORGAN, C. J. Respondents have filed petitions for rehearing, which are denied. They contain suggestions, however, which prompt the following addendum to the foregoing opinion:

There was evidence that the defective condition of the gate was brought to the attention of the manager of the company; that he promised to repair it, and that the promise was communicated to deceased shortly prior to the accident which resulted in his death. The question of whether or not the promise was so made and communicated was one for the jury, and that evidence should have been submitted to it to be considered in connection

Digitized by Google

with the defense of contributory negligence.

There is no merit in the contention that, at the time of the accident, McKenna was a trespasser.

RICE, J., concurs.

NOBLE v. HARRIS. (No. 3097.)

(Supreme Court of Idaho. June 30, 1920.)

1. Appeal and error ⟸773(2)—Failure to file brief within time no ground for dismissal.

Failure to file brief within the time prescribed by rule 45 (176 Pac. xxii), is not a ground for dismissal of appeal.

2. Appeal and error ⟸767(1)—Brief distinctly enumerating in argument errors relied on will not be stricken.

The errors relied upon for reversal should be distinctly enumerated in appellant's brief in conformity with rule 42 (176 Pac. xxi). However, in this case there is a distinct enumeration of the errors relied upon in the argument in the brief. Therefore we do not feel constrained to entertain a motion to strike the brief from the files.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by Anna Noble, trustee, against Alvin M. Harris. Judgment for plaintiff, and defendant appeals. Motion to strike the brief from the files and to dismiss the appeal denied.

E. J. Dockery, of Boise, for appellant.

J. L. Niday, of Boise, for respondent.

BUDGE, J. A motion to strike the brief from the files and to dismiss the appeal in this case has been made upon the following grounds: First, that the brief was not served in conformity with rule 45, in that the transcript was completed and certified on the 20th of March, 1917, and the brief was not served on respondent until the 20th of April, 1920; second, the brief does not comply with requirements of rule 42, in that it does not contain a distinct enumeration of the errors relied upon.

[1] As to the first ground of the motion it should be observed that, while rule 45 requires appellant to serve his brief within 20 days after the receipt of the clerk's completed transcript, unless, upon proper application, additional time be granted, the failure to file and serve such brief within the time prescribed by the rule, standing alone, is not a ground for dismissal of the appeal.

[2] As to the second ground of the motion, it is apparent that, while there is no separate and distinct portion of the brief designated as specification of errors, wherein are enumerated distinctly the errors relied on, nevertheless such errors are distinctly set forth in the body of the brief in the argument following the statement of facts, and, while not in the usual form, are stated with sufficient definiteness that the points relied upon for reversal of the case are clearly and intelligently defined. While the practice followed in this brief is loose and not to be commended, and not in strict conformity with the rule, nevertheless we do not feel constrained to sustain the motion to strike the brief from the files.

The motion is denied.

MORGAN, C. J., and RICE, J., concur.

STATE v. CROSSON et al.

(Supreme Court of Idaho. June 21, 1920.)

Constitutional law ⟸251, 283, 297—Classification of holders of licenses must be based on substantial differences to afford due process of law.

A law which is made applicable to one class of persons alone must be based on a substantial difference between the situation of its members and that of those to whom it does not apply, and one which purports to impose on a certain class, engaged in the transportation of freight and passengers for hire, burdensome taxes and regulations, and to exempt therefrom others engaged in the same business, without justification or reason for the classification, conflicts with article 1, § 13, of the Constitution of Idaho.

Appeal from District Court, Ada County; Charles F. Reddoch, Judge.

Frank Crosson and J. F. Koll were separately tried and convicted under the statute forbidding common carriers carrying freight or passengers without having obtained and paid for licenses and given a bond for the benefit of persons injured, and they appeal. Cases consolidated in Supreme Court, and judgment reversed, with instructions that the cases be dismissed.

E. G. Rosenheim and C. C. Cavanah, both of Boise, for appellants.

Roy L. Black, Atty. Gen., and Raymond L. Givens, Asst. Atty. Gen., for the State.

MORGAN, C. J. Appellants were separately charged with, tried for, and convicted of, violating C. S. §§ 2439, 2440, which are intended to prohibit common carriers mentioned in C. S. § 2380, subsec. 3, from carrying freight or passengers, or both, until they shall have first obtained, under such regulations as may be prescribed by the Public Utilities Commission, licenses and shall have paid therefor a sum of money for each vehicle used, being

Digitized by Google

$25, $30, $40, or $50 per annum, according to its carrying capacity, and shall have given bonds for the benefit of any person injured by the carrier's negligence. It is further provided that any person operating as such common carrier without first complying with these requirements shall be guilty of a misdemeanor.

That portion of C. S. § 2380, necessary to be considered in deciding this case is as follows:

"The term 'common carrier' when used in this chapter includes:

"3. Every * * * person * * * owning, controlling, managing, operating, driving or causing to be operated or driven, or holding out by sign, voice or other device or by advertisement that they will drive, operate or cause to be driven or operated over any particular route or routes or over any route or routes or between specified termini for hire or compensation any automobile, auto stage, motor vehicle or motortruck or any other self-propelled motor vehicle for use in the business of carrying either passengers or freight or both, excepting such as run on rails or tracks not hereinbefore enumerated, and automobiles used exclusively as hearses, ambulances, hotel busses operating solely between hotel and trains, or automobiles or auto trucks used for carrying United States mails on star routes when actually engaged in carrying such mail. * * *"

Appellant Koll owned automobiles and operated them in the transportation of passengers for hire, and appellant Crosson owned motortrucks and operated them in the transportation of freight for hire, and neither was so engaged in business as to entitle him to come within either of the exceptions mentioned in the statute, nor had either conformed to the requirements above mentioned in the matter of procuring a license or giving a bond.

The cases were consolidated and heard together in this court. Among the contentions made by appellants is that the statutes above referred to violate article 1, § 13, of the Constitution of Idaho, which provides:

"No person shall * * * be deprived of his life, liberty or property without due process of law."

The tax sought to be exacted by the statute under consideration was not levied upon the property of appellants, nor was it demanded of them, because of their use of the public highways with their vehicles. It is an occupation tax, and the regulations sought to be imposed upon the class of persons mentioned in C. S. § 2380, subsec. 3, to which appellants belong, are so sought to be imposed for the government of that class. As is said in respondent's brief:

"The license fee prescribed by the statute under consideration is placed not upon the operation of the motor vehicle upon the road as such, but is a license tax upon the business in which the motor vehicle operating as a common carrier is engaged."

A law which is made applicable to one class of persons alone must be based on a substantial difference between the situation of its members and that of those to whom it does not apply. 6 R. C. L. p. 381, § 374; 12 C. J. p. 1133, § 857; page 1136, § 860; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Siciliano v. Neptune Tp., 83 N. J. Law, 158, 83 Atl. 865; Kellaher v. City of Portland, 57 Or. 575, 110 Pac. 492, 112 Pac. 1076; Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116; State v. Le Barron, 24 Wyo. 519, 162 Pac. 265, Ann. Cas. 1918D, 998; Sterett & Oberle Packing Co. v. City of Portland, 79 Or. 260, 154 Pac. 410; People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L. R. A. (N. S.) 46, Ann. Cas. 1914A, 1129; Board of Commissioners v. Orr, 181 Ala. 308, 61 South. 920, 45 L. R. A. (N. S.) 575; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L. R. A. 1916C, 775, Ann. Cas. 1917C, 1065; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; Haynes v. Lapeer Circuit Judge, 201 Mich. 138, 166 N. W. 938, L. R. A. 1918D, 233; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785; Rodge v. Kelly, 88 Miss. 209, 40 South. 552, 11 L. R. A. (N. S.) 635, 117 Am. St. Rep. 733.

This law expressly exempts hotel busses operating solely between hotels and trains and automobiles and auto trucks used for and engaged in carrying United States mails on star routes. It is not necessary, in order that the owner of an automobile being used as a bus between a hotel and trains, shall also own or operate the hotel, or that he shall confine his business of carrier to the transportation of its guests, or convey them or their baggage free of charge, in order that he may escape the burdens of the law, and the owner of such a vehicle employed in transportation of the United States mails over a star route may use it in the transportation of passengers and freight for hire without procuring the license, giving the bond, conforming to the regulations, or incurring the penalty mentioned in the law.

These sections purport to impose on a certain class of persons engaged in the transportation of passengers and freight for hire burdensome taxes and regulations, and to exempt therefrom others engaged in the same business. No justification or reason exists for the classification, and the statutes which appellants were convicted of violating must be held to be in conflict with article 1, § 13, of the Constitution, and void.

The judgments appealed from are reversed, with instructions that the cases be dismissed.

RICE, J., concurs.

Digitized by Google

BUDGE, J. I concur in the conclusion reached, but in my opinion C. S. § 2380, is unconstitutional for the reason that it is discriminatory, in that it attempts to establish an arbitrary, unreasonable, and unjust classification, and therefore violates the provision of the Fourteenth Amendment to the federal Constitution that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

McMURRAY v. McMURRAY. (No. 4166.)

(Supreme Court of Montana. June 25, 1920.)

Marriage ⟸62—Power to award temporary alimony, etc., in annulment suit limited.

In annulment proceedings, the trial court may allow defendant temporary alimony, suit money, and attorney's fees necessary to enable her to defend, but such power exists only where the validity of the marriage continues in doubt and ends with the entry of a final decree.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

Annulment proceedings by Willis A. McMurray against Bessie L. McMurray. From an order awarding defendant temporary alimony, suit money, and attorney's fees, plaintiff appeals. Affirmed.

H. S. McGinley, of Ft. Benton, for appellant.

Stranahan & Stranahan, of Ft. Benton, for respondent.

MATTHEWS, J. Plaintiff having commenced annulment proceedings, the court, on application of the defendant, awarded her temporary alimony, suit money, and attorney's fees necessary to enable her to defend. The plaintiff appeals, challenging the jurisdiction of the court to make such an order in an annulment proceeding.

The question thus raised was disposed of contrary to the contention of plaintiff in the case of State ex rel. Wooten v. District Court, 57 Mont. ——, 189 Pac. 233, decided April 8, 1920. However, as the power of the court exists only while the validity of the marriage continues in doubt, or, as was said in the Wooten Case, while "the annulment suit is pending, whether in the district court, or in this court on appeal," the allowance, under the order, will cease upon the final entry of a decree in favor of the husband.

The order of the district court of Chouteau county is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, HURLY, and COOPER, JJ., concur.

McLEAN v. DICKSON et al. (No. 4153.)

(Supreme Court of Montana. June 25, 1920.)

1. Pleading ⟸368—Motion to require plaintiff to separately state and number causes of action held proper.

Where plaintiff in her complaint set forth all in one count, separate causes of action based upon separate acts of defendants and others, in harassing and annoying plaintiff in the use of premises wherein she conducted a hair dressing and manicuring business, a motion to require her to separately state and number the causes of action *held* a proper method of attacking the complaint.

2. Pleading ⟸368 — Complaint alleging conspiracy held subject to motion to separately state and number.

A complaint, alleging certain acts by defendants constituting several separate causes of action in pursuance of a conspiracy against plaintiff to annoy plaintiff in the use of premises wherein she conducted a hair dressing and manicuring business, *held* subject to a motion to separately number and state in view of Rev. Codes, § 6533, plaintiff seeking to recover among other things, damages for statements in the nature of slander, injury to and conversion of her property, and injury to person.

Appeal from District Court, Blaine County; W. B. Rhoades, Judge.

Action by Kathryn C. McLean against James L. Dickson and another. A motion to separately state and number causes of action was sustained, and, plaintiff refusing to plead further, judgment of dismissal was entered, from which plaintiff appeals. Affirmed.

F. N. Utter, of Havre, for appellant.

D. L. Blackstone, of Chinook, and Norris & Hurd, of Great Falls, for respondents.

HURLY, J. Plaintiff, for complaint, alleged that she was in the actual use and occupation of certain rooms located in Chinook, and entitled to certain privileges connected with her tenancy, and that she occupied said rooms as a place of abode and for the carrying on of her means of livelihood as a hairdresser and manicurist; that the defendants, "conspiring together and acting wrongfully and maliciously," did and committed certain acts by which they harassed, annoyed, and vexed plaintiff in the use and enjoyment of said premises, in that: (a) The defendant Jacob Dickson repeatedly attempted to force entrance into said premises, and at other times did wrongfully enter therein without her consent; (b) that defendants locked and barred the doors leading out of plaintiff's premises; deprived her of the use of lighting facilities and of the bath and toilet accessories appurtenant thereto; (c) that defendants maliciously entered and caused to be

Digitized by Google

circulated false and defamatory statements concerning plaintiff, and concerning her occupation as aforesaid; (d) did wrongfully and maliciously urge and solicit persons intending to engage plaintiff's services as a manicurist and hairdresser not to so engage her, whereby plaintiff suffered loss of business; (e) did falsely charge plaintiff with having committed crimes, and thereby, without probable cause, induced police officers to seek entrance into said premises in the nighttime, and to threaten plaintiff with arrest, by reason of which plaintiff suffered mental distress and suffering; (f) that, in the absence of plaintiff, defendants entered said premises without her consent, and fastened and barred the doors thereof, whereby plaintiff was compelled to seek refuge elsewhere; (g) that defendants wrongfully and maliciously seized and detained wearing apparel and personal belongings of plaintiff and her goods and accessories used in her said occupation, all of the value of approximately $1,500. It is further alleged that by reason of such acts, plaintiff has been damaged in the sum of $5,000. She demanded judgment: First for $5,000; and, second, for punitive damages in the sum of $15,000.

All of the foregoing, with the exception of the formal allegation as to plaintiff's occupancy of the premises, is set forth in one paragraph, as one cause of action.

The defendants served and filed a motion demanding that plaintiff be compelled to "separately state and number the causes of action united in one cause of action" upon different grounds, asserting in effect that the complaint sets forth causes of action for damages based upon the following: (1) Eviction; (2) unlawful interference with her occupation; (3) acts of defendant James L. Dickson, to which the other defendant was not a party; (4, 5) deprivation of use of bathroom and lights; (6) defamatory statements; (7) defamatory statements derogatory to plaintiff's business; (8) urging plaintiff's clients to refrain from dealing with her; (9) entrance of police officers to her apartment; (10) barring doors of the apartment; (11) conversion of her property. This motion was sustained, and, the plaintiff refusing to plead further, judgment of dismissal was entered, from which this appeal was taken.

It is urged by plaintiff that a motion was not defendant's proper remedy, and that defendants should have demurred, and the decision of this court in Bandmann v. Davis, 23 Mont. 382, 59 Pac. 856, is cited in support of her position. An examination of the opinion in that case, however, shows that the point raised on this appeal was not under consideration. There the defendant at the trial objected to the introduction of evidence because one of the causes of action arose ex delicto, whereas the other arose ex contractu, and was not separately stated and numbered. The court said:

"A motion to exclude evidence, or an objection to receiving it, is not the remedy for the intermingling in one count of several causes of action; nor is there remedy other than demurrer, by which the complaint may be attacked upon the ground that causes of action are improperly united therein."

It is clear that under the pleadings in the foregoing case, if the defendant wished to urge the objection that two separate and distinct causes of action had been united in one complaint, under section 6534, Revised Codes of 1907, a demurrer, and not a motion to separately state and number, was the proper remedy.

In Galvin v. O'Gorman, 40 Mont. 391, 106 Pac. 887, where three separate causes of action were stated in one count, and no objection to the form of the complaint was made until plaintiff had rested upon the trial, the court held:

"The proper practice in such a case is outlined in 5 Encyclopedia of Pleading and Practice, 336, where it is said: 'The clear weight of authority, however, is that the proper remedy for a failure to state separately is a motion to make the complaint more definite and certain by separately stating the causes of action.' This same rule is stated in Pomeroy's Code Remedies (4th Ed.) section 341 (*section 447), and is approved in City Carpet Beating, etc., Works v. Jones, 102 Cal. 506, 36 Pac. 841."

In Cohen v. Clark, 44 Mont. 151, 119 Pac. 775, a defendant, who had moved to have the plaintiff separately state and number certain alleged causes of action, was held to have waived the right to object upon the appeal that the complaint was indefinite and uncertain, for the reason that objection had not been made upon that ground.

While there is a distinction between a demurrer and a motion, a motion to require causes of action to be separately stated and numbered has many, if not all, of the elements of a special demurrer. It has been held in this jurisdiction to be an abuse of discretion to refuse to allow a plaintiff to reply after the overruling of a motion made by the plaintiff, directed against the answer, the court there holding that a motion for judgment on the pleadings in some respects is merely a demurrer. Floyd v. Johnson, 17 Mont. 469, 43 Pac. 631.

[1] A motion, therefore, to require plaintiff to separately state and number her causes of action was a proper method of attacking the complaint. See, also, Cohen v. Clark, supra.

[2] It is next contended that because all of the acts of the defendants were in pursuance of a conspiracy against the plaintiff, but one wrong was committed; hence plaintiff could properly set forth all the allegations of her complaint in one cause of action.

Section 6533 of our statute makes provision

Digitized by Google

for the inclusion, in one action of certain causes of action, and then provides:

"The causes of action so united must all appear on the face of the complaint, to belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

In this action plaintiff seeks to recover, among other things, damages for statements in the nature of slander, alleged to have injuriously affected her business and reputation; injury to and conversion of her property, and injury to her person by reason of the entry of her premises by the defendants.

This court, in Cohen v. Clark, supra, said:

"Several breaches of a single contract may constitute but one cause of action, and if the several acts pleaded do make up but a single cause of action, one count in the complaint is sufficient to state them. Under equally well-recognized rules of pleading, a plaintiff is prohibited from splitting a single cause of action. * * * But just what constitutes a single cause of action is frequently difficult to determine. At common law the question was easily settled, for the form of the action determined its character. Under the Codes, forms of action are abolished and the facts constituting plaintiff's complaint must be stated, and the construction put upon a pleading must now determine whether it states one cause of action only or more than one. 'A cause of action is the right which a party has to institute a judicial proceeding,' * * * and consists of a union of the plaintiff's primary right and an infringement of it by the defendant. * * * Manifestly, then, if plaintiff pleads several contracts and a breach of each, he states several causes of action; but if he pleads but a single contract and a breach of it in one or more particulars, he states but a single cause of action, and it is immaterial how the complaint is paragraphed."

The rule as laid down by Mr. Pomeroy in his work on Code Pleading (4th Ed.) § 350, is as follows:

"If the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct and separate wrongs, it follows inevitably * * * that the plaintiff has united two or more causes of action, although the remedial rights arising from each, and the corresponding reliefs, may be exactly of the same kind and nature. If two separate and distinct primary rights could be invaded by one and the same wrong, or if the single primary right should be invaded by two distinct and separate legal wrongs, in either case two causes of action would result; a fortiori must this be so when the two primary rights are each broken by a separate and distinct wrong."

The Supreme Court of Wisconsin in the case of Herman v. Felthousen, 114 Wis. 423, 90 N. W. 432, said:

"The test to be applied in order to determine whether a complaint states more than one cause of action is whether, looking at the whole pleading, there is more than one primary right presented thereby for vindication. There may be many minor subjects, and facts may be stated constituting independent grounds for relief, either as between the plaintiff and all the defendants, or the former and one of the latter, or between defendants, and there be still but a single primary purpose of the suit, with which all the other matters are so connected as to be reasonably considered germane thereto—parts of one entire subject, presenting to the court but one primary ground for invoking its jurisdiction. That was the rule before the Code, and it was preserved thereby in unmistakable language, as this court has said on many occasions."

See Level Land Co. v. Sivyer, 112 Wis. 442, 88 N. W. 317. And in Adkins v. Loucke, 107 Wis. 587, 83 N. W. 934, the court said:

"The infallible test by which to determine whether a complaint states more than one cause of action is, Does it present more than one subject of action or primary right for adjudication? * * * If it stand that test, no matter how many incidental matters may be connected with the primary right, rendering other parties than the main defendant proper or necessary to the litigation for a complete settlement of the controversy as to plaintiff, or for the due protection of their rights as against him or between themselves, there is yet but one cause of action, and a demurrer upon the ground of the improper joinder of causes of action will not lie."

Manifestly, in this case, the plaintiff alleges the invasion of more than one primary right. She asserts claims upon any one of which, under proper pleadings, she would be able to maintain her suit. Had she brought separate actions for the injury or conversion of her personal property, for the alleged defamatory words, or the invasion of her premises, her pleadings could not be successfully attacked because she had "split" her cause of action. Each cause, if proven, would establish the invasion of a primary right, each independent of the others.

It is apparent that plaintiff has failed to distinguish between the separate statement and numbering of different causes of action and a demurrer to a complaint because causes of action have been improperly united in the complaint.

The district court was not in error in directing that the plaintiff be required to separately state and number her causes of action. The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, MATTHEWS, and COOPER, JJ., concur.

Digitized by Google

NELSON v. MUTUAL LIFE INS. CO. OF NEW YORK. (No. 4159.)

(Supreme Court of Montana. June 25, 1920.)

1. Insurance ⟸349(2)—Failure to pay a life insurance premium works forfeiture.

Time is of the essence of all insurance contracts, and, even though the condition be construed as subsequent, a failure to pay the life insurance premium forfeits the contract, and, when payable in installments, failure to pay any installment works a forfeiture.

2. Insurance ⟸646(5)—Plaintiff pleading reinstatement of insured must prove waiver of forfeiture.

In an action to recover on a life insurance contract, a plaintiff pleading reinstatement of insured assumes the burden of establishing the waiver of forfeiture.

3. Insurance ⟸365(2)—Life policy not reinstated by payment without furnishing satisfactory health certificate.

Where insured had defaulted in installment of life insurance premium, but had subsequently paid the same, but not back interest thereon, which payment was held by the company as a "suspense payment" while waiting for certificate of good health "satisfactory to the company," as required by policy, which requirement was not waived, and which certificate was not furnished, the policy was not reinstated.

4. Insurance ⟸665(8) — Evidence held to show policy forfeited, default not waived and policy not reinstated.

Evidence *held* to show that a life insurance policy had lapsed for a nonpayment of a premium installment and was not reinstated by the subsequent payment of premium alone, and that the company had not waived the forfeiture by holding subsequently paid premium installment while awaiting certificate of health.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

Action by Lura A. Nelson against the Mutual Life Insurance Company of New York. From a judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

James L. Davis and F. B. Reynolds, both of Billings, and Clyde McLemore, of Baker, for appellant.

Charles R. Leonard and Earle N. Genzberger, both of Butte, and O. F. Goddard, of Billings, for respondent.

COOPER, J. Action to recover upon a policy of life insurance in the sum of $2,000. The cause was tried by the court without a jury and resulted in a judgment for the defendant. Plaintiff appeals from the judgment and from an order denying her a new trial.

The provisions of the policy pertinent to this inquiry are as follows:

"*Premiums.* All premiums are payable in advance at said home office or to any agent of the company upon delivery, on or before date due, of a receipt signed by either the president, vice president, second vice president, secretary or treasurer of the company and countersigned by said agent.

"A grace of 30 days (or 1 month, if greater), subject to an interest charge at the rate of 5 per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy year, if any shall be deducted from the amount payable hereunder.

"Except as herein provided, the payment of a premium or installment thereof shall not maintain this policy in force beyond the date when the next premium or installment thereof is payable. If any premium or installment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company, except as hereinafter provided. * * *

"*Reinstatement.* Unless it shall have been surrendered for its cash value, this policy may be reinstated at any time within 3 years from date of default in payment of any premium, upon evidence of insurability satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of 5 per centum per annum. * * *

"Agents are not authorized to modify this policy or to extend the time for paying the premium."

By mutual agreement, the policy was changed to permit the annual premiums to be paid in quarterly installments of $16.49 on February 10, May 10, August 10, and November 10, of each year.

The determinative issue in the case is presented by the sixth paragraph in the complaint, as follows:

"That said Merl S. Nelson fulfilled all the conditions of said policy on his part to be performed, and paid all premiums provided for in said policy up to the date of his death, in accordance with said policy and agreement for quarterly payments, as above mentioned, except the installment of premium which was due August 10, 1915, was paid October 18, 1915, and the installment due November 10, 1915, was never paid."

All the allegations of the complaint are denied by the answer. The premium payments were all met to the satisfaction of the company, until August 10, 1915, the policy being in full force on that date, at which time, however, a quarterly payment of $16.49 on the annual premium fell due. On October 8 insured's check for that amount was received by the company and placed in its suspense account. The insured died on December 13, 1915.

Digitized by Google

Appellant's position is that the forfeiture was waived:

"1. (a) By the acceptance of the payment of premium on October 8; (b) by demand of payment of the next quarterly premium, which became due November 10; and (c) by the retention of the money from receipt thereof on October 8, without even offering to return the same until after the death of the insured.

"2. Having waived the forfeiture, the company had no right to require a certificate of health.

"3. The time for the payment of the premium which became due November 10 was extended to December 25, by reason whereof the policy was in full force and effect at the death of the insured."

If the retention of the proceeds of the check is to be construed as a waiver of the health certificate the policy requires, or, what amounts to the same thing, "evidence of insurability satisfactory to the company," the conclusion would logically follow. Did the company forego this important right?

On September 9, 1915, the following letter was mailed to the insured by the agent of the company in the city of Spokane, Wash., and received in due course:

"Mr. M. S. Nelson, Billings—Dear Sir: I regret to note that you have allowed your policy to lapse by default in the payment of the last premium. This may have been an oversight, or there may be something about your contract which you do not fully understand. In either event, I trust you will favor us with your reason for discontinuing. Frequently a policy that does not exactly meet the requirements of a policy holder may be changed to some other plan, or, if necessary, reduced in amount. If it is inconvenient for you to pay the premium at this time, it is possible we can assist you with a loan, if the contract has been in force three years; or the payments may be changed to semiannual or quarterly. At any rate we would like to hear from you on the subject. A life insurance policy is too valuable an asset to your estate to be cast aside if it can possibly be avoided, and it should be borne in mind that to drop a policy or change it for a contract in another company is always to the detriment and cost of the insured. Being a mutual company our interests are the same, and we are always pleased to answer any questions or make explanations which may be of service to our members. Trusting that you will take up the matter of restoring the policy, and that we may hear from you by return mail, I am, etc. W. H. Shields, Manager."

The following indorsement appears on the bottom of the letter last referred to, in the handwriting of Merl S. Nelson: "Inclosed find check. Merl S. Nelson, 203 S. 30th St., Billings, Mont." This, the father of the insured testified, was found shortly after his death, in a tin box containing his private papers, together with a canceled check dated September 5, 1915, in the sum of $16.49, showing its indorsement and deposit by defendant and return in due course to the insured.

From the testimony of Miss Mary I. Williams, it appears that on October 14, 1915, after the receipt and deposit of the check, the following letter was sent to the insured:

"Dear Sir: We beg to acknowledge receipt of check for $16.49 tendered in payment of the premium due August 10 last under your policy No. 2043467, but as this remittance was not received within the 30 days of grace allowed by the company the policy has now lapsed, and in order to restore same it will be necessary for you to furnish the company with a satisfactory certificate of health. We are inclosing you herewith blank for this purpose, which, if you will kindly take to either of our examiners, Dr. James Chapple or Dr. E. W. Thuerer, of your city, he will be glad to complete same for you. The fee charged in this connection will be paid by the company. Trusting you will give this matter attention at your earliest convenience, so that your policy may be restored, we are, etc. W. H. Shields, Manager."

To this there was no reply.

On December 8, 1915, the following letter was sent from the office of the defendant in Spokane, Wash., in the regular routine of the business:

"Dear Sir: On October 14, last, we acknowledged receipt of your check for $16.49 tendered in payment of premium due August 10, last, under your policy No. 2043476. Of course, this check could not be accepted, as your policy had already lapsed; it was therefore placed in suspense pending receipt of satisfactory certificate of health, but to date we do not appear to have received this certificate. Another quarterly premium of $16.49 fell due November 10, last, and check for this amount must now accompany the certificate of health to this office. We would very much like to have you give this matter your attention at your earliest convenience, so that the same may be cleared up before the first of the year. If we do not hear from you on or before December 25, we will refund your check of $16.49."

[1] In the case of Kennedy v. The Grand Fraternity, 36 Mont. 325, 92 Pac. 971, 25 L. R. A. (N. S.) 78, the constitution and by-laws of the defendant society provided:

"That if the assured, denominated 'frater,' shall fail to pay his monthly dues on or before the last secular day of the month for which the same are due and payable, he shall 'thereupon become suspended by his own act, and his benefit certificate or certificates shall be absolutely void.'"

This provision is identical, in effect, with the forfeiture clause in the policy under consideration. It seems to be well settled that time is of the essence of all insurance contracts; and, even though the condition be construed as a condition subsequent, failure to pay when due forfeits the contract. Insurance Co. v. Statham, 93 U. S. 24, 28 L. Ed. 789. When the annual premium is payable in installments, a failure to pay any installment works a forfeiture. Klein v. Insurance Co., 104 U. S. 88, 26 L. Ed. 662. This court

Digitized by Google

so held in the Kennedy Case, where the rule is stated thus:

"The mere failure * * * to pay his dues for April and May ipso facto worked a forfeiture of his membership and an abrogation of the contract between the parties."

[2] To the same effect is the case of Neilsen v. Provident, etc., Co., 66 Pac. 663.[1] See, also, 2 Bacon on Life & Accident Insurance, § 453; Holly v. Metropolitan Insurance Co., 105 N. Y. 437, 11 N. E. 507. The language of the policy in suit can mean nothing less. Punctuality in the payment of the premiums is a prerequisite in all contracts of life insurance. Indeed, no life insurance company could continue to do business without a strict adherence to the terms of its contracts. The unequivocal holding in the Kennedy Case is that a failure on the part of the insured to meet the payments within the time provided removes the liability of the insurer, unless, by a course of dealing with the insured, it has evinced an intention to waive evidence of continued insurability, as this language implies:

"This policy may be reinstated at any time, within three years from date of default in payment of any premium upon evidence of insurability satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of 5 per centum per annum." 19 Ency. of Law (2d Ed.) 44, 47, and cases cited; Butler v. Grand Lodge, A. O. U. W., 146 Cal. 172, 79 Pac. 861; 2 Bacon on Benefit Societies & Life Insurance (3d Ed.) § 385.

[3] The plaintiff in the Kennedy Case, as in the case at bar, pleaded reinstatement of the insured, thereby assuming the burden of establishing a waiver of the forfeiture. The claim was there made that, because the application for reinstatement was accompanied by the necessary fees then in arrears, assured had met all the requirements of the constitution and by-laws of the society, and neither the secretary nor its officers could refuse to recognize such reinstatement.

But, as we have seen, a contract of insurance can only be kept alive by payment of the premiums within the time specified. In case of default, as here shown, it was incumbent upon the insured to meet the provision of the policy requiring certificate of good health "satisfactory to the company," before it could be revived, unless production of the health certificate was waived by the company. Says Mr. Justice Holloway in the Kennedy Case:

"This contract requires, in addition to the acts and things to be done on the part of the insured, that the society, or its officers, shall take affirmative action which involves the exercise of discretion and judgment; for the insured is only reinstated upon furnishing satisfactory evidence that he is in good health, and securing the approval of the Grand Secretary."

To precisely the same effect are New York Life Insurance Co. v. Scott, 23 Tex. Civ. App. 541, 57 S. W. 677; Clifton v. Mutual Life Insurance Co., 168 N. C. 499, 84 S. E. 817. Collins v. Metropolitan Life Insurance Co., 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. Rep. 578, is in harmony with these views.

By the express terms of the policy, the liability of the defendant was unalterably fixed. It could not escape payment of the principal sum to the beneficiary upon the death of the insured, had the premiums been paid according to the terms of the policy. By the same token, the beneficiary could not hope to enjoy its fruits without prompt payment of the premiums, or within the time fixed by the policy. These obligations were mutual. Upon default of any one of the payments specified the liability of the company ceased immediately, and the parties were not restored to their status quo ante until the insurability of Nelson had been proven to the satisfaction of the company, and the arrears of the premium with interest at the rate of 5 per centum per annum paid, as the language of the policy plainly indicates. The August 10 installment was nearly 2 months overdue, interest accruing meanwhile. Of the interest due no tender was made. The check did not reach the office of the company until nearly 60 days after the payment was due. To work a restoration of the policy two things were necessary under its provisions: Proof of insurability satisfactory to the company, and a tender of the overdue premium and interest from the time of default. Assuming that by retaining the check the company waived the interest on the overdue premium, evidence that it did not waive production of the health certificate, as the policy required, is furnished in the three letters addressed to the insured, advising him that the policy had lapsed and that the health certificate was a condition precedent to the restoration of his rights in the premises. Thompson v. Insurance Co., 116 Tenn. 557, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823; Melvin v. Piedmont Insurance Co., 150 N. C. 398, 64 S. E. 180, 134 Am. St. Rep. 943.

In Clifton v. Mutual Life Insurance Co., 168 N. C. 499, 84 S. E. 817, the Supreme Court of North Carolina, dealing with a similar question, said:

"We agree with his honor that there is no evidence of a waiver of the conditions of the policy. The defendant had a right to receive the premium and hold it, awaiting the return of the health certificate. That not being forthcoming, the defendant properly returned the premium after the death of the insured. Receiving the premium under such circumstances is no evidence of a waiver. * * * In Hay v. Insurance Co., 143 N. C. 257, 55 S. E. 623, the Chief Justice very pertinently says: 'It is always sad when one who has made payments

[1] Reversed in bank. See 139 Cal. 332, 73 Pac. 168, 96 Am. St. Rep. 146.

Digitized by Google

on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has the right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted.'"

[4] The letter of September 9, addressed to Merl S. Nelson, informed him that he had then allowed his "policy to lapse by default in payment of the last premium," a fact of which he was presumed to have knowledge. By the letter of October 15, receipt of his check for $16.49, tendered in payment of the premium due August 10, was acknowledged and he was again advised that his policy had lapsed and that in order to restore the same it would be necessary to furnish the company with a satisfactory certificate of health; and again, on December 8, by letter he was advised that his policy had already lapsed and the proceeds of his check placed in suspense pending receipt of certificate of health which he had not then furnished, and never did furnish, and that "if we do not hear from you on or before December 25, we will refund your check of $16.49."

Our opinion is that the policy had lapsed, that the letters addressed to the insured clearly negatived a waiver of the forfeiture committed by the insured, and that the judgment and order refusing plaintiff a new trial should be and are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, HURLY, and MATTHEWS, JJ., concur.

ROBERTS et al., State Board of Equalization, v. LYNCH, County Assessor.
(No. 3489.)

(Supreme Court of Utah. June 16, 1920.)

1. Statutes ⇐205—Construed as whole.

What a statute says must be taken as a whole in construing it.

2. Taxation ⇐386(1)—Bank deposits assessable as solvent credits, and taxpayer entitled to deduct debts.

Under Comp. Laws 1917, §§ 5865, 5877, bank deposits should be assessed for taxation to the depositors as solvent credits, not as money, and from the sum total of his credits a taxpayer is entitled to a deduction of debts owing by him.

Action by B. H. Roberts and others, constituting the State Board of Equalization, against James E. Lynch, as County Assessor of Salt Lake County. Complaint dismissed.

Cheney, Jensen & Holman, of Salt Lake City, for plaintiffs.

John A. Marshall, A. L. Hoppaugh, and Richard Hartley, Co. Atty., and James Ingebretsen, all of Salt Lake City, for defendant.

WEBER, J. By this action plaintiffs seek to compel defendant, the assessor of Salt Lake county, to assess as money or cash in hand the bank deposits of the various taxpayers of the county. Plaintiffs allege that in violation of an order issued by the state board of equalization defendant has treated bank deposits as credits from which the debts of the taxpayer may be deducted.

It is conceded that bank deposits are taxable and should be assessed to the depositors. It is also conceded that the relation between a general depositor and a bank is that of creditor and debtor; that the general deposit becomes the property of the bank and becomes and is part of a general fund from which the depositor is paid on demand. The question presented for decision is whether bank deposits shall be assessed for taxation as money or as solvent credits. If they are assessed as money, the depositor is not entitled to deduct his debts, and, if bank deposits are assessed as solvent credits, the taxpayer may deduct his bona fide debts.

The statutes of the different states relating to the assessment of bank deposits are so variant that the decisions of courts of other states in accord with the varying provisions of different statutes are of little, if any, assistance in arriving at a conclusion in the present case. In some of the states money is defined as including bank deposits. For instance, in Texas bank deposits are regarded as cash, not as credits, because the statute defines money as including "every deposit which any person owning the same or holding in trust and residing in this state is entitled to withdraw in money on demand." Campbell v. Wiggins, 2 Tex. Civ. App. 13, 20 S. W. 735.

Referring to Gray v. Street Com. of Boston, 138 Mass. 414, counsel for plaintiffs insist that "the court had before it a situation as nearly identical to the one before this court as two situations could possibly be." The statute of Massachusetts defining personal property distinguishes money on deposit from debts due the person, and the section of the statute of that state setting forth the form of valuation list made by the assessor provides that in the column for "ratable cash assets" the assessor shall enter the "'amount of money at interest more than the person assessed pays interest for, including public securities; the amount of money on hand, including deposits in any bank or in any savings bank, which is not exempted by law from taxation;' and other kinds of personal estate." The Massachusetts decision was

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

based upon a statute that differs radically from that of this state, and it follows that the case throws little light upon the question now involved. Nor can we accept Beard v. People's Savings Bank, 53 Ind. App. 185, 101 N. E. 325, as persuasive. In Indiana the statute provides in its tax schedule for the entry, as the first item, of "money on hand or on deposit," thus treating, for taxation purposes at least, money on hand the same as money on deposit.

In Michigan the Legislature has listed money under "personal property credits," and in City of Detroit v. Hertz, 184 Mich. 512, 151 N. W. 564, the court concludes that money on deposit is a credit because so listed by the Legislature.

It would be futile to further notice decisions based on statutes unlike those of Utah. We are in full accord with counsel for plaintiffs when they say:

"The question of whether the Legislature has authorized any deduction of indebtedness from moneys on deposit in banks is one determined by the provisions of the taxation laws of this state, and in their provisions the answer must be found."

In section 5865, subd. 6, Comp. Laws Utah 1917, the word "credit" in the sense in which it is used in the statutes on taxation is defined as "those solvent debts, secured or unsecured, owing to a person."

Section 5877 provides that the assessor may require from any person a statement under oath setting forth specifically all the real and personal property owned by such person or in his possession or under his control at 12 o'clock M., on the 1st day of January. Such statement must be in writing, showing separately, among other things, the following:

"1. All property belonging to, claimed by, or in the possession, or under the control or management of such person. * * *

"5. A statement of all lands in parcels or subdivisions, not exceeding 640 acres each, and the sections and fractional sections of all tracts of land containing more than 640 acres which have been sectionized by the United States government; improvements, and personal property, including all vessels, steamers, and other water craft, and all taxable state, county, city, or other municipal or public bonds, and the taxable bonds of any person, firm, or corporation, and the deposited money, gold dust, and other valuables, and the names of the persons with whom such deposits are made, and the places in which they may be found; all mortgages, deeds of trust, contracts, and other obligations by which a debt is secured, and the property affected thereby;

"6. All solvent credits, secured or unsecured, due or owing to such person, or to any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent, deducting from the sum total of such credits only such debts, secured or unsecured, as may be owing by such person, firm or corporation."

The above section was borrowed from either Montana or California; the latter state having enacted in 1872 what is substantially section 5877, supra. Instead of using the words "deposited money, gold dust or other valuables," both the California and Montana statutes read:

"Deposits of money, gold dust or other valuables and the names of the persons with whom such deposits are made and the places where they are to be found."

Money, gold dust, and other valuables are placed in a class by themselves, and are referred to as "such deposits"— i. e., such deposits of money, such deposits of gold dust, such deposits of other valuables. The deposits referred to are special deposits, the money, gold dust, diamonds, or other valuables being placed in some drawer, safe, or other receptacle, the transaction being a bailment and the bailor being entitled to a return of the identical property that has been deposited. It appears that the particular question here involved has not been decided by the Supreme Court of either Montana or California, but in Clark v. Maher, 34 Mont. 399, 87 Pac. 272, it was held that moneys due from other banks and subject to draft are solvent credits from which the depositing bank is entitled to deduct its debts.

Pacific Coast Sav. Soc. v. San Francisco, 133 Cal. 14, 65 Pac. 16, is to the effect that a balance of money account on general deposit in a bank outside of the state, held by a corporation having its principal place of business in the state, is taxable as a solvent credit to the California corporation. If deposits in banks outside of the state are considered solvent credits from which the California taxpayer may deduct his bona fide debts, why should not his deposits in banks inside the state be considered solvent credits under the laws of either California or Utah? It would be splitting hairs to distinguish between the words "deposit of money," as used in the California and Montana statutes, and "deposited money," as it occurs in our tax law. "Deposited money, gold dust, and other valuables, with whom such deposits are made and the places in which they may be found" means something different from credit balances in bank accounts. This is evident from the fact that "deposited" is used not only in connection with money, but also refers to gold dust and other valuables, the whole sentence plainly referring to money that is deposited as gold dust is deposited, or as other valuables are deposited, in some "place of deposit"—some receptacle, safe, or vault—and not to a debt due from some one, or to a bank deposit which is but a debt from the bank to the depositor. The directions that the taxpayer shall "give the names of the persons with whom such deposits are made and the places where they may be found" plainly indicate

Digitized by Google

that for the purpose of preventing such property from escaping taxation the Legislature provided for the disclosure of the hiding places where gold dust, jewelry, diamonds, coin, money, and other valuables were placed or secreted.

[1] In their argument plaintiffs refer to "deposited money," and when they say that the Legislature in Utah has excluded "deposited money" from the classification of solvent credits, they treat the words "deposited money" as synonymous with "bank deposits." What the statute says must be taken as a whole. Particular words taken from the context may be given and may often have an entirely different meaning than when read in connection with the language with which they occur in the statute. So here "deposited money," when standing alone, separated from the sentence in which it occurs, might fairly be held to include bank deposits, but, in our opinion, "deposited money" as used in section 5877, supra, cannot reasonably be defined or construed as embracing bank deposits. If the Legislature intended to exclude bank deposits from the classification of solvent credits, it would unquestionably have employed language similar to that used in Massachusetts or some of the other states and would have said "money on hand, including deposits in any bank," etc. If it was the intention to take bank deposits from the class of solvent credits and for the purpose of taxation transmute a credit in a bank into actual money in the taxpayer's hand or pocket, the Legislature would certainly have resorted to the use of more suitable language to express such intent.

[2] In our opinion, bank deposits should be assessed to the depositors as solvent credits, and from the sum total of his credits the taxpayer is entitled to a deduction of such debts as may be owing by him. The complaint in this case is therefore dismissed.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

HERALD v. SMITH. (No. 3425.)

(Supreme Court of Utah. June 9, 1920.)

1. Municipal corporations ⟸706(7)—Child not guilty of contributory negligence as matter of law when run over by automobile.

A child of four years and ten months cannot as a matter of law be held to have appreciated the danger of crossing a street when an automobile was approaching, and is not presumed to conduct herself as an adult person would under similar circumstances.[1]

[1] Gesas v. O. S. L. R. R., 33 Utah, 156, 93 Pac. 279, 13 L. R. A. (N. S.) 1074; Groesbeck v. Lakeside Printing Co., 186 Pac. 103.

2. Negligence ⟸85(2)—Degree of care required of child graduated to age.

The degree of care required of a child must be graduated to its age, capacity, and experience, and must be measured by what might ordinarily be expected of a child of like age and capacity under similar conditions, and, if it acted as might reasonably be expected of such a child, it cannot be charged with contributory negligence.

3. Municipal corporations ⟸705(3)—Care required of automobilist on street; "ordinary care."

An operator of an automobile on a public street is not an insurer against damages to children or other persons, and is only required to exercise ordinary care, or such care as an ordinarily prudent person would exercise under like or similar circumstances, but the degree of care required to be exercised will be greater when the safety of children, or others of immature judgment, is involved, and when such facts are known to the operator of the car.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

4. Municipal corporations ⟸705(3)—Blowing horn by automobilist did not relieve of charge of negligence as to child.

The fact that defendant automobilist sounded a horn when approaching a girl under five years of age about to cross the street could not relieve him of the charge of negligence, as such a child could not appreciate or understand the object sought or the reasons given for such warning.

5. Municipal corporations ⟸706(6) — Negligence of automobilist running over child for jury.

In an action for personal injuries to a little girl four years and ten months old, received when run down by defendant's automobile, whether defendant was negligent in assuming that the little girl would not get in front of the automobile after having seen it *held* for the jury.

Appeal from District Court, Cache County; J. D. Call, Judge.

Action by Charlotte Herald, guardian, etc., against Abraham Smith. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

Le Roy B. Young, of Brigham City, for appellant.

Walters & Harris, of Logan, for respondent.

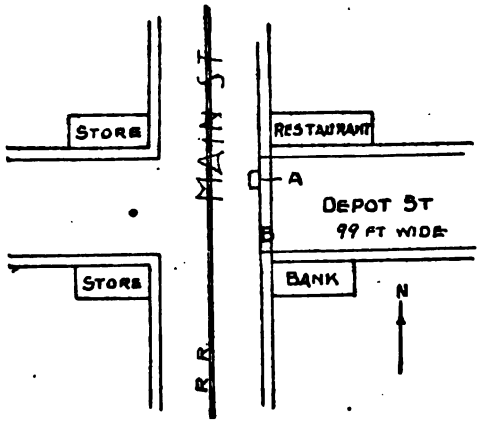
GIDEON, J. Plaintiff, a minor, by her guardian, brings this action to recover damages for personal injuries resulting from an automobile accident alleged to have been caused by the negligence of the defendant. The grounds of negligence alleged are: (a) That defendant operated the car at an excessive rate of speed; (b) failure to give any warning or to look ahead to see if pedestri-

Digitized by Google

ans were crossing the intersection of the street; (c) failure to have the car under proper control when crossing the intersection; and (d) operating said car in a negligent and careless manner without regard to the safety of the plaintiff.

The defendant denied the negligence and set up as an affirmative defense what is designated contributory negligence. At the close of the testimony, the court directed the jury to return a verdict no cause of action. The plaintiff appeals, and assigns that ruling of the court as error.

The accident occurred on the main street of a village in Cache county, this state. The following diagram will assist in understanding the facts:



On the afternoon of the day of the accident the plaintiff, pulling a small express wagon, came down the cement sidewalk, traveling westward on the north side of Depot street, and on arriving at the street intersection, at a point at or near A on the diagram, turned and proceeded to cross the street to the south corner, upon which a bank is located. A small automobile was parked at the point marked A. There was also a tree near that point. The plaintiff passed behind the automobile, under the tree, and turned south across the street. About the same time the defendant approached the intersection driving north on the west side of Main street. There was no obstruction to prevent the defendant from seeing the plaintiff at the time or immediately after she turned across the street from the point marked A. The testimony of the plaintiff's witnesses is that defendant approached the intersection traveling about 12 or 15 miles per hour; that he did not slacken his speed perceptibly until after the accident. The testimony of defendant is that in approaching the intersection from the south he was traveling at the rate of about 10 miles per hour, and that in turning eastward to cross the railroad track he slackened his speed to about 5 miles per hour. A cement walk some 3 or 4 feet wide runs from the point A southward across Depot street to the bank, and the child was traveling along that walk, pulling the express wagon. Defendant's testimony is to the effect that he observed the child while crossing, or immediately after crossing, the railroad track, and at that time the automobile was proceeding at a rate of about 5 miles per hour; that the plaintiff at that moment had left the sidewalk and had advanced into the street along the cement crosswalk probably some 7 or 8 feet; that, upon observing the child he feared an accident; that he immediately blew the horn of the automobile, and that the child stopped. At that time he was some 40 of 45 feet from the plaintiff. Defendant seems to have acted upon the theory that, as the child stopped when he blew the horn, he had a right to assume that she would not move forward. He therefore proceeded to advance. At the same time, apparently, the plaintiff, without much regard to the approach of the automobile (and from the testimony it appears that her attention was centered more on the little wagon than anything else), proceeded to go forward, and was either struck by the automobile or she walked against the running board and was thrown backward over the express wagon and sustained the injuries complained of.

The witnesses all agree that the accident happened at or near the point marked B on the diagram, which is some two-thirds or three-fourths of the distance across the street from the north to the south. As stated, there is some conflict in the testimony as to the rate of speed at the particular moment of the injury. We regard that, however, as of little moment. It appears from the defendant's testimony that he saw the plaintiff in ample time to have avoided the accident had he assumed that the plaintiff would not heed the warning given, if any was given, and remain in the place where she was until after defendant's automobile had passed.

[1, 2] The plaintiff was a little girl four years and ten months old. She was lawfully on the street at the time of the accident. The defendant's duty to the plaintiff cannot be measured by what he might reasonably have expected to be the conduct of an adult person in such circumstances. It was his duty to avoid the accident if possible in the exercise of ordinary care, and it was for the jury to say whether he was justified in assuming that the plaintiff would do or might do the acts which the testimony shows she actually did. A child of that age cannot, as a matter of law, be held to have appreciated the danger and is not presumed to conduct herself as an adult person would under similar circumstances. There is nothing in the record to indicate that the plaintiff had sufficient capacity to understand or appreciate the danger to which she was exposed by the approach of the defendant's automobile. In fact, the contrary appears.

"The degree of care required of a child must be graduated to its age, capacity, and experi-

Digitized by Google

ence, and must be measured by what might ordinarily be expected from a child of like age, capacity, and experience under similar conditions. If it acted as might reasonably be expected of such a child, it cannot be charged with contributory negligence." Gesas v. O. S. L. R. R., 33 Utah, 156, 93 Pac. 279, 13 L. R. A. (N. S.) 1074.

See, also, Groesbeck v. Lakeside Printing Co., 186 Pac. 103.

[3] There is no testimony in the record tending to prove that defendant did not have his car under control or that he was operating it in a reckless manner, but there is testimony, in our judgment, entitling the plaintiff to have the question submitted to the jury whether or not the defendant was negligent in proceeding over the cement crosswalk in disregard of plaintiff's rights, after he had observed the approach of plaintiff and knew that an accident was imminent and made no effort to stop the car. An operator of an automobile on a public street is not an insurer against damages to children or other persons. He is only required to exercise ordinary care or such care as an ordinarily prudent person would exercise under like or similar circumstances, and, as indicated, the degree of care required to be exercised will be greater when the safety of children or others of immature judgment is involved, and when such facts are known to the operator of the car. What would constitute reasonable care in one case might not be reasonable care in another. Berry, Automobiles (2d Ed.) § 279, and cases cited.

[4] There is a conflict in the testimony respecting whether the defendant sounded the horn of the automobile at or about the time he crossed the street car track. Under the circumstances and facts of this case it is immaterial whether such alarm was given or not. The plaintiff was a little girl not yet five years of age. The ordinary child of that age could neither appreciate nor understand the object sought or the reasons for giving such warning. If it made any impression at all upon her mind, she probably accepted it as for her amusement rather than anything else; in other words, we regard the fact as to whether defendant sounded the horn as immaterial. It would in no way relieve the defendant of the charge of negligence, if he was negligent in going forward after he observed the child crossing the street, nor would it charge the plaintiff with contributory negligence.

The testimony shows that the intersection of the streets was in the center of the town where the accident happened. A bank occupied one corner, a restaurant another, and a store each of the other two corners. We are not prepared to say that operating an automobile over such intersection at the rate of 12 to 15 miles per hour, as witnesses for plaintiff testified, was reasonable under the circumstances. The facts, however, do not show that the operation of the car at that rate of speed was the cause of, or contributed to, the accident. The only negligence of defendant shown by the testimony, if he was guilty of any, was in proceeding eastward over the crosswalk after he observed the child, upon the assumption that the plaintiff would heed his approach and remain away from the course of the automobile.

[5] We are of the opinion, and so hold, that the plaintiff was entitled to have that question submitted to the jury under proper instructions as to the degree of care required of the defendant under all the circumstances shown by the record. These conclusions are supported by Meserve v. Libby (Me.) 15 N. C. C. A. 781, 98 Atl. 754, and Deputy v. Kimmell, 8 N. C. C. C. A. 369, 89 S. E. 919. The recent cases bearing upon the question herein considered are collated in the note to Meserve v. Libby, supra.

It follows that the judgment of the district court must be reversed, and a new trial granted. Such is the order; appellant to recover costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

GEO. A. LOWE CO. et al. v. INDUSTRIAL COMMISSION OF UTAH. (No. 3484.)

(Supreme Court of Utah. June 29, 1920. Rehearing Denied July 15, 1920.)

1. Master and servant ⊜405(5) — Evidence held to show dependency within Compensation Law.

In a proceeding for compensation claimed by father and mother of deceased servant, evidence *held* to establish the partial dependency of the claimants within Laws 1917, c. 100, as amended by Laws 1919, c. 63.

2. Master and servant ⊜417(7)—Finding of dependency within Compensation Law conclusive.

The decision of the Industrial Commission is conclusive on the question of dependency of claimants awarded compensation for the death of a servant, where sustained by some substantial testimony.

3. Master and servant ⊜416—Compensation award not invalidated by failure to find daily wage.

Claimants having established partial dependency on deceased servant under Laws 1919, c. 63, amending Comp. Laws 1917, § 3140, subd. 3, an award based on the average weekly wage was not invalid because the commission failed to make a finding as to amount of the daily wage, especially where under the evidence the only finding that could have been made would justify the award.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

4. Master and servant ⟸417(7)—Amount of compensation awarded not reviewable.

Where the amount of compensation awarded by the Industrial Commission is sustained by some substantial evidence, it is not the province of reviewing court to disturb it.[1]

Petition by Robert J. Eames and wife, as father and mother and Lucy K. Eames, to the Industrial Commission of Utah for an award against Geo. A. Lowe Company, employer. Award granted. Application for rehearing denied, and the employer and the Ætna Life Insurance Company, insurer, bring certiorari to the Industrial Commission. Award sustained.

De Vine, Stine & Gwilliams, of Ogden, for plaintiffs.

Dan B. Shields, Atty. Gen., and Chez & Barker, of Ogden, for defendant.

CORFMAN, C. J. On the 27th day of December, 1919, George W. Eames, of Harrisville, Utah, met his death by reason of an accident arising out of and in the course of his employment with the plaintiff Geo. A. Lowe Company. The plaintiff Ætna Life Insurance Company was the insurance carrier of Geo. A. Lowe Company.

Under the provisions of chapter 100, Laws of Utah 1917, as amended by chapter 63, Laws of Utah 1919, Robert J. Eames and Lucy K. Eames, the father and mother of said George W. Eames, filed their petition for compensation with the Industrial Commission of Utah, claiming that they were dependents of the decedent. After the issues were joined and a hearing had, the said commission made an award against the plaintiff Geo. A. Lowe Company, granting to the said claimants compensation at the rate of $11.25 per week for a period of 284 weeks, but not to exceed $3,199. After an application for a rehearing, which was denied by the commission, the proceedings were brought to this court for review under a writ of certiorari sued out by the plaintiffs. They contend that the award made by the commission should not be sustained: First, for the reason that the evidence was insufficient to establish the dependency of the claimants; secondly, that the commission failed to make any finding of the average weekly wage of decedent; and, thirdly, that the award made was excessive.

[1, 2] The record shows that claimants are the parents of the decedent. They owned and lived upon a farm heavily incumbered by a mortgage. Their family included two daughters, under age, the decedent and his grandparents, all of whom reside together and were dependent upon the income from the farm for the necessaries of life. The decedent, age 20 years and 10 months, had assisted his parents in doing the general farm work, except when occasionally employed elsewhere, at which times he would contribute his earnings to the family support, including apparel for himself and at times for other members of the family. At the time of the accident in which decedent was killed he was an employé of the plaintiff Geo. A. Lowe Company and had been earning under said employment $3.25 per day 6 days in a week, for a period of about 3 months. During the time he was thus engaged with the Geo. A. Lowe Company he had obtained his lodging and meals without charge at claimants' home. On account of his absence from work on the farm it was arranged between himself and the claimants that he should contribute his earnings in payment of other help employed to assist in doing the farm work. As to the exact amount in dollars and cents derived from, and the full extent of, the dependency of claimants upon the decedent, the record is not certain and clear, but that they were dependent upon and that they received practically all of decedent's earnings and the benefits of his labor cannot be doubted from a reading of the evidence. All that may be said in this connection is that decedent was at the time of the accident capable of and was earning $3.25 per day, that all of his life he had contributed his labor and earnings to the support of claimants, and that there is substantial evidence in the record tending to show that claimants were dependent upon decedent's labors and earnings for the support and maintenance of themselves and the members of their family. Dependency in this class of cases has been universally held to be a question of fact to be determined by the commission, not the reviewing court. Dosker's Compensation Law, § 170.

Under the facts and circumstances of this case as disclosed by the record, we think partial dependency of the claimants was fully established within the purview and meaning of our statute. Further, the decision of the commission was final and conclusive on this question as well as all other questions of fact where there is some substantial testimony in the record to sustain it. Smith v. National Sash & Door Co., 96 Kan. 816, 153 Pac. 533; Herrick Case, 217 Mass. 111, 104 N. E. 432; In re Kelly's Case, 222 Mass. 538, 111 N. E. 395; Walz et al. v. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6, 155 N. Y. Supp. 703.

[3] The next question presented by the plaintiff is whether or not the failure of the commission to make a finding as to the daily wage of decedent at the time of the accident invalidates the award.

Having established partial dependency upon the decedent, under the provisions of

[1] EVALS v. Ind. Com. of Utah, 174 Pac. 825; Reteuna v. Ind. Com. of Utah, 185 Pac. 535.

Digitized by Google

section 3140, subd. 3, as amended by chapter 63, Laws of Utah 1919, claimants were entitled to "60 per cent. of the average weekly wages, but not to exceed the maximum of $16.00 per week, and to continue for all or such portion of the period of six years after date of the injury as the commission in each case may determine, and not to amount to more than a maximum of $5,000.00."

The evidence shows beyond any dispute that decedent was earning at the time of the accident $3.25 per day. The commission failed to make any such finding. Had the commission made a finding, no other finding than one to that effect could have been made under the evidence before it. There appears in the record, however, a purported copy of an unsigned stipulation certified under seal by the clerk of the commission "that the wage earned by decedent at the time of the accident was $3.25 per day, working 6 days per week." By permission of the court an affidavit made by the referee was filed, stating in substance that the said stipulation with respect to wages earned by decedent was a clerical error, and that no such stipulation was made by the interested parties. Be that as it may, we find no express requirement in the act that such a finding is necessary to a valid award, and in any event we cannot conceive of any good reason why an award should be set aside by reason of such failure and the case referred back to the commission when, as in this case, no other finding could be made under the evidence than that decedent earned $3.25 per day at the time of the accident. Such a finding would, if the case were referred back to the commission, be the only finding in that regard that could be made, and not only that, but it would support the award, be conclusive, and not subject to review by this court, in view of the testimony heretofore pointed out.

Notwithstanding the liberal provisions of our statute with respect to proceedings held by the commission, we think it would be better, although not legally essential, if the commission would in all cases make findings upon which they predicate an award.

[4] Lastly, the plaintiffs complain that the award made is excessive. They assign many reasons in support of their contention. We will not pause to discuss them in detail. As we view the record under consideration, the award made by the commission did not exceed the powers granted to it by the statute. Both the matter of dependency and the amount to be awarded were questions of fact for their ascertainment and determination from the evidence before them, and it is not by statute or otherwise made our province as a reviewing court to disturb the award so long as there is some substantial evidence to sustain it. Murphy's Case, 218 Mass. 279, 105 N. E. 635; Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; Evans v. Ind. Com. of Utah, 174 Pac. 825; Reteuna v. Ind. Com. of Utah, 185 Pac. 535.

Under the provisions of the act our review is confined in this class of cases to certain defined and fixed subjects and can be extended no further than to determine whether or not:

"(1) The commission acted without or in excess of its powers; (2) if findings of fact are made, whether or not such findings of fact support the award under review."

We think the jurisdictional facts entitling the commission to exercise its powers in the present case were fully and completely established by the proceedings as shown by the record before us. There can be no doubt about that. If there had been full and complete findings instead of only partial findings made by the commission, such findings of fact would have amply supported the award. Failure in that regard, therefore, should not defeat the purposes of the act to secure for employés and their dependents the prompt payment of compensation under its provisions. A substantial compliance with its provisions is all that is legally required. The act itself provides:

"A substantial compliance with the requirements of this act shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

In this case we think the record conclusively shows that the claimants were dependent upon the labors and earnings of the decedent. He was receiving at the time of his death $3.25 per day. The amount earned supports the award. The award made to claimants was within the limit prescribed by the statute, and should be sustained.

It is so ordered.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

Digitized by Google

CONSOLIDATED WAGON & MACHINE CO. v. WRIGHT. (No. 3405.)

(Supreme Court of Utah. June 21, 1920.)

1. Sales ⟸288(2)—Purchaser held not bound by card signed showing goods were satisfactory.

In seller's action for the purchase price of a harvesting machine, defended on the ground that it failed to work as warranted, a satisfaction card signed by defendant without reading it, upon representation of plaintiff's expert that it only showed the latter's presence, and which stated that the machine worked satisfactorily, was of no more solemnity than such an oral declaration of defendant would have been, and did not bind him where the facts were otherwise as shown by the expert's own statement, buyer's complaints, and expert's return to operate the machine.

2. Sales ⟸285(4)—Waiver of notice of breach of warranty by taking charge of setting up warranted machine.

The rule that a buyer impliedly accepts a warranted machine if he fails to report, in the time required by the warranty, that the machine fails to work, does not apply where the seller by delivering the machine unassembled and taking charge of assembling and trying it out in the buyer's field waived such notice.[1]

3. Sales ⟸288(2)—Buyer's keeping machine more than contract five days' trial limit held to be by seller's consent.

In a seller's action against buyer, a contention that the buyer retained the harvesting machine more than the five days allowed for trial under the terms of warranty is not well taken, where it was shown that the harvester was only operated while seller's employés were on the buyer's ranch overseeing its operation, since any extended time was by seller's consent.

4. Sales ⟸287(6)—Seller waived return of unsatisfactory machine by refusal to accept it.

Where buyer claimed the machine purchased did not fulfill its warranty, and was notified that seller would not receive it, the seller waived any right to insist that the buyer return the machine.

5. Sales ⟸196—Waiver of initial payment on price by delivery without it.

Where a seller delivered a machine to the buyer, assembled it on his premises and tested it out without exacting first payment, and it proved unsatisfactory, the seller waived the agreement for payment at the time of delivery.

6. Appeal and error ⟸1050(4)—Irregularity in evidence of notice of defect of goods held harmless.

In seller's action against buyer for the price of a machine which defendant claimed did not fulfill a warranty, irregularity in permitting in evidence carbon copy of buyer's notice to seller of defect, without accounting for the notice being mailed as required by law, *held* harmless in view of circumstances.

7. Appeal and error ⟸1064(4)—Poorly worded instruction held harmless.

Where in view of the evidence the jury could not have been misled to appellant's prejudice by a poorly worded instruction respecting waiver, any error therein must be held harmless.

Appeal from District Court, Box Elder County; J. D. Call, Judge.

Action by the Consolidated Wagon & Machine Company against H. G. Wright. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

W. J. Lowe, of Brigham, and Morris & Callister, of Salt Lake City, for appellant.
Walters & Harris, of Logan, and Le Roy B. Young, of Brigham City, for respondent.

FRICK, J. The plaintiff commenced this action against defendant to recover the purchase price of what is called a Massey-Harris harvester. In its complaint the plaintiff in substance alleged that on the 3d day of May, 1916, it sold to the defendant a harvester for the sum of $950, which sum the defendant agreed to pay as follows: $60 when the harvester was delivered, $450 on November 1, 1916, and the remainder on November 1, 1917—that said harvester was sold pursuant to the terms of a certain contract and warranty which are attached to and made a part of the complaint; that the defendant had failed to comply with the terms of said contract and had failed to pay the purchase price of said harvester, or any part thereof, all of which was due, together with interest, etc. The defendant filed an answer to said complaint in which he admitted the execution of the contract attached to plaintiff's complaint and denied that he was indebted to the plaintiff in any sum or amount. The defendant, as an affirmative defense, also relied on the terms of the warranty which was a part of the contract of sale, and to which we shall more specifically refer hereinafter, and averred that said harvester did not fulfill the terms of said warranty, stating the facts with respect thereto, and, in effect, further averred that the plaintiff had waived certain requirements of said warranty to which we shall more fully refer hereafter.

The case was tried to a jury, which returned a verdict in favor of the defendant, and the plaintiff appeals.

The plaintiff has assigned, and in its brief relies upon the following errors: (1) That the court erred in refusing to direct a verdict in favor of plaintiff; (2) that the court erred in its instructions to the jury; (3) that it erred in refusing to charge as requested by plaintiff; and (4) that it erred in the admission and exclusion of certain evidence

[1] Consolidated Wagon & M. Co. v. Barben, 46 Utah, 377, 150 Pac. 949.

Digitized by Google

and in certain other rulings during the course of the trial.

Preliminarily, plaintiff's counsel contend that the defendant had failed to plead a waiver, and hence its demurrer to that part of defendant's answer should have been sustained. It is not necessary to enter upon an analysis of the pleadings. It must suffice to say that the facts constituting the alleged waiver were sufficiently pleaded to authorize the admission of the evidence relating thereto, and hence this contention cannot prevail.

[1, 2] Proceeding, now, to a consideration of the other errors assigned: The plaintiff relies upon the terms of the contract of warranty pursuant to which the harvester in question was sold and delivered. The warranty, so far as material here, reads as follows:

"It is warranted that the machinery and goods hereby sold are made of good material, and durable with good care, if properly operated by competent persons with sufficient steam, gasoline, horse, or other power, as the case may be, and the printed rules and directions of this company and of the manufacturer are intelligently followed. If by so doing, after trial of five days by the second parties, said machinery or other articles shall fail to fulfill the warranty, written notice thereof shall at once be given to the company at Salt Lake City, Utah, and also to the agent through whom received, stating in what parts and wherein it fails to fulfill the warranty, and a reasonable time shall be given to said company to send a competent person to remedy the difficulty, the second parties rendering necessary and friendly assistance, said company reserving the right to replace any defective part or parts, and if then the machinery cannot be made to fill the warranty the part that fails is to be returned by the second parties free of charge to the place where received and the company notified thereof, and at the company's option another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned and the contract rescinded to that extent and no further claim made on the company. Failure to so make such trial or to give such notice in any respect shall be conclusive evidence of due fulfillment of warranty on the part of said company and that the machinery is satisfactory to the second party, and the company shall be released from all liability under the warranty. Any assistance rendered by the company, its agents or servants, in operating said machinery or in removing any actual or alleged defects, either before or after the five days' trial, shall in no case be deemed any waiver of, or excuse for, any failure of the second parties to fully perform the conditions of this warranty. * * *"

A contract and warranty in terms precisely like the one in question here was passed on by this court in the case of Consolidated Wagon & M. Co. v. Barben, 46 Utah, 377, 150 Pac. 949. It was there held that the defendant, Barben, had failed to comply with the terms of the warranty, and that Consolidated Wagon & Machine Company had not waived the terms thereof, and hence the defense that was there set up could not prevail. Counsel for plaintiff insist with much vigor that the Barben Case and the cases therein cited in its support control the case at bar. We have carefully read and considered all of the evidence in the case at bar, and, after doing so, are unable to yield assent to counsel's contention. The controlling facts in this case, stating them as briefly as possible, in substance are these: The defendant, in May, 1916, purchased from the plaintiff what in the record is designated as a Massey-Harris harvester, hereinafter, for convenience, called harvester, which was a combined reaper and thresher. The harvester was sold pursuant to the terms of the warranty hereinbefore set forth. While in the contract of sale the harvester was sold f. o. b. Salt Lake City, it was in fact delivered to the defendant at the town of Garland, in Box Elder county, Utah, where, according to the evidence, the plaintiff conducted a branch house or branch office. The harvester was delivered in boxes and was not assembled or "set up" in working condition. About the 1st of August, 1916, and some time before defendant's grain was ripe, and at about the time the harvester was delivered at Garland, the plaintiff sent one D. W. Pearson from its principal office at Salt Lake City, who in the record is designated as one of plaintiff's "general experts," to assemble or "set up" the harvester. Mr. Pearson assembled the parts, "set up," as he called it, the harvester, but, in view that defendant's grain was not yet ripe, he did not remain at defendant's ranch any longer than was necessary to complete the assembling of the harvester. Pearson, however, returned to the ranch on the 14th of August, at which time the grain was ripe and directed and superintended the operation of the harvester. Up to this point there is no conflict in the evidence. From this point on, however, the testimony of plaintiff's and defendant's witnesses differ very materially on some points. The jury, were, however, justified in taking the version of defendant's witnesses as correct, and hence in this statement we shall follow the testimony of the defendant's witnesses. The testimony of defendant and his witnesses is to the effect that when Pearson undertook to operate the harvester it failed to fulfill the terms of the warranty in almost every particular. Pearson remained at defendant's ranch from the afternoon of the 14th to the morning of the 16th of August, during which time he directed and superintended the operation of the harvester, and during all of which time, according to the statements of defendant's witnesses, the harvester failed to do good work, but wasted much grain. Pearson left the ranch on the morning of the 16th, but, at the request of the defendant, returned again

Digitized by Google

on the 17th. Pearson himself so states. Mr. Winters, who is designated as plaintiff's manager of the branch house at Garland, went to defendant's ranch on the 17th, and Pearson returned with Winters to Garland. A few days after Pearson had left the ranch two other employés of plaintiff came to the ranch, and, as the defendant and his witnesses say, brought some castings to replace broken ones. The harvester, however, would not work. The defendant also testified that Mr. Winters, the manager of the branch house at Garland, said that if the grain were his he would save it by obtaining a header to cut it. According to the defendant's statement, after the expert Pearson and the others of the plaintiff's employés had all failed to make the harvester do satisfactory work, he obtained a header, and by that means harvested his grain. Plaintiff contends, however, that the defendant signed a satisfaction card and delivered it to the expert Pearson on either the evening of the 15th or the morning of the 16th of August, wherein the defendant stated that the harvester was operating to his entire satisfaction. The defendant, and his witness who was present at the time the defendant signed the card, testified, however, that the defendant did not read the card or know its contents, but signed it, as he said, upon the representation of Mr. Pearson that it only contained a statement that Mr. Pearson was present at defendant's ranch and the time during which he was present. At all events, the defendant and all of his witnesses emphatically deny that the harvester was working satisfactorily as represented in the card or that it had fulfilled the warranty in any respect. In this conclusion they, to some extent at least, are indirectly supported by Mr. Pearson himself and by others of plaintiff's witnesses for the reason that, if the harvester had been operating satisfactorily on the evening of the 15th or on the morning of the 16th, when Mr. Pearson left the ranch, why should he return again on the 17th to attempt to overcome some defects? Again, if the harvester were working satisfactorily, then why, according to defendant's statement, should Winters, the branch house manager, advise the defendant to cut his grain with a header, which was in fact done? True, Winters denies this, but the jury had a right to accept defendant's statement in that regard. In this connection counsel, however, insist that the court, nevertheless, erred in permitting the defendant to explain the signing of the satisfaction card. It is contended that, having signed the card, defendant was estopped from explaining or contradicting the statements contained in the card. In our judgment this contention is not sound. The card was in no sense contractual; nor did it contain any statement or admission which, under the circumstances, the defendant was estopped from explaining or denying. The plaintiff was not deceived nor misled; neither did it change its position by reason of any statement or admission contained in the card. Indeed, according to the expert's own statements, on the very day he left the ranch with the card the defendant followed him to Garland and insisted that the harvester was not working satisfactorily, and the expert returned to the ranch to make it work. Moreover, after that two others of the plaintiff's employés went to the ranch for the same purpose. At most, the card was of no greater solemnity than a receipt or a declaration on the part of the defendant would have been which he had a right to explain, and it was for the jury to say whether his statements under oath or the declaration in the card was correct.

Plaintiff's counsel also vigorously insist that the defendant has failed to comply with some of the material terms of the warranty. They contend that the defendant under the warranty only had the right to try out the harvester for five days, and that after a trial of five days he was required to immediately notify the plaintiff in writing at the home office at Salt Lake City, and also in the same manner notify the branch office at Garland, stating the particulars in which the harvester failed to fulfill the warranty, all of which he failed to do. Counsel therefore contend that defendant must fail in his defense for the same reason that the defendant in the Barben Case failed. As before stated, we cannot yield assent to counsel's contention. If it were true that the defendant here had failed the same as the defendant in the Barben Case failed, counsel's contention should prevail. Counsel, however, construe and apply the terms of the warranty in question too literally. The terms of any contract, whether it be a warranty or something else, must receive a fair and reasonable construction and must be applied in the light of the circumstances and conditions under which the parties acted at the time it was entered into. This case, in its controlling features, is wholly unlike the Barben Case. Here the harvester was not even delivered to the defendant in the ordinary condition, but it was delivered as unassembled machinery. The plaintiff took it upon itself not only to assemble the parts and to "set up" the harvester, as Mr. Pearson says, but it, through its special expert, undertook to start the operation of the harvester itself. This it had a perfect right to do, and in view that this was the first harvester of the kind which plaintiff had sold it was both prudent and proper that it should have assembled it and supervised the operation. A mere cursory reading of the warranty will disclose that it is based upon the theory that the purchaser of the machine himself starts to operate it, and if, in doing so, it for any reason

Digitized by Google

fails to fulfill the terms of the warranty, then the notice provided for in the warranty must be given. It is quite obvious why that is necessary. Unless such notice be given, the plaintiff would not have an opportunity to make the machine fulfill the warranty or to supply any defective part or parts. Where, however, as here, the seller of the machine, through its expert, sets it up and is thus advised that the parts are properly assembled, and where such expert, on behalf of the plaintiff, starts the operation of the machine while the machine is nominally in the possession of the purchaser, but is, nevertheless, constantly under the control and supervision of the seller's agent and expert, the rule laid down in the Barben Case can have no application. It will not do to say that, although the machine is under the control and supervision of the plaintiff's experts, plaintiff, nevertheless, has no knowledge of whether it fulfills the warranty or not, and must be notified to that effect by the defendant. Plaintiff cannot be heard to say that it does not know the very things that it has employed its own expert to ascertain. It must be assumed that the plaintiff had some object or purpose of its own in having its expert assemble and start the operation of the machine. Its purpose manifestly was that through its expert it would obtain information at first hand as to whether the machine was properly assembled, whether it was properly operated, and if it fulfilled the terms of the warranty. If such was not plaintiff's purpose, we are at a loss to conceive any purpose. All the terms of the warranty proceed upon the theory that the plaintiff has no knowledge respecting the operation of the machine or whether some of its parts are defective, and that upon notice it might by its experts (and it as a corporation could act only through its agents or experts) have access to the machine to inspect it, and in that way ascertain whether the defects mentioned in defendant's notice in fact exist and how they may be remedied. The notice is to apprise the plaintiff of the defects, and in case it is fully apprised thereof through its experts further notice would be wholly useless. Where, therefore, the seller of a machine through its experts takes the whole matter of assembling and trying it out into its own hands and superintends and directs the operation of the machine, the notice contemplated by the warranty is of no value. Under such circumstances the plaintiff is in possession of all the knowledge and means of knowledge that the defendant, or any one else for that matter, could have, and hence it necessarily follows that the giving of the notice must be deemed to have been waived.

[3] Nor is the contention tenable that the defendant gave the machine more than five days' trial, and that for that reason he had breached the terms of the warranty. According to the statements of the defendant and his witnesses, the harvester was not attempted to be and was not operated after plaintiff's employés had left the ranch. If, therefore, the trial of the harvester was continued for more than during the period of five days, it was through plaintiff's own efforts and by its consent.

[4] It is, however, also insisted that under the terms of the warranty the defendant was required to return the harvester to the plaintiff at the place from which it was received. The evidence on the part of the defendant, however, is that the plaintiff had unconditionally refused to take back the harvester, and hence the jury were justified in finding that the defendant was not required to do a useless thing. It is quite evident from the record that, although the defendant had returned the harvester to the branch house at Garland, he nevertheless would have been sued for the recovery of the purchase price. In view, therefore, that plaintiff had refused to receive the machine if returned, nothing could have been accomplished by its return, and the law does not require the doing of a useless thing. Moreover, a careful perusal of the warranty will disclose that the return of the machine is required to the end that in case the plaintiff elects to rescind the contract and to return the notes evidencing the purchase price to the purchaser the machine shall be returned so as to place both parties in status quo. The plaintiff, according to the defendant's statements, having refused to receive the harvester upon any conditions, and in constantly claiming the full benefit of the sale and delivery of the harvester and insisting upon the payment of the full purchase price, the return of the machine must be deemed to have been waived by it. The plaintiff could not insist upon having the machine returned to it and also being paid the full purchase price therefor.

[5] Nor, in view of the facts and circumstances of this case, is there any merit to the contention that the defendant cannot prevail because the defendant failed to pay the $60 as the initial payment of the purchase price. Under the terms of the contract the $60 was payable upon the delivery of the harvester. We have pointed out the conditions under which the delivery was made, and that the plaintiff constantly kept supervision, if not actual control, over the harvester while it was being tried out. The plaintiff could have insisted upon the payment of the $60 at the time the machine was taken from Garland to defendant's ranch, and it could have refused to assemble or attempt to operate it until that amount had been paid. It could, however, also waive the prompt payment of that amount, which it did by its acts and conduct under the circumstances.

[6] It is, however, insisted that for the

Digitized by Google

reason that the defendant testified that he had in fact mailed the written notice required by the warranty to the plaintiff at its home office the court erred in permitting him to introduce a carbon copy of such notice without first laying the proper foundation for its introduction by accounting for the original, and that the defendant by his own testimony proved that the notice was not mailed as required by law. While perhaps the evidence respecting the mailing of the notice was irregularly admitted, yet in view of all the circumstances and for the reasons already stated, the irregularity was harmless.

[7] Nor did the court err in its charge to the jury. While it is true that the instruction respecting waiver was not happily worded and might have been made more specific, yet, in view of all the evidence, the jury could not have been misled by the instruction, and the plaintiff was not prejudiced in any way thereby. If the jury believed the evidence produced by the defendant, they could not have found the facts different than they did.

Nor did the court err in refusing plaintiff's requested instructions. The requests, in view of the facts and circumstances, stated the law too favorably for the plaintiff, and if the court had charged as requested it would have constituted error.

We have carefully considered the evidence and the whole proceedings, and are forced to the conclusion that the facts were fully and fairly presented to the jury; that the case on the part of the plaintiff was well presented, and that, while the jury might have found some of the controlling issues in favor of the plaintiff, yet there is ample evidence in the record to justify the finding in favor of the defendant. Moreover, in our judgment, the rights of the plaintiff were fully protected in the course of the trial.

We have not referred to the numerous cases cited by counsel for both parties for the reason that in view of the controlling facts and circumstances of this case none of the cases cited is in point.

For the reasons stated, the judgment is affirmed, with costs.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

SIDDOWAY, Fish and Game Commissioner of Utah, v. UTAH COUNTY et al.
(No. 2442.)

(Supreme Court of Utah. June 11, 1920.)

Fines ⟸20—In city court for violation of fish and game laws belong to commissioner.

Laws 1919, c. 34, § 1, amending Comp. Laws 1917, § 1726, providing that fines imposed by city court for violation of state laws shall be divided between the county and the city, which was similar to a provision in the original city court act passed before there was a game and fish fund, is a general statute, while Laws of 1919, c. 47, § 37, giving fines for violation of fish and game laws to the fish and game commissioner is a special provision originally adopted subsequent to the former, and therefore controls, so that fines imposed by city court for violation of fish and game laws belong to the commissioner, and not to the county and city.[1]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by R. H. Siddoway, Fish and Game Commissioner of Utah, against Utah County, a municipal corporation, and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Dan B. Shields, Atty. Gen., and O. C. Dalby, Jas. H. Wolfe, and H. Van Dam, Jr., Asst. Attys. Gen., for appellant.

Jacob Coleman, of Provo, for respondents.

CORFMAN, C. J. Plaintiff, as the fish and game commissioner of the state of Utah, brought this action against the defendants, Utah county and Provo City, in the district court of Utah county, to recover the amount of certain fines imposed by Hon. J. B. Tucker, city judge of Provo City, upon offenders under the fish and game statutes of Utah.

In substance, it is alleged in the complaint that said city judge, between June 20 and July 5, 1919, imposed and collected fines for the violation of the fish and game statutes aggregating $225, one-half of which was remitted by said judge to the defendant Utah county and one-half to the defendant Provo City; that the said fines were moneys belonging to the plaintiff as fish and game commissioner of Utah, and that the fines or money so received by the respective defendants was for the use and benefit of the plaintiff. Judgment was prayed for accordingly.

The defendants filed a general demurrer to the complaint, contending that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. Plaintiff declined to amend or further plead, and therefore said cause was dismissed with prejudice. Plaintiff appeals.

The sustaining of the defendants' demurrer to the complaint by the district court gives rise to the contention between the parties, and the appeal taken presents the question as to what statute controls in the disposition of funds collected by city courts as fines imposed upon violators of the fish and game laws of Utah.

The defendants claim the right to the fines collected, under the provisions of Laws Utah

[1] State v. White, 41 Utah, 480, 126 Pac. 330; Board of Education v. Hunter, 48 Utah, 373, 159 Pac. 1019.

Digitized by Google

1919, c. 34, § 1, amending Comp. Laws 1917, § 1726, which reads:

"*Distribution of Fees to City, County and State.*—All fees collected by ex officio clerk of city courts, and all fines and costs, collected for the violation of city ordinances, and one-half of the fines collected for violation of state laws, shall be paid in by him to the city treasury of the city wherein said courts are established, and the remainder of the fines collected for the violation of state laws shall be paid in by him to the county treasury; provided, that in all criminal cases appealed to the district court from the city court, where a fine, or a fine and costs is imposed by the district court, and collected by the county clerk, one-half of such fine shall by him be paid into the state treasury, and one-half into the city treasury."

The plaintiff, as state fish and game commissioner, contends that the moneys thus collected should be paid to him and that they belong to the "fish and game fund," under the provisions of section 37, c. 47, Laws Utah 1919, which reads:

"*Fish and Game Fund.*—A fish and game fund is hereby created and all moneys collected from the sale of fish and game licenses, and the net moneys collected from fines and forfeitures for violation of the fish and game laws shall be paid to the state fish and game commissioner; all moneys paid into the game fund in this section provided for shall be covered into the state treasury and shall constitute a state fish and game fund, which shall be drawn upon for the payment of salaries and expenses of the state fish and game department, and for no other purposes."

The reading of the sections above quoted is in conflict. It is pointed out by the Attorney General that when the city courts were first created there was no fish and game fund. A city court was first created by the enactment of chapter 109, Laws Utah 1901. However, no provision was then made for a city court except for cities of the first class. Therefore its provisions, in effect, applied to Salt Lake City only. The city court system was not extended to other cities until, by the provisions of Laws Utah 1919, c. 34, § 1, amending Comp. Laws 1917, § 1700, when the city court system was extended so as to include cities having a population of more than 7,500, thus, for the first time, including, among others, the defendant Provo City. In the first enactment creating city courts it was provided by section 25, c. 109, supra, that "one-half of the fines collected, and one-half of the costs for violation of state laws, shall be paid * * * to the city treasurer of the city of the first class, wherein said courts are established, and the remainder * * * to the county treasurer of the county within which said city is situated."

By chapter 30, Laws Utah 1903, a change was made so that these fines and costs were to be paid one-half to the city treasurer and one-half to the state treasurer. Thereafter no change occurred until the enactment of chapter 34 and chapter 47, supra, in 1919, which gave rise to the present dispute between the parties. It becomes the duty of the courts to harmonize these conflicting sections so as to give some effect to each, if possible.

It is observable that section 25 of chapter 109, Laws Utah 1901, supra, deals with the fines of city courts in general, and the same is true with the succeeding enactments down to and including the enactment of section 1726, as amended by chapter 34, Laws Utah 1919, upon which the defendants rely.

When the city courts were first created in 1901, there was no fish and game fund, nor was there until 1909, when such a fund was created by the enactment of section 31 of chapter 53, Laws Utah 1909, which provided:

"A fish and game fund is hereby created, and all moneys collected for fish and game licensees, except fees to persons issuing licenses, and the net moneys collected from the fines and forfeitures for violation of the fish and game laws, shall be paid to the state [fish and game] commissioner. All moneys so paid to the state commissioner shall be and are hereby constituted a state fish and game fund, said fund to be drawn upon only for payment of expenses of the state fish and game department."

Since 1909, in the various enactments, amendments, and repeals concerning the fish and game laws of the state, including section 37, c. 47, Laws Utah 1919, upon which the plaintiff relies, the same provision for payment to the state fish and game commissioner of fines and costs collected for violation of the fish and game laws has been carried forward and enacted by the Legislature into the laws of the state.

While it appears that there is a conflict in the reading of the statutes relied on by the respective parties, section 37, c. 47, Laws Utah 1919, supra, relied on by the plaintiff, was not only last in point of time, but special in its motive, and therefore should in any event prevail. State v. White, 41 Utah, 480, 126 Pac. 330; Board of Education v. Hunter et al., 48 Utah, 373, 159 Pac. 1019. To hold otherwise would be to nullify the plain provisions of section 37, c. 47, supra, in toto, and do violence to the manifest purpose and intent of the Legislature in creating a fish and game fund, and in providing for its maintenance with the fines and costs collected from violators of the fish and game laws of the state. Holding, as we do, that the section relied on by defendants is general, and the statute relied on by the plaintiff is special, and therefore takes precedence, the sections are harmonized and effect is given to both.

The judgment of the district court is therefore reversed. It is further ordered that the case be remanded, with directions to the lower court to overrule defendants' demurrer to the complaint and to proceed with the case; appellant to recover costs.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

Digitized by Google

MATSON v. MATSON. (No. 3460.)

(Supreme Court of Utah. June 25, 1920.)

1. Evidence ⟸376(12) — Trusts ⟸44(1) —Evidence held to show land was held in trust.

In an action by plaintiff, as surviving partner of defendant's husband, to recover land standing in the name of defendant, alleged to be partnership property, *held* shown by sufficiently clear, cogent, and convincing evidence that the land was held in trust for the partnership.

2. Evidence ⟸376(12) — Witnesses ⟸255(7, 10)—Partnership book entries authenticated by party admissible and may be used to refresh recollection.

In an action by a surviving partner against the wife of deceased partner, entries in the partnership books made by plaintiff were not admissible per se, but the plaintiff could use them to refresh his recollection, and if they did refresh he could then testify from memory; but if they did not refresh it, but he was able to state he knew the entries were correct when made, then they were admissible.[1]

3. Appeal and error ⟸931(6) — Court presumed to have based finding on evidence free from objection.

Case having been tried to the court without a jury, it must be presumed on appeal that the court based its findings on evidence free from objection as to competency.

Appeal from Second District Court, Weber County; A. E. Pratt, Judge.

Action by E. W. Matson against M. A. Matson. Judgment for plaintiff, and defendant appeals. Affirmed.

J. G. Willis, of Ogden, for appellant.

C. R. Hollingsworth, of Ogden, for respondent.

THURMAN, J. The plaintiff, E. W. Matson, is the surviving partner of George H. Matson, deceased, and brought this action to recover title to certain real property in Weber county alleged in the complaint to be partnership property. The defendant is the surviving widow of said deceased partner and claims the property in her own right.

It is alleged in the complaint that the partnership was formed January 1, 1899, under the firm name of Matson Bros., for the purpose of buying and selling real estate, stocks, bonds, and other kinds of personal property, and as insurance, real estate and rental agents and brokers, and that the said partners thereafter entered upon and continued to transact such partnership business under said firm name until the death of said George H. Matson, April 17, 1911. The complaint also, in substance, alleges: That it was agreed between said partners that they should share equally in the profits and losses of said partnership; that prior to the formation of said partnership, to wit, on or about December 16, 1895, the said George H. Matson bought certain tracts of land in Weber County at tax sale, among which are the parcels of land in controversy in this action; that all the money expended in the purchase of said land, together with the money paid for subsequent taxes thereon down to and including the taxes for the fiscal year 1898, was paid by said George H. Matson from his own money; that defendant did not pay any of said money, either for the purchase of said property or for the subsequent taxes thereon, and had no interest whatever in said property except as trustee thereof; that the tax sale certificates issued for said tax sales were taken, at the request of said George H. Matson, in the name of defendant, his wife, as trustee for said George H. Matson, she holding the legal title thereof merely for his convenience; that said George H. Matson was at all times prior to the formation of said partnership the sole owner of the beneficial interest in said property; that thereafter many of said tracts of land were redeemed from said tax sale and the money paid therefor was taken and retained by said George H. Matson as his property; that on February 4, 1898, the time having expired within which said property might be redeemed, the said George H. Matson surrendered all of said tax sale certificates to the county auditor of Weber county, who thereupon issued a tax deed for all of said tracts of land which had not theretofore been redeemed; that said deed, at the request of said George H. Matson, was issued in the name of said defendant, as grantee, but nevertheless as trustee for the said George H. Matson; that said defendant had no other interest in the property represented by said deed; that after the issuance of said deed, and prior to December 31, 1898, the owners of some of the tracts of land conveyed by said tax deed paid to said George H. Matson certain sums of money, whereupon, at his request, the defendant herein executed quitclaim deeds to the owners so paying said money, and the said money so received by said George H. Matson was retained by him as his own property; that on said January 1, 1899, at the time of the formation of said partnership, said George H. Matson sold, delivered, and contributed to said partnership all his interest in 36 tracts of said land, including the land in controversy in this action; that thereafter said land continued to be the property of said partnership, notwithstanding the legal title remained in defendant, as trustee for said partnership; that defendant was cognizant of the formation of said partnership and the contribution thereto of said

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Sagers v. International Smelting Co., 50 Utah, 423, 168 Pac. 105.

Digitized by Google

tax sale certificates and consented thereto; that subsequent to December 31, 1898, and down to the 17th day of April, 1911, the date of the death of said George H. Matson, the owners of some of the said tracts of land conveyed by said tax deed paid to said partnership certain sums of money for said lands, whereupon, at the request of said partnership, defendant executed and acknowledged quitclaim deeds to such owners as paid said money, and the money so paid was retained by said partnership and was equally divided between said partners; that the last of said quitclaim deeds prior to the death of said George H. Matson was executed by defendant at the request of said partnership December 11, 1906; that on July 5, 1911, after the death of said George H. Matson, defendant, at the request of plaintiff, as the surviving partner of said partnership, executed another quitclaim deed to the Merchants' Light & Power Company of Ogden, the consideration therefor being the sum of $510; that for the fiscal year 1899, to and including the fiscal year 1915, said partnership paid all the general taxes levied and assessed on the tracts of land included in said tax deed for which defendant had not executed quitclaim deeds as before stated. (At this point the complaint specifically describes ten tracts of land for which quitclaim deeds had not been given, and which is the land in controversy between the parties hereto.)

It is further alleged in the complaint that defendant at all times heretofore mentioned, and during the entire period from the day of the purchase of said tax sale certificates, acknowledged that she held the same as trustee, as aforesaid, and did not repudiate said trust until January 13, 1915, at which time she asserted to plaintiff, as surviving partner of said partnership, that she was the owner in fee simple of the ten tracts of land heretofore mentioned; that ever since said last-named date defendant has continued to assert her ownership of said property and claims an interest therein adverse to said partnership, which claim is without any right whatever. Plaintiff prays that defendant be adjudged to hold said property in trust for said partnership and be forever restrained from asserting any claim adverse to said partnership, and for general relief.

The answer of defendant admits the partnership and admits there have been no conveyances of the ten tracts of land in controversy. It also admits that defendant claims to be the owner of the property, and denies all the remaining allegations of the complaint. The trial court found the facts in favor of the plaintiff substantially as alleged in the complaint. Conclusions of law and decree were entered accordingly. Other findings and conclusions were made touching matters admitted in evidence, but such findings are not material to a determination of the issues presented on this appeal.

The evidence is included in two large volumes, covering more than 800 pages of typewritten matter. It is, in the main, documentary, accompanied with such oral explanations as were deemed necessary to render the same intelligible.

[1] A careful review of the evidence, as the same appears in the appellant's abstract, with an occasional reference to the transcript, has convinced the writer that the findings and conclusions of the court below are amply sustained. We deem it impracticable in this opinion to review any considerable portion of the evidence, nor is it necessary in our view of the case. The nature of the case is such that the issues can be determined without considering the evidence in detail. The books and accounts of George H. Matson, prior to the formation of the partnership between him and the plaintiff, appear to have been carefully and systematically kept. The same is true of the partnership books and accounts after the partnership was formed January 1, 1899. The documentary evidence, together with the oral explanations made in connection therewith, show quite conclusively that George H. Matson, in December, 1895, purchased at tax sale with his own money the several tracts of land in controversy, together with other tracts of land, and received certificates of sale therefor in the name of his wife, defendant in this action. After that, and prior to the partnership between him and plaintiff, which commenced January 1, 1899, George H. Matson paid all the subsequent taxes assessed upon said property out of his own money. During said period several of these tracts of land were redeemed by the owners and the money paid therefor was paid to George H. Matson and retained by him as his own property. In all cases where said property was redeemed, the defendant, in whose name the certificates of sale were issued, upon request of George H. Matson, immediately executed quitclaim deeds therefor to the owners of the property. When the time had fully expired within which the remaining tracts of land might be redeemed, George H. Matson surrendered said certificates of sale to the county auditor of Weber county and received a tax sale deed therefor in the name of the defendant. The certificates of sale and deed referred to were at all times retained in the possession and under the control of George H. Matson until the formation of the partnership between him and the plaintiff. Upon the formation of the partnership, as stated in the complaint, the tracts of land which had not been redeemed were contributed to the partnership by George H. Matson and were thereafter considered and treated as partnership property. Partnership books were opened and accounts

Digitized by Google

were kept concerning these lands. George H. Matson was credited therewith and the partnership debited. Subsequent taxes thereon were paid by the partnership, and whenever any of said lands were thereafter sold the purchase price was paid to the partnership and was either divided equally between the partners or became a part of the partnership funds and was used in the business. None of it was ever paid to defendant. All she did or was requested to do was to execute quitclaim deeds to the persons to whom the property was sold. This was the uniform method of transacting the business down to as late as 1915, four years after the death of her husband. One deed was executed by her at the request of plaintiff, as surviving partner, after the death of her husband. The consideration therefor, $510, was received by plaintiff and used by him as partnership funds. No part of it was paid to defendant.

In addition to these facts, concerning which there is little or no dispute, there is one fact which to my mind is of deep significance in determining the question of ownership, which is the ultimate issue between the parties litigant. In 1913 the defendant, for some reason, in the first instance, paid the taxes on the land still remaining. The partnership afterward assumed this obligation and issued to her its check by way of reimbursement. The same thing occurred as to the taxes of 1914. All the facts and conditions heretofore summarized, it seems to me, are utterly inconsistent with the theory of individual ownership on the part of defendant. Another thing is worthy, at least, of passing notice: These same books and accounts show a debit and credit account with the defendant, from which it is quite clear that at some time defendant placed in the hands of her husband for investment a small sum of money aggregating a few hundred dollars. The partnership ledger, in March, 1899, shows a credit to begin with of $620 brought from the old ledger. Then there appears credits by sugar stock dividends, canning company dividends, various items of interest and sale of sugar stock, the whole aggregating $2,567.05. The debits balance the credits and show receipts by defendant of shares of sugar stock, dividend on canning company stock, and various checks. It nowhere appears in the books or accounts of the partnership that defendant is credited with anything on account of the lands in controversy or debited with the payment to her of any portion of the proceeds. It does not appear that any accounting was ever demanded by her or had in any manner or form between her and the partnership concerning these lands.

In addition to these circumstances, which are almost conclusive in and of themselves, two witnesses testified for plaintiff as to conversations had with defendant after the death of her husband and prior to 1915. One of these, a Mr. Rasmussen, testified that in 1912 or 1913 he had a conversation with defendant respecting the price of these lands. He informed her that Mr. Matson (meaning the plaintiff) would take $800 for his half interest. Defendant said, "Well, I have an idea I will buy his interest myself." In a later conversation she told the same witness she had settled with Mr. Matson and that the lands then belonged to her. A Mr. Farr testified for plaintiff. He also had a conversation with defendant about 1914. He was trying to negotiate a purchase of the land. He testified defendant told him she could not give him a definite answer as to the price; that her brother-in-law, Mr. Matson, was interested in the property and she would have to consult him.

These apparent admissions on the part of defendant are entirely consistent with the claim of plaintiff that the land was partnership property and that defendant was cognizant of the fact. The defendant herself testified that before she married George H. Matson, as early as 1892, she was earning money in some clerical employment, and that she placed in his hands for investment sums aggregating about $600, besides accumulations of profit and interest thereon; that she understood he had invested some money for her in these lands, but did not know how much. In fact, she seemed to know very little about it. We have already shown that she had an account appearing on the books of the company, the first item of which, $620, was transferred from the books in use prior to the partnership. Other entries were made in the partnership books, both debits and credits, but nothing pertaining to the lands in question. The books show transactions with and on account of defendant relating to other classes of property, showing immense profits to her, aggregating many thousands of dollars, but nothing pertaining to the property in question. When we consider the fact that the books and accounts were kept in a systematic manner, and transactions with and for the defendant were entered apparently in the most formal manner, it is certainly strange that nothing relating to these lands should occur in her account, if she was, as she claims, the individual owner of the property. It is even more strange that she would permit the business to run for a period of 20 years without some kind of an accounting which would demonstrate the exact condition of her affairs in respect to the property. Furthermore, there is nothing in the entire history of the case to justify the assumption that her husband, George H. Matson, would take from her property to which she was exclusively entitled and give it to his brother.

When we consider, from every point of view, the apparent generosity of George H. Matson towards the defendant in matters of

Digitized by Google

business, as disclosed by the record, it is unbelievable that he would have conducted the business as it was conducted, or permit it to be so conducted, if the property in question was the property of defendant. Defendant denied the alleged conversations with Rasmussen and Farr, but her testimony from beginning to end was vague, uncertain, and far from satisfactory. It utterly failed to meet the case made by plaintiff. Even admitting that where an attempt is made to establish a trust under circumstances such as exist in the present case the evidence should be clear, cogent, and convincing, we are of the opinion that the evidence on behalf of plaintiff in the case at bar responds to the measure of proof required.

Appellant assigns as error the admission of incompetent evidence. There are some 48 assignments. Most of them belong to one class—the admission of various exhibits, most of them entries in the books of account.

[2] The trial court, early in the trial, ruled that entries in the books made by plaintiff were not admissible per se, but that plaintiff could use the entries made by himself to refresh his recollection. If they did refresh it he could then testify from memory; if they did not refresh it, but he was able to state he knew the entries were correct when made, then the entries themselves were admissible in evidence. This, undoubtedly, is the correct rule. Sagers et al. v. International Smelting Co. et al., 50 Utah, 423, 168 Pac. 105, and cases cited. Some of the entries in the books were made by George H. Matson, some by plaintiff, and some by other bookkeepers. A large proportion of the entries were made by the plaintiff himself and were admissible under the rule above referred to. Defendant objected to practically everything that was offered as an exhibit. In appellant's brief there is no attempt at segregation, no specific reference to objectionable evidence, little or no explanation, and no authorities cited. It is extremely difficult for the court to understand just what appellant's contention is with respect to the matter alleged as error. In view of these facts, unless the circumstances were such as to demand a specific definite determination of the question mooted, it would not be prudent to attempt an adjudication.

[3] We are of the opinion that there is sufficient competent evidence in the record to sustain the findings of the court below, and, the case having been tried to the court without a jury, it must be presumed the court based its finding upon evidence free from objections as to its competency. Seaverns v. Costello, 8 Ariz. 308, 71 Pac. 930.

The judgment is affirmed, at appellant's costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

WEST CACHE SUGAR CO. v. HENDRICKSON et al. (ZION'S SAVINGS BANK & TRUST CO., Garnishee).

(No. 2443.)

(Supreme Court of Utah. June 14, 1920.)

1. **Garnishment ⇐167 — Court may require garnishee bank to open safety deposit box to reach contents.**

In garnishment proceedings, where it is sought to reach the contents of a safety deposit vault in garnishee's possession, the district court has power to require garnishee to open the box for the purpose of reaching its contents by the process of garnishment, in view of the broad provisions of the garnishment statute and of Comp. Laws 1917, § 1813, conferring power to carry jurisdiction into effect.[1]

2. **Attachment ⇐63 — Garnishment ⇐54 — Contents of safety deposit box are subject to writ.**

The contents of safety deposit boxes are subject to garnishment or attachment.

3. **Garnishment ⇐167—That opening of safety deposit box by garnishee incurs expense no excuse for disobedience.**

In garnishment proceedings, wherein it is sought to reach the contents of a safety deposit box leased by garnishee bank, that the garnishee is required to call in an expert to open the box at an expense of $2.50 constitutes no excuse for failing to open the box when ordered to do so by the court.

4. **Garnishment ⇐167—Neither garnishee nor debtor entitled to notice before order to open safety deposit box.**

Where it is sought by garnishment to reach the contents of a safety deposit box leased by garnishee to the judgment debtor, neither the garnishee nor the judgment debtor is entitled to notice before making and serving an order requiring the box to be opened.

5. **Garnishment ⇐167—Responsibility of garnishee bank upon opening safety deposit box under court order stated.**

Where it is sought in garnishment to reach the contents of a safety deposit box leased by the garnishee to the judgment debtor, the garnishee owning the box and having the physical possession and control thereof is responsible for the contents to the same effect as any bailee of property would be under the circumstances.

6. **Evidence ⇐21—Courts will take judicial notice as to the use of safety deposit boxes.**

It is a matter of common knowledge that safety deposit boxes are generally used for safely keeping valuable articles and securities of all kinds, and that the head of a family who rents the box may permit the different members thereof, or a friend, to deposit their valuables in the box with his.

7. **Garnishment ⇐167—Order requiring garnishee to open safety deposit box should allow garnishee to make inventory.**

An order in garnishment proceedings, requiring a garnishee bank to open a safety de-

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Cole v. Sugar Co., 35 Utah, 148, 99 Pac. 681.

Digitized by Google

posit box for the purpose of reaching its contents, should be so framed as to permit the garnishee to be present by its agents or attorneys, and to make a complete and accurate inventory of the articles that are found in the box when it is opened.

8. Garnishment ⟸167—Notice necessary upon opening safety deposit box for inspection stated.

In garnishment proceedings, where it is sought to reach the contents of a safety deposit box, it is not necessary that notice be given to judgment debtor, or any person other than the garnishee, that the box be opened for inspection, and such an order may be made upon ex parte application.

9. Garnishment ⟸167—Order requiring garnishee bank to open safety deposit box held too broad.

In garnishment proceedings, where it was sought to reach the contents of a safety deposit box in possession of garnishee bank, an order, requiring the bank to open the box and deliver the contents to the sheriff, who shall keep such property as is liable to garnishment and attachment, *held* not sufficiently to guard and protect the rights of the garnishee or persons other than the judgment debtor who has access thereto.

10. Garnishment ⟸167—Garnishee bank's liability upon opening safety deposit box in its possession stated.

In garnishment proceedings, where it is sought to reach contents of a safety deposit box in garnishee bank's possession, the garnishee under no circumstances would be chargeable with any property except such as is owned by the judgment debtor, or in which he has a beneficial interest which may be reached by the process of garnishment.

Appeal from District Court, Salt Lake County; H. M. Stephens, Judge.

Action by West Cache Sugar Company against John A. Hendrickson and another and the Zion's Savings Bank & Trust Company, garnishee. Plaintiff recovered judgment against the principal defendants, and the court directed garnishment to be issued, under which an order was entered, requiring the garnishee to deliver the contents of a safety deposit box to the sheriff. From a denial of a motion to quash such order, the garnishee appeals. Remanded, with directions to modify.

See, also, 190 Pac. 952.

D. H. Thomas, of Salt Lake City, for appellant.

Cheney, Jensen & Holman, of Salt Lake City, for respondent.

FRICK, J. The plaintiff, West Cache Sugar Company, a corporation, obtained judgment in the district court of Salt Lake county against the defendants, John A. Hendrickson and Lorenzo N. Stohl. The judgment not being satisfied, the plaintiff, pursuant to our statute (Comp. Laws Utah 1917, §§ 6730, 6752) caused a writ of garnishment to be issued in said action, which on the 7th day of June, 1919, was served on the Zion's Savings Bank & Trust Company, hereinafter called garnishee.

In addition to the usual statutory interrogatories that are propounded to garnishees, there was also appended the following interrogatory: "Have defendants, or either of them, a safety deposit box in your bank?" The garnishee, after answering in writing and under oath all the statutory interrogatories in the negative, that is, that it was not indebted to the defendants, or either of them, that it had no property or effects of theirs in its possession or under its control, and that it knew of no debts owing to them, or either of them, also under oath answered the interrogatory relating to the safety deposit box as follows: "Yes; Mr. Lorenzo N. Stohl has."

The answers of the garnishee were duly filed in said district court, and the plaintiff did not deny or controvert them in any way as, under the statute, it might have done within 10 days after they were filed. On the 27th day of June, 1909, however, and after more than 10 days had elapsed from the time of filing the answers, and after the garnishee's answer, under the statute, had become conclusive, the plaintiff, by its counsel, appeared in said court and made an ex parte application for an order requiring the garnishee to open the safety deposit box referred to in its answer and to deliver the contents thereof to the sheriff of Salt Lake county. Pursuant to said application the district court issued the order hereinafter set forth. The order, after referring to the garnishee's answer respecting the safety deposit box, and that the plaintiff claimed that said Stohl "has property and securities on deposit" in said box, reads as follows:

"Now therefore, it is hereby ordered and adjudged, that the said garnishee defendant cause said box to be opened, and deliver the property therein to the sheriff of Salt Lake county, who shall take and keep such of said property and securities as are liable to garnishment and attachment herein."

The sheriff made return to the effect that he had duly served said order upon the garnishee; that he had "made demand upon O. C. Beebe, cashier" of said garnishee, to comply with said order and to cause said safety deposit box to be opened "and the contents of the box delivered to me as sheriff," and that said "O. C. Beebe refused to comply with the order." Thereafter, on the 1st day of July, 1919, counsel for the garnishee served a notice upon plaintiff's counsel to the effect that on the 5th day of said month

Digitized by Google

he would move the court to quash the order upon various grounds, among others, that the district court had exceeded its authority in making the same. The motion was supported by the affidavit of the cashier of the garnishee, in which, among other things, it was stated that the garnishee could not open said box without the key, which was in the possession of said Stohl, unless great force were used to open the same, and such force, if used, would "greatly damage, mutilate, and destroy garnishee's vaults" in which said box was placed.

Thereafter, on the 12th day of July, the garnishee by leave of court filed amendments to the motion to quash, and also amended its original answer filed in the garnishment proceeding. In the amended answer the garnishee averred that said Stohl was not the only person who had access by means of his key to the said deposit box, but that there were two other persons who had access thereto by means of his key. In the amended motion to quash the writ, the garnishee set forth, among other grounds, that the order to open the safety deposit box was "improvidently issued, in that it was issued without notice," etc., and also set forth the fact that the other persons referred to in its answer had equal right to, and did have access to, said safety deposit box, and that the garnishee had no knowledge respecting the contents of said box, nor whether it contained anything.

At the hearing of said motion to quash, the garnishee produced evidence to the effect that in addition to said Stohl two other persons had access to the box, and that the only means by which said box could be opened, according to the knowledge and belief of the cashier and the attorneys of the garnishee, was to force said box open by breaking the hinges or the lock, etc. Upon the other hand, the plaintiff produced evidence that there was a comparatively easy and inexpensive method of opening safety deposit boxes like the one in question by means of drilling a small hole into the lock, through which the tumblers in the lock could be turned, so that by means of the master key alone, which was in the possession of the garnishee, the box could be opened without any substantial injury; that said hole could be plugged and the combination of the lock changed and other keys obtained, which, if done, left the box in substantially the same condition for use as it was before it was opened by said method; that said method had been in use for some time in Salt Lake City; that at least several hundred safety deposit boxes had been opened in that way in the different vaults in Salt Lake City, and that there were several experts in said city who opened safety deposit boxes, and that a certain expert had in fact opened some of the garnishee's safety deposit boxes by that method during the past year. The custodian in charge of the garnishee's safety deposit vaults and boxes conceded that the expert had opened a considerable number of the garnishee's safety deposit boxes, by the method aforesaid. He testified, however, that the cashier was not present when the boxes, or any of them, were opened, and he did not know whether the cashier was aware of the method or not.

The district court denied the garnishee's motion to quash the order to open the safety deposit box, and confirmed the same, to which ruling the garnishee excepted. In due time, and pursuant to the provisions of Comp. Laws Utah 1917, § 6753, the garnishee has appealed to this court, and assigns the ruling of the district court, in the particulars stated, as error, giving numerous reasons which it is not necessary to set forth here.

In his brief, counsel for the garnishee, among other things, insists: (1) That the district court had no power or jurisdiction to make the order requiring the garnishee to open the box, and in that connection counsel expresses serious doubt whether the contents of a safety deposit box are the subject of garnishment process; (2) assuming such power, however, that the garnishee cannot be required to expend its money to open the box nor to damage its property in doing so without being indemnified; (3) that the order to open the safety deposit box merely required the garnishee to open the same in the usual manner, namely, by means of the customer's key when used in connection with the master key in its possession, which in this case could not be done, for the reason that the customer was not within this jurisdiction and his key could not be obtained, although the garnishee had made all reasonable efforts to do so; and (4) that the order was "improvidently issued."

[1] The contention that the district court did not have the power or jurisdiction to issue the order requiring the garnishee to open the safety deposit box for the purpose of reaching its contents by the process of garnishment is not tenable. The provisions of our statute relating to garnishments are very broad and comprehensive. This court has held (Cole v. Sugar Co., 35 Utah, 148, 99 Pac. 681) that the statute should be liberally construed, and so as to fully effectuate the purpose sought to be attained thereby. Moreover, Comp. Laws Utah 1917, § 1813, provides:

"When jurisdiction is, by statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the Codes of Procedure."

Digitized by Google

The district court certainly had jurisdiction of the action, and by the service of the writ of garnishment on the garnishee and the filing of its answers in response to the writ, wherein it stated that the defendant Stohl had rented a safety deposit box in its bank vaults, the court also had jurisdiction of the garnishee, and, in view of the provisions of section 1813, supra, had full power and authority to direct what should be done in the premises in order to effectuate the object or purpose of the writ of garnishment. Nor can the contention prevail that the contents of a safety deposit box which is rented by a judgment debtor cannot be reached by the process of garnishment or attachment. It is true that in 20 Cyc. 1022, it is said:

"According to the weight of authority, property or funds deposited with a safety deposit company cannot be reached by garnishment proceedings."

[2] The text just quoted, however, was written more than 14 years ago, and since then a number of courts of last resort have held the law to be otherwise under statutes the provisions of which are substantially the same as those of this state. If we keep in mind that the relationship existing between the lessor of a safety deposit box and that of his customer is one of bailee and bailor for hire, we should encounter little, if any, difficulty in arriving at the conclusion that the contents of such boxes are subject to the process of garnishment or attachment, and that the boxes themselves may be ordered opened by the court for the purpose of reaching their contents. To that effect are the following well-considered cases: Tillinghast v. Johnson (1912) 34 R. I. 136, 82 Atl. 788, 41 L. R. A. (N. S.) 764, Ann. Cas. 1914A, 960; Washington Loan, etc., Co. v. Susquehanna Coal Co., 26 App. D. C. 149; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806; National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430; United States v. Graff, 67 Barb. (N. Y.) 305, affirmed in 4 Hun, 634.

While, in the foregoing cases it is squarely held that the contents of such boxes may be reached in garnishment proceedings, yet, as we shall see, in none of the cases was the order to open the box as broad and sweeping as in the case at bar.

In 12 R. C. L. p. 805, § 35, which was issued in 1916, the law is stated thus:

"In the case of property placed in a safety deposit box, garnishment against the bank which is the lessor of the box is the proper remedy, by the weight of authority, though a slight conflict must be admitted. In such cases the court may cause the box to be opened to determine the garnishee's liability."

In Trowbridge v. Spinning, supra, it is said:

"Under the broad provisions of this section [speaking of the garnishment statute], the court could inquire into the contents of the box by causing the defendant to be examined as a witness, and might even require an inspection of the contents, to the end that effects liable to execution should be delivered to the sheriff."

[3, 4] It certainly would be a reproach to our jurisprudence and to the administration of the law if it were held that the law may successfully be defied by human agencies, and that courts cannot make their processes effective merely because valuable property may be locked and concealed in a steel safe or receptacle. The court's orders may not be baffled merely because the lessee or owner of a safety deposit box refuses to surrender the key by which the box, in connection with the master key, is opened. If, therefore, there is any method or device available by means of which such boxes can be opened without destroying them and their contents, the courts have ample power to direct those who have possession and control of such boxes to open them by any available method, and to deliver the contents thereof into the custody of the law as hereinafter more specifically pointed out. Nor can the contention prevail that the court was powerless to order the box opened at the expense of the garnishee. The evidence produced in opposition to the motion to quash the writ is to the effect that modern safety deposit boxes such as the one in question here can be opened by merely drilling a small hole, about the size of a parlor match, into the lock, through which hole the tumblers which are operated by the customer's key may be turned, and the box may then be opened with the master key, which is in possession of the garnishee. It was also made to appear that the time required to open the box by that method is quite short, and that the usual charge of the expert who opens the boxes by that method was $2.50, and that the small hole could be closed with a steel plug prepared for the purpose, and after the hole is plugged the box is just as good as it was originally. If, therefore, a garnishee is required to call in one of the experts to open the box at an expense of $2.50, that fact, standing alone, would afford no excuse for failing to open the box when ordered to do so by the court. Every garnishee is necessarily put to some inconvenience, and perhaps may be put to some expense in complying with the order of the court. Such expenses are, however, chargeable as costs, and will be allowed by the court. Such matters are too trivial, however, to be urged as a means of arresting or impeding the due administration of justice. Under our statute no garnishee can be required to answer the interrogatories until he is paid a fee of $2 unless he expressly waives such payment. Nor is there any mer-

Digitized by Google

it to the garnishee's contention that the court should not have made the order without notice to it. Neither the garnishee nor the judgment debtor is entitled to notice before the order is made and served requiring the box to be opened.

[5, 6] This brings us to the final objection, which, in substance, is that the order of the court was improvidently issued, and that it does not sufficiently protect the interests of the garnishee, etc. We confess that this is the only ground which, to our minds presents serious difficulties. The order was made ex parte and without notice to the garnishee, and was based entirely upon its answer that the defendant Stohl was the lessee of a safety deposit box. While at the hearing on the motion to quash the writ it was made to appear that at least two other persons had access to the box, yet such fact was unknown to the plaintiff and to the court when the order was made. It will be observed that the terms of the order in question are very sweeping. The garnishee is peremptorily ordered to "cause said box to be opened and to deliver the property therein to the sheriff of Salt Lake county, who shall take and keep such of said property and securities as are liable to garnishment and attachment herein." It will be seen that the garnishee was thus required to deliver to the sheriff all of the property and securities which may have been in the box, regardless of whose property it was. True, the order provided that the sheriff should "take and keep such of said property and securities as are liable to garnishment and attachment herein." The sheriff, therefore, was required to, and legally could, take only such property and securities as were liable to garnishment under the writ. By the terms of the order, however, he is made the sole judge as to what property and securities are "liable to garnishment." As a matter of law, as we have seen, the relationship between the garnishee and those who have access to the safety deposit box in question was that of bailee and bailor. In view that the garnishee owned the box and had the physical possession and control thereof, it, under the law, is held responsible for the contents to the same effect as any bailee of property would be under the circumstances here disclosed. To that effect are the decisions. See Lockwood v. Manhattan Storage, etc., Co., 28 App. Div. 68, 50 N. Y. Supp. 974, where it is held that the relation of the company renting a safety deposit box to its customer is, "that of bailee or depositary for hire," and that such a relationship "imposed upon it the burden of explaining and excusing the nonproduction of articles intrusted to it. * * *" It being made to appear that at least two others with the defendant Stohl had access to the box, and that they may have had valuable articles and securities of their own therein, for which the garnishee might be required to account as bailee, it is but just and fair that the court should protect the interests of the garnishee while enforcing the rights of the judgment creditor. Even though the fact that others had access to the box were not made to appear, yet, in view that it is a matter of common knowledge that safety deposit boxes are now being generally used for the purpose of safely keeping valuable and precious articles and securities of all kinds, and that the head of a family who rents the box may permit the different members thereof to deposit their valuables in the box with his, or that he may permit a friend to do so, of all of which those who own the safety deposit boxes are well aware, it becomes the duty of the courts to protect the interests of all in case it becomes necessary to order one of those boxes to be opened to ascertain its contents. While it is the duty of all persons in all relations and walks of life to yield prompt obedience to the orders of the courts, which, presumptively at least, are justified by and are based upon the law, yet the same law to which all citizens are required to yield obedience also protects all against preventable injury or loss. In view, therefore, of the uses that at the present time are constantly made of safety deposit boxes, and of which uses the courts, like all others, must take notice, the order in question, in the form it was issued, in one sense was "improvidently issued."

[7, 8] Let us pause a moment to again call attention to the provisions of section 1813, supra. It is there specifically provided that if in exercising the jurisdiction which by law is conferred upon the courts of this state "the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the Codes of Procedure." Thus there is ample power and authority conferred upon the courts to meet all contingencies, both in enforcing and in protecting the rights and obligations of all. While it is the duty of garnishees to obey the orders of the courts and to aid the officers in executing their orders, judgments, and decrees, yet it is also the duty of the courts and of the officers, at all times and under all circumstances, to protect the rights and interests of garnishees and those who may have business relations with them. If, therefore, an order is made which requires a garnishee to open a safety deposit box for the purpose of reaching its contents, the order should be so framed as to permit the garnishee to be present by its agents or attorneys and to make a complete and accurate inventory of the articles that are found in the box when it is opened. In view of the garnishee's liability, it should be given the right, not only to make such an inventory,

Digitized by Google

but in case the articles bear no earmarks respecting ownership, and the garnishee claims an interest or right to any article found in the box, then the garnishee should be permitted to go before the court and assert its right to such articles, or, in case it has reason to believe, and does believe, that some article or articles belong to a person or persons other than the judgment debtor or lessee of the box, the garnishee should be permitted to suggest that fact to the court, to the end that the alleged owner or owners may be notified to come before the court and make known their rights or interest in or to the articles. To follow such a course in no way impedes or interferes with the expeditious and orderly administration of justice, and can in no way interfere with the plaintiff's rights in the premises. While, in pursuing such a course, all the property belonging to the judgment debtor and in the possession or under the control of the garnishee which is subject to execution must be surrendered, yet it also safeguards and protects the rights of the garnishee, as well as those who may have or claim some rights to or interests in the property found in the safety deposit box, without in any way interfering with the rights of the plaintiff in the action. It was not necessary in this case, nor, as we conceive, is it necessary in any case, that notice be given to the judgment debtor or to any person other than the garnishee that the safety deposit box be opened for inspection, as herein suggested. Such an order may be made upon an ex parte application, but when it is made it should comply with the conditions herein suggested, to the end that all interests and rights may be protected.

[9] We are of the opinion, therefore, that the order in this case is too broad and sweeping, and does not sufficiently guard and protect the rights of the garnishee or of such persons as may have had access to and may have had property in the safety deposit box. Nor is there in any of the cases to which we have referred anything which leads to a different conclusion, unless it be found in the case of United States v. Graff, supra. In that case it was held to be proper for the sheriff to exclude both parties and their attorneys or agents while he was opening and inspecting the contents of an iron safe. That case was decided 45 years ago, since which time the use of safety deposit boxes by the general public has been greatly increased, and since which time the law governing safety deposit boxes has been more fully developed. But even though that case were of recent origin we should, nevertheless, not feel inclined to follow it in that respect. In all of the other cases cited there is nothing said in the opinions which in any way militates against the views herein expressed. There is, however, considerable said which is in perfect harmony with the foregoing views.

In Tillinghast v. Johnson, supra, it is said that under the garnishment statute "the court may take such action, in accordance with proper legal procedure, as will enable it to determine the liability of the garnishee. This would warrant the court in directing the garnishee to break the seal upon such parcel or to open such safety deposit box and to inspect the contents thereof, that he may disclose the same to the court, and thus enable it to determine as to whether the garnishee is chargeable and to what extent." What is there said clearly implies that the garnishee, as well as the sheriff, should have access to the contents of the box, and if it claims some interest in the contents or has reason to believe, and does believe, that the property, or some of it, does not belong to the judgment debtor, the garnishee may make that fact known to the court, and the court may then determine the ownership of the property; that is, in the language of the opinion just quoted from, the court may then "determine as to whether the garnishee is chargeable, and to what extent."

[10] Again, in 12 R. C. L., supra, the language of the text is:

"In such cases the court may cause the box to be opened to determine the garnishee's liability."

In order to do that, the garnishee, for its own protection, must be given the right to inspect the property deposited in the box, and to direct the court's attention to such as it may claim, or to such as may be the property of some one other than the judgment debtor. The garnishee, under no circumstances, will be chargeable with any property except such as is owned by the judgment debtor, or in which he has a beneficial interest which may be reached by the process of garnishment. Moreover, we think the course herein outlined should be followed for the officer's protection, as well as for the protection of the garnishee. If a full and accurate inventory is made by the garnishee, the officer would also be protected against false or unjust claims by those who may claim an interest in or right to some of the property found in such box.

We do not wish to be understood, by anything we have hereinbefore said, that when it is made to appear, as in this case, that the judgment debtor has a safety deposit box which is under the control of the garnishee, and an application is made to the court for an order requiring the garnishee to open such box, it would not be proper practice for the court to issue an order requiring the garnishee to appear before the court or judge forthwith and show cause why the box should not be opened and the contents thereof exhibited as hereinbefore stated. In most cases such a course would avoid all misunderstandings. If such a course had been fol-

Digitized by Google

lowed in this case we are convinced that this controversy would have been avoided. It would then have been made to appear that the box could be opened without the judgment debtor's key and without force or injury to the box, and no doubt the garnishee would have complied with the court's order to open the box after its objections challenging the jurisdiction of the court had been passed on. As it is, the box still remains unopened, and its contents are still undisclosed.

We are of the opinion, therefore, that while the court was authorized to make the order, yet the order is too broad and sweeping, and does not sufficiently protect the rights of the garnishee or of any other person, if there be such, as may have property or some interest in the property deposited in the safety deposit box.

For the reasons last stated the cause is remanded to the district court of Salt Lake county, with directions to modify the order so as to require the officer to permit the garnishee, by its attorney or agent, or both, to be present when the box is opened, and to take a full and accurate inventory of the contents of the box, and to make any claim as herein suggested to any property or articles found in the box, and, in case any claim is made, to present the same to the court for determination at the earliest possible time consistent with orderly procedure.

In view of the whole record we are of the opinion that one half of the costs of this appeal should be paid by the plaintiff and the other half by the garnishee. Such is the order.

CORFMAN, C. J., and WEBER, GIDEON and THURMAN, JJ., concur.

In re THOMAS et al. (No. 3429.)

(Supreme Court of Utah. June 14, 1920.)

1. Contempt ⟸54(1)—Statement of deputy sheriff to court not in form of affidavit held sufficient basis for contempt proceedings.

In contempt proceedings against the attorneys of a garnishee bank for advising their client not to comply with a court order requiring a safety deposit box to be opened for inspection, a statement by the deputy sheriff serving the order, made to the court under oath and reduced to writing, *held* sufficient under Comp. Laws 1917, § 7060, as a basis for an order to show cause why a contempt order should not be issued; it not being requisite to give the court jurisdiction that the facts appear to the court in the form of an affidavit, designated as such.

2. Contempt ⟸10—Rights of attorneys to advise noncompliance with court order stated.

While it is the duty of attorneys to promptly obey all lawful orders of the court and to advise their clients when called on for advice to obey them, yet it is also their duty, in case a reasonable doubt exists respecting the jurisdiction of the court, or that the order in question was improperly made, to preserve and protect the legal rights of their clients by assailing any order in the proper manner and within proper time, in view of Const. art. 1, § 11, providing that every injured person shall have a remedy.

3. Contempt ⟸10—Advising client, garnished to disobey order requiring safety deposit box to be opened, held not contempt.

Where in garnishment proceedings it was sought to reach the contents of a safety deposit box in garnishee's possession, and garnishee's attorneys advised it to disobey an order requiring the box to be opened, such advice did not constitute contempt of court; the attorneys having reason to believe that the order was improper.

4. Contempt ⟸10—Characterizing court order as "foolish" or "damned foolish" held not contempt.

That a garnishee's attorney, after an order has been made requiring the garnishee to open a safety deposit box for inspection, has characterized the order as a "foolish" or as a "damned foolish" order *held* not to constitute contempt.

5. Contempt ⟸66(7)—Questions to be considered by reviewing court in contempt proceedings stated.

In contempt proceedings, where appeals are allowed, it is the duty of the reviewing court to pass upon the question as to whether the trial court had jurisdiction to enter the judgment or make the order which is made a basis of the proceedings, and whether the acts, words, or conduct complained of constituted contempt.

Appeal from District Court, Salt Lake County; H. M. Stephens, Judge.

D. H. Thomas and Ashby Snow were adjudged guilty of contempt, and they appeal. Reversed and remanded, with directions to dismiss.

James Ingebretsen and D. N. Straup, both of Salt Lake City, for appellants.

Frank E. Holman, of Salt Lake City, for respondent.

FRICK, J. D. H. Thomas and Ashby Snow, attorneys at law and officers of this court, were adjudged guilty of contempt by the district court of Salt Lake county, and they appeal.

The contempt proceedings here in question arose out of the garnishment proceedings in the case of West Cache Sugar Co. v. John A. Hendrickson and Lorenzo N. Stohl, defendants, and Zion's Savings Bank & Trust Co.,

Digitized by Google

Garnishee and Appellant, 190 Pac. 946, which we have just considered. A judgment was duly entered in said action against the defendants Hendrickson and Stohl. The appellants here were the duly authorized attorneys of the Zion's Savings Bank & Trust Company hereinafter called garnishee, and in the transactions giving rise to the contempt proceedings they acted as such. The judgment entered in the action aforesaid not being satisfied, a writ of garnishment was issued therein, which was served on the garnishee on the 7th day of June, 1919. To the writ of garnishment, in addition to the usual statutory interrogatories, was added the following interrogatory: "Have defendants, or either of them, a safety deposit box in your bank?" The garnishee, in writing and under oath, after answering all of the statutory interrogatories in the negative, answered the special interrogatory just set forth as follows: "Yes; Mr. Lorenzo N. Stohl has." The answers of the garnishee were duly filed in said cause, and the plaintiff did not in any way controvert them, or any of them, within the time it was required to do so under our statute or at any time. On the 27th day of June, 1919, however, at which time the answers of the garnishee had become conclusive as against the plaintiff, it, by its counsel, appeared in the district court, and upon an ex parte oral motion and statement which were based upon the answer of the garnishee, obtained an order from said court, requiring the garnishee to "cause said box to be opened and deliver the property therein to the sheriff of Salt Lake county, who shall take and keep as much of said property and securities as are liable to garnishment and attachment herein." The order was duly served upon the cashier of the garnishee on the afternoon of the day it was issued. Immediately after the order was served the cashier called up the appellant Thomas, and asked his advice with respect to the order. The attorney at once commenced the preparation of a motion or application in said action, in which he, upon various grounds, sought to have said order vacated and set aside. He also forthwith called up the sheriff's office, and informed the sheriff what he contemplated doing, and asked the latter to suspend further action on said order until he had time to present his motion and application to the court to set aside or modify the order. After receiving what he assumed to be assurance from the sheriff that the order would not be immediately pressed, the motion to set aside the order was not forthwith presented to the court. Mr. Thomas also at once took up the matter with one of the judgment creditor's counsel, and, it seems, counsel was inclined to not press the order until Mr. Thomas could present his motion. In the meantime, however, the sheriff was seen by a stockholder of the plaintiff, who insisted upon immediate action. The deputy sheriff, in whose hands the order was placed, then immediately went back to the bank of the garnishee, and demanded that the cashier forthwith open the safety deposit box and deliver its contents to him; in other words, that the cashier comply with the court's order. The cashier informed the deputy sheriff that two keys were necessary to open the box, that Mr. Stohl had one of them, and that the box could not be opened unless Stohl's key could be obtained. The cashier, however, also sent for Mr. Thomas, and in the meantime made efforts to get into communication with Mr. Stohl, who, it seems, was not within this jurisdiction at the time. The cashier again insisted that the box could not be opened without the key except by the use of force. During the conversation between the deputy sheriff and the cashier Mr. Thomas arrived at the bank, and on seeing the deputy expressed surprise that he had not conformed to the understanding counsel had with him, namely, that the opening of the box would not be pressed at once. The deputy sheriff then informed Mr. Thomas that after he had agreed to suspend immediate action the stockholder aforesaid appeared and demanded that the order be complied with forthwith, and that the deputy sheriff came to the bank pursuant to that demand. Mr. Thomas then informed the deputy sheriff that he had an agreement with one of plaintiff's counsel that he might have time to file a motion assailing the order, and Mr. Thomas, in the presence of the deputy sheriff, again called up the counsel referred to. Counsel was, however, quite busy in one of the departments of the district court, arguing a motion, and nothing definite was agreed upon. Mr. Thomas, however, asked the deputy sheriff to talk to counsel over the phone, which the deputy did, and he subsequently testified that counsel advised him that in view that he was at the bank he should make a formal demand upon the cashier to open the safety deposit box and to deliver its contents to him as a basis for contempt proceedings. Thereupon the deputy sheriff again made a demand that the box be opened, and it was then that the controversy arose between the parties. The cashier insisted that he could not obtain Mr. Stohl's key, and that he could not open the box without it except by the use of such force as would injure and perhaps destroy the box. The deputy sheriff, upon the other hand, strenuously insisted that the box could be opened by a method which did not require Stohl's key, and which would not injure the box, but he did not at any time disclose what the method he had in mind was, and the cashier and both of the appellants testified that they did not know of such method. The cashier then again called on Mr. Thomas and also on Mr. Snow, who had arrived at the bank in the meantime, for advice. A somewhat heated discussion took place, dur-

Digitized by Google

ing which, as the deputy sheriff subsequently testified, Mr. Thomas characterized the order to open the box as a "foolish" order, or as a "damned foolish order," and that Mr. Snow said, "we can't open the box," and, "We won't open the box." Much was said pro and con, and the controversy between the cashier and the attorneys on one side and the deputy sheriff upon the other at times was not conducted in the best of temper. The controversy, however, ended in a refusal by the cashier to open the box, which was subsequently sealed by the sheriff, and has remained in that condition. The deputy sheriff left the bank, and immediately reported to the district court. He told the court what had transpired at the bank, and informed it that the cashier, upon advice of his counsel, the appellants, had peremptorily refused to comply with the court's order to open the box and to deliver its contents to him, whereupon the district court, upon its own initiative, propounded certain questions to the deputy sheriff, which he answered under oath, and which were taken down in shorthand by the official shorthand reporter of the court. After the deputy sheriff's answers to the court's questions and his statements in that behalf had been transcribed into longhand, they were duly filed in the garnishment proceedings. The court then ordered that a notice and a copy of the deputy sheriff's statements be prepared and served upon the appellants and on the cashier, requiring them to show cause why they should not be adjudged guilty of contempt for having refused to comply with the court's order to open the safety box and to deliver its contents as in said order directed. The notice and statement were duly served, and the appellants and the cashier forthwith appeared in court in response to such notice, and by their counsel filed a demurrer to the statement of the deputy sheriff, upon which was based the order or notice to show cause why they should not be adjudged guilty of contempt. The demurrer was based upon the ground that the statement of the deputy sheriff was deficient in substance. They also filed a motion to quash the notice and statement upon the ground that the court was without jurisdiction in the premises, stating the reasons therefor. The district court overruled the demurrer and denied the motion to quash. Thereupon all three, the two appellants and the cashier, interposed a plea of not guilty and the court immediately proceeded to hear the evidence. After hearing the evidence, which is very voluminous, the court adjudged all three guilty of contempt, and entered judgment accordingly. Mr. Thomas and Mr. Snow have appealed from the judgment, and have presented the record to this court for review. Mr. Beebe, the cashier, does not appeal, and will therefore receive no further consideration.

The acts and conduct of the appellants constituting the alleged contempt were by all the parties hereto, and by the district court, treated and considered on the theory that they constituted, if anything, a criminal contempt, and for that reason alone, without further considering the character or nature of said acts, words, and conduct, we shall treat them upon the same theory.

The appellants have assigned numerous errors, which, so far as we deem them material, we shall now proceed to consider.

It is insisted that the court was without jurisdiction because no proper affidavit or statement was filed as a basis for the contempt proceedings. Comp. Laws, Utah, 1917, § 7060, so far as material, provides:

"When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officer."

[1] It is contended that the statement of the deputy sheriff, which he made to the court and which was reduced to writing, in no sense was an affidavit, and that therefore the statute was not complied with, which, it is contended, is fatal to the jurisdiction of the court. As we have seen, the contempt proceedings were initiated upon the court's own motion, and in the manner stated. It may be conceded that the method pursued by the court in taking the statement of the deputy sheriff by questions and answers and in basing the order to show cause thereon, while somewhat irregular, was, however, not void. A mere cursory reading of the statute will disclose that it is not absolutely essential that under all circumstances the facts upon which the order to show cause is based must be stated in the form of an affidavit. It seems that if the facts appear and are sufficient to authorize the court to act, the form of the statement is immaterial. At all events, the court would not be without jurisdiction merely because the facts were made to appear to the court in the form of a statement rather than in the form of an affidavit and designated as such. Moreover, in this case the court treated the statement of the deputy sheriff precisely as though it were in the form of an affidavit, and the appellants were permitted to assail it both by demurrer and by motion. They could have done no more if the facts had been stated in the form of an affidavit. Again, the statement contained all the essential facts to authorize an order to show cause, and thus the appellants were not prejudiced in any way or to any extent. We are clearly of the opinion that the facts contained in the statement were sufficient to confer jurisdiction upon the court to issue the order to show cause, and that the court did not err in overruling the demurrer and in denying the motion to quash.

Digitized by Google

It is next insisted that the order to open the safety deposit box was not a "lawful order," and for that reason the appellants should not have been adjudged guilty of contempt. We have, however, arrived at a contrary conclusion, as appears from the opinion in the case which precedes this one, and hence this contention cannot prevail.

[2] The next assignment is that "the court erred in finding that the acts and conduct of the defendants [appellants] constituted criminal contempt." This, to our minds, presents the serious question in this proceeding. It will be observed that the order was not directed to the appellants, or to either of them, but was directed to the garnishee. It must also be kept in mind that while the appellants were not parties in interest they, nevertheless, were not merely volunteers, but by virtue of their calling, and as attorneys of the garnishee, were called upon to give advice to their client in a matter which was of great importance to such client, as pointed out in the preceding case. While it is the duty of attorneys at law, who are officers of the court, to promptly obey all lawful orders of the court and to advise their clients when called on for advice to obey them, yet it is also their duty, in case a reasonable doubt exists respecting the jurisdiction of the court, or that the order in question was improvidently made, to preserve and protect the legal rights of their clients by assailing any order in a proper manner and at the proper time. Our Constitution (article 1, § 11) provides:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party."

[3] This means that courts are open for the purpose of having any order or judgment assailed in the proper manner and at the proper time, precisely the same as they are open for the redress of wrongs and for the enforcement of rights. If, therefore, the appellants had good cause to believe, and in good faith did believe, that the order in question was in excess of the court's power or jurisdiction, or that it was improvidently issued and for that reason vulnerable, or that the order merely required that the safety box be opened in the usual manner, that is, by using the customer's key in connection with the master key, and they believed that the cashier could not obtain the customer's key, and was thus unable to open the box except by the use of such force as would injure the same or the vaults in which it was placed, then appellants were not only within their rights in assailing it, but it was their duty to assail the order in a proper manner and at the proper time, and to advise their client to that effect. We have very carefully read all of the evidence and the proceedings in this case, and, after doing so, and without pausing here to set forth the evidence, have been forced to the conclusion that what was said and done by counsel, in view of all the circumstances, does not constitute a criminal contempt. The conviction is forced upon us that the appellant Thomas, who was first called upon for advice, in the best of faith assumed that the order of the court could be successfully assailed upon several grounds: (1) That the order was not enforceable because the contents of the safety deposit boxes were not subject to garnishment; (2) that the box could not be opened in the usual manner because the cashier was unable to obtain the use of the customer's key in connection with the master key, and hence the garnishee should not be required to open the box; and (3) that at all events, in view of his communications with counsel for the plaintiff, the box was not required to be opened until after he had time to present a motion to vacate and set aside the order. Such was also the conclusion of Mr. Snow. As pointed out in the preceding case, the law is stated in 20 Cyc. 1022, to the effect that according to the weight of authority the contents of safety deposit boxes are not subject to garnishment. The question had not been before the courts in this jurisdiction, and therefore had not been decided. Moreover, there are some respectable authorities which support the text in Cyc. True, we have since held the law to be otherwise in this jurisdiction. The question was, however, an open one at the time the alleged contempt was committed, and hence any lawyer would have been justified in assailing such an order, and especially under the circumstances in which the cashier was placed. We are clearly of the opinion, therefore, that under all the circumstances appellants had a clear legal right to assail the order in question, and therefore their conduct and that of the cashier in refusing to comply with the order forthwith did not constitute contempt.

[4] In arriving at such a conclusion we are not unmindful of the fact that Mr. Thomas was indiscreet in using the expletive he did in characterizing the order in question as a "foolish," or as a "damned foolish," order. What he said was, however, said long after the order was made, and was in no sense intended or calculated to intimidate or to impugn either the motives or the dignity of the court. As pointed out by that eminent jurist, Mr. Justice Brewer, in Re Pryor, 18 Kan. 72, 26 Am. Rep. 747, much more latitude is allowed counsel in criticizing the courts after the judgments or orders have been entered than while the matters are still pending before them and remain undetermined. The case just referred to is very illuminating and instructive upon that point, and clearly points out the distinction between what is harmless criticism and what is really harm-

Digitized by Google

ful and contumacious on the part of attorneys and therefore may be punished as a contempt. It is manifest to us that neither one of the appellants by what was said or done at the somewhat heated interview with the deputy sheriff intended to be disrespectful to the court, much less was it their intention to willfully or contumaciously advise the violation of the order. What was said was said in the heat of controversy, and what was done was done with a view of legally assailing the order at the proper time and in the proper manner pointed out by our practice. In this connection it should also be kept in mind that while it was not essential to the court's jurisdiction that the garnishee be notified that the order would be made, yet, in view that it was made upon an ex parte application, and in view that Mr. Thomas sincerely questioned the court's power to make such an order, he had especial reason for assailing it by motion; and to do that was manifestly proper, if for no other reason than as a basis for an appeal to this court.

[5] We are also aware that in contempt proceedings appellate or reviewing courts should be careful in interfering with the findings and judgments of the courts in such proceedings. If the alleged contempt here were a direct contempt, that is, one committed in the presence of the court, or, even, if the alleged offensive words had been uttered and the objectionable conduct had occurred before the order in question was made and while the question whether, it should or should not be made was still pending, as was the case in Re Pryor, supra, the case would be somewhat different. Under such circumstances we should long hesitate before we interfered with the findings of the court and with its judgment adjudging appellants guilty of contempt. In such cases the court cannot, with any degree of accuracy, reflect the proceedings in the record; nor can it accurately describe the demeanor and conduct of counsel which occurred in the court's presence. In a case like the one at bar, however, he have substantially the same opportunity to judge of the conduct and of the acts that the trial court had. True, that court had the advantage of hearing and seeing the witnesses testify, and in case of conflict was in a better position than we are to pass upon the weight and credibility that should be given to their statements. In this case, however, there is little, if any, real conflict respecting the controlling facts, and where there is such we have followed the statements of the deputy sheriff. We have, however, also kept in mind that in contempt proceedings where appeals are allowed it is the duty of reviewing courts to pass upon at least two questions in addition to such other propositions of law as may be presented. One of those questions is, Did the trial court have jurisdiction to enter the judgment or make the order which is made the basis of the contempt proceedings, and did it have jurisdiction to enter the judgment in the contempt proceedings? The other is, Did the acts, words, or conduct complained of constitute a contempt? Attorneys are officers of the court, and as such may be summarily dealt with in case they offend against the dignity of the court. In case the offense is serious they may be suspended or even disbarred from practice altogether. The consequences may thus be very serious and far-reaching. For that reason, as is well stated by the Supreme Court of North Carolina in the case of Ex parte Robbins and Jackson, 63 N. C. p. 312, "* * * the court will not be easily prevailed on to proceed in this manner [contempt proceedings], if it appears that the matter complained of was rather owing to neglect or accident than design. * * *"

Such is also the law in England. Moreover, the mere fact that an attorney has advised his client to act contrary to the order or judgment, or to disregard it, does not necessarily constitute a contempt of court. In re Kepecs, 123 N. Y. Supp. 872.

The record in this case shows that the trial court exercised great, almost infinite, patience in trying the case. The appellants were given every opportunity to exculpate themselves, and, as we think, succeeded in doing so. In our judgment, the only serious error of the court lies in the fact that it laid too much stress upon the naked fact that the appellants had advised the cashier to refuse to comply with the order to open the box and deliver its contents to the sheriff. The court seemingly overlooked the fact, and did not give sufficient consideration to appellants' efforts and preparations and purposes to assail the order, and in advising the cashier not to open the box for the other reasons hereinbefore stated.

In view of the circumstances of this case, we are of the opinion that appellants were acting within their rights in what they advised; that the only offense they, or either of them, committed was in the use of improper language, which, while not excusable, nevertheless, falls far short of being contumacious, and hence did not constitute a contempt of court.

In view that the proceedings in this case were initiated by the court itself, and that the plaintiff in the principal action took no part in defending or justifying the court's action, and did not in any way participate in the contempt proceedings, no order with respect to costs will be made.

For the reasons stated the judgment adjudging the appellants guilty of contempt and imposing a fine is reversed, and the cause is remanded to the district court, with directions to vacate and set aside the findings and judgment, and to dismiss these proceedings and to discharge the appellants.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

Digitized by Google

BOARD OF DIRECTORS OF MEDFORD IRR. DIST. v. HILL.

(Supreme Court of Oregon. July 6, 1920.)

1. Waters and water courses ⟸225—In confirmation proceedings to organize irrigation district, court should examine all questions, whether discussed or not.

In proceedings for the confirmation of the organization of an irrigation district and the issuance of its bonds, which are in the nature of proceedings in rem, the Supreme Court on appeal from a decree of confirmation must examine every question presented by the record, whether discussed in the briefs or not.

2. Waters and water courses ⟸225 — Court may confirm irrigation district as to nonappearing parties without notice.

In proceedings to confirm the organization of an irrigation district and the issuance of its bonds, neither the circuit court nor the Supreme Court have jurisdiction to enter a decree binding on landowners who did not appear, where the hearing was held before the expiration of ten days after the last publication of the notice, contrary to Laws 1917, p. 773, § 41, subds. "a," "d."

3. Waters and water courses ⟸225—Court without statutory notice may confirm irrigation district as against party appearing.

Though the statutory notice for proceedings for the confirmation of an irrigation district and the issuance of its bonds was not given, the court can determine the legality of the district and the bonds as against the objections of a landowner who appeared and answered.

4. Waters and water courses ⟸230(1)—Order for irrigation district bond election must state general purpose.

Under Acts 1917, p. 754, § 19, authorizing election for the issuance of irrigation district bonds for any purpose, the board of directors, in calling the election for a bond issue, must specify in a general way the purpose for which the bonds are to be sold, and cannot, after the election, abandon the purpose stated entirely and sell the bonds to finance a totally different plan.

5. Statutes ⟸226—Difference from state irrigation district act of another state held to preclude adoption of construction.

Where the irrigation district act of another state authorized an election for the issuance of district bonds in the amount determined, while the Oregon statute requires an election for the issuance of bonds for any purpose, the Legislature cannot be held to have adopted a construction previously placed on the act of the other state as not requiring the purpose of the bonds to be stated in the call for election.

6. Waters and water courses ⟸230(1) — Change in irrigation district law held not to authorize bond election without stating purpose.

The change from the irrigation district act of 1911 requiring submission at election of the question whether the bonds required for the project previously determined shall be issued to that of Acts 1917, p. 754, § 19, requiring an election for issuance of bonds for any purpose, does not indicate an intention to abolish the necessity of stating the purpose of the bonds in the call for the election.

7. Waters and water courses ⟸230(1)—Purpose of district bonds need be stated only generally.

In stating the purpose for which irrigation district bonds are to be issued, it is not necessary to state more than a general plan, and such plan may be modified or changed in particulars after the bonds are authorized, but cannot be completely abandoned and another plan adopted.

8. Waters and water courses ⟸230(1)—Bonds issued on insufficient resolution calling election held invalid.

Where the resolution of the board of directors of an irrigation district adopted a particular project in one paragraph, and in the next paragraph called an election to authorize a bond issue, the sale of bonds authorized at that election to construct a totally different project from that adopted is invalid, whether the resolution be construed as calling the election to issue bonds for that project or as not stating the purpose of the bond as required by statute.

9. Waters and water courses ⟸226—Lands can be eliminated from district only by strictly following statutory proceedings.

Lands can be eliminated from an irrigation district after its organization over the objection of other landowners in the district only by strictly following the statutory procedure therefor, including the publication of notice; a stipulation between the district and the owners of the land to be eliminated cannot authorize the elimination of the land as against those not parties thereto.

In Banc.

Appeal from Circuit Court, Jackson County; Frank M. Calkins, Judge.

Proceedings by the Board of Directors of Medford Irrigation District for a confirmation of the regularity and legality of the organization of the district and the issuance of the bonds of the district, in which Dillon R. Hill appeared and answered in objection to the confirmation. Decree of confirmation, and objector appeals. Decree affirmed in so far as it confirmed the organization of the district, and modified and reversed in so far as it affirmed the issuance of the bonds.

This is a proceeding brought in the circuit court of the state of Oregon for Jackson county to confirm the creation and organization of an irrigation district and the election and proceedings authorizing the issue and sale of the bonds of said district in the sum of $1,500,000 for irrigation purposes.

According to the petition for the original

Digitized by Google

organization of the district, and the order of the county court creating the same, the district was to comprise 18,500 acres of land.

An election was called and the district was organized and officers elected. After the organization the board of directors met and adopted a project, designated as the "Big Butte project," for the obtaining of water to irrigate the district, and directed that bonds should be issued in the sum of $1,500,000 for the construction and installation of a system for irrigating the district, and to provide for the payment of the first year's interest on the bonds, and calling an election to determine whether or not the bonds should be issued. At the election the result was favorable to the issuance of the bonds by a small majority.

There is some indefiniteness and uncertainty as to whether the order for a bond election made by the board of directors of the district was tied up definitely by such order to the Big Butte project. The resolution adopting that particular project, and the resolution calling for the bond election, were separately stated, but they seem to have been offered as one resolution and acted upon together by the same vote and proceeding.

Thereafter this proceeding was brought in the circuit court to confirm the proceedings before the county court, the action of the board of directors, and the proposed sale of bonds.

Certain of the landowners in the district, and among others the defendant Hill, appeared and contested the proceedings for confirmation, and some of them asked that their land be eliminated from the district, alleging divers grounds therefor.

Pending the final decision upon this confirmation proceeding, the directors concluded that the original project, designated as the "Big Butte project," was not feasible, and rescinded the order adopting that project, and adopted an entirely different one, which is known as the "Little Butte project."

It seems to be conceded that the "Little Butte project" would not furnish water sufficient to irrigate the whole 18,500 acres included in the original boundaries, and the directors concluded to permit all of those who were contesting the proceeding in the circuit court to have their lands eliminated from the district, and proceedings were had to that effect.

Just how this result was brought about does not seem to fully appear from the record, but it seems that some of the landowners, holding land to the amount of something over 8,000 acres, had appealed to the Supreme Court from a decision of the circuit court refusing to eliminate their lands from the district, and upon that appeal to the Supreme Court there was a stipulation between such parties and the board of directors that their property should be eliminated, and upon such stipulation a decree of this court was so ordered.

The facts as to the change of the project and the elimination and consequent reduction of the irrigation district to about 10,000 acres does not appear from the petition of the board of directors to have such proceedings confirmed; but the defendant, Hill, who is now the contesting party, appeared in the circuit court and filed an answer setting up such proceedings, and making the same the basis of an objection to any order confirming the sale of the bonds of the district.

There was a decree of the circuit court sustaining the proceedings and validating the issuance of the bonds, and from this decree the defendant appeals to this court.

Rawles Moore, of Medford, for appellant.

Lincoln McCormack, of Medford, for respondent.

BENNETT, J. (after stating the facts as above). This proceeding is in the nature of a friendly suit to test the legality of the organization of the district in question and the regularity of the proceedings by which the bonds were authorized. Nevertheless the matter has been presented upon both sides with the utmost good faith and with great earnestness and ability.

[1] The case is a very important one, not only on account of the very large amount of bonds which are involved in this particular proceeding, and the importance of this particular irrigation project to the development of the country in which it is situated, but because it will also establish a rule in relation to the proceedings to authorize the creation of other irrigation districts, and the issuance of bonds for such irrigation projects.

The proceeding is in the nature of a proceeding in rem, and in view of its character and importance we think, before decreeing the validity of these bonds, that it would be and is our duty to examine every question presented by the record, whether discussed in the briefs or not.

[2] At the outset of the case we are met with the contention on behalf of the defendants that the court has no jurisdiction to establish the validity of these proceedings, or declare the validity of the bonds, because, as contended, the notice for the hearing in the circuit court was not published in accordance with the provisions of the act authorizing the proceedings.

Subdivision "a" of section 41, c. 357, Laws 1917, authorizing proceedings of this kind, provides that after the petition for the confirmation shall have been filed by the board of directors—

"the court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given

Digitized by Google

and published for three successive weeks in a newspaper published in the county where the office of the district is situated. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may on or before the day fixed for the hearing of said petition, demur to or answer said petition."

Subdivision "d" further provides:

"The board of directors may, within the time hereinafter limited, after the order of the county court declaring the organization of any irrigation district hereunder, or declaring the result of any election hereunder, or after the order of the board of directors of such irrigation district including or excluding any lands in or from said district or declaring the result of any election, general or special, herein provided for, or after any order of such board of directors levying any assessment, general or special, or ordering the issue of any bonds for any purpose hereunder, or after the order determining any bond issue or providing for the same, or after such bond issue, bring a proceeding in the circuit court of the county in which the district, or the larger portion thereof, is situated for the purpose of determining the validity of any of the acts or things in this section above enumerated. Said proceeding shall be a proceeding in the nature of a proceeding in rem, and the practice and procedure therein shall follow the practice and procedure of suits in equity so far as the same shall be consistent with the determination sought to be obtained except as herein provided.

"Jurisdiction of the said irrigation district, of each and all of the freeholders, assessment payers and legal voters therein shall be obtained by the publication of notice directed to said district and to 'all freeholders, legal voters, and assessment payers within said district' without naming such freeholders, legal voters, and assessment payers individually. Such notice shall be served on all parties in interest by publication thereof for at least once a week for three successive weeks in some newspaper of general circulation published in the county where said proceeding is pending, and jurisdiction shall be complete within ten days after the full publication of said notice as herein provided."

The notice in this case was dated the 16th day of January, 1919, and the time of the hearing, as set therein, was the 8th day of February, 1919. It was published in the Medford Mail Tribune, and the affidavit of publication states that—

"It was published in the regular and entire issue of said newspaper, once each day for three successive weeks; the first publication thereof having been made on the 17th day of January, 1919, and the last publication thereof having been made on the 7th day of February, 1919."

So it will be seen that there was no ten days after the last publication of the three weeks of notice, as required by subdivision "d," supra, and if that subdivision applies the publication was not sufficient.

The provisions of section 41 which we have already quoted are not very definite and certain. There seems to be a duplication between the general provisions and subdivision "a," on the one hand, and subdivision "d," on the other. We think, however, that taking the legislative act as a whole and construing it by its four corners, as we must do, the notice should be published three weeks, and the last publication should be at least ten days before the date of the hearing, in order to give the court jurisdiction over non-appearing landowners within the boundaries of the district, in a confirmation proceeding of this kind. It follows that neither the circuit court nor this court would have jurisdiction to enter a decree binding upon the landowners who are not appearing.

[3] However, the defendant Hill has appeared and answered in the cause, which is sufficient to give jurisdiction as between him and the board of directors, who are petitioners for the confirmation.

In order, therefore, that there may be no unnecessary delay, we will proceed to decide the question in issue, as between the petitioners and the defendant Hill.

There is no defect in the original proceeding for the organization of the district, which has been pointed out, or which we have been able to discover, which would be fatal thereto, under the previous decisions of this court.

The constitutionality of this act has been frequently upheld in this state. Links v. Anderson, 86 Or. 508, 168 Pac. 605, 1182; Gard v. Peck, 91 Or. 33, 178 Pac. 186; Hanley Co. v. Harney Valley Irr. Dist., 93 Or. 78, 180 Pac. 724, 182 Pac. 559.

The constitutionality of a similar act in California has been many times upheld by the Supreme Court of that state, and finally by the Supreme Court of the United States in Fallbrook v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

We think, therefore, there was no error in the decree of the circuit court, in so far as it confirmed the organization of the district, and the proceedings in relation thereto.

As to that portion of the decree of the circuit court confirming the validity of the bonds to be issued, it appears that the original proposition, at the time the bonds were voted, was to bring in the water of a certain stream, known as Big Butte creek, at an estimated cost of $1,500,000, and the projected district at that time included about 18,500 acres, so that the estimated cost was $75 per acre.

It is alleged in the answer of defendant Hill, and expressly admitted in the petitioner's reply, that this project has been entirely abandoned, and that since the election upon the bonds the board of directors has rescind-

Digitized by Google

ed the action adopting the same and substituted another project to bring in the waters of Little Butte creek at a cost of $1,250,000, and has eliminated about 8,000 acres of land, so the cost would be about $125 per acre, instead of $75, and it is admitted and conceded in the pleadings that the board of directors are now attempting to sell the bonds for the purpose of the new project, which was not considered at all at the time the bonds were voted, and which is an entirely different proposition from the one the people had in view at the time the bonds were so authorized.

We think we would not be justified in confirming the sale of the bonds for this new and entirely different purpose without a new election, giving the landowners who are now to be included in the district an opportunity to vote thereon.

[4] Section 19 of the act of 1917 (chapter 357, p. 754) provides:

"Upon order of the directors duly entered an election shall be held to determine whether bonds in any amount the board may deem necessary shall be issued *for any purpose* necessary or convenient in carrying out the provisions of this Act, including the refunding of outstanding bonds, or whether the right to enter into an obligation or contract with the United States shall be authorized. * * *"

We think the words "for any purpose," italicized above, together with the clauses following, indicate an intention upon the part of the Legislature that there should be some general plan or purpose adopted for the bringing in of water before a bond election, which purpose should be expressed in the order of the directors authorizing the election, and upon which the landowners can vote intelligently as to whether or not the bonds for that purpose shall be issued.

If this were not true, bonds could be issued and sold without any project whatever having been selected or being in view, and upon the mere chance that some feasible proposition for obtaining water could be discovered and decided upon at some time in the future.

We do not think an act of this kind, authorizing the burdening of large agricultural districts with great sums of indebtedness, approximating the entire value of the lands in the district, and to be enforced oftentimes against the will of a portion of the landowners, should be so loosely construed. Such enterprises are full of risk and danger at the best, and must necessarily be disastrous to the entire district if they fail.

The California act, generally known as the "Wright Act," passed in 1887 (St. 1887, p. 29), and upon which other irrigation district acts have been more or less modeled, was loosely drawn, and was at first still more loosely construed by the courts.

Mr. Chandler, in his work on Western Water Law, p. 143, sums up the final outcome of the 25 companies that issued bonds under this early law, and the decisions so loosely construing the same, as follows:

"Of the 25 that issued bonds, 7 have made some kind of a settlement and have no outstanding obligations as districts at this time. Two have made settlement, but still have small outstanding indebtedness that either has been declared illegal or cannot be found. Four have made settlement by exchanging new for old bonds and are now active, and with the exception of one, whose reorganization is not yet complete, and which therefore cannot be judged, are active and successful and can undoubtedly be counted on to pay both bonds and interest as due. Five have compromise settlements pending. Seven have apparently been totally abandoned, with no plan of settlement as yet seriously taken up.

"Where settlements have been made, they have been so different that it is hard to explain them with sufficient brevity for the purpose of this paper, and reference is therefore made to the table that will be submitted. The lowest basis of settlement has been 30 cents on the dollar, and the highest between 80 cents and 90 cents. Several compromised at 50 cents."

Such results not only bring catastrophe and financial ruin to the landowners within the irrigation districts, and to the bond buyers who are compelled to take a heavy loss on each dollar invested in the bonds, but they discredit irrigation bonds generally and make it difficult, and sometimes impossible, to market the same to finance really meritorious undertakings.

In construing our own law we cannot suppose that the Legislature intended to authorize the issue and sale of bonds until some definite plan for obtaining water has been adopted, or that it intended that bonds might be issued and sold, and the money left in the hands of the directors, or in the treasury of the company, for an indefinite time which might reach into months or years.

If the order of the board of directors, calling the election for the bonds, must adopt and specify some particular purpose or project for which the bonds are to be issued, as we hold, it follows logically as a matter of course that the directors could not entirely abandon that project, upon which the landowners had voted the bonds, and issue bonds for the purpose of developing some other and entirely different project, entirely foreign to the one adopted at the time of the election.

We hold, therefore, that under this statute the board of directors in calling the election must specify in a general way the project upon which the bonds are to be sold, and, having adopted that project, they cannot entirely abandon it and sell bonds to finance some other and totally different plan than the one voted on.

It is urged on behalf of respondent that our statute is a re-enactment of the Wright

Digitized by Google

Statute in California, adopted in 1887, and to which we have already referred, and that before the passage of our law the Supreme Court of California had construed that act and held that it was unnecessary for the resolution of the board of directors to point out or specify any particular project in calling the election upon the bonds, and that in adopting the California law we have adopted it as construed by the California court, under the well-known rule that, where a statute copied from another state is adopted by our Legislature, it adopts with it any construction of the legislation which had been given by the courts of the state from which the same was adopted.

There are two reasons why this rule does not compel the adoption of the construction contended for on behalf of the board of directors in this case.

[5] In the first place, section 19 of our statute, already quoted, is not copied from the California statute. Section 15 of the Wright Act, which was the section controlling the issuance of bonds, was as follows:

"For the purpose of constructing necessary irrigating canals and works and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act the board of directors of any such district must, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised, and shall immediately thereupon call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question whether or not the bonds of said district shall be issued in the amount so determined."

By comparing this section with section 19 of our own act, already quoted, it will be seen at once that there is a very substantial difference in the wording of the two sections, so much so that the rule invoked concerning statutes, copied literally from the statutes of another state, cannot apply. Neither do we think that the California decisions, taken as a whole, support the construction of the Wright Act urged by the respondent herein.

It is true that in Modesto Irr. Co. v. Tregea, 88 Cal. 334, 26 Pac. 237, one department of the Supreme Court of California did use the language quoted in the brief of the respondent, and among other things, said:

"The authority to issue bonds is wholly independent of the source of supply of water or any plans for obtaining it."

Which is the language upon which particular stress is placed in the brief of respondent in this case. But, when the same question came before the court in banc in Cullen v. Glendora Water Co., 113 Cal. 503, 45 Pac. 822, the court held directly that it was necessary that a definite plan should be adopted before the election upon the bonds could be called, and disapproved the previous language relied upon by the respondent in this case, saying:

"Counsel for respondent contends that this question has already been decided in their favor in the case of Board v. Tregea, 88 Cal. 357 [26 Pac. 237], where the following language was used by the court: 'The authority to issue bonds is wholly independent of the source of supply of water or any plans for obtaining it.' This language was not very happily chosen, and, taken in its largest sense, for universal application, is misleading."

It is true that the court in the latter case attempts to reconcile its decision with the decision in the Tregea Case upon the ground that in the Tregea Case there was only a modification of the previous plan. But we think the latter case cuts all the heart out of the former, and leaves nothing which could logically support the construction contended for by the respondent herein, even if the statutes were alike.

In Willow Springs Irr. Dist. v. Wilson, 74 Neb. 269, 272, 104 N. W. 165, 167, the Supreme Court of Nebraska, in construing a statute identical with the Wright Act, held that there must be definite plans prepared by an engineer, in order to sustain an election authorizing the issuance and sale of bonds, saying:

"The object of the statute under consideration was undoubtedly to allow the people of the district to examine and know the plan of the proposed improvement, and the estimated cost thereof, before they incurred the burden of the indebtedness necessary to complete the proposed works."

[6] It is argued that the change from the language of our act of 1911 (Laws 1911, p. 378) to that of the act of 1917 supports respondents' construction, but we think there is nothing in the change which indicates an intention on the part of the Legislature to authorize the directors to call a bond election, without adopting any plan or project for the bringing in of water. On the contrary, we think that, while the language of the act of 1911 was more explicit in that regard than the language of the later act, yet the later act, when fairly construed, still provides that the bond election must only be called with reference to some general purpose or project, and cannot be left entirely up in the air, with power to the district to issue and sell bonds, without reference to any purpose or plans and without ascertaining whether there is any source from which water for irrigation can be obtained. If any such a revolutionary change had been intended by the Legislature, we think it would have indicated it in plain words, and the fact that it did not say so, but, on the contrary, limited such authorization of bonds to "any purpose" selected by the order of the directors, makes some definite purpose just as neces-

Digitized by Google

sary to the issuance of bonds as it was under the old act.

[7] We must not be understood as holding that every detail of a project must be set forth in the order of the court calling the election, or that anything more than a general plan or project is required. Neither are we holding that the plan or project adopted cannot be modified or changed in any particular, or that such plans cannot be added to or developed if that shall become necessary.

[8] In this case the action of the board of directors calling the election was by resolution which appears to have been as follows:

"Resolved that for the purpose of providing a system for the irrigation of the district this board hereby adopts the project known as the Big Butte project in accordance with the report, specifications, and estimates submitted to the board by its engineers.

"Resolved that for the purpose of defraying the expense of the construction and installation of a system for irrigating the district, and to provide for the payment of the first year's interest on bonds, bonds be issued by the district to the amount of $1,500,000. * * *

"Resolved that an election shall be held on the 28th day of September, 1918, to determine whether bonds to the amount of $1,500,000 shall be issued for the purpose of constructing and installing a system for the irrigation of the district, in accordance with the provisions of chapter 357 of the General Laws of Oregon for 1917."

Whether this resolution is construed as declaring a definite project upon which the authorization of bonds was submitted to the voters or not, the result is equally fatal to the authorization of the bonds. If its intent was not to adopt any particular project for the bringing in of water, then it was not sufficient in the first instance, as before shown; and, if it did tie the election up to the particular project, then the board of directors had no authority to abandon the same and proceed to sell bonds for an entirely different project from the one upon which the people had voted.

It follows that the proceedings of the district in the matter of its organization and the election of its officers be confirmed; but the proposed action of the board of directors in selling bonds for a different project than the one voted upon is not confirmed, but is held to be illegal.

[9] It is not necessary to decide, and we do not find in the record sufficient to justify us in deciding, whether the action of the board of directors in eliminating the 8,500 acres from the irrigation district was valid and effectual. There is no doubt that the act of the Legislature provides ample authority for such elimination, if the proper steps are taken and the proper notice given. But it is necessary that proper notice shall be given by publication, as provided by the act, and that every step which the act requires for such elimination must be carefully followed to make the elimination valid.

No stipulation of the parties who appeared in the cause, and no judgment based upon such stipulation, as between them, could be binding upon the other landowners in the district, who did not appear, if no such notice as required by law was given.

The proceedings in relation to the attempted elimination are not presented by the petition for confirmation, and we find nothing in the record upon which we can decide whether the requisite notice was given or not. If such notice was given, and the law was complied with in every step leading up to such elimination, then no one could complain, since every landowner had received notice and an opportunity to be heard, if he desired to object. But, if these notices were not given, as required by the statute, then it would be better to take steps to have such eliminations as are necessary carefully made, in accordance with the statute, before another election is called.

The decree of the court below is affirmed as to that portion confirming the proceedings of the county court and of the district and board of directors organizing the district and electing its officers, and modified and reversed as to that portion confirming and authorizing the sale of the bonds for the purpose of constructing and developing the Little Butte creek project.

BURNETT and BENSON, JJ., did not sit in this case.

SMYTH v. KENWOOD LAND CO.

(Supreme Court of Oregon. July 13, 1920.)

1. **Corporations ⟸630(5)—Evidence in action by stockholder after dissolution held to sustain finding defendant authorized removal of personal property.**

In a stockholder's action, after dissolution, for damages to personal property belonging to the corporation, because of its removal by defendant from the premises sold by defendant to the corporation, after an alleged default in the sales contract, evidence *held* to support a finding that defendant had authorized such removal.

2. **Evidence ⟸383(3) — Dissolution proclamation held prima facie evidence of filing report of delinquency.**

Where the Governor has issued a proclamation dissolving a corporation for failure to pay license fees for two years, under L. O. L. §§ 6716–6718, and Laws 1913, p. 670, § 8, the recital of such proclamation that the corporation commissioner has filed a report of the delinquency of the corporation, constitutes prima facie evidence thereof, in view of L. O. L. § 768.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

3. Corporations ⟸617(2)—When stockholders become owners of assets on dissolution stated.

The property of a corporation, including rights of contract and choses in action, upon dissolution, becomes vested in the stockholders subject to the rights of creditors, and ordinarily and in the absence of debts the stockholders become the owners of the assets.

4. Corporations ⟸630(4)—Complaint held to allege ownership by stockholder of property of dissolved corporation.

In a stockholder's action for damages to personal property, brought after dissolution of the corporation, complaint, after verdict and in the absence of demurrer, *held* sufficiently to allege that plaintiff became, as stockholder, the sole owner of the corporation's property.

5. Corporations ⟸617(2)—Default under land sale contract held not to create debt preventing property passing to stockholders on dissolution.

A dissolved corporation's default under a land sale contract did not create a debt, existence of which prevented personal property of the dissolved corporation on the premises sold from passing to the stockholders, where the vendor elected to re-enter into possession.

6. Corporations ⟸617(2)—Removal by vendor of defaulting corporation's goods before time for re-entering held to create liability enforceable by stockholder after dissolution.

Where a corporation defaulted under its contract to purchase realty, and the vendor failed to wait 60 days after default before re-entering into possession, as required by the contract, the acts of such vendor in removing the property of the corporation from the premises before its right to possession had matured *held* sufficient to create a basis for liability for damages to the corporation's property, enforceable by the plaintiff as a stockholder after dissolution.

Department 1.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Harry Howard against the Kenwood Land Company. Judgment for plaintiff, and defendant appeals. Upon plaintiff's death, Sidney Smyth was substituted as administrator. Affirmed.

This is an action to recover damages for injuries to certain articles of personal property and for the destruction of other articles of personalty. The action was brought by Harry Howard, and he obtained a verdict and judgment against the Kenwood Land Company, and the defendant then appealed. Howard died after the rendition of the judgment, and Sidney Smyth, as administrator of Howard's estate, was substituted as the party plaintiff.

The Kenwood Land Company, the Pacific Gas Traction Company, and the Ajax Auto Traction Company are corporations; but for convenience they will be referred to, respectively, as the Kenwood Company, the Gas Company, and the Ajax Company. The Pacific Coast Westrumite Company was a corporation until January 11, 1916, when it was dissolved by a proclamation of the Governor; and, for the sake of brevity, this corporation will be designated as the Westrumite Company. The Oregon Wool Scouring Mills and the Pacific Coast Safe & Vault Works are corporations; and for convenience they will be mentioned, respectively, as the Wool Company and as the Safe Company.

On September 8, 1909, the Kenwood Company agreed in writing to sell to the Gas Company a tract of land embracing about 7 acres near Kenton, in Multnomah county. The Gas Company agreed to pay $3,000 per acre for the land. The purchase price was made payable on or before five years after September 8, 1909, the date of the instrument, with interest after November 1, 1909, at the rate of 6 per cent. per annum payable semiannually on November 1 and May 1 of each year. The Gas Company covenanted to pay the taxes on all improvements placed upon the land, while the Kenwood Company agreed to pay the taxes on the land until the delivery of the deed to the Gas Company. The contract contained a provision to the effect that if the Gas Company defaulted in the payment of interest or taxes, or failed to comply—

"in any respect with the agreements and promises herein contained on its part to be performed at the time herein agreed, then the whole amount of said purchase price shall at once become due and payable and the party of the first part may demand payment thereof with all arrearages of interest and taxes, if any there be, and on default or neglect by the said party of the second part for a period of sixty (60) days after such demand to pay the full amount of the purchase price with all arrearages, the party of the first part may, at its option, enter and repossess itself of the lands herein described and remove the party of the second part therefrom or may sue for and recover judgment against the party of the second part for the amount of the purchase price of the said lands with interest and taxes."

At some time subsequent to September 8, 1909, the Gas Company assigned its interest in the land sale contract to the Ajax Company; and afterwards, on April 10, 1911, the Ajax Company assigned to the Westrumite Company its interest in the contract so far as it concerned a portion of the land, which portion was described by metes and bounds and contains 1.15 acres. The writing evidencing this assignment was signed by the Ajax Company and by the Westrumite Company; and by one of the provisions in the instrument the Westrumite Company agrees to pay to the Ajax Company the sum of $1,150—

"and further agrees to assume with relation to the one and fifteen hundredths (1.15) acre tract of land herein described all the obliga-

Digitized by Google

tions under the contract between the Kenwood Land Company and the Pacific Gas Traction Company, its successors and assigns, so far as the same equitably should apply to said one and fifteen hundredths (1.15) acre tract."

Contemporaneously with the execution of the assignment to the Westrumite Company, the Kenwood Company in writing consented to the assignment by the Ajax Company, and agreed to deed to the Westrumite Company—

"the one and fifteen hundredths (1.15) acre tract of land therein described when it shall comply with the terms of the contract between said Kenwood Land Company and the Pacific Gas Traction Company."

The Safe Company owned 1.44 acres adjoining the tract embracing 1.15 acres; and the Westrumite Company at the time when, or possibly before, it acquired the assignment from the Ajax Company, made an agreement with the Safe Company for the purchase of this tract of 1.44 acres.

George F. Heusner is the general manager, and Warren Keeler is the auditor, of the Kenwood Company. Heusner owned most of the stock in the Safe Company, and, for all practical purposes, was the owner of that corporation. William Lind, Fred J. Blakeley, and Harry Howard owned all the Westrumite Company's stock outstanding on January 11, 1916, the date of the Governor's proclamation dissolving the Westrumite Company.

The Westrumite Company paid $3,000 when it received the assignment from the Ajax Company. While the defendant contends that it did not receive any part of this sum, the plaintiff claims that the Kenwood Company received $1,850 of the amount paid by the Westrumite Company. Heusner says that either Lind or Blakeley, acting for the Westrumite Company, paid $3,000 to him personally; but he also states that $1,850 of the amount was "turned over to" the Safe Company on account of the tract of 1.44 acres, and that $1,150, the remainder, was delivered to the Ajax Company, and that this distribution of the money was approved by the representative of the Westrumite Company. The defendant claims that the amount paid to the Ajax Company represents the profit made by the Ajax Company in the assignment, and that, since neither the Gas Company nor the Ajax Company had paid to the Kenwood Company any part of the principal, the whole of the principal of the purchase price amounting to $3,450 for the tract of 1.15 acres remained unpaid.

With the permission of the Kenwood Company, the Westrumite Company in November, 1910, a time prior to the execution of the assignment by the Ajax Company, began the erection of a building, 80x100 feet in size, and the installation of equipment used in the manufacture of westrumite, a product employed in paving roads and streets, and the Kenwood Company completed the improvements in May or June, 1911. The building, together with docks and tracks, constructed by the Westrumite Company, cost about $15,000, and the machinery and fixtures cost about $20,000, making a total expenditure of $35,000 for improvements.

The Westrumite Company did some paving in 1911, and also in 1912; but it did no paving after the fall of 1912. In 1913 the Westrumite Company sold some material "to other paving companies," and in 1914 nothing was done "except to try to sell the place." Lind testified that in 1915 he kept on trying to sell the interests of the Westrumite Company, and it may be added that there was evidence to show that attempts to sell the property were made in 1916, but without success.

The Wool Company had purchased a quantity of machinery which it desired to store until such time as it could secure a location for the installation of it, and with the permission of the Kenwood Company the Wool Company in March or April, 1916, stored its machinery in the large building which had been constructed by the Westrumite Company. The Wool Company arranged with the Kenwood Company to take over the property, including the buildings which had been used by the Westrumite Company, and then in the fall of 1916 the Wool Company began to assemble the machinery in the building, where it had been stored since the previous March or April. Inside this building there was a considerable quantity of equipment and material, including empty and filled barrels, tanks, metal flooring, and the like, all owned by the Westrumite Company. Before installing its machinery, the Wool Company removed all the barrels, tanks, metal flooring, machinery, and other equipment then in the building. Although it is to be inferred from the record that the Wool Company's contract with the Kenwood Company was dated November 1, 1916, nevertheless the record shows that the Wool Company began to remove the equipment and material on October 13, 1916.

After the Wool Company had occupied the premises and removed from the building the equipment and materials which had been placed there by the Westrumite Company, Lind and Blakeley assigned to Howard their interest in any right of action which the stockholders of the Westrumite Company might have against the Kenwood Company for entering the building and removing the property of the Westrumite Company. Howard brought this action against the Kenwood Company, alleging that without foreclosing the land sale contract, and without giving notice for a period of 60 days as provided for in the contract, the Kenwood Company wrongfully entered upon the premises and removed specified articles of property from the building, with the result that some of the property was damaged or destroyed in the process of re-

Digitized by Google

moval, some was damaged by the elements, some carried away by floods, and some was stolen. In this connection it is proper to say that it is the theory of the plaintiff that the Kenwood Company is liable for whatever the Wool Company did with the property of the Westrumite Company.

Besides the denials, the answer avers that the Westrumite Company defaulted by failing to pay interest or taxes, or any of the principal due the defendant, and that on November 1, 1916, after more than 60 days' notice to the Westrumite Company, and to Howard, Lind, and Blakeley, the defendant entered into a contract for the sale of the 1.15 acres to the Wool Company, and that the Wool Company entered into possession of the land, and that "whatever property of the plaintiff was removed, the same was done by the Oregon Wool Scouring Mills, and not by this defendant."

In the reply the plaintiff admits that the Westrumite Company failed to pay interest and taxes, and failed to pay the principal due on the land sale contract; but the plaintiff further avers that the defendant excused and waived the defaults of the Westrumite Company, by receiving repayments of taxes after the same became due, by agreeing that payments on the purchase price might be made whenever the Westrumite Company should be able to make them, and by encouraging the Westrumite Company and its stockholders "to try to sell their interest in said premises."

Robert B. Kuykendall, of Portland (Carey & Kerr and Omar C. Spencer, all of Portland, on the brief), for appellant.

John W. Reynolds, of Portland (Flegel, Reynolds, Flegel & Smith, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). The defendant argues that the judgment should be reversed because: (1) There is no evidence to show that the injury to or destruction of any of the property was done by the Kenwood Company; (2) "there is no evidence of the dissolution of the Westrumite Company;" and (3) the plaintiff has not alleged or proved a cause of action in his favor, since there is neither allegation nor proof of the payment of the debts of the corporation. These three points are the only ones discussed in the printed brief submitted by the defendant, and consequently we shall confine our attention to these three points. Miller Lumber Co. v. Davis, 185 Pac. 1107.

We may better understand the argument of the Kenwood Company, that there is no competent evidence connecting it with the injury and destruction of the property owned by the Westrumite Company, if we first state some additional facts shown by the record. As previously explained, the Westrumite Company was engaged in the manufacture of westrumite, and in laying pavement in 1911 and 1912. In 1913 the company did nothing, except to sell some material it had on hand, and in 1914 the company "did not do anything, except to try to sell the place." In the language of Lind, in 1915, "we kept on trying to sell it right along." There is also evidence tending to show that attempts were made at different times in 1916 to bring about a sale of the plant. From and after 1914, and until the fall of 1916, when the Wool Company installed its machinery, the property was idle. There was not even a watchman, although Lind visited the premises occasionally. Locks were placed on the doors and the building was closed. Lind testified that "we had the key to the property right along," until the Wool Company "came in" and removed "our lock" and took possession. The Westrumite Company never paid any taxes, except for the first year, and it never paid any interest, and it failed to pay any of the purchase price; and yet, notwithstanding these defaults, the Kenwood Company indulged the Westrumite Company most generously. The auditor says that "when the contract was first made, and interest periods would come around, I would send a notice to Mr. Lind, but he never paid any attention to it"; that after repaying to the Kenwood Company the amount of the taxes for the first year the Westrumite Company—

"paid no attention to any notice, and finally, after two or three years, I quit sending them, because I knew their condition was such that they could not pay anything."

Heusner explained that he made—

"every attempt that he could to pull them through, never oppressed them in any way; * * * I wanted to help them rather than injure them at all times."

Heusner also stated that "during all of this period of time up to the year 1916" he had indulged the Westrumite Company, and did not take any steps to terminate the contract, and that in each talk had with Lind—

"I would encourage him, tell him that we would not hurt him in any way, just to continue and see if he could not in some way rehabilitate himself with this, that, or the other."

Lind stated that he talked with Heusner and Keeler—

"about trying to get rid of it [the property], and of course they urged us in trying to get rid of it, but never crowded us, and said we had to pay it or get out, or anything of that kind, but always treated us nice that way, and gave us plenty of time to try to sell it."

Again, this witness testified that he would advise Heusner and Keeler "right along and talk about disposing of the place," and that they—

"said they would do all they could do for us to help us sell it, but as far as making any de-

Digitized by Google

mand for money, or telling us we had to do so and so to get the money, or get out, they never did."

However, after 1916, Lind, as president of the Westrumite Company, received from the Kenwood Company two letters, one of which was dated March 23d and the other October 14th. The March letter advised Lind:

"That unless your company can make arrangements to complete its contract on or before April 1st next, your contract will be voluntarily surrendered. If you are unable to come through before that time, you are requested to remove from the premises, immediately after the above date, such material as may properly belong to you."

Keeler says that he saw Lind after the date of the March letter—

"and he still maintained that he had a prospect of selling, and so it dragged along week after week, waiting for them to arrive at some definite arrangement."

It also appears from the testimony of Keeler that when the Wool Company stored its machinery in the building in March or April it did so under—

"arrangements * * * to put the machinery in the building and leave it there until such time as the Westrumite Company would come through with their contract, or let go and get out;" and "the negotiations and uncertainty and talk with Lind lasted until October that same year;" and again, "the negotiations for the sale of the property to the Oregon Wool & Scouring Mills Company was hanging fire from approximately the 1st of April, 1916, until the middle of October, 1916, or perhaps later, waiting for Mr. Lind * * * to do something."

In the October letter the Kenwood Company notified Lind, as president of the Westrumite Company, to remove the machinery, boilers, and fixtures "from the building formerly occupied by you," and "in case you do not do same within three (3) days from this date we will remove them, and store such as can be stored in the rear of the safe works building, subject to your order, upon payment of the cost of removal." The defendant contends that the building was entered by thieves and some of the property stolen before the Wool Company stored its machinery in March or April, 1916, and that whatever property was removed after March, 1916, was removed by the Wool Company, and that therefore, if there is any liability at all, it attaches to the Wool Company, and not to the defendant.

Lind says that not until June or July, 1916, did he discover that any of the property had ever been interfered with, and that at that time, upon going to the building, he found that certain articles had been removed, and "the locks we had on there were taken off, and another lock put on the big door." While Lind says that he had no knowledge of Keeler having a key to the building, and Keeler states that he does not recall of having given a key to W. L. Crowe, the president of the Wool Company, nevertheless Crowe testified that, when he first went to the building, "Mr. Keeler gave me a key when I got in." Lind stated that some time "during the summer" of 1916 he saw Heusner and talked with him about selling the property to certain prospective purchasers, and when—

"I was explaining to him about throwing the stuff out" Heusner "said it was entirely out of his hands; that the company (Kenwood Company) was doing it themselves, through Mr. Keeler or somebody who had charge of it."

Crowe claims that the Wool Company did not disturb any of the property in the building at the time he stored the machinery in the spring of 1916; but there is evidence in the record from which the jury could have inferred that some of the property had been removed from the building, as related by Lind, at some time prior to June or July. Crowe admits, however, that on October 13 the Wool Company began the work of removing all the property then remaining in the building. Turning to the October letter written by the Kenwood Company, it will be observed that it is dated October 14, the day after the Wool Company began to remove the property; and it will also be noted that in this letter the Kenwood Company advises Lind that, if he does not remove the property within three days, "we will", although the Wool Company was at that very moment actually engaged in removing the property. Crowe testified that the work of removal was done by the Wool Company "at the instigation or with the consent of the Kenwood Land Company"; and when asked: What officer of the Kenwood Company "talked with you or gave you instructions to the effect that things should be removed?"—he answered: "Both Mr. Heusner and Mr. Keeler."

[1] The evidence relied upon by the plaintiff is sufficient to accomplish more than to suggest a suspicion or possibility; and, although there was evidence tending to support the theory of the defendant, and to contradict the position taken by the plaintiff, still the evidence relied upon by the plaintiff was sufficiently substantial to enable reasonable men to reach the verdict returned by the jury; and therefore we are prohibited from disturbing the verdict, even though, we might, if we were authorized to review the evidence, reach a different conclusion as to the facts. Schneider v. Tapfer, 92 Or. 520, 546, 180 Pac. 107.

The defendant insists that the plaintiff has failed to prove the dissolution of the Westrumite Company. The statutes provide that, if a corporation "for two consecutive years" fails to pay the prescribed license fees, the

Digitized by Google

corporation commissioner shall, on or before the first Monday in January, report that fact to the Governor, and "the Governor shall forthwith issue his proclamation declaring such" corporation dissolved, and the proclamation of the Governor must then be filed in the office of the corporation commissioner. Sections 6716, 6717 and 6718, L. O. L.; section 8, c. 341, Laws 1913. These statutes, as stated by the defendant, contain three essentials: (a) Failure to pay license fees for two consecutive years; (b) report by the corporation commissioner showing the delinquency of the corporation; and (c) proclamation by the Governor declaring the dissolution of the corporation.

These three essentials are sufficiently pleaded in the complaint to meet the requirements of the rule announced in Dowd v. American Surety Co., 69 Or. 418, 139 Pac. 112; but the defendant contends that there is no competent evidence to show that the corporation commissioner reported the delinquency of the corporation to the Governor. The record contains direct evidence that the license fees were not paid, for Lind testified that the fees for the years 1914 and 1915 were not paid. The fact that the Governor issued a proclamation of dissolution on January 11, 1916, is shown by a certified copy of a proclamation signed by the Governor and filed with the corporation commissioner on January 11, 1916. The proclamation issued by the Governor opens by reciting that the corporation commissioner "did, on the 3d day of January, 1916, report to me, as the Governor of the state of Oregon, a list of all of the corporations organized under the laws of the state of Oregon, for gain, which, for two consecutive years or more next preceding the said 3d day of January, 1916," have failed to pay the license fees required by law; and it is also recited in the proclamation that the report of the corporation commissioner contains the name of the Westrumite Company.

[2] The plaintiff contends that evidence of the making of the report by the corporation commissioner is found in the presumption that official duty was performed, not only by the corporation commissioner, but also by the Governor. In other words, this contention involves the argument that, since it is directly shown that the fees were not paid, it must be presumed that the corporation commissioner performed his official duty by making the report, and that since the Governor did in truth issue a proclamation, it is to be presumed that he did so only after receiving the report from the corporation commissioner, for the reason that without such a report he had no authority to issue a proclamation. It is not necessary, however, to decide whether the doctrine of presumption of performance of official duty is applicable (see Davis v. Chamberlain, 51 Or. 304, 310, 98 Pac. 154; Stephenson v. Von Blokland, 60 Or. 247, 253, 118 Pac. 1026; Reiff v. Portland, 71 Or. 421, 431, 141 Pac. 167, 142 Pac. 827, L. R. A. 1915D, 772), for the reason that the recitals in the proclamation are prima facie evidence of the filing of a report by the corporation commissioner.

The proclamation issued by the Governor is a public document. The statute expressly commands the Governor to issue a proclamation when the corporation commissioner makes the report required of the commissioner. The report of the commissioner is the basis of the Governor's proclamation. The recitals appearing in the proclamation are official statements of facts, and unless the facts so stated actually existed the proclamation would be ineffective. The facts recited in the proclamation are the facts which create the duty of issuing the proclamation, and consequently the recitals concerning the corporation commissioner's report are official statements, which constitute prima facie evidence that the corporation commissioner filed a report showing the delinquency of the Westrumite Company. Section 768, L. O. L.; 3 Wigmore on Evidence, § 1630 et seq.; 4 Enc. of Evidence, 841; 10 R. C. L. 1126; 22 C. J. 801.

[3] The next point urged by the defendant is that the complaint does not sufficiently show that the plaintiff had a right of action, for the reason that the pleading does not aver payment of all the corporate debts; and it was also forcibly and ably argued at the hearing by counsel for the defendant that, since it affirmatively appears from the evidence offered by plaintiff himself that the purchase price, interest, and taxes provided for in the land sale contract are still unpaid, the plaintiff has failed to prove a right of action. Regardless of whatever the rule may have formerly been, it is now a well-established doctrine that the property of a corporation, including rights of contracts and choses in action, upon dissolution of the corporation, become vested in the stockholders, subject to the rights of creditors; and ordinarily, and in the absence of debts, the stockholders, upon dissolution of the corporation, become the owners of its assets. 5 Thompson on Corporations (2d Ed.) §§ 6585, 6587 and 6589. Service L. Co. v. Sumpter Valley Ry. Co., 81 Or. 32, 50, 149 Pac. 531, 152 Pac. 262, 158 Pac. 175; Baldwin v. Johnson, 95 Tex. 85, 65 S. W. 171; Gasque v. Ball, 65 Fla. 383, 62 South. 215; Stearns Coal & Lumber Co. v. Van Winkle et al., 221 Fed. 590, 137 C. C. A. 314.

In addition to contending that the complaint is sufficient to meet the objection of the defendant, and that the evidence shows that there were no debts, the plaintiff argues that the complaint avers and that the evidence shows actual possession by the stockholders at the time of the alleged wrongful removal of the property, and that therefore

Digitized by Google

such actual possession is of itself and alone enough to permit the maintenance of this action, even though it be assumed that the legal as distinguished from the equitable title is not yet vested in any of the stockholders on account of some outstanding debt due from the Westrumite Company, and to sustain this contention the plaintiff cites the following authorities: Stowell v. Otis, 71 N. Y. 36; Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360; Guttner et al. v. Pacific Steam Whaling Co. (D. C.) 96 Fed. 617. However, we shall pass this phase of the controversy; and, after noticing the language of the complaint, we shall endeavor to ascertain whether it can be said from a consideration of the evidence that there is any debt owing from the Westrumite Company. For the purposes of the instant case we shall assume, without deciding, that in no event can stockholders of a dissolved corporation prosecute an action like this one, unless at the time the action is brought all the corporate debts have first been paid. The complaint tells about the failure of the corporation to pay the required license fees, the report of the delinquency, and the Governor's proclamation dissolving the Westrumite Company; and then appears the following allegation:

"That prior to and at the time of said dissolution of said Pacific Coast Westrumite Company the sole stockholders of said corporation were William Lind, Fred J. Blakeley, and the plaintiff herein, Harry Howard, and that by reason of said dissolution all the property and property rights of said corporation devolved upon and became the property of the said William Lind, Fred J. Blakeley, and the plaintiff."

[4] We think this averment is sufficient after verdict and in the absence of a demurrer. It is true that there was a motion for a nonsuit and a motion for a directed verdict; but the language used in both motions was general, and attention was not directed to the specific question now under consideration. The uncontradicted testimony is that all the debts of the Westrumite Company have been paid, except the debt, if there is a debt, created by the land sale contract. If the writings concerning the land have not already created a debt, and if on account of what has occurred they cannot in the future create a debt, then it is accurate to say that there are no corporate debts, and that therefore the legal title to the corporate assets passed to the stockholders upon the dissolution of the corporation.

The grievance of the plaintiff, as related in the complaint, is rested upon two grounds: The one, that the removal, whether rightful or wrongful, was negligently done; the other, that the removal was wrongful. Noticing only that aspect of the complaint which deals with the charge of wrongful removal, we find the plaintiff saying that the defendant, without the consent of the stockholders of the Westrumite Company then in possession of the property, wrongfully entered upon the premises and wrongfully removed the personal property; and we find the defendant saying in its answer that it rightfully took possession of the premises by selling to the Wool Company, and that what it did was rightful because done after giving 60 days' notice. In effect the defendant has admitted in its pleading that it had no right to take possession of the property unless it first gave 60 days' notice. It is true that the land sale contract obligates the seller to convey and the purchaser to pay; but it is also true that failure to pay does not alone and by its own force create a debt owing from the purchaser. By the express terms of the contract, the seller is given two alternatives from which to choose; and while the Kenwood Company could have chosen either one of the two, it could not and cannot choose both. The Kenwood Company could have treated the land as sold, and then sued for the purchase price; but it did not so choose. On the contrary the defendant elected to retake possession of the land, and by so doing precluded itself from treating the land as sold and from recovering the purchase price as a debt.

[5] In its answer the Kenwood Company alleges that it contracted to sell to the Wool Company, and that the Wool Company entered into possession of the premises. There is no debt owing to the Kenwood Company on account of the land sale contract; the choice of alternatives made by the Kenwood Company prevents the creation of a debt at any time in the future; and consequently the legal title to the assets of the Westrumite Company passed to the stockholders upon the dissolution of the corporation.

We do not attempt to decide whether a strict foreclosure of the contract is necessary in order to extinguish any equity the stockholders of the Westrumite Company may have in the land. It is sufficient to say that, if such a suit is necessary, it cannot terminate in a personal judgment or decree for money enforceable by execution or otherwise.

The conclusion that the Kenwood Company elected to retake possession of the land is not inconsistent with a finding by the jury that the property of the Westrumite Company was wrongfully removed. If the notice of March 23d was waived, then any property removed before June or July, the time when Lind says that he first discovered that part of the property had been removed, was wrongfully removed. Indeed, the very fact that an additional notice was sent on October 14th is some evidence that the defendant itself regarded the March notice as having been waived. The undisputed testimony is that the Wool Company began to remove the remaining contents of the building on Octo-

Digitized by Google

ber 13th, and that the work continued until the building was cleaned out. In other words, assuming that the March notice had been waived, and that it was therefore inefficient, the Wool Company began to remove the property 61 days before the Kenwood Company was entitled to take possession of the premises.

[6] Treating the notice of October 14th as a notice given under the contract, the right of possession was in the process of development from the date of the notice, but it did not mature until the expiration of 60 days. The Kenwood Company did not wait for the maturity of the right of possession, but some and probably the most part of the property was removed before the maturity of the right.

It follows from what has been said that the judgment must be affirmed.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

WHITE v. WHITE.

(Supreme Court of Oregon. July 13, 1920.)

1. Divorce ⟸182—Supreme Court cannot grant suit or maintenance money pending appeal.

The Supreme Court has no jurisdiction to grant suit or maintenance money pending appeal from a decree of divorce.

2. Divorce ⟸183—Rule requiring printed briefs relaxed on account of poverty.

In view of extreme poverty of wife, granted decree of divorce, from which husband has appealed, the rule requiring her to furnish printed briefs will be relaxed, and she will be permitted to have her case heard on typewritten briefs.

In banc.

Appeal from Circuit Court, Linn County; Percy R. Kelly, Judge.

Suit by Berta K. White against D. C. White for divorce. Pending appeal by defendant from decree for plaintiff, plaintiff moves in the Supreme Court for suit and maintenance money. Motion refused, but rule as to printed briefs relaxed.

Dan Johnston, of Albany, for appellant.

Weatherford & Wyatt and Hewitt & Sox, all of Albany, for respondent.

McBRIDE, C. J. This is a motion for additional suit money and maintenance during the pendency of an appeal.

[1] The plaintiff sued for a divorce, and obtained from the circuit court an order for $60 suit money pending the hearing, which was exhausted in the payment of witness fees and expenses of the trial. She was granted a decree, from which defendant appealed to this court, where the cause is now pending. The affidavit shows that she is practically destitute of means to print briefs, or pay her attorneys, or even maintain herself, pending the trial here; but, as shown in O'Brien v. O'Brien, 36 Or. 92, 57 Pac. 374, 58 Pac. 892, and in Taylor v. Taylor, 70 Or. 510, 134 Pac. 1183, 140 Pac. 999, this court has no jurisdiction to grant suit or maintenance money pending a decree.

[2] In view, however, of plaintiff's extreme poverty, the rule requiring her to furnish printed briefs will be relaxed, and she will be permitted to have her case heard upon typewritten briefs.

SCHOOL DIST. NO. 1 OF CLATSOP COUNTY, to Use of HANSEN et al., v. ASTORIA CONST. CO. et al.*

(Supreme Court of Oregon. July 13, 1920.)

1. Judgment ⟸222—Order void where blank as to amount of recovery.

A judgment order as entered in the court's journal, being blank as regards the amount to be recovered, is void, even as to the award of costs; the court, without a judgment on the verdict, being without jurisdiction to award a judgment for costs.

2. Judgment ⟸329—Entry of judgment order blank as to amount may be corrected by entry of new order.

While the court could amend its journal entry of a judgment order, blank as to amount of recovery, it may disregard it and, under L. O. L. § 204, make a new order, entry of which will stand as the final adjudication.

3. Appeal and error ⟸112—Void judgment entry appealable.

Though judgment order as entered is void because of being blank as to amount of recovery, it is appealable.

Department 1.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by School District No. 1 of Clatsop County, for use and benefit of James Hansen and another, partners as Hansen & Nelson, against the Astoria Construction Company and others. From an adverse judgment, defendants appeal. Reversed and remanded, with directions.

This is an action for the recovery of money, which was tried by the court and a jury, resulting in a verdict for plaintiffs, and immediately thereafter, on December 21, 1918, the following "judgment order" was entered on the journal of the court:

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 27, 1920.

Digitized by Google

"This cause having come on regularly for trial, plaintiffs appearing in person and by their attorneys, Norblad & Hesse, defendant Astoria Construction Company appearing by its attorneys, E. E. Mathison and Charles Robison, defendant Massachusetts Bonding & Insurance Company appearing by its attorney, D. P. Price, and defendant New Amsterdam Casualty Company appearing by its attorney, James L. Conley, and a jury having been duly sworn and impaneled to try the issues in said cause, having returned into court with their verdict in favor of the plaintiffs for the sum of $3,756.35:

"Now, therefore, by reason of the law in the premises, it is hereby ordered, adjudged, and decreed that plaintiff school district No. 1 of Clatsop county, for the use and benefit of James Hansen and Hans Nelson, copartners doing business under the firm name and style of Hansen & Nelson, do have and recover of and from the defendants Astoria Construction Company, Massachusetts Bonding & Insurance Company, and New Amsterdam Casualty Company, corporations, defendants, the sum of $——, together with its costs and disbursements in the sum of $91.30, and that a writ of execution issue therefor."

Thereafter the defendants perfected an appeal, and upon an examination of defendants' printed abstract of record plaintiffs' attorneys, for the first time, discovered that the judgment entry was a blank as regards the amount to be recovered. They then promptly filed the following motions:

"Comes now the above-named plaintiff, by Norblad & Hesse, its attorneys, and based upon the affidavit of F. C. Hesse, attached hereto and made a part hereof, moves at this time this honorable court for the entering of a judgment in favor of plaintiff and against defendants for the sum of $3,756.35, in accordance with the verdict of the jury in the above-entitled cause, together with costs and disbursements in the sum of $91.30."

Notice of the hearing upon this motion was given to defendants, who appeared, and thereafter on March 26, 1919, the court made and entered the following order:

"Now, at this time, coming on to be heard, plaintiff's motion for a judgment against defendants, in accordance with the verdict of the jury heretofore duly returned on the 20th day of December, 1918, plaintiff appearing by Norblad & Hesse, its attorneys, and defendants appearing by E. E. Mathison, one of its attorneys, and after listening to argument of counsel, and the court being fully advised in the premises, and being of the opinion that the said motion is well taken:

"Now, therefore, it is ordered, adjudged, and decreed that plaintiff school district No. 1 of Clatsop county, for the use and benefit of James Hansen and Hans Nelson, copartners doing business under the firm name and style of Hansen & Nelson, do have and recover of and from the defendants Astoria Construction Company, Massachusetts Bonding & Insurance Company, and New Amsterdam Casualty Company, corporations, the sum of $3,756.35, together with its costs and disbursements in the sum of $91.30, and that a writ of execution issue therefor."

Thereafter plaintiffs filed their motion to dismiss this appeal upon the ground that the judgment from which defendants have appealed has been superseded by the later judgment entry, from which no appeal has been taken.

James L. Conley and D. P. Price, both of Portland (E. E. Mathison and C. W. Robison, both of Astoria, on the brief), for appellants.

F. C. Hesse, of Astoria (Norblad & Hesse, of Astoria, on the brief), for respondents.

BENSON, J. (after stating the facts as above). [1-3] The judgment entry which was first made is obviously no judgment at all. The jury had returned a verdict for $3,756.35, but the order as entered in the journal of the court gives the plaintiffs no sum whatever. Neither is the judgment for costs therein of any value, since, without a judgment upon the verdict of the jury, the court was without jurisdiction to award a judgment for costs. Under these conditions, the court, upon having its attention called to the condition of its record, could either amend its journal entry, thereby validating it, or it could order an entry of judgment in like manner as if no attempt had been made in that direction, under authority of section 204, L. O. L., treating the former entry as a nullity, and this is just what the court did, with full notice to and actual knowledge upon the part of the defendants. It follows that the judgment entry of March 26, 1919, is the only valid judgment that has been entered in the case, and, not having been appealed from, stands as the final adjudication of the action. However, the judgment entry of December 21, 1918, although void, is appealable. Therkelsen v. Therkelsen, 35 Or. 75, 54 Pac. 885, 57 Pac. 373; O. R. & N. Co. v. Eastlack, 54 Or. 196, 102 Pac. 1011, 20 Ann. Cas. 692.

The order of December 21, 1918, is therefore reversed, and the cause remanded to the circuit court, with directions to enter an order vacating such entry.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Digitized by Google

BROWN et al. v. CITY OF SILVERTON.

(Supreme Court of Oregon. June 29, 1920.)

1. **Municipal corporations ⟸46 — Charter amendments held not to supersede existing charter.**

Amendments of May 7, 1917, to charter of the city of Silverton, under Const. art. 2, § 2, and article 4, § 1a, by adding thereto sections 135–138, *held* to merely supplement and not take the place of the then existing charter, notwithstanding Const. art. 4, § 22, requiring that the revised act or amended sections shall be set forth and published at length, such constitutional provision having no application where the legislation merely adds new sections to an existing act without modifying or altering the original act.

2. **Statutes ⟸141(2) — Constitutional provision as to amending a statute inapplicable where new sections are added.**

Const. art. 4, § 22, providing that the act revised or sections amended shall be set forth and published at length, and not merely by reference to title, does not apply where the legislation merely adds new sections to an existing act without modifying or altering the original act.

3. **Municipal corporations ⟸56—Statute conferring power must provide for jurisdictional requirements.**

Statutes conferring power upon cities and towns must provide for all jurisdictional requirements compelled by the Constitution, but may, if the Legislature chooses, add to such jurisdictional requirements, though Legislature is not required to so do.

4. **Municipal corporations ⟸56—Jurisdictional requirements must be complied with.**

A city or town in exercising a given power must heed every jurisdictional requirement regardless of whether it is purely statutory or required by the Constitution.

5. **Municipal corporations ⟸443—Jurisdictional requirements must be complied with.**

Failure to observe a jurisdictional requirement, whether organic or statutory, will usually defeat an ordinance requiring an improvement and invalidate an ordinance for an assessment.

6. **Municipal corporations ⟸298 — Owners have constitutional right to be heard.**

Statute providing for special improvements must entitle owners to be heard at some stage of the proceedings, the owners' right to be heard being a constitutional right.

7. **Municipal corporations ⟸297(1)—Right to file remonstrance against improvements statutory.**

The right to file an operative and self-executing remonstrance against improvements exists only where the statute creates the right.

8. **Municipal corporations ⟸297(1)—Mistake as to sufficiency of remonstrance held not to oust council of jurisdiction.**

That city council, when passing upon remonstrance to special improvements by abutting owners under Charter of City of Silverton, § 71 (as in force in 1914), *held* a sufficient remonstrance insufficient because of a mistake in construction of charter provisions as to sufficiency of remonstrance, did not affect the sufficiency of the remonstrance to oust the council's jurisdiction to make the improvement.

9. **Taxation ⟸2—Attribute of sovereignty.**

The power to tax is an attribute of sovereignty.

10. **Municipal corporations ⟸406(1)—Special assessment based on power of taxation.**

The power to levy a special assessment, though it is to be differentiated from a pure tax, is a branch of the power of taxation, and when exercised is a manifestation of sovereignty.

11. **Constitutional law ⟸121(2) — Remonstrance to improvements held not to create contractual obligations.**

The filing of an operative and self-executing remonstrance to construction of a special improvement by abutting owners under City of Silverton Charter, § 71 (as in force in 1914), conferring on abutting owners the right to file such a remonstrance, would not result in a contract with attending contractual rights and obligations, the fundamental doctrines of special assessments not being based upon the principles of contract.

12. **Municipal corporations ⟸514(2)—Legislature may reassess and cure defect.**

The Legislature may ratify and cure, through reassessment, that which might have been constitutionally and lawfully authorized in the first instance, but cannot validate retrospectively what it could not have originally authorized, the power to validate a tax or assessment rendered invalid by errors or omissions being an essential attribute of the sovereign power of taxation.

13. **Constitutional law ⟸290(5) — Remonstrance held not to preclude reassessment as denying due process.**

Reassessment proceedings under Charter of City of Silverton, §§ 135–138, made necessary because of invalidity of original assessment for city council's lack of jurisdiction to proceed with the improvement owing to sufficient remonstrance thereto by abutting owners under section 71, *held* not unconstitutional on the theory that it is the taking of property without due process of law, since the Legislature, in prescribing the procedure with reference to the construction of such improvement, was not required to have included the provision making a remonstrance a bar to further proceedings, and therefore the city, under the home-rule amendments, by its legislative power could amend the law so as to make the proceedings valid notwithstanding such remonstrance.

14. **Statutes ⟸263—Not construed to be retrospective unless clearly made so.**

Laws will not be interpreted to be retrospective unless by their terms they are clearly intended to be so.

Digitized by Google

15. Municipal corporations ⟸408(2)—Charter amendments providing for reassessment held to operate retrospectively.

Amendments of 1917 to city of Silverton charter, enacted by adding sections 135–138 thereto, providing for reassessment where assessment for special improvement "which has heretofore or which may hereafter be made," construed to operate retrospectively and to affect invalid assessment levied prior to amendment.

Department 1.

Appeal from Circuit Court, Marion County: Percy R. Kelly, Judge.

Action by J. M. Brown and others against the City of Silverton. Decree of dismissal, and plaintiffs appeal. Affirmed.

This is a suit to enjoin the city of Silverton from collecting a reassessment made on account of a street improvement. Section 71 of the municipal charter, which was in force in 1914, empowered the council to improve the streets; but this section of the charter also provided that "the owner or owners of two-thirds of the property next adjacent thereto may make and file with the council a written remonstrance against the proposed improvement, and thereupon the same shall not be proceeded with." The charter made the abutting property liable for the cost of street improvements. Laws 1891, pp. 539 and 542. In April, 1914, the council ordered that McClaine street be covered with a hard-surface concrete pavement, and caused notices to be published of its intention to pave the street. Within the time fixed by the charter the plaintiffs and other abutting owners filed a remonstrance against the proposed improvement. Acting on the theory that only the front footage of the adjacent property should be counted on the remonstrance, the council decided that the remonstrance did not represent "two-thirds of the property next adjacent" to the improvement, and a contract for laying the pavement was let to C. A. Hartley on July 15, 1914. The contractor laid the pavement, and on October 21, 1914, upon the recommendation of the city engineer, the council accepted the improvement. Subsequently, in conformity with the directions of the charter, the council passed an ordinance assessing the cost of the improvement against abutting property.

On June 14, 1914, J. G. Lais, together with J. M. Brown, E. J. Brown, M. Small, J. H. Brewer, A. F. Blackerby, and Sophia Blackerby, the plaintiffs in the present suit, commenced a suit to enjoin the municipal authorities from letting the contract and proceeding with the improvement. The city answered by claiming that the remonstrance did not represent the necessary number of front feet to make it effective. After hearing the evidence in that case the circuit judge decided that the remonstrance was insufficient, and rendered a decree dissolving a preliminary injunction and dismissing the suit, and then the plaintiffs in that case appealed. Instead of discontinuing the work pending the appeal, the city proceeded with the improvement and completed it before the appeal was heard in this court. The appeal finally terminated on January 16, 1917, in a decree enjoining the city from assessing the abutting property with the cost of the improvement. The decree in this court was based upon our conclusion that under the terms of the charter the sufficiency of the remonstrance should be measured by the superficial area of the abutting property, and not by the number of front feet "adjacent" to the improvement, and that when so measured the remonstrance was sufficient to prevent the improvement. Lais v. Silverton, 77 Or. 434, 147 Pac. 398, 150 Pac. 269, 151 Pac. 712; Lais v. Silverton, 82 Or. 503, 162 Pac. 251.

Acting under the authority of article 2, § 2, and article 4, § 1a, of the state Constitution, the legal voters of Silverton at an election held on May 7, 1917, amended the charter by adding to it sections numbered 135, 136, 137, and 138. The amendment, so far as it is material here, reads as follows:

"An act submitted by the common council of the city of Silverton, Marion county, Oregon, to the legal voters thereof to amend an act entitled 'An act to incorporate the city of Silverton, Marion county, state of Oregon,' filed in the office of the secretary of state on the 18th day of February, 1891, to provide that whenever any assessment to cover the cost of any public improvement heretofore or hereafter made shall be annulled, set aside, or declared to be invalid, or shall be repealed by any court or other tribunal, or by the council, the council may, by ordinance, reassess the cost of such improvement upon the properties benefited to the extent of their respective and proportionate share of the full cost of said improvement.

"Be it enacted by the people of the city of Silverton, Marion county, state of Oregon:

"Be it enacted by the common council of the city of Silverton, Marion county, state of Oregon:

"The city charter of the city of Silverton, Marion county, state of Oregon, is hereby amended to read as follows:

"Sec. 135. Whenever any assessment for the opening, altering, grading or other repair or improvement of any street, or the construction, reconstruction or repair of any water or sewer plants, systems, mains or laterals, or for any local improvement whatsoever which has heretofore, or which may hereafter be made by the city has been, heretofore, or shall hereafter be, set aside, annulled, vacated or declared void, or its enforcement enjoined or refused by any court, directly or indirectly, or when the council shall be in doubt as to the validity of any assessment, or any part thereof, the council

Digitized by Google

may, by ordinance, make a new assessment or reassessment upon the lots, blocks or parcels of lands which have been benefited by such improvement, to the extent of their respective and proportionate share of the full value thereof. Such reassessment shall be based upon the special and peculiar benefit of such improvement, to the respective parcels assessed, at the time of the original making of the improvement, but shall not exceed the amount of such original assessment. Interest thereon at the legal rate may be added from the time when such improvement was completed at the discretion of the council. Such reassessment shall be made in an equitable manner, and as nearly as may be in accordance with the provisions of the charter in force at the time it is made. But the council may adopt a different plan of apportionment of benefits when, in its judgment, essential to secure an equitable assessment. The proceedings required by this charter to be had prior to the making of the original assessment shall not be required to be taken or had within the intent of this section in the making of such reassessment.

"Sec. 136. Such reassessment shall be made and shall become a charge upon the property upon which the same is laid, notwithstanding the omission, failure or neglect of any officer, body or person to comply with the provisions of the charter of the city of Silverton, or laws of the State of Oregon, connected with or relating to such improvement or assessment, and notwithstanding the proceeding of the council, or any other officer, board or body, or public authority, contractor or any other person connected with such work or contract may have been defective, irregular or void, and notwithstanding any such irregularity or defect may be jurisdictional, and the provisions hereof authorizing a reassessment shall apply where an improvement has been made, notwithstanding a remonstrance sufficient to defeat the same shall be filed, in the same manner and to the same extent as the provisions hereof would apply in the case of any other defect, irregularity or circumstance rendering the proceeding void. The council shall, by resolution declare the district, and designate the properties that have been or will be benefited by the improvement for which the reassessment is made, and shall direct the recorder to prepare a preliminary assessment upon the property included therein, within a time to be fixed by such resolution. Upon the passage of such resolution the recorder shall, as soon thereafter as such reassessment is prepared, give notice by two successive publications in one of the city newspapers that such preliminary assessment is on file in his office, giving the date of the passage of the resolution directing the making of the same, and stating the time at which the council will hear and consider the objections to said reassessment by parties aggrieved thereby and notifying such persons not to depart from any such hearing or meeting until such reassessment has been completed. And the auditor shall forthwith, following the passage of such resolution also mail to the owner of each lot thereof, or tract of land affected by such assessment, or to his agent, at the last known postoffice address thereof, notice substantially similar to that required to be published. If the postoffice address be unknown, then such notice shall be mailed to such owner or agent at Silverton, Marion county, Oregon.

"Sec. 137. The owner of any property which is assessed on such reassessment, or any person having interest therein, may, within ten days from the date of the last publication of the published notice, file with the recorder objections in writing to such assessment. At the time appointed in such published notice the council shall hear and determine all objections which may have been filed by any interested party. The council shall have the power to adjourn such hearing from time to time and, in its discretion, to revise, correct or set aside such preliminary assessment and order the remaking thereof, and pass an ordinance approving and confirming such reassessment as corrected and remade by it. And the decision of the council shall be final with respect to the regularity, validity and correctness of the reassessment. When such reassessment is completed and confirmed it shall be entered in the docket of city liens, and shall be enforced and collected in the same manner that other assessments for local improvements are enforced and collected under this charter and the laws governing the city of Silverton."

Pursuant to the authority conferred by the amendment, the council on August 6, 1917, regularly declared its intention to reassess the "adjacent" lands benefited by the improvement to the extent of their proportionate share of the cost. The council also defined the district which had been benefited by the improvement, and directed the recorder to prepare a preliminary assessment upon such designated property. The recorder made a preliminary assessment, and a notice was duly published stating that the council would convene on September 4, 1917, and hear any objections that might be made. The plaintiffs appeared and interposed objections to the proposed reassessment; but the council disallowed the objections, and then passed a reassessment ordinance charging the cost of improving McClaine street "against the property adjacent to and abutting upon said portion of said street which has been specially and peculiarly benefited by such improvement to the extent of its respective and proportionate share of the full value thereof." After the enactment of the reassessment ordinance the plaintiffs brought this suit for the purpose of annulling the reassessment proceedings. A trial in the circuit court resulted in a decree dismissing the suit without the costs, and the plaintiffs appealed.

W. C. Winslow, of Salem, and Richard W. Montague, of Portland, for appellants.

John H. McNary of Salem (McNary & McNary and E. M. Page, all of Salem, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). The plaintiffs contend: (1) That the pavement was not laid in accordance with the terms of the contract; (2) that because of its form the amendment adopted by the

Digitized by Google

legal voters of Silverton in 1917 displaced and supplanted the original charter, with the result that the amendment alone constitutes the whole charter; and (3) that the reassessment proceedings are unconstitutional and void for the reason that they amount to a taking of property without due process of law.

The complaint alleges that the contractor failed to comply with his contract by failing to roll the subgrade with a 10-ton roller "until same made no impression thereon"; by estimating the component parts of the pavement instead of measuring them; by using cement without submitting samples to the city; by neglecting to tamp the mixture placed in position on the street with iron-shod rammers; and by permitting heavy loads to be hauled over the pavement before it hardened. The same contention, based upon the same grounds of alleged failure of performance, was urged in McClaine v. Silverton, 83 Or. 26, 162 Pac. 496, where, when speaking of the same contract and the same improvement as are involved here, it was said that the evidence submitted there did not justify this court in reviewing the conclusion of the municipal authorities that there was a substantial compliance with the contract. A transcript of the evidence submitted in McClaine v. Silverton was by a stipulation of the parties here received as evidence in the present case. In addition to the transcript referred to, the trial court heard the testimony of eight witnesses, of whom three were called by the plaintiffs and five by the defendants. The trial court in the instant case found from the evidence that "said improvement was completed substantially as agreed upon." Here, as in McClaine v. Silverton, the evidence is conflicting, and after a careful examination of the whole record we do not feel justified in disturbing the findings of the trial judge.

[1] The contention that the amendment constitutes the whole charter is without merit. In 1891 the Legislature enacted a charter consisting of 130 sections. Laws 1891, p. 530. In 1911 the legal voters exercised the power of the initiative, and added sections 131, 132, 133, and 134 to the charter. The amendment of 1917 merely enlarges the then existing charter by adding four sections, and by numbering them consecutively with reference to the 134 sections of the then existing charter. The amendment of 1917 conferred the power of reassessment where that power did not previously exist. The amendment of 1917 was not enacted as a revision of the original charter, nor as a substitute for all that had been done before; but it was passed as a supplement to the then existing charter. The amendment did not change or modify a single word in any of the 134 preceding sections. Sheridan v. Salem, 14 Or. 328, 12 Pac. 925, is a precedent squarely in point, for there the facts were like those presented here, and it was there ruled that the amendment was not controlled by article 4, § 22, of the state Constitution, which commands that "no act shall be revised or amended by mere reference to its title, but the act revised or sections amended shall be set forth and published at length."

[2] Even though we assume, without deciding, that article 4, § 22, of the state Constitution, governs not only the legislative assembly when adopting an act, but also controls the legal voters of cities and towns when exercising the power of the initiative, nevertheless this section of the Constitution does not apply to the amendment of 1917, for the reason that legislation which does no more than to add new sections to an existing act, without modifying or altering the original act, does not come within the embrace of constitutional provisions like article 4, § 22, of our Constitution. 25 R. C. L. 875.

The principle announced and applied in Nottage v. Portland, 35 Or. 539, 58 Pac. 583, 76 Am. St. Rep. 513; Phipps v. Medford, 81 Or. 119, 156 Pac. 787, 158 Pac. 666; Wagoner v. La Grande, 89 Or. 192, 173 Pac. 305—supports the conclusion that the reassessment proceedings are constitutional and valid. See, also, Wilson v. Portland, 87 Or. 507, 514, 169 Pac. 90, 171 Pac. 201; Ukase Investment Co. v. Portland, 186 Pac. 558; Gardner v. Portland, 187 Pac. 306. Although our conclusions could be securely rested upon the precedents already mentioned, yet, because of the earnest and learned arguments made by counsel for the plaintiffs in their written brief and at the hearing, we have examined the subject anew.

Jurisdictional requirements concerning street improvements and special assessments may, for the purposes of this discussion, be divided into two classes: (1) Those which arise out of and are compelled by organic law; and (2) those which arise out of and are compelled only by statutory law. Gray on Limitations of Taxing Power, 616. The first class finds its source in written constitutions; the other in legislative assemblies.

[3] When any given power is, by a statute enacted by a legislative assembly, conferred upon cities and towns, that statute must, in order to make such power available, provide for all jurisdictional requirements compelled by the Constitution; but the Legislature need not, although it may if it chooses, add to such jurisdictional requirements as are compelled by the Constitution. Jurisdictional acts made necessary by the organic law may for present purposes be termed indispensable, for the reason that any attempt by legislation to confer a power is ineffective unless provision is made for such jurisdictional acts; while those made necessary by statute only, and not required by the Constitution, may be called dispensable, for the reason that the Legislature is not obliged to provide for them, although

Digitized by Google

it may do so if it wishes. If the Legislature does prescribe jurisdictional acts in addition to those required by the Constitution, then the sum of these jurisdictional requirements, organic and indispensable as well as statutory and dispensable constitutes the mode, and therefore the measure, of the power exercisable by the municipality.

[4, 5] So far as the city or town is concerned it is obliged to heed every jurisdictional requirement, regardless of whether such requirement is purely statutory or essentially organic in its nature, for both the Constitution, and ordinarily the Legislature, are of superior authority; and therefore failure to observe a jurisdictional requirement, whether organic or statutory, will usually defeat an ordinance ordering an improvement, and invalidate an ordinance for an assessment.

[6] The right to be heard at some stage of the proceedings arises out of the Constitution. The Legislature, when enacting the charter of 1891, complied with the Constitution, and made provision for notice and an opportunity to be heard. These were indispensable and jurisdictional requirements.

[7] The charter of 1891 also provided that a remonstrance, when signed by the owners of two-thirds of the property adjacent to the proposed improvement, should operate as a bar to further proceedings and prevent the improvement. While, strictly speaking, a sufficient remonstrance ousts jurisdiction, we may, for convenience, speak of the filing of such a remonstrance as a jurisdictional act. The effect of a remonstrance is dependent wholly upon the statute. A remonstrance may of itself evidence the disapproval of its signers, and show that they do not acquiesce in a proposed improvement; but it has no legal effect except as provided by statute. The right to file an operative and self-executing remonstrance exists only where the statute creates the right; and therefore we may speak of the remonstrance filed by the plaintiffs and others in 1914 as a dispensable jurisdictional act. Page & Jones on Taxation by Assessment, § 803; City Street Improvement Co. v. Laird, 138 Cal. 27, 70 Pac. 916; City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605.

[8] The council, it is true, when passing upon the remonstrance, decided that the sufficiency of the remonstrance should, under the terms of the charter, be measured by the number of front feet abutting upon the proposed improvement, and not by the superficial area of the adjacent property. The circumstance that the council was mistaken in its construction of the charter cannot affect the question, for the fact remains that the remonstrance was sufficient to oust the council's jurisdiction to make the improvement.

[9, 10] The power to tax is an attribute of sovereignty, and the power to levy a special assessment, although it is to be differentiated from a pure tax, is a branch of the power of taxation, and when exercised is a manifestation of sovereignty.

[11] The fundamental doctrine of special assessments is not based upon the principles of contract; and therefore the charter, conferring the right to file an operative and self-executing remonstrance, plus the filing of such remonstrance, did not result in a contract with attending contractual rights and obligations. French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232; Colby v. Medford, 85 Or. 485, 525, 167 Pac. 487; Howell v. Buffalo, 37 N. Y. 267.

As said in Nottage v. Portland, 35 Or. 539, 548, 58 Pac. 883, 884 (76 Am. St. Rep. 513):

"It may be regarded as settled that the Legislature may, unless restricted by the state Constitution, legalize or validate retrospectively a proceeding for the improvement of a street which it might have authorized in advance, and it may also cure defects in or make immaterial statutory requirements which it could have dispensed with in the first instance."

The doctrine, as expressed in Frederick v. Seattle, 13 Wash. 428, 432, 43 Pac. 364, 365, is as follows:

"The rule deduced from all the authorities seems to be, in substance, that if the Legislature had the power in the first instance to make valid the assessment without the requirement which was disregarded by the authorities, it can by Legislative enactment dispense with that requirement in providing for a new assessment."

[12] In brief, the Legislature may ratify and cure through reassessment that which it might have constitutionally and lawfully authorized in the first instance. The power to validate a tax or assessment rendered invalid by errors or omissions is an essential attribute of the power vested in the Legislature in its control over the sovereign power of taxation, and is necessarily without limit except as restricted or limited by the Constitution, in cases where the Legislature could originally authorize the tax or assessment, although it cannot validate retrospectively what it could not originally have authorized. If a jurisdictional act is a "dispensable act" within the meaning of those words as here used, the rule, subject to certain possible exceptions, is that the Legislature can cure a defect, which has resulted from failure to do a dispensable jurisdictional act, by providing for a reassessment. Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232; People v. Supervisors, 26 Mich. 22; In re Commissioners of Elizabeth, 49 N. J. Law, 488, 10 Atl. 363; Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578; Sanderson v. Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141; Mayor v. Ulman, 79 Md. 469, 30 Atl. 43; Chester City

Digitized by Google

v. Black, 132 Pa. 568, 19 Atl. 276, 6 L. R. A. 802; Gray on Limitations of Taxing Power, § 1282 et seq.; 25 R. C. L. 111, 171; Hamilton on Special Assessment, § 823; Reiff v. Portland, 71 Or. 421, 427, 141 Pac. 167, 142 Pac. 827, L. R. A. 1915D, 772.

Reassessment proceedings have been sustained: Where the reassessment was levied to pay for an improvement for which, when the improvement was made, there was no statutory authority to levy an assessment as to a part of the improvement, and for which part the municipality had determined to pay by general taxation (Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232); where the petition for the improvement did not contain the names of owners of one-half of the property fronting on the proposed improvement (Nottage v. Portland, 35 Or. 539, 58 Pac. 883, 76 Am. St. Rep. 513); where the work was done under a void contract (Wagoner v. La Grande, 89 Or. 192, 173 Pac. 305); where there was a failure to observe a provision of the charter requiring the giving of notice before commencing the construction of the improvement (Phipps v. Medford, 81 Or. 119, 156 Pac. 787, 158 Pac. 666); where the original assessment was void because of the failure to procure the consent of the necessary number of property owners (In re Van Antwerp, 56 N. Y. 261); where the original assessment was void because the contract for the improvement was illegally let (St. Paul v. Mullen, 27 Minn. 78, 6 N. W. 424); where the order directing the improvement was void because of jurisdictional defects (State v. District Court, 95 Minn. 183, 103 N. W. 881); where the order for the improvement was void because made without a certificate of the city assessor (Howell v. Buffalo, 37 N. Y. 267); where the assessment was void because there was no petition signed by the owners of more than three-fifths of the front feet abutting upon the improvement (Frederick v. Seattle, 13 Wash. 428, 43 Pac. 364); where there was no estimate of the cost submitted by the engineer of the council before making the contract (Emporia v. Norton, 13 Kan. 569, 588); where the paving was done under authority of an act subsequently declared unconstitutional (Chester City v. Black, 132 Pa. 568, 19 Atl. 276, 6 L. R. A. 802); where the order directing the improvement is by charter declared to be of no effect until the consent in writing of the owners of one-half of the front footage is obtained (Jones v. Town of Tonawanda, 158 N. Y. 438, 53 N. E. 281); and where the petition for the improvement lacks the required number of signatures (Kansas City v. Silver, 74 Kan. 851, 85 Pac. 805).

[13] The Legislature was not obliged, when it enacted the charter of 1891, to include a provision making a remonstrance signed by any given number of owners operative and self-executing. The provision making a remonstrance a bar to further proceedings could have been omitted, for it was a "dispensable" jurisdictional act; and, therefore, under the rules so well established by the authorities, the Legislature could, prior to the adoption of the home-rule amendments to the Constitution, have passed a special act providing for a reassessment and applying to Silverton alone. See Page & Jones on Taxation by Assessment, 1624; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844. In other words, the Legislature, in the exercise of its power to amend a municipal charter by a special law, could, prior to 1906, have adopted the very amendment which the legal voters of Silverton themselves adopted, and such special law would have been constitutional. The amendment involved was concerning an intramural power, and was within the scope of the legislative authority of the legal voters of Silverton; and it is therefore valid to the same extent as though it had been passed as a special law by the Legislature prior to 1906. State ex rel. v. Port of Astoria, 79 Or. 1, 17, 154 Pac. 399. However, nothing said here is to be construed as a judicial affirmation of the validity of section 138 of the amendment, for the question of the validity of that section is not involved in the instant case.

[14] The plaintiffs argue that the amendment should not be construed so as to operate retrospectively. It is true, as contended by the plaintiffs, that the settled rule of construction is that laws will not be interpreted to be retrospective unless by their terms they are clearly intended to be so. Wist v. Grand Lodge A. O. U. W., 22 Or. 271, 282, 29 Pac. 610, 29 Am. St. Rep. 603; Catterlin v. Bush, 39 Or. 496, 59 Pac. 706, 65 Pac. 1064.

[15] As we read the amendment it clearly and plainly operates, and was intended to operate, retrospectively. See Kadderly v. Portland, 44 Or. 118, 159, 74 Pac. 710, 75 Pac. 222.

It is also contended, under the amendment "in question in the case at bar, that the right of the property owner is in effect limited to a hearing upon the amount of his assessment." In our view of the amendment, it furnishes to the landowners "an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent." Spencer v. Merchant, 125 U. S. 345, 354, 8 Sup. Ct. 921, 926, 31 L. Ed. 763, 767.

Our views of the questions presented on this appeal result in the conclusion that the decree must be affirmed without costs in either court.

McBRIDE, C. J., and BENSON and JOHNS, JJ., concur.

Digitized by Google

STATE ex rel. MARTIN v. JUSTICE'S COURT OF ELKO TP. et al.
(No. 2431.)

(Supreme Court of Nevada. July 15, 1920.)

1. **Justices of the peace ⟸81(5)—Statute held to require justice to make certificate for service of summons by publication.**

In view of Civil Practice Act, § 80, as amended by St. 1913, p. 109, and section 790, as amended by St. 1913, p. 360, relating to the service of summons, a justice of the peace is under duty of making the certificate required for a proper service of summons by publication in justice court cases.

2. **Justices of the peace ⟸122(2) — Where copy of complaint not certified, justice acquires no jurisdiction.**

Where plaintiff's attorney, in a suit brought before a justice of the peace, has failed to certify the copy of the complaint accompanying the summons, or cause it to be certified by the justice, the justice court is without jurisdiction to enter a judgment against such party.

3. **Justices of the peace ⟸83(1) — Statutes prescribing mode of service to be strictly pursued.**

Statutory provisions, prescribing the manner by which a resident defendant shall be notified that an action has been commenced against him in justice's court, to the end that jurisdiction of his person may be obtained, are mandatory, and must be strictly pursued, and failure to observe them in any material manner will prevent the court issuing summons from obtaining jurisdiction of the defendant's person.

4. **Justices of the peace ⟸84(6)—General appearance by demurrer after default not waiver of defects in service.**

While a general appearance by demurrer prevents the party appearing from subsequently complaining of want of proper service of summons, where a demurrer was presented and filed after the time to answer in a justice court had expired, and after default and judgment had been duly entered, such appearance did not constitute a waiver of objection to the sufficiency of the service, since the subsequent filing of the demurrer could not operate retrospectively to give life to a void judgment.

5. **Judgment ⟸136—Statute authorizing relief from default for mistake, etc., held inapplicable to judgment void for lack of jurisdiction.**

Rev. Laws, § 5742, empowering the court to relieve a party from a judgment by default because of mistake, inadvertence, surprise, or excusable negligence, *held* not to apply to a judgment wholly void for lack of jurisdiction of the person of the defendant.

6. **Judgment ⟸145(2)—Right to relief from void default judgment is absolute.**

A party's right to relief from a judgment wholly void because of lack of jurisdiction of his person is absolute, and not dependent upon a showing of meritorious defense, under Rev. Laws, § 5742.

7. **Justices of the peace ⟸198—That judgment, sought to be annulled, has been satisfied, no bar.**

That a void default judgment, taken in the justice's court, has been satisfied and discharged, does not prevent proceedings by certiorari to annul it.

Appeal from District Court, Elko County; E. J. L. Taber, Judge.

Action by H. Sutton against Kirk E. Martin before a justice of the peace. A judgment against defendant by default was entered, and defendant brought certiorari. From an order overruling the demurrer of the justice to a petition for a writ of review, and from a judgment entered thereon, reversing the judgment of the justice, the Justice Court and its justice, J. C. Doughty, appeal. Affirmed.

Milton B. Badt, of Elko, for appellants.
C. A. Eddy, of Ely, for respondent.

DUCKER, J. This is an appeal from an order of the Fourth judicial district court, overruling the appellants' demurrer to a petition for a writ of review, and from the judgment entered thereon, reversing and annulling the judgment of the justice of the peace in an action entitled, H. Sutton, Plaintiff, v. Kirk E. Martin, Defendant.

The portion of the record containing the return made by the justice of the peace to the writ of certiorari issued by the district court shows that the action was instituted in the justice's court of Elko township, Elko county, Nev., and that summons was personally served on the defendant in White Pine county, Nev., April 5, 1919. On April 26, 1919, a default was taken, and judgment entered against the defendant and in favor of the plaintiff. Thereafter on the same day a demurrer was received through the mail by the justice and filed. An execution was issued on the 26th day of April, 1919, and the return of the justice, as it was subsequently completed pursuant to a stipulation entered into by counsel for the parties, shows that the execution was duly levied and the judgment satisfied except as to a small portion thereof. The unsatisfied portion was waived by the judgment creditor, as appears by the return to the execution. It appears from the record that the copy of the complaint served with the summons was not certified by the justice of the peace or the plaintiff's attorney. For this defect the district court held that the justice's court was without jurisdiction to enter a default judgment, and annulled the same in the certiorari proceedings.

The sections of the Civil Practice Act, so far as they are applicable to the question, read as follows:

Digitized by Google

"The summons may be served by a sheriff or constable of any of the counties of this state, or by any other person of the age of twenty-one years or over, not a party to the action, and said summons must be served and returned, as provided in chapter 8 of this act, or it may be served by publication. * * *" Section 790, Civil Practice Act, as amended, Session Laws 1913, p. 360.

"The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by any citizen of the United States over twenty-one years of age; and, except as hereinafter provided, a copy of the complaint, certified by the clerk or the plaintiff's attorney, shall be served with the summons. * * *" Section 80, Civil Practice Act, as amended, Session Laws 1913, p. 109.

[1] The exception mentioned in the last section clearly refers to service by publication. In all other cases the copy of the complaint served with the summons must be certified by one of the persons designated in the statute. This is the plain import of these sections of the Civil Practice Act. The law does not provide for a clerk in the justice's court, but as the justice, in addition to his judicial duties, is required to perform all duties of a clerical nature, it seems quite obvious that the Legislature intended that this officer could make the certificate required for a proper service of summons in justice court cases. Marooney v. McKay, 3 Or. 373.

[2] Did the failure of respondent's attorney to certify the copy of the complaint accompanying the summons in this case, or cause it to be certified by the justice of the peace, deprive the justice court of jurisdiction to enter the judgment against respondent? We are of the opinion that it did. This requirement is one of substance, designed to assure the defendant of the authenticity of the copy of the complaint served, which informs him of the nature of the action and the judgment demanded. It can no more be dispensed with than other statutory requirements essential to a proper service of summons.

[3] Statutory provisions prescribing the method by which a resident defendant shall be notified that an action has been commenced against him in a justice's court, to the end that jurisdiction of his person may be obtained, are mandatory, and must be strictly pursued, and failure to observe them in any material manner will prevent the court issuing summons from obtaining jurisdiction of the person of the defendant. Regean v. Harrington, 31 Mont. 294, 78 Pac. 484, 485. See, also, McMillan et al. v. Reynolds, 11 Cal. 372.

[4] Appellants contend that the defendant's general appearance, made by filing a demurrer in the cause, was a waiver of any objection to the sufficiency of the service. That a party who appears generally by demurrer cannot subsequently complain of want of proper service of summons upon him is a uniformly recognized rule, but applicable only where such general appearance is made prior to the judgment or other proceedings, questioned on account of such defective service.

In this case the demurrer was presented and filed after the time to answer had expired, and after default and judgment had been duly entered. The judgment was rendered without any previous valid service of summons upon the defendant, and for this reason was not merely voidable, but void. The subsequent filing of the demurrer could not therefore operate retrospectively to give life to a void judgment.

[5] Appellants assert that there is another plain, speedy, and adequate remedy, and on this ground deny respondent's right to invoke the remedy of certiorari. Section 5742 of the Revised Laws, it is said, furnishes this remedy. The only portion of the section which might be considered applicable reads:

"The court may also, on such terms as may be just, and on the payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor."

[6] The district court held that this provision did not apply to a judgment wholly void for the lack of jurisdiction of the person of the defendant, and we think the court was right in this conclusion. A defendant against whom such a judgment has been rendered is entitled to be relieved from its effects without being penalized to any extent. So it is clear from the provisions of this statute, providing terms and the payment of costs as conditions of relief from a judgment by default taken against a party by reason of his mistake, inadvertence, surprise, or excusable neglect, that judgments void for want of jurisdiction are not within the scope of the statute. A party's right to relief from such a void judgment is absolute, and not dependent upon any of the elements of excuse enumerated in the statute; nor is it dependent upon any showing as to a meritorious defense, which must appear in the affidavit showing good cause for relief, as required in said section 5742.

[7] It is insisted that, because the judgment of the justice's court was satisfied and discharged before the rendition of the judgment herein appealed from, certiorari cannot lie to annul the former judgment. We are not impressed with this contention. While the ruling on this point in the case of State ex rel. Reynolds v. Laurendeau, 27 Mont. 522, 71 Pac. 754, cited by appellants, seems to be in accord with the position taken by them, the contrary view is, in our opinion, maintained by the weight of better authority. Passing upon the question in Clark v. Ostrander, 1 Cow. (N. Y.) 437, 13 Am. Dec. 546, the court said:

Digitized by Google

"The settlement and set-off of the judgment does not supersede the certiorari. The defendant, in the small judgment, did no more than he might have been compelled to do by execution. He paid it, but this will not prevent a certiorari."

In 24 Cyc. 767, 768, the rule is thus stated:

"It is no objection to the issuance of a writ of certiorari * * * that the judgment has been paid."

And again in 5 R. C. L. 258:

"It sometimes occurs that the petitioner does not seek relief by certiorari until the judgment rendered against him has been satisfied, but even this will not prevent the issuing of a writ of certiorari, or supersede one already brought."

No sound reason can be advanced why a judgment void for want of jurisdiction cannot be set aside in certiorari proceedings, solely because satisfaction of such judgment has been coerced by execution or the judgment otherwise paid.

The judgment appealed from is affirmed.

COLEMAN, C. J., and SANDERS, J., concur.

KING v. RANDALL et al. (No. 2392.)

(Supreme Court of Nevada. July 6, 1920.)

1. Indemnity ⇐3—Contract creating situation preventing removing of county seat held contrary to public policy.

Where building contractor had ceased work on a county courthouse because of a dispute as to the legality of his contract to rebuild it and threats to bring injunction proceedings against him, and where there was a movement on foot to remove county seat to other town, a contract by certain residents of the county seat to reimburse the contractor for any loss he should sustain in his further prosecution of the work in consideration of his proceeding therewith, entered into in order to procure rebuilding of courthouse before removal of county seat, and thus create a situation which would influence public sentiment against the change *held* unenforceable as contrary to public policy.

2. Evidence ⇐10(1)—Court will take judicial notice of removal of county seat by Legislature.

The court will take judicial notice of the fact that the county seat was removed by the Legislature.

3. Contracts ⇐102 — Contracts operating to public detriment void.

All contracts the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, regardless of whether in a particular case the purpose of the contract is effectuated.

Appeal from District Court, Lyon County; T. C. Hart, Judge.

Action by George F. King against D. P. Randall and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. E. Hull, of Yerington, for appellant.

Warren Hauser, of Yerington, for respondents.

COLEMAN, C. J. Appellant, who was plaintiff in the district court, brought this action to recover upon the following contract:

"Memorandum of Agreement.

"Whereas, the county commissioners of Lyon county, Nev., have entered into a contract in writing with one George F. King under the terms of which said King is to rebuild the county courthouse at Dayton, in said county; and

"Whereas, there is some dispute as to the legality of proceeding under said contract, and a suit and injunction are threatened by certain residents of said county to tie up the said work;

"Now, therefore, we, the undersigned residents and taxpayers of Lyon county, Nev., and each of us, in consideration that said King will proceed to order the material necessary and employ the laborers and go forward with the construction of said courthouse, do hereby promise and agree and bind ourselves jointly and severally to save said King harmless from any and all illegality of said contract, and to repay to him any and all sums he may pay or become liable for in connection with the rebuilding of said courthouse, in case the said contract, or the manner in which it was let, should be held illegal, and in case the county officials shall be prevented by law or otherwise from paying to said King the contract price of said building or any part thereof.

"In consideration of the foregoing, said King hereby agrees and binds himself to go forward with the reconstruction of said building in all respects as required in said contract until such time as he may be prevented from doing so by an order of court.

"Dated Dayton, Nev., March 14, 1910.

"D. P. Randall, A. J. Loftus, Bert Baroni, W. B. Sayers, Byron Gates—Residents and Taxpayers. Geo. F. King, Contractor."

The complaint alleges that upon the 26th day of July, 1910, plaintiff entered into an agreement with the board of county commissioners of Lyon county, Nev., whereby it was agreed that in consideration of the stated compensation he was to furnish the necessary material and do the labor for the rebuilding of the county courthouse of said county at Dayton, the county seat thereof; that at and prior to the 14th day day of March, 1910, certain residents and taxpayers of said county claimed, and where then claiming, that the contract for the rebuilding of said courthouse was invalid, and had threatened and were threatening to commence an action in the district court of said

Digitized by Google

county to enjoin the further prosecution of the work and to prevent the payment to plaintiff out of the funds of said county of any moneys for work and labor performed and materials furnished by plaintiff in the prosecution of the work of rebuilding said courthouse.

It is further averred that, because of said claim of said residents and taxpayers, and said threatened action, and the possibility that plaintiff might not be able to collect the moneys due for said work and materials so furnished, on March 14, 1910, he desired to and was about to cease work upon said courthouse and delay the ordering of labor and material therefor, and that the defendants (respondents), and each of them, were desirous, and considered it to be for their benefit and welfare, that the work of rebuilding said courthouse should be continued and diligently prosecuted until completed. It is also alleged:

"That at said times last herein mentioned an effort was being made by certain residents of said county to have the county seat of said Lyon county changed from said town of Dayton to the city of Yerington, in said county, and it was considered by said defendants and by each of them that said change was in immediate danger of being made, but that, if the rebuilding of said courthouse was completed before the removal of said county seat could be brought to an issue, the effort to change said county seat would fail; that the defendants were then residents and taxpayers and the owners of real and other property within said town of Dayton, and would be damaged by the removal of said county seat from said town of Dayton, and did not desire that such change should be made."

It is further alleged that, in order to induce plaintiff to continue the work of rebuilding said courthouse, the defendants executed, acknowledged, and delivered to plaintiff the written agreement above set out, and that in reliance upon said writing, he did order material and employ labor and continue with the work; that on March 16, 1910, an action was commenced in the district court of said county to restrain the plaintiff from proceeding with the work and to restrain the officers of said county from paying to plaintiff out of the county funds any sum or sums on account thereof, and that a temporary restraining order as prayed was issued, which upon final hearing was made permanent.

It is further alleged that, relying upon the contract, plaintiff incurred certain obligations, because of which the defendants became indebted to the plaintiff in the sum of $2,199.45, which, though often demanded, defendants have refused to pay.

To this complaint a general demurrer was filed, and, upon its being sustained, plaintiff not electing to amend, judgment was entered in favor of the defendants, from which this appeal is taken.

In sustaining the demurrer the lower court held that the contract sued upon was contrary to public policy. It is conceded by appellant that any contract which is against public policy is void. The only question is: Is the contract one which is contrary to public policy?

[1] What was the purpose of the contract? Of this there can be no doubt. Its clear purpose was by procuring the rebuilding of the courthouse to create a situation which would so influence the public sentiment of the county that it in turn would make itself felt in such a way as to result in the retaining of the county seat of Lyon county at Dayton, notwithstanding the fact that the public interest might demand its removal to Yerington. That such a contract is contrary to public policy we do not question. The general rule sustaining this view is thus stated in 13 C. J. p. 437:

"When the general public is interested in the location of a public office, a contract to influence its location at a particular place for individual benefit or personal gain is against public policy."

The same doctrine is asserted in 6 R. C. L. p. 747, § 152, as follows:

"Moreover, it has been said that any contract made for the purpose of securing the location of a public office, such as a post office, in any certain part of the city or elsewhere, or which prevents, or tends to prevent, the change or removal of such office, when the necessities of business or the interest of the public demand such change or removal, is opposed to public policy, and void, as tending to the injury of the public service, and as subordinating the public welfare to individual convenience or gain."

The Supreme Court of Indiana, in the case of Elkhart Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746, in considering the validity of a contract to procure the locating of the post office on a certain lot, said:

"There are many phases of injury to the public service, and we do not deem it necessary to examine the cases upon the subject; for we think it quite clear that a contract which is made for the purpose of securing the location of an important office connected with the public service for individual benefit, rather than for the public good, tends to the injury of the public service. The case made by the evidence falls fully within the principle that contracts which tend to improperly influence those engaged in the public service, or which tend to subordinate the public welfare to individual gain, are not enforceable in any court of justice. Pollock, Prin. of Cont. 279; Anson, Cont. 175; 1 Whart. Cont. §§ 402 to 414, inclusive. A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare. * * *

"It is not necessary that actual fraud should

Digitized by Google

be shown; for a contract which tends to the injury of the public service is void, although the parties entered into it honestly and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was in fact done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. An English author says: 'But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void.' Pollock, Prin. of Cont. 286. In the case of Tool Co. v. Norris, 2 Wall. 45, the court said: 'All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.'"

In Fuller v. Dame, 18 Pick. (Mass.) 472, wherein the validity of a contract and note was in question, the consideration of which was the procuring of the establishment of a railroad depot near the property of the defendant Dame in Boston, the court, speaking through Chief Justice Shaw, held the contract and note void, as without consideration and against public policy. The court, speaking of the establishing of the depot and of the consequences of such a contract as was sued on, used the following language:

"It is also true that it was left to the corporation and the directors, to fix the termination and place of deposit. In doing this a confidence was reposed in them, acting as agents for the public, a confidence which, it seems, could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried, and had goods to be carried—that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests to be affected and controlled by considerations having no regard to such interests."

In Woodman v. Innes, 47 Kan. 26, 27 Pac. 125, 27 Am. St. Rep. 274, the court, in speaking of a contract to influence the locating of a post office, said:

"Any contract which is made for the purpose of securing the location of such an office, or which prevents, or tends to prevent, the change or removal of such an office, when the necessities of business or the interest of the public demand a change or removal, tends to the injury of the public service, and therefore is against public policy. Such contracts as referred to in the petition tend to improperly influence those engaged in the public service, and also tend to subordinate the public welfare to individual convenience or gain. Parties should not be permitted to make contracts which induce personal or private interest to overbear public duty or public welfare."

In a note to Edwards v. Goldsboro, 4 L. R. A. (N. S.) on pages 589, 590, the editor tersely states the rule as follows:

"Every court in the land would doubtless assent to the proposition that any contract, made chiefly in contemplation of private advantage, for the purpose of securing the location of a building in which the public has an interest, or for the purpose of preventing its removal when the necessities of business or the public interest demand it, tends to the injury of the public service, and is therefore void; that the tendency of these contracts is improperly to influence public servants, and to subordinate the public welfare to private gain; and that even the making of them should be prohibited where they induce individual interest to overbear the public welfare. The principle of public policy itself is not troublesome in this connection, except in the application of it."

In Davis v. Janeway, 55 Okl. 725, 155 Pac. 241, L. R. A. 1916D, 722, the decisions are reviewed at considerable length, and some apparently conflicting ones distinguished.

[2, 3] The rule is so well established, and founded upon such a wholesome theory, that any contract entered into for personal gain, as was the one in question by defendants, for the purpose of creating a situation with the sole purpose of preventing the removal of the county seat of the county, regardless of the public interest, is contrary to public policy, that we see no escape from adopting that view. It is not a question as to the success of the scheme which we must look to, for we will take judicial notice of the fact that the county seat was removed by the Legislature at its succeeding session, but purely one of the general tendency of such contracts. The courts cannot draw the line and say that up to a certain point a contract which is made to influence the creation of a situation repugnant to the interest of the public is not against public policy, and hence is valid, but beyond that point it is void; and therefore it must be asserted that all contracts the purpose of which is to

Digitized by Google

create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in a particular case the purpose of the contract is effectuated. Nor can we consider the moral obligation resting upon the defendants to comply with their contract. That is a plea which must be made to their sense of integrity and standing as men who have regard for their pledged word in the community in which they live.

For the reasons given, the judgment is affirmed.

SANDERS and DUCKER, JJ., concur.

STATE ex rel. HART-PARR CO. v. DISTRICT COURT OF MUSSELSHELL COUNTY. (No. 4638.)

(Supreme Court of Montana. June 1, 1920.)

1. Judgment ⟸155—Plaintiff entitled to notice of defendants' motion to set aside default.

Under Revised Codes, § 6589, plaintiff was entitled to notice of defendants' motion to set aside their default and permit them to file answer on ground their failure to appear was due to excusable neglect, and without such notice the court had no authority to set default aside.

2. Judgment ⟸145(2)—Motion to set aside default insufficient without affidavit of merits or copy of answer.

Defendants' motion to set aside their default and that they be permitted to file answer on ground failure to appear was due to excusable neglect was insufficient in absence of affidavit of merits or copy of proposed answer.

Original application by the State, on the relation of the Hart-Parr Company, for order annulling order of the District Court of Musselshell County. Order annulled.

John McKenzie, of Great Falls, for appellant.

Carl N. Thompson, of Roundup, for respondent.

BRANTLY, C. J. This is an original application to this court for an order, under its supervisory power, annulling an order of the district court of Musselshell county.

[1, 2] On February 4 of this year, in an action pending in the district court of Musselshell county in which the relator is plaintiff and Mike Kerzan and others are defendants, default was duly and regularly entered against all of the defendants for their failure to appear within the time allowed by law for that purpose. The purpose of the action is to obtain a decree for the foreclosure of a mortgage held by the relator upon real estate situated in Musselshell county. Before the plaintiff applied to the court for the relief demanded, the defendants filed a motion asking that the default be set aside and that they be permitted to file their answer, on the ground that their failure to appear was due to their excusable neglect. The plaintiff was not given notice of the motion, nor was it supported either by an affidavit of merits containing a statement of facts constituting the defendants' defense or by a copy of the proposed answer. The plaintiff was entitled to notice of the motion. Rev. Codes, § 6589. In the absence of notice, the court had no authority to make the order. But, even if the notice had been given, the showing made in support of the motion was wholly insufficient. It was substantially the same as that considered in the recent case of Crawford v. Pierse, 56 Mont. 371, 185 Pac. 315. It was there held that, however meritorious the motion may have been in other respects, it was wholly insufficient to move the discretion of the court because of the absence of the affidavit of merits or a copy of the proposed answer.

For these reasons, the order is annulled.

Order annulled.

HOLLOWAY, HURLY, MATTHEWS, and COOPER, JJ., concur.

STATE v. GOMEZ. (No. 4376.)

(Supreme Court of Montana. June 25, 1920.)

1. Criminal law ⟸552(3)—Circumstantial evidence must be consistent, and inconsistent with any other rational hypothesis.

To sustain a conviction on circumstantial evidence the criminatory circumstances must not only be consistent with each other but must also point clearly to the guilt of the accused, or be inconsistent with any other rational hypothesis.

2. Criminal law ⟸753(2)—Directed verdict proper, where contrary verdict would require new trial.

Where the evidence was such that had it been submitted to the jury and verdict of guilty returned the trial court must have granted a new trial, it is proper to direct an acquittal at the close of the evidence.

3. Criminal law ⟸753(2)—Acquittal properly directed where evidence insufficient to convict.

Where the evidence was wholly insufficient to sustain a conviction, direction of acquittal was proper, for Rev. Codes, § 9297, providing for advising an acquittal, applies only where the trial court deems the evidence, though tending to prove every element necessary to constitute the crime, insufficient in weight to warrant conviction.

Digitized by Google

Appeal from District Court, Silver Bow County; J. V. Dwyer, Judge.

Felix Gomez was indicted for murder, and, an acquittal having been directed, the State appeals. Order affirmed.

S. C. Ford, Atty. Gen., Frank Woody, Asst. Atty. Gen., and A. C. McDaniel and N. A. Rotering, both of Butte, for the State.

Louis E. Haven, of Hardin, and James B. O'Flynn, of Butte, for respondent.

BRANTLY, C. J. The defendant, Felix Gomez, and two others, Ben Gomez and Crescenciano Rodriguez, were jointly charged with the murder of one Juan Domengo at Divide, a station on the Oregon Short Line Railway in Silver Bow county, on March 17, 1918. They were awarded separate trials. Ben Gomez was convicted of manslaughter and Rodriguez of murder in the second degree. At the close of the state's case on the trial of Felix Gomez, the court, on motion of his counsel, ordered the jury to return a verdict in his favor. From this order the state has appealed. The question for decision is whether the evidence was sufficient to require the case to be submitted to the jury.

[1, 2] The evidence is entirely circumstantial. It would serve no useful purpose to recapitulate and analyze it in detail. It is sufficient to say that after a careful study of it we are of the opinion that, taking it as a whole, it does not meet the requirements of the rule applicable to such cases, viz. that when a conviction is sought upon circumstantial evidence the criminatory circumstances proved must not only be consistent with each other but also point so clearly to the guilt of the accused, as to be inconsistent with any other rational hypothesis. State v. Suitor, 43 Mont. 31, 114 Pac. 112, Ann. Cas. 1912C, 230; State v. Chevigny, 48 Mont. 382, 138 Pac. 257; State v. Woods, 54 Mont. 193, 169 Pac. 39. Some of the circumstances proved, considered apart from the rest of the evidence, tend to incriminate the accused; but other circumstances, the proof of which cannot be questioned, so far explain and destroy the criminatory force of the former that they leave no substantial basis in the evidence for the conclusion that the accused had anything to do with the homicide. In other words, there was no substantial evidence upon which to base a verdict of guilty. This being the condition of the evidence, if the case had been submitted to the jury and a verdict of guilty had been returned, it would have been obligatory on the trial court, on motion addressed to it, to grant the defendant a new trial. It was therefore its duty at the close of the evidence to order the jury, as it did, to return a verdict of not guilty. Territory v. Laun, 8 Mont. 322, 20 Pac. 652; State v. Welch, 22 Mont. 99, 55 Pac. 927; State v. Foster, 26 Mont. 71, 66 Pac. 565.

[3] Contention was made by the Attorney General during the argument that the court should have advised the jury to acquit the defendant instead of peremptorily instructing them to do so. The statute (Rev. Codes, § 9297) "is applicable to those cases only in which the trial court deems the evidence, although tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant a conviction." State v. Mahoney, 24 Mont. 281, 61 Pac. 647. It has no application to the facts of this case.

The order is affirmed.

Affirmed.

HOLLOWAY, HURLY, MATTHEWS, and COOPER, JJ., concur.

DANIEL v. MONCURE. (No. 4170.)

(Supreme Court of Montana. June 25, 1920.)

1. Libel and slander ⇐89(1)—Complaint not stating special damages is good only if words are slanderous per se.

Complaint for slander which does not allege any special damages does not state a cause of action unless the words spoken are defamatory per se.

2. Libel and slander ⇐81—Complaint must state surrounding circumstances in making words slander.

If the language used is not defamatory of itself, but becomes so only in the light of the surrounding circumstances, the facts disclosing its slanderous character must be pleaded.

3. Libel and slander ⇐19—Words to be construed with reference to conversation as a whole.

Alleged defamatory matter is to be construed as an entirety and with reference to the remaining portion of the conversation.

4. Libel and slander ⇐19—Words to be given their ordinary meaning.

Alleged defamatory words are to be construed according to their usual, popular, natural meaning and common acceptation; that is, in the sense in which persons out of the court and of ordinary intelligence would understand them.

5. Libel and slander ⇐86(1)—Innuendo cannot make words slanderous per se.

If the words used are not slanderous per se, the innuendo cannot make them such.

6. Libel and slander ⇐123(2)—Jury question whether words were used with defamatory meaning.

If the language used is susceptible of two meanings, one defamatory, and the other not, it is for the jury to determine in which sense it was used.

Digitized by Google

7. Libel and slander ⟸7(16)—Charge that woman was common and tough held not slanderous per se.

A statement that plaintiff, a woman, was the commonest and toughest thing around there does not, in the absence of special circumstances, impute unchastity to plaintiff so as to be slanderous per se under Rev. Codes, § 3603, though the word "common," when applied to a woman, may impute unchastity, or it may not, depending on the circumstances, since its primary meaning is universal, pertaining equally to two or more, and it may also mean low, inferior, vulgar, or coarse.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common.]

8. Pleading ⟸93(1)—Defendant may interpose inconsistent defenses.

A defendant may interpose as many defenses as he may have even if they are inconsistent, provided they are not so far inconsistent that, if one be true, the other must necessarily be false.

9. Libel and slander ⟸94(1)—Answer held not to admit words were slanderous per se.

In an action for slander, where defendant denied generally the complaint, and then pleaded as justification the truth of the charge that plaintiff was the commonest, toughest thing on the reservation, in the sense that she was unchaste, does not establish that the words spoken by him charged unchastity so as to be slanderous per se.

Appeal from District Court, Big Horn County; Charles L. Crum, Judge.

Action for slander by Marie Allen Daniel against W. P. Moncure. Judgment for plaintiff, and new trial denied, and defendant appeals. Reversed and remanded.

F. B. Reynolds, of Billings, and John L. Waddell, of Hardin, for appellant.

E. E. Enterline, of Billings, and C. F. Gillette, of Hardin, for respondent.

HOLLOWAY, J. This action was brought to recover damages for alleged slander. Plaintiff charges in her complaint that on May 10, 1915, in the presence of herself and other persons, the defendant used to and concerning her the following language:

"This is the toughest and commonest thing on the reservation. We won't have this thing around. She's the damnedest, commonest, toughest thing around here. I wouldn't have your damn old homestead (referring to a homestead held by plaintiff and her husband) the next one to me. I'll look for a man and put him on the place of mine (referring to some lands adjoining the homestead held by plaintiff and her husband and occupied by defendant) and tell him what you are."

By innuendo it is alleged that by the use of this language defendant intended to convey, and did convey, the meaning that plaintiff was a coarse, indecent, and unchaste woman. Defendant denied generally all the allegations of the complaint, and pleaded justification as follows:

"That the charged and supposed defamatory words in the complaint set forth were each and all of them true, and that the plaintiff was, on or about the 10th day of May, 1915, an unchaste woman, and was the damnedest, commonest, and toughest thing on the reservation, in the sense that she was a coarse, vulgar, indecent, and unchaste woman."

The trial of the cause resulted in a verdict for plaintiff, and defendant appealed from the judgment and from an order denying a new trial.

[1] Throughout the proceedings the court below ruled that the language set forth in the complaint is slanderous per se, and upon these rulings the principal assignments of error are predicated. Special damages are not pleaded, and it follows that, unless the theory adopted by the trial court is correct, the complaint does not state a cause of action. Brown v. Independent Pub. Co., 48 Mont. 374, 138 Pac. 258.

[2] It is a rule of the law of slander that, if the language used, in and of itself, is not defamatory, but becomes so only in the light of the circumstances surrounding the utterance, the extrinsic facts disclosing its slanderous character must be pleaded. Cooper v. Seaverns, 81 Kan. 267, 105 Pac. 509. There are not any extrinsic facts stated in this complaint, so that the correctness of the trial court's position must be tested by reference to the language itself.

Slander is defined by section 3603, Revised Codes, as follows:

"Slander is a false and unprivileged publication other than libel, which:

"1. Charges any person with crime, or with having been indicted, convicted, or punished for crime.

"2. Imputes in him the present existence of an infectious, contagious, or loathsome disease.

"3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

"4. Imputes to him impotence or want of chastity; or,

"5. Which, by natural consequence, causes actual damage."

There are certain well-defined rules applicable to cases of this character upon which the authorities are generally agreed:

[3] (a) The alleged defamatory matter is to be construed as an entirety and with reference to the remaining portions of the conversation. Brown v. Independent Pub. Co., above.

Digitized by Google

[4] (b) The opprobrious words are to be construed according to their usual, popular, and natural meaning and common acceptation, that is, in the sense in which persons out of court and of ordinary intelligence would understand them (25 Cyc. 355), for the presumption is to be indulged that the third party or parties present so understood them.

[5] (c) If the language is not slanderous per se, the innuendo cannot make it such. Paxton v. Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416; Lemmer v. Tribune, 50 Mont. 557, 148 Pac. 338.

[6] (d) If the language is susceptible of two meanings, one defamatory and the other not, it is for the jury to determine in what sense it was used. D'Autremont v. McDonald, 56 Mont. 522, 185 Pac. 707.

In so far as disclosed by the pleadings, the language quoted constituted substantially the entire conversation, and, according to plaintiff's version of the affair, little, if anything, more was said.

[7] Counsel for plaintiff concede, as they must, that the trial court's rulings can be justified only upon the assumption that the language, as it is set forth in the complaint, charges "want of chastity," for it cannot be brought within any other provision of the statute above. Does this language, of itself, impute to plaintiff a want of chastity? That it does not is beyond controversy, and a reference to any standard dictionary is sufficient to demonstrate the correctness of this conclusion. It is not alleged that any or all of the opprobrious epithets had a local meaning or significance which implies want of chastity, and of those epithets only the word "common" has that significance under any circumstances, according to the lexicographers. The term "common," when applied to a woman, may impute want of chastity or not, depending upon the circumstances of its use. In its primary sense it means universal; pertaining equally to two or more; usual, habitual; not distinguished from the majority, as a common soldier; the common people. It means, also, trite; commonplace; low; inferior; vulgar; coarse. Century Dictionary.

[8] In the absence of any prefatory allegations disclosing that the language was used in a defamatory sense to denote want of chastity, it is not slanderous per se, and the trial court erred in its rulings. D'Autremont v. McDonald, above. But counsel for plaintiff insist that by his plea of justification defendant has supplied the necessary allegations omitted from the complaint. Under our very liberal rules of pleading in civil actions, the defendant may interpose as many defenses as he has, even inconsistent defenses, provided only that they are not so far inconsistent that, if one be true, the other must necessarily be false. Johnson v. Butte & Superior C. Co., 41 Mont. 158, 108 Pac. 1057; O'Donnell v. City of Butte, 44 Mont. 97, 119 Pac. 281.

[9] If defendant had admitted that he used the language set forth in the complaint, the position taken by counsel for plaintiff would be invulnerable; but we see no reason why these defenses may not be interposed without detriment to the defendant. The plea of justification is hypothetical in effect, if not in form, and amounts to no more than this: Defendant denies that he used the language or intended to impute to plaintiff a want of chastity, but, if the jury should find that he employed language which had that effect, he asserts that it was true. There is some analogy, at least, between this defense of justification as pleaded in this instance and the plea of contributory negligence which presupposes the existence of primary negligence. In Day v. Kelly, 50 Mont. 306, 146 Pac. 930, and in Nelson v. Northern Pac. Ry. Co., 50 Mont. 516, 148 Pac. 388, we held that a general denial and plea of contributory negligence may be joined, and that the latter plea does not confess the negligence charged in the complaint.

The answer does not supply the allegations omitted from the complaint, and which are necessary to disclose that the language is slanderous. The other assignments need not be considered.

For the reason that the complaint does not state a cause of action, the judgment and order are reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

BRANTLY, C. J., and HURLY, MATTHEWS, and COOPER, JJ., concur.

MONTANA LIVE STOCK & LOAN CO. v. STEWART. (No. 4163.)

(Supreme Court of Montana. June 25, 1920.)

1. Sales ⟹418(2)—Damages for breach is difference between contract and market prices.

The measure of damages for breach of a contract to sell sheep was the difference between the contract price and their reasonable market value at time and place of delivery.

2. Appeal and error ⟹1050(1)—Testimony as to resale at advance harmless, where advance price was market value.

In an action for breach of contract to sell sheep, admission of testimony as to advance of 35 cents a head over the contract price was not reversible error, where each witness also testified the reasonable market value of the sheep at the time and place of delivery was the price at which they were sold at an advance.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

3. Evidence ⇐402 — Witnesses ⇐270(2) — Cross-examination as to statements concerning check given in payment incompetent, immaterial, or attempt to vary writing.

In an action for breach of contract to sell sheep for which a check was given, testimony of the buyer's agent on cross-examination as to purported statements concerning the check, made before and after its return by the bank, was either incompetent or immaterial or an attempt to vary the terms of a written instrument.

4. Sales ⇐191—Check accepted in place of cash was payment until dishonored.

Whatever the agreement of the parties to a sale as to a cash payment had been, the buyer's check, when accepted, superseded such negotiations, and was payment until dishonored.

5. Appeal and error ⇐1026—Judgment reversed only for error materially affecting the merits.

An appellate court will not reverse judgment merely because the trial court erred, but only when the error has materially affected appellant's rights on the merits.

6. Sales ⇐191—Refusal to guarantee check in payment of price not dishonor thereof.

Where the seller of sheep for which a check was given, on refusal of bank of deposit to cash the check, had such bank call up the drawee bank, and ask if they would guarantee payment of the check, which was refused, the action of the drawee bank did not amount to a dishonor of the check justifying the seller in his refusal to deliver the sheep under the contract; the seller should have presented the check for payment either directly or by deposit with another bank for collection.

7. Sales ⇐191—Seller who took check could not rescind for nonpayment without presenting it.

Where the seller accepted a check in part payment of the purchase price of sheep sold, as evidenced by written memorandum of contract, he could not avoid or rescind the contract for nonpayment of the check without presenting it to the drawee bank for payment and having payment refused; an instruction to such effect not advising the jury that the check must be presented in person to the bank.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

Action by the Montana Live Stock & Loan Company against William Stewart. From judgment for plaintiff, and an order denying his motion for new trial, defendant appeals. Judgment and order affirmed.

E. E. Enterline and J. W. Snellbacher, both of Billings, for appellant.

Johnston & Coleman, of Billings, for respondent.

MATTHEWS, J. This action was brought to recover damages for the alleged breach of a contract of sale of certain sheep, and resulted in a judgment for the plaintiff. The defendant appeals from the judgment and from the order of the court denying his motion for a new trial.

The controversy between the plaintiff and defendant arose over a check given defendant by one McCain, as agent of the plaintiff, at the time of making the contract, as part payment on the sheep. The check was drawn on the Bank of Montana, of Billings. It was taken by defendant to the Custer State Bank, where the cashier refused to cash the check, as he stated, "without knowing something about it." According to the testimony of defendant, he then had the cashier call up the cashier of the Billings bank and inquire whether the bank would *guarantee* the payment of the check. On being informed that the bank would not do so, defendant returned the check, and notified the plaintiff that he would not deliver the sheep.

The brief of defendant contains 34 specifications of error, grouped in argument under eight heads.

[1] I. Specifications 1, 2, 8, 9, 10, 11, and 12 go to the admission of evidence concerning the sale of the sheep mentioned in the contract, to outside parties immediately after the contract was entered into, at $6 per head, or an advance of 35 cents per head over the contract price. The measure of damages in this case was, of course, the difference between the contract price and the reasonable market value of the sheep at the time and place of delivery, and it is possible that, standing alone, the admission of such evidence would constitute reversible error. However, each of the witnesses, in addition to testifying to the contract price on resale, testified that the reasonable market value of the sheep at Custer was $6 per head, and this evidence of the market value was corroborated by other evidence. The effect of the testimony complained of was therefore that they agreed to pay the reasonable market price for the animals for which they bargained. Lehrkind v. McDonnell, 51 Mont. 343, 153 Pac. 1012. The court thereafter correctly instructed the jury as to the measure of damages, and, as this court said in the case of Shandy v. McDonald, 38 Mont. 393, 100 Pac. 203:

"This instruction excluded from the consideration of the jury all other evidence as to the value of these animals. Therefore it is unnecessary to express an opinion as to the propriety of the ruling."

[2] While the admission of such testimony constituted error, it could not have affected the substantial rights of the defendant, and will therefore be disregarded. Section 7118, Rev. Codes; Church v. Zywert, 57 Mont. —, 190 Pac. 291.

[3] II. Specifications 3, 4, 13, 14, 15, 16,

Digitized by Google

21, and 24 are predicated upon the exclusion, on cross-examination of McCain, of purported statements concerning the check, made before and after its return. Such testimony was clearly either incompetent or immaterial or an attempt to vary the terms of a written instrument, and the court's action in excluding it was proper.

[4] Whatever the agreement of the parties as to a cash payment down, the check, when accepted, superseded such negotiations, and was "payment until dishonored." Morse on Banks & Banking, § 545. The case of Pasha v. Bohart, 45 Mont. 76, 122 Pac. 284, Ann. Cas. 1913C, 1250, is not in point.

[5] III. In specifications 5, 6, 7, 19, and 20, defendant complains of the admission of what counsel denominates "immaterial evidence" as to what directions were given by plaintiff to its bank concerning the payment of the check. Counsel, thus admitting the immateriality of the evidence, fails to specify in what particular its admission is prejudicial to the rights of the defendant, and a careful reading of the evidence fails to disclose wherein such testimony could have prejudiced the defendant's rights. "An appellate court will not reverse a judgment merely because the lower court erred. It is only when the error has materially affected the appellant's rights on the merits of the case." Lane v. Bailey, 29 Mont. 548, 75 Pac. 191; State ex rel. Kohl v. District Court, 46 Mont. 348, 128 Pac. 582; Way v. Sherman, 30 Mont. 410, 76 Pac. 942.

[6] IV. It is contended that the action of the Billings bank amounted to the dishonor of the check, and justified the defendant in his refusal to deliver the sheep under the contract. Defendant proceeds on the theory that the Billings bank had refused to honor the check, and relies on Jenderson v. Hansen, 50 Mont. 216, 146 Pac. 473, where it was held that inquiry of the bank as to whether the buyer had funds therein sufficient to meet it could be made in person or by telephone, or through another, and that evidence of a negative answer over the telephone was admissible. However, the facts before us do not bring this case within the rule laid down. According to the testimony of defendant himself, the inquiry was as to whether the bank would "guaranty" the payment of the check. This is entirely different from an inquiry as to whether the maker of the check had funds in the bank to meet payment on presentment, or whether it would be paid when presented. In the latter case a negative answer would excuse presentment, as it would be useless, and "the law neither does nor requires idle acts." Section 6200, Rev. Codes. But, while the bank might be required to advise the payee, over the telephone or otherwise, as to whether a check will be paid on presentment, provided the signature is genuine and the check in due form, it could not be required, under any circumstances short of having certified the check, to guarantee the payment of it.

As heretofore stated, a check is payment until dishonored; it can only be dishonored by presentment at the bank on which it is drawn, in regular form, and refusal of payment. Section 6033, Revised Codes, provides that "a check is a bill of exchange drawn on a bank payable on demand." Section 6035 declares that "where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance;" and, under section 6037, "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

Sharp, the cashier of the Custer State Bank, called on behalf of the defendant, testified that, in response to his inquiry—

"Mr. Langworthy replied those checks drawn by McCain required the O. K. of somebody in the office before he was authorized to pay it, but he added the check would undoubtedly be paid when presented."

Langworthy, called in rebuttal, testified that he stated that—

"Without any question the check would be paid when it was presented properly; that if he would give me about 5 minutes or so, I would call Mr. O'Donnell on the phone, or see him with reference to this check, and advise him again."

Within 30 minutes O'Donnell advised defendant that the check was perfectly good, and would be paid on presentment, but in the meantime defendant had deposited the check in the post office, addressed to the maker.

The statement of Langworthy was not that the check was not perfectly good, taken in the most favorable light to the defendant; it was coupled with the expression of his opinion that it would be paid when presented. It was the duty of the defendant to present the check for payment, either to the bank directly or through another, as by deposit with the Custer State Bank, and collection by it. Having made an informal request of the Billings bank, he should at least have waited a reasonable time for an answer. On receipt of advice that the check would be paid, he could have easily secured the return of the check at the post office. Having failed to present the check for payment, defendant was in no position to declare a rescission of the contract for nonpayment.

[7] V. Defendant contends that the court erred in instructing the jury as follows:

"The defendant having accepted the check in question in part payment of the purchase price of sheep, as evidenced by written memorandum of contract, he could not avoid or

Digitized by Google

rescind the contract for nonpayment of check without having presented the check to the Bank of Montana for payment and having payment refused. Having failed to do so, plaintiff is entitled to recover herein for such damages, if any, as it may have suffered."

The instruction correctly states the law, and is not open to the complaint that it advised the jury that the check must be presented in person to the bank.

No error was committed in the refusal of instructions not in harmony with the above quoted instruction.

We find no substantial error in the record, and the judgment and order of the district court are therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, HURLY, and COOPER, JJ., concur.

R. M. COBBAN REALTY CO. v. CHICAGO, M. & ST. P. RY. CO. OF MONTANA et al. (No. 4243.)

(Supreme Court of Montana. June 25, 1920.)

1. Statutes ⇐196—Qualifying words applied to words immediately preceding.

Relative and qualifying words and phrases and clauses are to be applied to the word or phrase immediately preceding, and are not to be construed as extending to or including others more remote.

2. Deeds ⇐95—Qualifying words applied to words immediately preceding.

The rule that relative and qualifying words and phrases and clauses are to be applied to the word or phrase immediately preceding, and are not to be construed as extending to or including others more remote, is applicable to the construction of deeds as well as statutes.

3. Deeds ⇐93—Object of construction to ascertain intention.

The object in construing a deed is to ascertain the intention of the parties to it.

4. Estoppel ⇐63—Purchaser estopped to claim that description in deed was not to convey land as shown on map prepared by purchaser.

Where a railway company seeking to obtain a right of way furnished the data, including the right of way map, from which the description in a deed to the railroad was obtained, the railway will not be permitted to say that it did not intend that the description in the deed should operate to convey the ground shown upon the map.

5. Stipulations ⇐14(7)—Construed as to burden on defendant in quieting title action to show land claimed under deed.

Where, by terms of a stipulation in an action against a railroad to quiet title, the burden was imposed upon the defendant to prove that the ground occupied by its right of way was conveyed by a certain deed, it was necessary for defendant not merely to show that a strip of ground 100 feet wide and 50 feet on each side of the center line of the railroad was conveyed through plaintiff's tract, but must as well show its location with reference to the land claimed by plaintiff; issue being location of right of way on plaintiff's land.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Action by the R. M. Cobban Realty Company, a corporation, against the Chicago, Milwaukee & St. Paul Railway Company of Montana and another. From judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Murphy & Whitlock, of Missoula, for appellants.

Elmer E. Hershey, of Missoula, for respondent.

HOLLOWAY, J. Upon a former appeal the judgment in favor of the defendants was reversed and a new trial ordered (52 Mont. 256, 157 Pac. 173). A statement of the case with illustrating maps will be found in our former opinion and need not be repeated here. Upon the second trial the court found the issues in favor of plaintiff, and defendants appealed from the judgment and from an order denying a new trial.

There was not any new evidence presented, and only a portion of the evidence employed in the first trial was introduced upon the second trial. The same stipulation used upon the first trial was renewed for the purpose of the second trial, and this stipulation, the Weirick deed, and the defendants' right of way map were introduced by plaintiff.

At the instance of the defendants, the deposition of C. F. Healy, used at the first trial, was received in evidence, and in rebuttal the witness Jones testified to substantially the same facts as upon the first trial. A more specific reference to this evidence will be found in our former opinion. Upon the second trial the defendants abandoned each of the affirmative defenses pleaded in their answer—estoppel in pais and mutual mistake—and relied altogether upon the conveyance evidenced by the Weirick deed. In our former opinion we construed the stipulation above, and determined that it "relieves the plaintiff of the necessity of deraigning its title and shifts the burden of proof to the defendants." Under the terms of this stipulation (omitting any reference to the defense of estoppel, which was abandoned), plaintiff was entitled to judgment unless the defendants could show that the ground in controversy was conveyed to the railway company by the Weirick deed. If the terms of the deed be considered independently of the circumstances surrounding their prepa-

Digitized by Google

ration, the meaning of the instrument is not open to serious controversy. It conveys that portion of the S. E. ¼ of the N. W. ¼ of section 20, township 13 north, range 19 west, hereinafter referred to as the 40-acre tract, described as follows:

"Beginning at a point of intersection of the E. side line of said above-described tract of land, and the center line of the said right of way of the Chicago, Milwaukee & St. Paul Railway Company of Montana, as the same is now surveyed, located, and staked out upon the ground over and across the said S. E. ¼ of the N. W. ¼; thence running south on and along said E. side line of said tract of land a distance of 50 feet to the S. E. corner thereof; thence running west on and along the S. side line of said tract of land to an intersection with the E. side line of lot No. 15 in Cobban & Dissmore Orchard Homes addition to Missoula, Mont.; thence north on and along the E. side line of said lot No. 15 a distance of 100 feet; thence running east on a line parallel to and 50 feet north of the said center line of the railway of the party of the second part to a point on the E. side line of the said S. E. ¼ of the N. W. ¼ of said section No. 20; thence running south 50 feet to place of beginning."

[1, 2] Under the familiar rule of construction known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses are to be applied to the word or phrase immediately preceding, and are not to be construed as extending to or including others more remote. State v. Centennial Brewing Co., 55 Mont. 500, 178 Pac. 296. The rule is applicable to the construction of deeds as well as statutes. Grooms v. Morrison, 249 Mo. 544, 155 S. W. 430. Applying this rule to the language employed in the description above, and the phrase "said above-described tract of land," and the phrases "said tract of land," each and every one of them refers to the 40-acre tract, and not to the right of way.

[3, 4] It is elementary that the object in construing a deed is to ascertain the intention of the parties to it (Hollensteiner v. Missoula Lumber Co., 37 Mont. 278, 96 Pac. 420), and conceding that the rule of the last antecedent is only an aid in interpretation and must give way to the intention of the parties if its application involves a conflict with such intention, we are led to inquire: What were the surrounding circumstances which indicate the intention of the parties at the time this deed was prepared and executed? The evidence is uncontroverted that the railway company seeking to obtain a right of way over this 40-acre tract furnished the data, including its right of way map (figure 1, 52 Mont. 258, 157 Pac. 173), from which the description in the deed was obtained, and that map not only photographed, as it were, the strip of ground to be conveyed as the south 100 feet of the 40, but showed the south line of the strip to be identical with the south boundary line of the 40 and added emphasis to that fact by writing on the identical line the words "¼ section line" and "right of way line." It would do violence to every conception of right to permit the railway company to say now that it did not intend that the description in the deed should operate to convey the ground shown upon the right of way map as the ground it proposed to acquire. But counsel for defendants in their brief say:

"The record will be searched in vain for any proof which even tends to show that the south line of the 40-acre tract is not the same as is the south line of the land occupied as right of way."

This statement is correct, but, if there is a failure of proof, the fault lies with the defendants, for they had the burden of proof.

If it is a fact that the ground occupied by the right of way is the identical strip shown upon the right of way map, then defendants should have disclaimed, for they have no interest whatever in the ground claimed by plaintiff; but, from the fact that they are before this court defending this action and insisting upon a construction of the deed which will give to them the strip of ground illustrated by figure 2 (52 Mont. 258, 157 Pac. 173), it is fairly deducible that they are making some claim to the ground in controversy.

[5] By the terms of the stipulation the burden was imposed upon the defendants to prove that the ground occupied by the right of way was conveyed by the Weirick deed, and to establish this fact it was necessary not merely to show that a strip of ground 100 feet wide, 50 feet on each side of the center line of the railway, was conveyed, but as well to show its location with reference to the land claimed by plaintiff, and in this they failed.

If any officer or agent of defendants knows where its right of way is located upon the 40-acre tract above, he refrained from furnishing the information to the court. The engineer Healy, whose testimony constitutes all the evidence offered by defendants, declined to fix its location and professed to be unable to do so. Healy's testimony merely establishes the fact that the center line of the right way was surveyed and staked out before the deed was prepared or executed; that the roadbed was constructed and the road has since been operated upon that line, but where that line is situated with reference to the ground claimed by plaintiff no one seems to know. There is a failure of proof, and, since the burden of proof was imposed upon defendants, the failure is theirs.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and HURLY, MATTHEWS, and COOPER, JJ., concur.

Digitized by Google

SANBORN CO. v. POWERS et al.
(No. 4150.)

(Supreme Court of Montana. June 25, 1920.)

1. **Appeal and error ⟸1053(2)—Withdrawal of evidence and instruction to disregard held sufficient to avoid error.**

In an action against alleged partners, where evidence of reputation of being partners, consisting mainly of impressions largely gained from conduct of the defendant not appealing, was admitted on the unfulfilled condition that knowledge would be brought home to appellant, the court's striking testimony and admonishing the jury not to consider it was sufficient, since it did not come under the exception to the general rule embracing evidence so impressive that in the opinion of the appellate court its effect could not be so removed.

2. **Appeal and error ⟸215(1)—Objection to instructions necessary.**

In view of Rev. Codes, § 6746, where no objection was interposed on a settlement of the instructions, no error can be predicated on them.

3. **Partnership ⟸55—Evidence held sufficient to establish.**

Evidence *held* sufficient to establish a partnership, under Rev. Codes, §§ 5466, 5467.

4. **Appeal and error ⟸1002—Verdict on conflicting evidence conclusive.**

Where there is substantial conflict in the evidence, the Supreme Court will not reverse for alleged insufficiency to support the verdict.

Appeal from District Court, Gallatin County; Ben. B. Law, Judge.

Action by the Sanborn Company against G. R. Powers and another, copartners as Powers & Black. From a judgment on the verdict for plaintiff, and an order denying new trial, the defendant G. R. Powers appeals. Affirmed.

W. S. Stephenson, of Missoula, and George Y. Patten, of Bozeman, for appellant.

E. A. Peterson, of Three Forks, J. A. Walsh, of Helena, and C. E. Carlson, of Bozeman, for respondent.

MATTHEWS, J. The plaintiff brought this action on an open account for goods, wares, and merchandise alleged to have been sold and delivered to the defendants as copartners. Defendant Black failed to enter his appearance, and his default was duly entered. Powers answered, denying generally all the allegations of the complaint. On the trial he did not dispute the correctness of the account, but contended that no partnership agreement existed between himself and Black, and that Black alone was liable to plaintiff. The jury found in favor of plaintiff. From the judgment on the verdict, and an order denying his motion for a new trial, this appeal is prosecuted.

[1] The first eight assignments of error are predicated on the admission of evidence of the reputation of Powers and Black as copartners in the community in which they operated as wheat growers; the remaining assignments, on the alleged insufficiency of the evidence to establish an actual partnership. It is contended that the admission of the evidence of reputation constituted a material variance from the allegations of the existence of an actual partnership.

1. While this might be true, the testimony objected to was admitted only provisionally on the statement of counsel that he would bring knowledge of the alleged reputation home to Powers. It was later admitted that this had not been done, and all of the evidence was by the court stricken from the record, and the court thereupon orally admonished the jurors not to consider such evidence in any way in arriving at their verdict, explaining to them the reason for striking it from the record. It is conceded that, under the general rule, this was sufficient to take the matter from the jury, but counsel contends that an exception is recognized "where the testimony so permeates the record that its exclusion cannot be said to fairly remove the impression which must have been created by it," citing 38 Cyc. 1443. The exception noted in Cyc., however, is:

"Where the evidence is so impressive that, in the opinion of the appellate court, its effect is not removed from the minds of the jury by its subsequent withdrawal, or by an instruction of the court to disregard it."

The testimony consists mainly of impressions, evidently gained largely from the conduct of Black alone; it was admitted only on the assurance of counsel that it would be connected up, and the court at the outset, in overruling counsel's objections, stated:

"He [Powers] might be held out as a partner without his knowledge; no matter what the reputation is there, if Mr. Powers had no knowledge of it, he is not bound by it; it must be connected with some act or knowledge of his."

The jurors are presumed to be reasonable men, and, hearing the evidence complained of with this declaration of the court in mind, followed, at the close of the testimony, by the order of the court striking the entire matter from the record, must have clearly understood that they were not to consider the evidence in any manner in arriving at their verdict. We are therefore of the opinion that the action of the court comes within the general rule stated, and not within the exception thereto.

[2] Some complaint is made that the court instructed the jury on the subject of osten-

Digitized by Google

sible partnerships, but no objection was interposed on the settlement of the instructions, and no error is, nor could be, predicated on this ground. Rev. Codes, § 6746; Stokes v. Long, 52 Mont. 470, 159 Pac. 28; Allen v. Bear Creek Coal Co., 43 Mont. 269, 115 Pac. 673; Forquer v. North, 42 Mont. 272, 112 Pac. 439.

[3] 2. Appellant contends that the evidence is insufficient to warrant a verdict requiring a determination that an actual partnership existed. Black, called as a witness for the plaintiff, testified in effect that, in the year 1915, he leased a certain section 9 from Powers; that Powers had control of the adjoining sections 15 and 21, belonging to one Wilson; that Powers suggested that they borrow the money, necessary to crop these sections, from Wilson, Black to do the work and Powers to pay one-half of the value thereof, and they each to pay one-half of the expense for supplies, seed, labor, etc.; that they give Wilson, for the use of the land, one-fifth of the crop; and that they then divide the profits or share equally in the losses. He further testified that they mutually agreed to the arrangement, gave their joint note to Wilson, and deposited the proceeds in the name of Powers, and thereafter he (Black) paid the running expenses by checks on this account, signed "G. R. Powers, by J. W. Black." He further testified that when the wheat was threshed he hauled it to the elevator, and by the direction of Powers deposited it in the name of "Powers & Black," and thereafter it was taken out and disposed of by Powers. While Powers held a mortgage on Black's interest in the grain, he did not follow the procedure for foreclosing a mortgage, but disposed of the grain as partnership property, and Black testified that the mortgage was given solely at the suggestion of Powers, to protect Black's interest from seizure by his creditors.

One Brandley testified that he sold two binders to Powers on an open account for use in harvesting the grain, and that, at the time, Powers told the witness that he and Black were partners, but that he wanted to get rid of Black. Plaintiff's credit man related a conversation over the telephone, in which he advised Powers that Black was purchasing goods of plaintiff; that they were charged to "Powers & Black"; he stated, "I asked him if it was all right, and he said it was all right." The witness further testified that, after the account sued on was due and payable, he requested payment from Powers, who raised no objection to the bill, but stated that he would take it up with Black, and that Powers made no objection to payment until after the account was placed in the hands of an attorney.

While the evidence canvassed above is not entirely satisfactory, it is sufficient, if believed, to establish a partnership in this jurisdiction. It tends to establish "the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them" (Rev. Codes, § 5466), "by the consent of all the parties thereto" (section 5467); a "partnership business, the funds for investment partnership funds, the property purchased partnership property; and the profits if any, partnership profits" (Beasley v. Berry, 33 Mont. 477, 84 Pac. 791). There was "such a community of interest as empowers each party to make contracts, incur liabilities, and dispose of the property." Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74. It was a business venture for profit. Croft et al. v. Bain et al., 49 Mont. 484, 143 Pac. 960. It tends to establish "the interchangeable relation of principal and agent, which is indispensably necessary to constitute a copartnership" (Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65), and that there was an agreement not only to share profits, if any, but losses as well.

[4] True, Powers denied each of the statements made; but it was for the jury to determine which version they would accept, and the rule that, where there is a substantial conflict in the evidence, the Supreme Court, on appeal, will not reverse the judgment of the trial court on the ground of alleged insufficiency of the evidence is too well settled in this state to require the citation of authorities.

The judgment and order of the district court are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, HURLY, and COOPER, JJ., concur.

STATE ex rel. BREEN v. MAYOR OF CITY OF BUTTE. (No. 4541.)

(Supreme Court of Montana. June 1, 1920.)

1. Appeal and error ⇐781(7) — Dismissed where appellant has complied with order appealed from.

If an assistant city jailer in the police department has been restored to his position by the mayor acting within his authority and in obedience to a peremptory writ of mandamus, the motion of the jailer in the mandamus proceedings for dismissal of the mayor's appeal should be sustained, and the appeal dismissed.

2. Municipal corporations ⇐185(4)—Though statute requires dismissal for cause and after hearing, council can retire policemen to eligible list.

Though under Rev. Codes, §§ 3306, 3308, a member of the police department of a city cannot be dismissed except for cause and after a

Digitized by Google

hearing or trial, the city council has authority to retire a member or any number of members of the police department to the eligible list on a good-faith determination that their services are not required.

3. **Municipal corporations ⟸185(4)—Council may not remove assistant city jailer and appoint another without charges and hearing.**

Under an ordinance of the city of Butte, No. 823, adopted in 1908 in conformity with the Metropolitan Police Law, creating the office of city jailer and two assistant city jailers, city council was without authority to remove an assistant jailer from his office and to place another in his stead, on the ground that his services were not required, and not on charges and after hearing, in compliance with Rev. Codes, §§ 3306, 3308.

Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

Mandamus by the State, on the relation of Peter T. Breen, against the Mayor of the City of Butte, William T. Stodden, incumbent. From judgment awarding peremptory writ, defendant appeals. Affirmed.

Robert L. Clinton, E. D. Elderkin, and C. F. Juttner, all of Butte, for appellant.

Maloney & Andrew, of Butte, for respondent.

MATTHEWS, J. Respondent Breen, hereafter for convenience called the plaintiff, instituted proceeding in mandamus against appellant, hereafter referred to as the defendant, to compel his restoration as assistant city jailer in the police department of Butte. This appeal is from the judgment of the district court awarding the peremptory writ, filed and entered September 14, 1919. The bill of exceptions herein was settled October 14, 1919.

On March 25, 1920, plaintiff filed in this court a motion to dismiss the appeal on the ground that defendant had fully complied with the writ and satisfied the judgment. In support of this motion he filed, on May 25, 1920, affidavits to the effect that on September 14, 1919, the very day of the issuance of the writ, R. L. Clinton, city attorney and counsel for defendant, notified plaintiff to return, and instructed the city jailer to return plaintiff to his position, which was done, and he has ever since retained the position and received his monthly warrants signed by the defendant mayor.

[1] If plaintiff was restored to his position by the mayor, acting within his authority and in obedience to the peremptory writ, the matter comes within the rule laid down in the case of In re Black's Estate, 32 Mont. 51, 79 Pac. 554, the motion should be sustained, and this appeal dismissed. However, neither the record nor the motion papers show a return of the writ or any action taken by the defendant in obedience thereto; the city attorney was without authority to direct the restoration of the officer, and it is at least questionable whether the signing of salary warrants by the mayor, while the appeal was pending, would constitute a ratification of the return of the officer to his position. The question may be raised at any time; and, if this appeal is dismissed without a determination on the merits, further litigation would result or the legal status of the respective parties be left in doubt. We deem it proper, therefore, to pass, without determining the question presented by the motion, to a consideration of the case on its merits.

The undisputed facts are that plaintiff was a duly appointed and qualified member of the police department of the city of Butte, and, having served the probationary period of six months, under the Metropolitan Police Law, as assistant city jailer, that he was, on the 16th day of April, 1919, permanently appointed by the defendant to that position; and that he thereupon gave his bond in the sum of $2,500 for the faithful performance of his duties. On May 28, 1919, the mayor, finding the shrinkage in the city's finances, through discontinuance of the liquor licenses, amounting to some $65,000 per annum, increase in wages and cost of materials, made retrenchment imperative, and that, owing to the closing of the saloons and, perhaps, other causes, the city could well dispense with practically one-third of the police force, recommended to the council the placing of 20 members of the police department on the eligible list, without pay until reinstated by the council. The council accepted the recommendation, and passed a resolution to that effect, embodying their reasons for so doing in the resolution, and placing on the list the 20 men last appointed to the police department, among them, the plaintiff.

[2] While it is true that under our statute (Rev. Codes, § 3306), a member of the police department cannot be dismissed except for cause and after a hearing or trial (section 3308; State ex rel. Quintin v. Edwards, 40 Mont. 287, 106 Pac. 695, 20 Ann. Cas. 239), there can be no doubt at this time of the authority of the city council to retire a member, or any number of the members, of the police department to the eligible list, on a determination, in good faith, that the necessities of the city do not require their services. The city council has control over the affairs of the city, and has not only authority, but it is its duty, to see that those affairs are economically administered, and that there shall be no useless expenditure of the city's funds.

It can be readily understood that, in many instances, especially in those cities dependent largely for their prosperity and population on mining operations, and where, consequently, the needs as to police protection fluctuate frequently, the officials upon whom rests this duty to protect the city's finances must, of

Digitized by Google

necessity, be vested not only with power to increase the police force to meet either growing or sudden demands, but to thereafter reduce the force, with a decrease of the demands, by retiring to the eligible list those members of the force last appointed and whose services are no longer needed. This question has been fully disposed of in the cases of State ex rel. Rowling v. Mayor of Butte, 43 Mont. 331, 117 Pac. 604, and State ex rel Dwyer v. Duncan, 49 Mont. 54, 140 Pac. 95. It is therefore clear that, if the plaintiff was merely a patrolman and one of the number thus, for economical reasons, retired to the eligible list, he has no just cause of complaint, even though his particular work is performed by some member of the force still retained.

The position of jailer is one which might, we assume, be filled by any patrolman, and the council might properly have provided that a certain number of patrolmen be from time to time assigned to act as jailers, just as they are to the "plain clothes squad," the traffic force, or any particular beat. This, however, was not done, but the council, in 1908, in conformity with the Metropolitan Police Law, established the police department, with all its divisions and offices, by special ordinances, among which we find Ordinance 823, which reads in part as follows:

"The offices of city jailer and two assistant city jailers are hereby created and each of them are hereby constituted as members of the police department."

[3] Thus we have the creation of three distinct "offices" within the police department; no one of these offices was vacated by the council by its resolution of retrenchment; but we find from the record that immediately upon the retirement of plaintiff, a patrolman, older in point of service, was called in to take his office. This being the condition of affairs in the police department of the city of Butte, the council was without authority of law to remove plaintiff from his office and place another in his stead.

Again, the question presented is disposed of by the opinion in State ex rel. Dwyer v. Duncan, supra. We see no distinction between the position of a lieutenant of police and an assistant city jailer, where each position is created and denominated an "office" by the ordinance. While the office might be vacated for economic purposes, it cannot, under the civil service principle of the Metropolitan Police Law, be continued in operation, the incumbent removed therefrom, and another placed in charge.

The judgment of the district court of Silver Bow county is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, HURLY, and COOPER, JJ., concur.

TUTTLE v. PACIFIC MUT. LIFE INS. CO.
(No. 4167.)

(Supreme Court of Montana. June 25, 1920.)

1. Insurance ⟸535—Accident policy held to require notice of accident, though mode of death unknown.

While under Rev. Codes, § 5047, time is never considered as of the essence of a contract unless by its terms expressly so provided, and any succinct and intelligent statement, giving the information called for in a provision of the policy requiring notice, is sufficient to put the insurer upon inquiry, to determine whether he is liable, the beneficiary of an accident policy must, where she was convinced that insured was dead as a result of accident, but did not know of the manner of his death, give notice in accordance with the stipulation that claimant must deliver immediate written notice of any accident with full particulars.

2. Insurance ⟸538—Oral notice to agent not immediate written notice to insurer at home office.

Oral notice to the agent of the insurer is not a compliance with a provision of an accident policy requiring delivery of immediate written notice of accident to the insurer at its home office; the condition as to notice being a condition precedent to liability.

3. Insurance ⟸539(6) — Where insured disappeared while hunting notice of the accident necessary, though mode of death not known.

Where it was believed that because of his failure to return to camp, insured had met his death in the mountains, the claimant must give written notice of accident as required by the accident policy, even though there could be no determination of the cause of insured's death, until discovery of his body, the giving of notice and the forwarding of affirmative proof of death being separate and distinct obligations, so there can be no recovery where for a long period of time the claimant utterly failed to give any written notice of the accident.

4. Insurance ⟸556(1)—Provision as to waiver is information that there could be no waiver by agent.

A provision that no waiver should be valid unless signed by the president or vice president, also the secretary or assistant secretary of insurer, is information to the insured's beneficiary under an accident policy that provisions as to notice could not be waived by an agent.

5. Insurance ⟸559(2) — Letters from home office of insurer not waiver of provisions as to notice.

Letters from the home office of an accident insurer, stating that it was not liable because the mode of death could not be shown, and denying liability on the further ground that the requirements as to notice were not met, cannot be deemed a waiver of the policy provisions as to notice, disregarding the fact that they were not signed by the president or vice president, etc., so as to constitute a waiver; the

Digitized by Google

letters expressly stating that no waiver was intended.

6. Insurance ⟸646(6)—Claimant under accident policy has burden of showing accidental death.

In an action on an accident policy insuring against death from external, violent, and accidental means, if death shall result within 90 days, independent of other causes, the beneficiary seeking recovery has the burden of showing that the insured's death was the result of an accident within the terms of the policy, and occurred within the 90 days.

7. Insurance ⟸455—To recover on accident policy, death must be shown to result from accidental means; "accident."

To recover on an accident policy insuring against death resulting from injuries caused solely by external, violent, and accidental means, it must be shown, not only that death was an accidental result, but that the cause itself was external, violent, and accidental; the word "accident" in such policy meaning an event which takes place without one's foresight or expectation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

8. Insurance ⟸646(6)—Presumption against suicide does not create presumption of accidental death.

Where insured, while hunting, met his death in the mountains, and his body was not found until long thereafter, at which time it was impossible to determine the cause of his death, and a rifle which he was carrying when he left camp was not with the body, although an automatic pistol was, the mere proof of death, and that insured, who went out in a storm, was never again seen alive, will not support recovery on a policy insuring against death resulting from external, violent, and accidental means; for while there is no presumption of suicide, etc., there can be no presumption that the death was the result of accidental means.

9. Appeal and error ⟸1010(2)—Findings unsupported by evidence.

Judgment, unsupported by evidence, will be reversed.

Appeal from District Court, Jefferson County; Joseph C. Smith, Judge.

Action by Mattie A. Tuttle against the Pacific Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Day & Mapes, of Helena, for appellant.

D. M. Kelly, of Butte, and J. E. Kelly, of Boulder, for respondent.

MATTHEWS, J. This action was brought by plaintiff on an accident policy carried by her son, Ora Tuttle. The case was tried to the court sitting without a jury, and resulted in a judgment in favor of the plaintiff for the amount of the policy.

The undisputed facts are as follows: In 1908 Ora Tuttle was insured by defendant company "against the effects of bodily injuries sustained during the term of this policy and caused solely by external violent and accidental means. * * * And if death shall result from such injuries within ninety days, independent of all other causes, the company will pay the principal sum of fifteen hundred dollars." The policy was in full force and effect throughout the year 1910. In November of that year, Ora Tuttle, his brother R. S. Tuttle, and three other young men went into the park district in Gallatin county on a hunting trip, and established a camp at Grayling. On the morning of the 21st Ora Tuttle left camp alone on the trail of an elk; it was then snowing hard, and a man could not be distinguished at a hundred yards. The storm continued throughout the day and night, the temperature remaining slightly below the freezing point, not cold enough to freeze a person out in the storm. The next day was fairly pleasant, but squally, and 10 to 12 inches of snow had then fallen. The second day a heavy storm broke, and continued for 8 or 10 days, and the snow then appeared to be several feet deep. On leaving camp, Tuttle took with him a rifle, an automatic pistol, and provisions sufficient for the day. As night approached and he did not return, his companions instituted a search for him, building signal fires and discharging their rifles, but without receiving any response. The search was continued until the following February, but no trace of the missing man was found. On October 2 or 3, 1913, his remains were found in a small park about two miles from the location of the camp. A small canyon intervened, necessitating a detour, requiring one to travel approximately five miles from the camp to the place where the remains were found. R. S. Tuttle identified the clothing and shoes as those of Ora Tuttle. His watch was still in the vest pocket and his automatic in the trousers pocket; the rifle was nowhere in the vicinity. Only the larger bones of the body remained; most of these were with the clothing. The skull, however, was found in a shallow gulch some 30 feet distant and the shoes Tuttle had worn were found near the skull. There was no cliff or other point from which deceased could have fallen to his death. The remains were taken to Whitehall, and on the 9th day of October, 1913, were buried.

The plaintiff testified that shortly after the disappearance of Ora Tuttle, she had a conversation with the local agent of the company and that—

"I asked him if the boy was dead if I would have to write the company for proofs—for blanks anyway. He said No, he would attend to that himself. And then I asked him if I

Digitized by Google

would have to keep his payments up. He said No, I would not have to do that. He assured me that he did not think the boy was dead; that he thought he would come home after a little."

On June 19, 1911, Ike E. O. Pace, Esq., an attorney at Whitehall, notified the company by letter of the disappearance of Tuttle and of the search made for his remains, and closed with the statement:

"There is no doubt, however, that the young man is dead, and probably was either accidentally shot or received some serious fall, or was attacked by some wild animal which accident resulted in his death."

On October 20, 1913, plaintiff notified the local agent in writing of the finding of the body, and requested instruction as to what was required of her as to "proof and statement." The letter was forwarded to and answered by the head office, to the effect that the last policy carried by Ora Tuttle was in 1910, and that "the conditions of it are such that it would appear that no claim exists thereunder." The plaintiff replied, reciting her conversation in 1910 with the local agent, and stating that she would be glad to hear further from the company. Thereafter, on January 30, 1914, J. L. Wines, Esq., an attorney, took the matter up with the company, and was advised in writing that—

"It appears impossible to show the manner of such death. Such being the fact, it is impossible to determine whether the case falls within the terms of the policy, said policy being one of limited liability. Furthermore, it appears from an examination of the files that the provisions of the contract in regard to giving notice and submitting proofs have not been complied with. You will, of course, understand that the action of the company in writing you as above is not to be construed as a waiver or impairment of any defense which it may have to any action upon the policy."

The amended complaint alleges that—

"Ora Tuttle came to his death by bodily injuries sustained, caused by external, violent, and accidental means, and resulting in his death and disability, independent of all other causes."

It then recites the facts, substantially as hereinbefore stated. It then alleges the conversation with the local agent and the subsequent writing of the letter referred to above, with the contents, but continuing, "and asking him if he would look after the matter as he said he would." This latter request does not, however, appear in the letter which was introduced in evidence. The complaint then alleges the notice of June 19, 1911, and, after stating the contents, avers that—

"At the same time requested that proper blanks be forwarded to her to make the necessary written affirmative proof of death."

The letter, also introduced in evidence, does not contain the request quoted above from the complaint.

The complaint further alleges that notice of death was given and liability denied within the 120 days as required by the policy, "after ascertaining the fact of death"; that defendant failed, neglected, and refused to furnish the blanks, and plaintiff was unable, therefore, to furnish the proof required, and was thereby excused from furnishing other proof than that submitted, and that defendant waived any advantage that it might have claimed by reason of the failure of plaintiff.

The defendant demurred to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, pointing out the failure to state in what manner the injuries were sustained, or that they were caused by external, violent, and accidental means; that the complaint shows a failure to give the required notices, and does not state facts sufficient to constitute a waiver. The demurrer was overruled, and defendant answered, and thereafter the cause was tried to the court sitting without a jury. The plaintiff having rested, defendant moved the court to find the issues in its favor, which motion was denied. The defendant introduced no evidence, and the court made its findings, to the effect that Ora Tuttle came to his death by external, violent, and accidental means on or about the 22d day of November, 1910, at which time he was insured in defendant company, and that plaintiff was his beneficiary; that the facts did not come to the knowledge of plaintiff until October, 1913, and in the interim plaintiff did not know the actual fate of Ora Tuttle, or that he was in fact dead; that after the discovery of his death, and within the time provided in the policy, plaintiff duly notified defendant of the death; that the amount of the policy was due and payable January 30, 1914, at which time defendant refused payment. The court thereupon recited its conclusions of law that the plaintiff was entitled to a judgment, and entered judgment accordingly. The appeal is from the judgment.

The specifications of error herein are that the court erred in (1) overruling the demurrer to the amended complaint; (2) refusing to grant the motion to find the issues for defendant; (3) finding that Ora Tuttle came to his death by external, violent, and accidental means on or about November 22, 1910; and (4) finding as a conclusion of law that plaintiff was entitled to judgment.

1. In overruling the demurrer the court evidently considered the general allegations of the complaint sufficient, to be thereafter aided by proof of specific facts, and disregarded the recitation of evidence as surplusage. The case was thereafter tried, and

Digitized by Google

all the facts, concerning the death of Tuttle, that could possibly be developed were brought out. No good purpose could now be served by a new trial, and we are of the opinion that the matter should be disposed of on its merits. We will therefore pass, without deciding, the question of the correctness of the court's ruling on the demurrer.

[1] 2. The motion to find the issues in favor of the defendant is based on the ground of alleged insufficiency of the evidence to establish (a) that death resulted from injuries sustained, caused solely by external, violent, and accidental means; (b) that immediate written notice of the accident was given in accordance with the terms of the contract; or (c) that written affirmative proof of death by such means was made within the time required by the terms of the contract; or (d) that there was a waiver of such conditions by the company. The grounds designated (a), (b), and (c), are so closely allied that they will be considered together.

The policy here under consideration contains the following provisions:

"6. The claimant must deliver to the company at its home office in Los Angeles, California, immediate written notice of any accident, with full particulars and name and address of insured, and deliver to the company at its said home office written affirmative proof of such injuries or death and whether said injuries or death were caused by external, violent and accidental means within the terms of this policy; and so furnish such proof as to death * * * within one hundred and twenty days from time of accident; or no claim shall arise or be valid."

"9. No alteration or waiver of the conditions or provisions of this policy or said application shall be valid unless in writing at the company's home office and signed by the president or vice president and also the secretary or assistant secretary; nor shall notice to or knowledge of any person of anything not written in said application be held to effect a waiver or estoppel upon the company, or affect the provisions of this contract."

While, in this state, "time is never considered as of the essence of a contract, unless by its terms expressly so provided" (Rev. Codes, § 5047), and "any succinct and intelligent statement, giving the information called for by the stipulation in the policy, whether verified or not, or whether by eyewitness or not, is sufficient to put the insurer upon inquiry to determine whether he is liable" (Da Rin v. Casualty Co., 41 Mont. 175, 108 Pac. 649, 27 L. R. A. [N. S.] 1164, 137 Am. St. Rep. 709), under the above quoted provision "6" some notice, "with full particulars and the name and address of insured," should have been given to the company at its "home office." And while the beneficiary did not know, immediately after the accident, the exact facts concerning the manner in which insured had met his death, she was, within a reasonable time after his disappearance, fully convinced of his death, and, under the terms of the contract, either she, or some one acting in her behalf, should have given the required notice to the company at its home office.

[2] In the absence of proof that the facts related were communicated to the home office, notice to the local agent during the informal conversation held shortly after the disappearance of Ora Tuttle, could not, under any circumstances, be held to meet the requirement of the contract that immediate notice be given to the "company at its home office." As was said in Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398 (14 L. R. A. [N. S.] 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290):

"The promise to insure is not absolute but conditional. The condition is that the notice, whatever it may be and by whomsoever or whenever given shall be given. It is a condition precedent to the creation of liability or the life of the promise; or, to put it perhaps in a better way, the giving of the notice is one of the essentials of the cause of action. * * * If it be said, as it sometimes is, that such a defense is purely technical, the answer (if one is needed) is that the provision for notice is of the essence of the contract, that it is manifestly an important provision for the protection of the insurer against fraudulent claims, and also against those which, although made in good faith, are not valid. It is a provision which tends to the elucidation of the truth when the claim for indemnity is made. It was one to which the insured agreed, and it is not unreasonable."

[3] The giving of the notice of the accident, and the forwarding of affirmative proof of death, are two separate and distinct obligations. Under the circumstances of this case, the latter obligation could not be met until after the discovery of the body and a determination of the cause of death, if it was then possible; but the fact of the accident, if any, with its attendant circumstances, was known to plaintiff within a few days after the disappearance, but no notice thereof was given until June 19, 1911, nearly seven months thereafter.

In the case of Foster v. Fidelity & Casualty Co., reported in 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833, it was held that where the beneficiary satisfied herself after investigation that her son's death was accidental, but did not give notice until 29 days thereafter, she did not bring herself within the requirement of "immediate notice."

There is a class of cases which holds that the time within which notice must be given does not begin to run until the discovery of the facts upon which the claim is based. Trippe v. Provident Fund Society, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529; Munz v. Standard L. A. Ins. Co., 26 Utah, 69, 72 Pac. 182, 62 L. R. A. 485, 99

Digitized by Google

Am. St. Rep. 830; Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 13 Am. St. Rep. 109. But these cases are of little assistance here; for leaving out the question of death, with which this preliminary notice is not concerned, the facts relating to the accident, if any, were known to plaintiff at the time she was notified of the loss of her son in a storm.

The plaintiff contends that she was not required to give notice until after the establishment of the fact that the assured was dead. If this were true, no such notice as is required by the terms of the contract was even given, as it would exclude the letter of June 19, 1911, which contained the only written notice furnished the company at any time, attempting a recital of the facts. There is no evidence of a compliance with the requirement of written affirmative proof of death; the letter of October 20, 1913, written to the local agent, but forwarded to the home office, goes no further than to state that the "remains of my son Ora Tuttle have been found." What communication was made by Attorney Wines is not disclosed, and appears to have been made orally, while the stipulation in the contract is that it be made in writing, and was made more than three months after the discovery of the body.

[4, 5] As to waiver, the insurer and the insured mutually agreed that—

"No waiver * * * shall be valid unless in writing at the home office and signed by the president or vice president and also the secretary or assistant secretary."

Where the policy contains a provision against waiver by an agent, it is both notice to and agreement by the policy holder that no agent of the company has authority to waive the condition. Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. Rep. 578; Travelers' Ins. Co. v. Meyers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760.

Three letters, admittedly coming from the home office, were introduced, and the material parts of their contents have been heretofore quoted. No one of these letters is signed as provided for in the policy; but we shall not pass upon the question as to whether such requirement is reasonable or not, as, in our opinion, nothing contained in the letters could constitute a waiver, even though signed.

[6-8] 3. The first ground mentioned in the motion for findings in favor of the defendant, and the third and fourth assignments of error, are based on the lack of evidence to establish death by external, violent, and accidental means. The evidence, heretofore quoted, establishes the fact of death, but the manner in which the insured met his death is left entirely to conjecture. The policy on which the action was brought is not an ordinary life insurance policy, but an accident policy, in which the liability of the company is specifically limited to insurance "against the effect of bodily injuries sustained during the term of the policy, and caused solely by external, violent, and accidental means," and, under the terms of which, "if death shall result from such injuries within ninety days, independent of all other causes, the company will pay the principal sum of fifteen hundred dollars." The burden of proof was upon the plaintiff to show, not only the death of the insured, but also that the death was caused by injuries sustained by the insured by external, violent, and accidental means, and resulted within 90 days after the injury. In other words, the plaintiff must not only show death, but death resulting from accident within the meaning of the policy. Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175; Rock v. Travelers' Ins. Co., 172 Cal. 463, 156 Pac. 1029, L. R. A. 1916E, 1196; Vernon v. Iowa State T. Ass'n, 158 Iowa, 597, 138 N. W. 696; Wilkinson v. Ætna Life Ins. Co., 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269; Wright v. Order of U. T. C., 188 Mo. App. 457, 174 S. W. 833; Laessig v. Travelers' Pro. Ass'n, 169 Mo. 272, 69 S. W. 469; Hatch v. U. S. Casualty Co., 197 Mass. 101, 104, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; Smith v. Travelers' Pro. Ass'n, 219 Mass. 147, 106 N. E. 607, L. R. A. 1915B, 872.

In the case of Laessig v. Travelers' Pro. Ass'n, supra, the court said:

"The proof of accidental death is the essential prerequisite and condition precedent to the right to recover on an accident insurance policy. This is the distinguishing feature between accident policies and ordinary life policies. In the latter, to make out a prima facie case it is only necessary for the plaintiff to show the contract after the death, * * * whereas, in the former, the condition precedent to a recovery is not simply the natural death, but the death from accident. Hence in suits upon accident policies the burden of proof is upon the plaintiff (subject to the limitation that it is not presumed as a matter of law that the deceased took his own life or was murdered) to show that the death was caused by external violence and by accidental means. This is exactly what the policy or contract itself provides. And this is the rule laid down by Mr. Justice Harlan, in the Supreme Court of the United States, in Insurance Co. v. McConkey, 127 U. S. 661. * * * As mere proof of injury in a damage case will not entitle plaintiff to recover, but negligence of the defendant must be shown, so in a suit upon an accident policy mere proof of injury or death will not entitle the plaintiff to recover, but the injury or death must be shown to be due to an accidental cause."

There is a clear distinction between accidental death and death by accidental means; the latter only is covered by the policy. Thus

Digitized by Google

in Smith v. Insurance Co., supra, we find the rule stated as follows:

"It is not sufficient that the death or the illness that caused the death may have been an accidental result of the external cause, but that cause itself must have been, not only external and violent, but also accidental [citing a long list of authorities]."

The word "accident," in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental.

Death resulting from voluntary physical exertion or from intentional acts of the insured is not accidental, nor is disease or death caused by the vicissitudes of climate or atmosphere the result of an accident; but where, in the act which precedes an injury, something unforeseen or unusual occurs which produces the injury, the injury results through accident.

In Sinclair v. Maritime Ass. Co., 3 El. & El. 478, the court says:

"We cannot think that disease produced by the action of a known cause can be considered as accidental. Thus disease or death, engendered by exposure to heat, cold, damp, the vicissitudes of climatic or atmospheric influences, cannot, we think, properly be said to be accidental unless brought about by circumstances which may give it the character of accident."

Respondent cites a number of cases in support of the contention that the circumstances in this case supply this element. But in each of these cases there is shown the element of accident. For example, in Travelers' Ass'n v. Insurance Co., 10 Manitoba, 537, the death of the insured by freezing was found to have been caused by prolonged exposure due to the breaking down of the conveyance in which he was riding.

In Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620, it was held that a drowning, caused by a temporary trouble to which the insured was not subject, but which was entirely unusual and uncommon, whereby he fell into the water, was "accidental."

In United States Mut. Acc. Ass'n v. Hubbell, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453, drowning while crossing a ford, which insured had safely crossed on previous occasions, and which was entered only with the apprehension of getting wet, was held to be "accidental."

It will be noted, however, that in each of the cases the "accidental means" which brought about the death was shown. Here the only evidence is that the insured left camp in a heavy snowstorm, following the trail of an elk; he had been reared in the mountains; the weather was not cold enough to freeze a man, and the storm did not increase in violence. The body was found but two miles from camp, though insured would have had to walk five miles in order to reach the spot, a distance which could not have exhausted a strong young man; there was no place from which insured could have fallen to his death. The rifle he carried on leaving camp was not with the remains, and the automatic was still in his pocket. At the time the body was found it could not, of course, be ascertained whether there had been any marks on it. While there is no presumption that a man found dead has been murdered or has committed suicide, as was stated in Laessig v. Insurance Co., supra, it is equally true that no presumption can be indulged in that insured met death by external, violent, and accidental means.

The insured, having contracted that the company should be liable only in case of death from injuries caused solely by external, violent, and accidental means, the burden of proving that the case is within the terms of the policy rested upon plaintiff, and this burden, in our opinion, was not sustained. Conjectural causes of death, which do not fall within the terms of the policy, as that insured died of heart failure or apoplexy, are as reasonable, under the evidence adduced, as those which fall within those terms.

[9] While we are mindful of the rule that this court will not disturb the findings of the trial court where there is substantial evidence to support them, in this case there is no evidence to support the finding "that Ora Tuttle came to his death by external, violent, and accidental means on or about the 22d day of November, 1910."

The judgment of the district court of Jefferson county is therefore reversed, and the cause remanded to the trial court, with the direction to enter judgment in favor of the defendant.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, HURLY, and COOPER, JJ., concur.

Digitized by Google

WALLACE v. CHICAGO, B. & Q. R. CO.
(No. 954.)

(Supreme Court of Wyoming. July 19, 1920.)

1. Eminent domain ⇐280—Landowner cannot recover land taken with his knowledge after construction of road.

Where railroad having power of eminent domain, but without exercising such power, has taken possession of land necessary to the conduct of its business either with or without the consent of the owner, but with his knowledge, and has constructed its road and is operating thereon as a common carrier, the owner cannot recover possession of the land but is limited to an action for damages.

2. Adverse possession ⇐13—Open, notorious, and continued possession under color of title sufficient.

Open, notorious, and continuous possession of real estate under color of title is sufficient evidence of notice to the owner to start the running of the statute of limitations in favor of an adverse claimant.

3. Eminent domain ⇐280—Landowner not objecting to taking of land by railroad could not recover possession.

Where a railroad took possession of land under deed from former owner and constructed its road thereon, landowner who had knowledge that railroad was constructing road on his land, and who made no objection, could not, after the road was constructed and in operation, recover possession, but was limited to recovery of damages.

4. Eminent domain ⇐308—Award of damages for land proper in owner's action for possession.

In landowner's action against railroad for possession of land on which railroad had constructed its road, the court, on refusal to award owner possession because of failure to object to construction of road, may award owner damages for the taking and thus avoid a multiplicity of actions.

5. Eminent domain ⇐297—Owner not objecting to construction of road not entitled to value of company's improvements.

Where railroad took possession of land under deed from former owner and constructed its road thereon, owner, who with knowledge thereof did not object to construction of road, was not entitled, on being subsequently awarded damages for the taking, to recover for the value of improvements placed thereon by the railroad.

Appeal from District Court, Natrona County; Charles E. Winter, Judge.

Action by C. M. Wallace against the Chicago, Burlington & Quincy Railroad Company. From judgment giving him insufficient relief, plaintiff appeals. Affirmed.

William O. Wilson and George W. Ferguson, both of Casper, and Fillius, Fillius & Winters, of Denver, Colo., for appellant.

E. T. Clark, of Billings, Mont., and A. C. Campbell and Nichols & Stirrett, all of Casper, for respondent.

BEARD, C. J. Plaintiff in the district court, appellant here, alleged in his amended petition, in substance for a first cause of action, that the defendant was a corporation; that he was the owner of certain lots situated in Central addition to the town (now city) of Casper, and entitled to the possession of the same; that defendant well knowing that plaintiff was such owner did, on or about October 10, 1910, willfully and wrongfully take possession of said lots and excluded plaintiff therefrom to his damage in the sum of $5,000. For a second cause of action, he averred that about May 1, 1891, one Wright was the owner of the north half of the southeast quarter of section 4 in township 33 north of range 79 west, and on said date laid out and platted said property in lots and blocks as such addition and filed said plat or map in the office of the county clerk of Natrona county; that Wright conveyed all of said addition to one Champion, trustee, by deed recorded May 24, 1894; that about March 28, 1883, plaintiff by diverse mesne conveyances from said Champion trustee, all of which were duly recorded, became the owner of the lots in controversy, and has ever since paid the taxes thereon; that about October 31, 1910, defendant attempted to acquire title to said property by warranty deed from William F. Dunn and Mary A. Dunn, said deed purporting to convey said north half of the southeast quarter of section four; that at the date of the execution of said deed the defendant well knew that said land had been platted into lots, blocks, etc., as said Central addition to Casper. Alleges the taking of possession by defendant and damages as in the first count, and prays:

"(1) For five thousand ($5,000) dollars damages suffered by the plaintiff in being deprived of the premises aforesaid by the defendant. (2) For a decree that the plaintiff is the owner of said premises, and that the defendant has no right, title or interest therein, and for recovery of the said premises by the plaintiff, and the ejection of the defendant therefrom. (3) For such other and further relief as to the court shall seem meet and proper."

The defendant by its answer denied the allegations of the first cause of action except that it was a corporation. And answering the second cause of action admitted it was a corporation, averred that the Dunns were the owners of the land October 31, 1910, and in possession of the same, and on said date defendant in good faith and

Digitized by Google

for a valuable consideration, and without notice or knowledge of any claim, right, or title thereto by plaintiff, acquired from said Dunns, by warranty deed, the said premises. Denied the other allegations of said count.

For a further defense, defendant alleged: That at all times mentioned in the amended petition it was and now is a railroad company and engaged in the business of a common carrier, interstate and intrastate, for hire. That since October 31, 1910, defendant has been in possession of the lands in question holding the same adversely to plaintiff under the deed from the Dunns. That since said date the defendant for the purpose of conducting its business as a common carrier for hire, and in good faith without knowledge that plaintiff had any claim or title to the premises, and with the knowledge, acquiescence, and consent of plaintiff, has made valuable and lasting improvements thereon exceeding in value the sum of $4,000. That said lands have become a necessary and component part of its railroad, and that to surrender said land to plaintiff would seriously interfere with the operation of said railroad and prevent defendant from performing its duty to the public as a common carrier. That the value of said lands at the time defendant entered into possession of the same and immediately prior to the time it made the improvements thereon did not exceed the sum of $250. Wherefore plaintiff is estopped from claiming title to said lands.

Plaintiff replied, admitting that defendant is a railroad company engaged in business as a common carrier, and claims title to the lots under the deed from the Dunns, and denying the other allegations of the answer, and alleged that plaintiff had been the undisputed owner of the lots since March 28, 1893, and no action had been brought by defendant or its grantor to recover the title or possession, and pleaded the statute of limitations.

The case was tried to a jury, and, after the evidence as to the title to the land was concluded, counsel for defendant made the following statement:

"We can see we are liable to some damages for taking the property. We are prepared to put on evidence to show what the damages are. We think it is up to the plaintiff to state what the damages are, which he had not done. At the same time we are anxious to avoid further suit by putting the whole matter before this jury. We realize Mr. Wallace here purchased this property innocently, notwithstanding the fact that all precautions were taken by the officers of the Burlington road right of way men, attorneys, and all others, but still they must pay Mr. Wallace something."

The defendant then called a witness, who testified that he had been engaged in the real estate business in Casper since January, 1905, and was acquainted with the property in controversy, that it was a cow pasture inclosed by a wire fence in 1910, without any streets, alleys, or marks in it. He was then asked: "In 1910 what was that property worth?" To which counsel for plaintiff made the objection:

"Objected to. I object to this testimony for the reason that it is incompetent, irrelevant and immaterial what the lots were worth in 1910, or in 1892, or any other time, for the reason that this is an action in ejectment to recover specific property, and entirely immaterial what the lots were worth in 1910. Absolutely tends to prove no issue involved in this suit."

[1] The court overruled the objection, to which ruling the plaintiff excepted. To understand the court's ruling it is necessary to state that, while the petition is substantially in form an action in ejectment, the prayer was also for general relief. And the answer alleged the value of the property taken by defendant in 1910, which was denied by the reply. We think the rule has become well settled that when a railroad company having the power of eminent domain, but without exercising the same, has taken possession of land necessary to the conduct of its business, either with or without the consent of the owner, but with his knowledge, and has constructed its road and is operating the same as a common carrier, the landowner cannot recover possession of the land, but is limited to his action for the damages sustained by reason of such taking. Roberts v. Northern Pacific Railroad, 158 U. S. 1, 11, 15 Sup. Ct. 756, 39 L. Ed. 873; Goodin v. Cincinnati Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95; Gurnsey v. Northern Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185, and notes; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; Flynn v. Beaverhead County, 49 Mont. 347, 141 Pac. 673; Miller & Lux v. Enterprise C. & L. Co., 169 Cal. 415, 147 Pac. 576; Stuart v. Colorado Eastern R. Co., 61 Colo. 58, 156 Pac. 152; State ex rel. Twiss v. Superior Court, 93 Wash. 429, 161 Pac. 68; 9 R. C. L. 860, § 29; 15 Cyc. 999. In the present case there was at least a question as to the validity of plaintiff's title under the evidence contained in the record. But we are relieved from deciding that question by the statement of counsel for defendant above quoted; but the evidence is sufficient to show good faith on the part of defendant in attempting to acquire title to the property in 1910, and in accepting a warranty deed from Dunn and wife. It is also sufficient, in our opinion, to warrant the conclusion that plaintiff knew that the road was being constructed over the land. The defendant had taken possession of the lots under the deed from Dunn, was engaged in constructing its road and in

Digitized by Google

making other improvements necessary to its operation, and had expended several thousand dollars therefor long before this action was commenced.

[2] Open, notorious, and continued possession of real estate under color of title is sufficient evidence of notice to the owner to start the running of the statute of limitations in favor of an adverse claimant. Black v. Tenn. Coal, Iron & R. R. Co., 93 Ala. 109, 9 South. 537; Murray v. Hoyle, 92 Ala. 559, 9 South. 368; King v. Carmichael 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; Wilson v. Williams' Heirs, 52 Miss. 487; Close v. Samm, 27 Iowa, 503; Key v. Jennings, 66 Mo. 356; Craig v. Cartwright, 65 Tex. 413; Davis v. Baugh, 59 Cal. 568; 1 Cyc. 998; 1 A. & E. Enc. Law, 832 et seq.

[3] We think that rule is applicable to a case like the present one to the extent of tending to prove such knowledge and assent to the possession by the defendant as to prevent the recovery of the possession of the premises, and to remit plaintiff to an action for damages. In this case it further appears that on December 8, 1914, more than two years before this action was commenced, an agent of plaintiff, residing in Casper, wrote to the defendant stating that plaintiff was the owner of the lots and asking if the company wished to purchase them. The defendant replied making an offer for them. No further negotiations seem to have taken place between the parties. There is also another significant fact tending to support the conclusion of knowledge on the part of plaintiff. The reply denying knowledge of the possession by defendant was not verified by him, but by one of his attorneys, and although the evidence showed the open and notorious character of defendant's possession, and the above referred to correspondence was introduced in evidence, the plaintiff being present at the trial and testifying in his own behalf that he resided in Colorado and had never been to Casper and had never seen the lots until the time of the trial, he did not deny actual knowledge or information of defendant's possession from the time it took possession, which plaintiff alleged and defendant admitted was October, 1910. Plaintiff having made no objection and having taken no action until long after the road was constructed and in operation, the case comes clearly within the rule first herein stated, and the district court correctly ruled that plaintiff was not entitled to recover possession of the premises. In that situation of the case, the plaintiff having offered no evidence in support of his claim for damages, there was but one of two courses for the court to pursue, viz., either direct a verdict for defendant, or proceed with the case as an action for damages. The court took the latter course and directed the case to proceed as an action in the nature of an action in condemnation. The Supreme Court of Colorado, in Stuart v. Colorado Eastern R. Co., 156 Pac. 152–156, in considering a somewhat similar case said:

"In such cases in some states a suit in the nature of an action in equitable ejectment may be brought to compel condemnation and payment; in other states the action is termed trespass to try title, similar to ejectment; in other jurisdictions injunction may be resorted to in the first instance, which is converted into a condemnation proceeding; while in others the owner may bring a direct action in the nature of an action in condemnation. But the form or name of the action is immaterial. Such actions are all akin to condemnation suits, and are to compel condemnation and payment for the right of way taken and the damages occasioned by the taking."

[4, 5] In this case the defendant pleaded, and introduced evidence to the effect, that this land was necessary for railroad purposes, and alleged the value of it when taken. There does not seem to be any substantial reason why, under the pleadings in the case, the just compensation guaranteed by the Constitution to the plaintiff could not be awarded in this action as well as in another suit, and thus avoid a multiplicity of actions. Plaintiff, however, was content to rest his case solely upon the proposition that he was entitled to a judgment for possession, and declined to offer any evidence as to the value of the land taken. The defendant then proved the value of the land in 1910 when it took possession; and the court instructed the jury to return a verdict in favor of plaintiff for the value so proven, with interest from October 31, 1910, which it did, and the court rendered judgment accordingly. Plaintiff's contention in this court is that he was entitled to judgment for possession, the enforcement of which judgment he conceded should be stayed for a reasonable time to allow defendant to bring condemnation proceedings, in which case he should recover, not only the value of the land taken, but also the value of the improvements placed thereon by defendant. In other words, he insists that the defendant should forfeit to him the improvements and then pay him their value. That we do not consider either the law, equity, or justice. Holding as we do that under all of the circumstances disclosed by the record it sufficiently appears that the railroad company in good faith under color of title took possession of the premises and made the improvements thereon; and that the evidence is sufficient to establish notice to plaintiff of such occupation, and without objection on his part. He is not, therefore, entitled to more than the value of the land at the time it was taken with interest from that date, but not to the value of the improvements.

Digitized by Google

The just compensation to which he is entitled and which is guaranteed to him by the Constitution is payment for what he has lost and no more. As said by the Supreme Court of Illinois in C. & A. R. R. Co. v. Goodwin, 111 Ill. 273, 53 Am. Rep. 622:

"The 'just compensation' required to be given is for that which is taken from the owner, and which is of value to him, and not for something he never owned."

It would unnecessarily extend this opinion to cite and review the large number of decisions we have examined on this subject, and we shall cite only the case of J. T. & K. W. Ry. Co. v. Charles S. Adams, 28 Fla. 631, 10 South. 465, 14 L. R. A. 533, in the opinion of which case many decisions on the question are reviewed. The plaintiff was deprived of the possession of his land in 1910, and by his inaction has lost the right to recover possession. Under the particular circumstances of the case, just compensation for his loss is the value of the land at the time it was taken, with interest from that date. That amount he was awarded by the judgment. The judgment of the district court is affirmed.

Affirmed.

POTTER and BLYDENBURGH, JJ., concur.

BOATMAN v. MILES. (No. 1003.)

(Supreme Court of Wyoming. July 19, 1920.)

1. Appeal and error ⟸656(1)—Appellant may amend record to make it conform to statute.

Where questions in the transcript of the evidence are not numbered as required by the statute, the court will grant appellant's motion for leave to amend the record so as to make it comply with the statute.

2. Appeal and error ⟸766—Failure of brief to point to evidence not ground for dismissal where claim of no evidence is made.

Where appellant contends in his brief that there is no evidence in the record to support the verdict and judgment, the appeal will not be dismissed on the ground that the brief does not refer to pages and portions of record where the questions arise, and that it fails to refer by page or number to any specified testimony on which appellant relies for a reversal.

Appeal from District Court, Natrona County; Ralph Kimball, Judge.

Action by Roy Boatman against James H. Miles. Judgment for plaintiff, and defendant appeals. On plaintiff's motion to dismiss appeal, and on defendant's motion for leave to amend the record on appeal. Defendant's motion granted. Plaintiff's motion denied.

William O. Wilson and George W. Ferguson, both of Casper, for appellant.

Floyd E. Pendell, of Casper, for respondent.

BEARD, C. J. This case has been submitted at this time on two motions—one by the respondent to dismiss the appeal on the grounds: (1) That the brief of appellant does not contain any statement of the points or authorities sufficient to justify the consideration of the cause, and does not refer to the pages and portions of the record where the questions arise; (2) that the brief of appellant is frivolous; (3) that the record on appeal does not comply with the requirement of the statute, the questions in the transcript of the evidence not being numbered as required; (4) the brief fails to refer by page or number to any specific testimony upon which appellant relies for a reversal. The appellant moves for leave to withdrawn the record for the purpose of numbering or causing to be numbered the questions as required by the statute.

[1] We think the motion of appellant should be granted. The statute provides, in cases wherein a transcript of the testimony is necessary, "the party appealing shall cause to be prepared by the official court reporter a complete transcript of all the testimony offered at the trial, with each question consecutively numbered," etc. The failure of the court reporter to number the questions is quite analogous to the failure of the clerk of the district court to number the pages of the transcript sent up in proceedings in error under rule 10 (104 Pac. xii), requiring that to be done. Said rule provides that in such case the court may on its own motion, or upon the motion of defendant in error, enter an order requiring the plaintiff in error, within a specified time, to properly number the pages of the bill or transcript, and for failure to comply with such order the cause may be dismissed in the discretion of the court. An order will be entered requiring appellant to properly number the questions in the transcript within 30 days from this date, and leave is granted to withdraw the record for that length of time for that purpose.

[2] As to respondent's motion, the first and fourth points are not well taken, for the reason that appellant contends in his brief that there is no evidence in the record to support the verdict and judgment; and, if that is the situation, of course he could not point out where something which he claims does not exist could be found in the transcript. The third point is premature. As stated, in deciding appellant's motion, the motion to dismiss on that ground would lie only after an order has been made to number the questions, and that order has not been complied

Digitized by Google

with. The brief fairly presents the question of the sufficiency of the evidence to support the verdict and judgment, and the second ground of the motion is not well taken. The respondent's motion to dismiss the appeal is denied. If the order requiring appellant to number the questions in the transcript of the testimony is not complied with, the case will be subject to dismissal, and, if the order is complied with, respondent may have 45 days after the expiration of said 30 days within which to serve and file his brief.

Appellant's motion granted.

Respondent's motion denied.

POTTER and BLYDENBURGH, JJ., concur.

WHITE v. WHITE et al. (No. 15869.)

(Supreme Court of Washington. June 29, 1920.)

1. Wills ⟸55(1)—Testamentary incompetency not shown by evidence.

Evidence *held* to support conclusion of trial court that testatrix was in her right mind and capable of disposing of her property.

2. Wills ⟸166(1) — Undue influence not shown.

Evidence *held* not to show that the will was the result of undue influence.

Department 2.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Abel White against John C. White and others to set aside a will. Judgment for defendants, and plaintiff appeals. Affirmed.

E. N. Eisenhower and Bates & Peterson, all of Tacoma, for appellant.

Herr, Bayley & Croson, of Seattle, F. D. Oakley, of Tacoma, and M. F. Porter, of Puyallup, for respondents.

MOUNT, J. This action was instituted by Abel White to set aside a will made by his sister, Harriet Young, deceased. The petition alleges, in substance, that the testatrix was incompetent to make the will in question, and that the will was executed under and because of undue influence exerted upon her by John C. White and M. F. Porter. The case was tried to the court and a jury. The jury returned a verdict in the form of special interrogatories, finding, in substance, that the testatrix at the time she made the will in question was not competent to make a will, and that the will was the result of undue influence exercised by John C. White or other persons. On the return of this verdict, which the trial court treated as advisory, the court reversed the findings of the jury, and, after finding the facts in the case, concluded as follows:

"That at the time of the execution of her last will the deceased had very largely recovered from the weakened condition which existed during the summer of 1915; that she had sufficient mental power and capacity to understand what she was doing and to know her property and to remember her friends and relatives, and that the said will was duly and properly executed by her without any undue influence on the part of John C. White, M. F. Porter, or any other person, and that the said will as admitted to probate in the court on June 1, 1918, is the last will and testament of the said Harriet Young, deceased, and was properly so admitted."

The trial court thereupon dismissed the proceedings. The petitioner has appealed from that judgment.

The only questions presented in the case are questions of fact, as stated by counsel for appellant in their brief as follows:

"First. Was Harriet Young on June 29, 1916, competent to make a valid will?

"Second. Was the paper signed by her on that day the result of undue influence exercised by John C. White and other persons?"

But for the fact that the trial court and the jury, after listening to the evidence, arrived at directly opposite conclusions, we would be satisfied to say that the facts as found by the trial court were amply sufficient to justify the court's finding. In view of the fact that the trial court and the jury do not agree in their conclusions upon the facts, it may be well to state some of the more important contentions of the parties hereto. The following facts, we think, are not disputed: Harriet Young, the testatrix, died in the Dunlap Hotel at Puyallup on May 27, 1918. Her nearest surviving relative at that time was her brother, Abel White. At the time of her death she had property, consisting of real and personal property, of the value somewhere between $60,000 and $80,000. On June 29, 1916, she was 85 years of age. At that time she executed a will drawn by M. F. Porter, who had been for several years her attorney and confidential adviser, and who prepared the will at her request. According to the terms of this will she left a farm near the town of Sumner in Pierce county, Wash., to a nephew, John C. White, and also $8,000 in cash. The rest, residue, and remainder of her estate, not to exceed $50,000, she devised to certain named persons, in trust, for the purpose of incorporating and maintaining a charitable institution in the town of Puyallup, Wash., to be known as the "Harriet Young Young Men's Christian Association." The will provided that the further residue was charged with the payment of $25 per month to Lewis Mc-

Digitized by Google

Adams and Willis Y. McAdams, nephews of the said deceased, who were also to be given rooms without charge in said Y. M. C. A. building.

In the year 1915 the deceased was induced by one Barron to make a sale of her farm near Sumner. This sale was made for a wholly inadequate price and upon unreasonable terms. Upon hearing of this sale Mr. Porter brought an action in the superior court of Pierce county to set aside the sale. Thereafter a petition was filed in the superior court of Pierce county, alleging that Mrs. Young, "has by reason of her advanced age and bodily infirmities, become mentally incompetent either to care for herself or to manage her property." Upon the hearing of this petition, the doctors who had called to see her and had heard evidence of her manner of life testified that she was afflicted with senile dementia at that time. The court thereupon found that she was incompetent to take care of her business, and her nephew, John C. White, was appointed guardian of her estate. Thereafter this guardian was substituted as a party plaintiff, and upon issues joined the transaction with Mr. Barron was set aside. Thereafter Mr. White continued as guardian of her estate. He transacted all her business. In October of 1915, the deceased was taken to the Dunlap Hotel in Puyallup, where she lived from that time until her death, which occurred in May, 1918.

[1] The appellant contends that the deceased was incompetent to make a will in June of 1916, because at that time she was suffering from senile dementia and was incompetent to manage her own affairs, and because a guardian had been appointed a year previously to care for her estate. There is testimony in the record by doctors who, in answer to hypothetical questions detailing her condition both prior and after the year 1915, stated that it was their opinion she was afflicted with senile dementia. All the doctors who testified in the case seem to agree that this disease is a progressive disease; that it is one which destroys the brain cells and permits of no improvement or recovery, but grows gradually worse until death. We think it is undisputed, at least the great weight of the evidence is to the effect, that nearly 3 years after physicians testified that Mrs. Young was afflicted with senile dementia she did not die of that disease, but that her death was caused by bronchial pneumonia, and that prior to the time she contracted this disease she was much improved mentally. So it is apparent that, whatever caused her affliction in 1915, it was not senile dementia. If not senile dementia at that time, it was not senile dementia later. We think the evidence to the effect that prior to her affliction in 1915 she had lived alone upon her ranch without sufficient nourishment, and had been quite sick on a number of occasions, sufficiently explains the cause of her condition in 1915, and that she was temporarily, rather than permanently, incapacitated at that time. We are satisfied after a careful reading of the abstract of the evidence that Mrs. Young was not afflicted with senile dementia in June of 1916, and we are also satisfied that she was free at that time to make her will. We said in Re Murphy's Estate, 98 Wash. 548, 168 Pac. 175, quoting from Points v. Nier, 91 Wash. 20, 157 Pac. 44, Ann. Cas. 1918A, 1046, regarding a will, "Suspicion, however great, is not enough to nullify it":

"This court has laid down the rule in the case of In re Gorkow's Estate, 20 Wash. 563, 56 Pac. 385, quoting from Redfield on Wills, as to what the quantum of mental capacity to make a will is, as follows: 'The result of the best-considered cases upon the subject seems to put a quantum of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction, or, in popular phrase, that the testator should, at the time of executing the will, know and understand what he was about.'

"We hold the view that the right to dispose of one's property by will is one assured by the law, and is a valuable incident to ownership, and does not depend upon its judicious use."

Prior to the time the testatrix executed the will in question she had executed at least four other wills, and in each of these wills she had made provision for some charitable purpose similar to the one here in question, and in those wills she provided for her brother to the extent of $100. At the time she requested this will to be drawn she stated to Mr. Porter, whom she employed to draw the will, that she would give her brother $100, because she was afraid he would attempt to set her will aside unless she gave him something. When informed that was not necessary, she directed that nothing be left to her brother. She had a number of nieces and nephews, for none of whom, except the McAdams boys, had she made provision in any of her previous wills. The main difference between this will and other wills is that in the other wills her nephew John C. White was not mentioned. In this will he received a large portion of her property. We think there is nothing unnatural in this, because Mr. White had for several years been caring for her and her property. She had trusted him implicitly, and had told him upon different occasions that she expected to remunerate him by her will. We think the whole evidence bears out the conclusion of the trial court that she was in her right mind, capable of disposing of the property, and did so as she desired it to go.

[2] Upon the question of undue influence we failed to find any evidence that either Mr. Porter or Mr. White induced the testatrix to make the will she did, or any will. It is argued by the appellant that the fidu-

Digitized by Google

ciary relationship and confidential relations existing between the testatrix and her guardian and her attorney, M. F. Porter, are sufficient to show undue influence. While there were confidential relations existing between these parties, we think the evidence conclusively shows that relation was not used in any way to influence the testatrix in making her will. She had said to John C. White upon different occasions that she intended to give him her property, and he in turn said to her that she ought to remember her other relatives. When she asked Mr. Porter to draw the will Mr. Porter inquired very carefully concerning the disposition she desired to make of her property, and after the will was drawn he gave it to her and told her to read it over and study it carefully, and if she was not satisfied with it to return it to him and he would change it, or words to that effect. She took the will after it was drawn and kept it for several days before it was finally executed.

Some contention is made by the appellant to the effect that one of the witnesses was a doctor, and that this of itself is a suspicious circumstance. It is true that the doctor was a witness to the will. He had treated her professionally. He examined the testatrix before he signed the will as a witness, to determine her qualification at that time, and he concluded that she was qualified, and therefore signed the will as a witness. Considering all the circumstances, there is nothing in this to warrant criticism.

We are satisfied from all the evidence in the case that there was no undue influence, and that the testatrix was fully competent to execute the will.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

TEED v. BROTHERHOOD OF AMERICAN YEOMEN. (No. 15655.)

(Supreme Court of Washington. June 29, 1920.)

1. Insurance ⟸123—Wife's interest in husband's life does not expire on divorce.

Where a wife has an insurable interest in her husband's life at the time he assigns to her a policy of insurance, the existence of an insurable interest at maturity of the policy is unnecessary, and her interest does not expire upon procurement of divorce.

2. Insurance ⟸770—Wife's status as one entitled to be named as beneficiary remained with her.

Where a wife was entitled, under the laws, to be named as beneficiary in her husband's benefit certificate, her status remained to her thereafter.

3. Statutes ⟸263—No retrospective construction, unless intent plainly expressed.

Statutes will not be construed to operate retrospectively, unless the intent that they shall do so is plainly expressed.

4. Insurance ⟸770—Statute confining death benefit to wife not retrospective.

Rem. Code 1915, § 6059—211, providing that the payment of a death benefit by a mutual benefit society shall be confined to the wife of the member, *held* not to operate retrospectively to deprive of her rights under the certificate the divorced wife of a member named as beneficiary.

5. Insurance ⟸770—Benefit society estopped to raise question whether wife entitled to receive benefit.

Mutual benefit society whose local officers, on divorce of a member, notified him and his former wife that it was not necessary to change the beneficiary of the husband's benefit certificate to their grandson, and advised them to keep on paying premiums, which they did, *held* estopped to raise the question whether the wife after her divorce, under Rem. Code 1915, § 6059—211, was entitled to receive benefits.

6. Insurance ⟸812—Limitation of time for action without application where death not known.

Provision of benefit certificate that no action could be maintained unless brought within year of death of member *held* without application to case where death of member was not known to the beneficiary or the society within the year; the certificate being kept alive by regular payment of dues.

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Minnie Teed against the Brotherhood of American Yeomen, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

John D. Denison, of Des Moines, Iowa, and Grass & Horr, of Seattle, for appellant.

Gay & Griffin, of Seattle, for respondent.

MOUNT, J. This action was brought to recover upon a fraternal beneficiary policy of insurance. It was tried to the court without a jury and resulted in a judgment in favor of the plaintiff for $899.80 with interest. The defendant has appealed from that judgment.

There are no disputed facts in the case. The facts may be stated briefly as follows:

The appellant is a fraternal beneficiary association organized and doing business under the laws of the state of Iowa and authorized and licensed to do business in this state. On June 28, 1900, it entered into a contract with Benjamin F. Teed of Kent, Wash., under

Digitized by Google

which it issued to him the benefit certificate in question. Under the contract the insured agreed to be bound by all the laws of the defendant association "now in force and which may hereafter be adopted and which are hereby made a part of this contract." In this benefit certificate as originally issued Ella Teed, related to the insured as wife, was named as beneficiary. Thereafter Ella Teed died, and on October 7, 1907, Margaret Hodden, related to the insured as mother-in-law, was named as beneficiary. Thereafter on the 27th day of March, 1909, the insured married Minnie Teed, respondent. And on the 27th day of July, 1909, Minnie Teed, then related to the insured as wife, was, in accordance with the by-laws of the appellant association, substituted as beneficiary.

In October of 1909 Minnie Teed also took out a benefit certificate in the appellant association, and in this certificate her husband, Benjamin F. Teed, was named as beneficiary. Under some agreement between Minnie Teed and her husband after these beneficiary certificates were issued, Mrs. Teed has continually paid the dues for both certificates to the appellant company.

On the 17th day of September, 1913, Minnie Teed and Benjamin F. Teed were divorced. At that time the certificate of insurance upon the life of Benjamin F. Teed was delivered to Mrs. Teed. She has retained possession thereof ever since. After the divorce Mrs. Teed and Mr. Teed desired to have the certificates of insurance changed, so that the beneficiary named therein should be the grandson of Mrs. Teed. They made application therefor to the local correspondent of the appellant at Kent and were then advised by the local correspondent not to make such transfers because the policies were valid, but to allow the policies to stand as they were and to continue to make their payments. This method was afterwards pursued.

On April 3, 1916, while these certificates of insurance were in full force and the dues were fully paid, Benjamin F. Teed died. The respondent, Minnie Teed, at that time was absent from the state of Washington and his death did not become known to her until after the 5th day of January, 1918. In the meantime she had made all payments as required by the contract of insurance, and on learning of the death of Benjamin F. Teed she furnished proofs of death and demanded payment of the certificate of insurance in which she was named as beneficiary. The company refused to pay upon the ground that more than a year had elapsed after the death of the insured, and upon the further ground that she was not a legal beneficiary under the laws of this state. At that time they tendered back to Mrs. Teed the premiums and dues which she had paid after the death of Mr. Teed.

[1] The first contention of the appellant is to the effect that the respondent had no insurable interest in the life of Benjamin F. Teed after the date of her divorce from him. A number of authorities are cited to that effect in the appellant's brief. This court has passed upon that question in the case of Humphrey v. Mutual Life Insurance Co., 86 Wash. 672, 151 Pac. 100. In that case we recognized the fact that the question was one upon which the authorities were not agreed, but we held, in accord with the apparent weight of authority, that where a wife had an insurable interest at the time her husband assigned to her a policy of insurance upon his life, the existence of an insurable interest at the maturity of the policy is unnecessary, and her interest in the policy does not expire upon the procurement of a divorce. The ruling there is conclusive of the point in this case.

The main point, and the one upon which appellant apparently relies, is that under the laws of this state the respondent is not entitled to the benefits of this certificate because she is not related to the insured as required by the statute. The statute (Rem. Code 1915), by section 6059—211, provides:

"The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree ascending or descending, father-in-law, mother-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member. * * * Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules, or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member: Provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes."

[2] This statute was passed in 1911. It was not in effect when the policy in this case was issued, nor was it in effect when the respondent was made beneficiary in the certificate of insurance. No doubt, if this law had been in effect at that time and the beneficiary in the certificate had not been married to the respondent, he could not have named her as a valid and legal beneficiary. But at the time the respondent was named as beneficiary in the certificate she was the wife of the insured. She was entitled under the law to be named as beneficiary. That status remained to her thereafter. Humphrey v. Mutual Life Insurance Co., supra.

[3] So the question now is: Did the enactment of this law take away from the respondent her rights in this policy of insurance because it provides, "The payment of death benefits shall be confined to wife"? We have held, and the rule is, that statutes will not be construed to operate retrospectively unless the intent that they shall do

Digitized by Google

so is plainly expressed. Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381. We find nothing in this statute expressing such an intention. On the other hand, section 6059—221, providing for the manner in which foreign corporations may be permitted to do business in this state, provides:

"That nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein."

[4] We think it is apparent from this provision that it was not the intention of the Legislature, in passing this act, to make it retroactive or to nullify or change in any way any of the contracts theretofore made by fraternal insurance companies.

[5] We are furthermore of the opinion that the appellant at this time is estopped from raising this question. The insured and the beneficiary named in the policy after the divorce was granted applied to the local officer who conducted the correspondence of the appellant and to whom the premiums and dues were paid and forwarded, and this officer notified the parties that it was not necessary to change the beneficiary and advised them to keep on paying their premiums, which they did. The appellant accepted the premiums from that time down until after the death of the insured. We have held in the case of Kennedy v. Knights of Maccabees, 100 Wash. 36, 170 Pac. 371, that the secretary of a subordinate lodge, charged with the collection and remittance of dues, is such an agent that in the performance of his duties his mistakes could be chargeable as the act of the principal. It follows in this case that the appellant is estopped to say that the beneficiary here is not a legal beneficiary.

[6] Some contention is also made by the appellant that the action was not brought within the time limited by the policy. The policy provides:

"No action can or shall be maintained on this certificate unless brought within one year of the date of death or disability of said member."

The action was not brought within one year from the death of the member, because his death was not known either to the beneficiary or to the insurer. The premiums and dues were regularly paid and the policy was kept alive and no default was made therein. This provision in the policy was plainly for the purpose of limiting the time when an action might be brought after a dispute arose after maturity of the policy. This provision, we think, does not cover a case where the insured dies and the death is not known either to the insurance company or to the beneficiary in the policy within the year where the policy is kept alive by the regular payment of dues or premiums and the policy is not known to be matured. No authorities are cited in support of the appellant's position, and we are of the opinion that this provision does not apply to the facts in this case.

We find no error in the judgment, and it is therefore affirmed.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

SCHULTZ v. WESTERN FARM TRACTOR CO. (SCHULTZ et al., Interveners). (No. 15832.)

(Supreme Court of Washington. June 25, 1920.)

1. Death ⟸101—Division of damages between surviving wife and child held proper.

Where the sum of $2,250 was paid into court in settlement of an action under Laws 1917, p. 495, for wrongful death, court did not err in refusing to give the widow more than $1,600, the remainder being given to a crippled minor son of deceased by a former marriage; the widow having been married to deceased for about a year and having received $2,000 life insurance and $250 wages due him.

2. Parent and child ⟸3(1) — Parent must support defective child after majority.

The legal duty of the parent to support his normal children ceases at the age of majority, but to defective children, whether the defect be mental or physical, the parent owes a continuing obligation of support, which ceases only when the necessity of support ceases.

Department 2.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Jessie Schultz, as administratrix of the estate of Albert W. Schultz, deceased, against the Western Farm Tractor Company and another. Parties having compromised their differences and defendant having paid into court money in settlement of the action, William Robert Schultz and the plaintiff individually intervened and applied for a distribution. From an order distributing the funds, Jessie Schultz appeals. Affirmed.

Burkey, O'Brien & Burkey, of Tacoma, for appellant.

F. B. Churchill, of Kent, for respondent.

FULLERTON, J. On August 28, 1918, one Albert W. Schultz was injured by an automobile driven by an employé of the Western Farm Tractor Company, dying from the effects of the injury on the day following. Schultz left surviving him a widow and a minor son by a former wife. The widow was appointed administratrix of his estate,

Digitized by Google

and later on began an action against the tractor company in damages as for wrongful death for the benefit of herself and the minor son. Issue was taken on the complaint, but before the action was brought on for trial, the parties compromised their differences, the tractor company paying into court $2,250 in settlement of the action. After the payment of the money into court the parties entitled thereto applied for a distribution of the fund. At the hearing on the application their claims proved antagonistic, and the court took evidence as to the degrees of dependency of the respective claimants, finally entering an order dividing the fund by giving to the widow $1,600 and to the son $650. From the order the widow appeals.

The statute which gives a right of action for wrongful death (Laws of 1917, p. 495), while providing that such an action may be maintained by the personal representative of the person whose death is wrongfully caused for the benefit of certain designated relatives of such person, does not in terms prescribe any rule by which the fund is to be apportioned. Seemingly it could be contended with some plausibility that an equal division was intended, or, at least, where, as here, there is a widow and a child entitled to share, the widow's portion could not exceed one-half; but as the case is presented it is unnecessary to determine the question. The child who received the minor part is not complaining, and has not appealed, and seeks an affirmation of the award and of the reasons which actuated the court in making it.

[1] Meeting the question on the ground chosen by the parties, we see no reason to change the award. At the time of his marriage with the present appellant, Mr. Schultz was well along in years. He had at that time no property whatsoever, but was dependent entirely on his personal labor for his support. The marriage occurred but 13 months prior to his death, and there was not that degree of dependency upon him on the part of the wife that usually arises where the marriage relation is long standing and the wife, from the very nature of the relationship, becomes unfit to take up a gainful occupation. Moreover, the appellant received his life insurance, some $2,000, and the money he had received as "back pay" for his labors, some $250 more. True, the appellant says that these are considerations immaterial to the question in hand, and cites authorities to maintain the position. But an examination of them convinces us they are not in point. One of the inquiries here was the financial condition the parties were left in because of the death, which was not so in the instances cited, and it seems to us clear that the property received by either claimant arising from the death is a proper subject of inquiry.

On the other hand, the son had a substantial claim on his father's bounty. He is a cripple. In his early boyhood, because of some misfortune which had overtaken him, his left arm was amputated at the shoulder. He has but a moderate education, and there are in consequence but few pursuits open to him by which he can earn a livelihood. From his birth until his early youth he was supported entirely by his father, and, from the time he began to do something for his own support up to the time of his father's marriage with the appellant, if not up to the time of his death, he has been a recipient of a part of his father's somewhat meager wage. This is cut off by the death of his father, and to him it is a serious loss.

[2] The appellant contends that in any event the award is too large. She calls attention to the fact that had the monthly sums the son claims to have received from his father been continued up to the time he would reach the age of majority it would not amount to the sum awarded him, and argues that the sum he would have so received is the measure of his loss. But the argument is hardly conclusive. Doubtless the legal duty of a parent to support his normal children ceases at the age of majority, but the rule is not the same with respect to his defective children, whether the defect be mental or physical. To these he owes a continuing obligation of support, which ceases only when the necessity for support ceases.

There was no error in the order, and it will stand affirmed.

HOLCOMBE, C. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

In re FICK'S ESTATE. (No. 15743.)

(Supreme Court of Washington. June 23, 1920.)

1. Executors and administrators ⇐199—Facts warranting setting aside of order awarding property for fraud of administratrix.

In a proceeding to remove an administratrix and to set aside an order awarding her land as widow of the deceased, facts *held* to show such fraud as justified the court in setting aside the order, especially in view of the fact that minors were not represented by a guardian ad litem, and that the property set aside exceeded in value the sum of $3,000.

2. Executors and administrators ⇐35(15)—Evidence of fraud and neglect warranted removal of administratrix.

In a proceeding for the purpose of removing administratrix, *held*, that evidence of fraud

Digitized by Google

and neglect warranted trial court in removing the administratrix.

Department 2.

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

In the matter of the estate of Mike Fick, deceased. From an order removing her as administratrix, the surviving spouse of deceased appeals. Affirmed.

Louis J. Muscek and Blackburn & Gielens, all of Tacoma, for appellant.

H. G. & Dix Rowland, of Tacoma, for respondent.

MOUNT, J. This proceeding was brought to remove the administratrix of the estate of Mike Fick, deceased, on the alleged ground that she had misappropriated the property belonging to the estate, neglected her trust, and was attempting to secure for herself all the property of the estate, and also for the purpose of setting aside an order awarding to the administratrix, as widow of the deceased, 50 acres of land, on the ground that said order was obtained by fraud. The petition was filed by a minor child of the deceased, through his guardian ad litem. Upon issues joined the case was tried to the court, and at the conclusion of the evidence the trial court discharged the administratrix and set aside the order allowing to the widow 50 acres of land. The administratrix has appealed from that order.

The facts are substantially as follows: Mike Fick died intestate in Pierce county in August of 1916. At the time of his death he owned a 50-acre tract of land, on which was located his dwelling and farm buildings. This 50-acre tract was subject to a mortgage of $1,000. He also had contracted to buy from one Swanson 40 acres additional which adjoined the 50 acres, for the sum of $2,000. There was still due on this contract $400 at the time of Mr. Fick's death. He also left personal property of the value of something over $1,500, as found by the trial court. He left a widow and nine children, four of whom were minors. The others were married and doing for themselves.

About nine months after the death of Mike Fick, his widow, who had married one Steve Lindway in the meantime, petitioned for letters of administration upon the estate of her deceased husband. She was in due time appointed administratrix, qualified, and gave bond, and letters of administration were issued to her. She thereupon made an inventory, describing the real estate above referred to, and alleging that there was no personal property belonging to the estate. Appraisers were appointed; the 50-acre tract was appraised at $2,910; the 40-acre tract was appraised at $2,000; another small tract at $100. After the inventory and appraisals were made, the widow petitioned the court to set aside to her the 50-acre tract. A notice was posted, directing all persons to appear and show cause, if any, why the court should not award to Mary Fick Lindway a homestead in accordance with article 15, § 103, p. 670, of the Laws of 1917, describing the property. No guardian ad litem was appointed to represent the minor heirs, and they were not represented at the hearing. At that hearing no evidence was introduced as to the value of the property, except the appraisement which had theretofore been made. The court thereupon set over the 50 acres to the widow.

Thereafter a petition in this proceeding was filed, alleging in substance that the administratrix had neglected her trust, had misappropriated the personal property belonging to the estate, and was attempting to secure for herself all the property of the estate, and that the setting aside of the 50 acres to the administratrix was procured by fraud upon the court, because it was not shown what the value of the property was at that time. It is alleged in the petition that the value of the property at that time was largely in excess of $3,000, and that this fact was known to the administratrix.

The appellant makes a number of assignments of error, but these are discussed upon two points, as follows: First, that the court should not have set aside the order and judgment awarding the tract in question to the appellant as a homestead; and, second, that the court was not justified in discharging appellant as administratrix of her husband's estate, and refusing to allow her commissions, and holding her liable for the personal property collected by her.

Upon the first question the respondent argues that the order here made was not the awarding of a homestead, but was an order made under section 103 of the act of 1917 (Laws 1917, p. 670). It is argued that, because Mike Fick died in August of 1916, prior to the time the act of 1917 took effect, the estate is governed by the prior law, and therefore the order setting aside this 50-acre tract was void in any event.

[1] It is not necessary to decide or to discuss this question, because we are satisfied that, even if the act of 1917 applies, there is ample evidence of fraud to justify the court in vacating the order. It is not disputed that at the time of the death of Mike Fick the property was all community property, and that he left at the time of his death personal property of the value of about $1,500. The widow, at the time of her appointment as administratrix, alleged that there was no personal property. When she applied to the court for an order setting aside to her this tract of land as a homestead, no proof was offered as to the value

Digitized by Google

of the tract of land at that time. While there is a dispute in the evidence as to its value, the trial court found as a fact that it was worth at that time at least $5,000. The minor heirs were not represented at the hearing. At the time the order was made, none of the children resided with their mother. She had remarried Mr. Lindway and was living upon the property.

In view of these facts, and especially in view of the fact that the minors were not represented by a guardian ad litem, and in view of the fact that the property set over exceeded in value the sum of $3,000, and this fact was known to the appellant, we think it follows as a matter of course that the trial court was justified in setting aside that order.

[2] We are also satisfied that the trial court was justified in removing the appellant as administratrix. The deceased at the time of his death left upon the farm $1,533.30 worth of personal property. The administratrix had represented to the court that there was no personal property. After her appointment she had rented the farm, without accounting therefor, for sums aggregating $1,350, as found by the court; she had collected an insurance upon a burned building, $300; she had borrowed upon the 40-acre tract some $600—making a total of $3,783.30. The court found that she accounted for and was entitled to a credit of $894.64, leaving a balance of $2,888.66 to be accounted for by her. We think it is plain from these findings, which are amply supported by the evidence, that the administratrix was at least neglectful of her trust, even if she was not attempting to convert to her own use all the property of the estate, without considering the interest of her children.

Upon the whole record we are satisfied with the disposition of the case made by the trial court, and the judgment is therefore affirmed.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

TUKWILA SCHOOL DIST. et al. v. BURROWS, County Superintendent of Schools. (No. 15781.)

(Supreme Court of Washington. June 23, 1920.)

1. Schools and school districts ⟸25—Town being organized did not, ipso facto, become school district.

A town within a school district on organization did not become ipso facto a school district separate and apart from the district of which its territory then comprised a part by virtue of Sess. Laws 1889–1890, p. 379, § 64.

2. Schools and school districts ⟸25—Town did not become separate school district upon organization.

Assuming that a town organized within a school district became, ipso facto, a school district, separate and apart from the district of which its territory then comprised a part by virtue of Sess. Laws 1889–1890, p. 379, § 64, it did not remain a separate school district, where, subsequent to the incorporation of the town, and while its territory was shown on the books of the county school superintendent as forming a part of the old school district, the Legislature enacted the Code of Public Instruction, which recognized as legal all school districts then existing as shown by the records of the county superintendent.

Department 2.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

In the matter of the petition for Tukwila School District. From a judgment of the superior court denying the petition after an appeal from an order of A. S. Burrows, County Superintendent of Schools for King County, denying the petition, the petitioners, G. R. Payne and others, appeal. Affirmed.

Robert D. Hamlin, of Seattle, for appellants.

Fred C. Brown and Howard A. Hanson, both of Seattle, for respondent.

FULLERTON, J. School district No. 144, of King county, was duly organized as such on April 7, 1904. On June 16, 1908, a part of the territory comprising the school district was incorporated as a town of the fourth class under the name of the town of Tukwila. On May 5, 1919, the requisite number of heads of families residing within the town of Tukwila filed with the county superintendent of schools of King county a petition, praying that a new school district be organized out of the territory of school district No. 144, the boundaries of which should be coincident with the corporate boundaries of such town. After due notice given, a hearing was had on the petition by the county superintendent, and the petition denied. An appeal was taken to the superior court of King county from the order of the county superintendent, where the petition was again heard on its merits and denied. This appeal is from the judgment of the superior court.

In this court the petitioners do not question the correctness of the judgment of the superior court, treating it as a judgment upon an application for the organization of a new district, but contend that under and in virtue of the statutes existing at the time of the incorporation of the town of Tukwila the town became, ipso facto, a school district, separate and apart from the district of which its territory then comprised a part,

Digitized by Google

and that the county superintendent and the superior court erred in failing to recognize and treat it as such. The provision of the statute on which the contention is founded reads as follows:

"Each incorporated city or town in this state shall be comprised in one district and under one board of school directors, and in all such cities or towns where the enumeration of school children entitled to draw school money is three hundred or more, the directors shall be required to adopt the graded system of teaching in their schools: Provided, that nothing in this section shall be so construed as to prevent the extension of such city or town districts a reasonable distance outside the limits of such incorporated city or town: And provided further, that the schools of such cities and towns may be graded in such manner as the directors thereof may deem best suited to the wants of such districts." Session Laws of 1889–1890, § 64, p. 379.

[1] It is not contended, if we have correctly gathered the argument, that the language of the body of the section, namely, "Each incorporated city or town in this state shall be comprised in one district and under one board of school directors," necessarily means, when taken alone, that the incorporation of a city or town creates a new school district, but that such must be its meaning if any effect is given to the language of the first of the provisos, since no school district comprised of a city or town could extend its boundaries a reasonable distance outside of its corporate limits, unless it is of itself a school district. But we cannot think the reasoning conclusive. If the intent was to provide that the mere act of incorporating a city or town of itself created a new school district, the Legislature would have so expressly declared, and not left the question to inference. To our minds the more obvious meaning is that the proviso was intended as explanatory of the language of the body of the section, the purpose being to make it clear that the boundaries of a school district comprising an incorporated city or town need not be confined to the boundaries of such city or town.

[2] But there is another reason which we think controlling in this instance, even if our construction of the statute be wrong. Subsequent to the incorporation of the town of Tukwila, and while its territory was shown on the books of the county school superintendent as forming a part of school district No. 144, the Legislature enacted a new code (Laws 1909, c. 97), relating to the public schools, which it denominated the "Code of Public Instruction of the state of Washington." In the act, after providing for the classification of school districts, a method of organizing new districts and of changing the boundaries of existing ones, it further provided:

"That all school districts now existing as shown by the records of the county superintendent are hereby recognized as legally organized districts, subject to the classification of article 1 of this chapter." Laws 1909, c. 97, subc. 2, art. 2, § 1.

The evident purpose of this provision was to fix definitely the status of all the then recognized school districts, and set at rest controversies over boundaries and controversies over the question whether any such district was legally organized. Since the town of Tukwila was then shown by the records of the county school superintendent as forming a part of school district No. 144, its status was by the act definitely fixed as such, even though it might theretofore have asserted its independent existence as a school district.

The judgment is affirmed.

HOLCOMB, C. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

CASEY v. WILLIAMS. (No. 15789.)

(Supreme Court of Washington. June 25, 1920.)

1. Landlord and tenant ⟸169(6)—Evidence held to show landlord had actual knowledge of defect.

In an action against a landlord by a child to recover for personal injuries received when a defective railing gave way, evidence *held* sufficient to support a finding that defendant had actual knowledge of the defect.

2. Appeal and error ⟸1177(6)—On reversal of judgment notwithstanding verdict, appellee is entitled to have trial court dispose of motion for new trial.

Where defendant, after verdict for plaintiff, moved for judgment notwithstanding the verdict, or in the alternative for a new trial, and court granted the portion of the motion asking for a judgment notwithstanding the verdict, on reversal on appeal, Supreme Court will not direct the entry of a judgment in accordance with the verdict, but will remand the case; respondent being entitled to have the trial court dispose of the motion for a new trial.

Department 2.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Roy Casey, a minor, by his guardian ad litem, against C. W. Williams. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. W. Anderson, of Tacoma, for appellant.

Emil N. Stenberg, of Tacoma, for respondent.

Digitized by Google

FULLERTON, J. On August 5, 1916, the respondent, being then the owner of a certain house and lot situated in the city of Tacoma, leased the same to the appellant guardian and one Rinke. The house was a two-story structure. On the back side of the house was a porch, inclosed on the open side by a balustrade, the railing of which was fastened by nails to the upright supports of the porch. The evidence tended to show, and the jury were warranted in finding, that at the time of the rental the landlord was informed that Rinke, with his family, intended to occupy the lower story, and that the guardian, with her family, consisting of herself, a minor son, and a minor daughter, intended to occupy the upper story. The parties moved into the house some four days after the lease was entered into, and two days later the minor son went onto the porch, and while there started to pass or throw to his sister, who was on the ground below, a magazine or some like periodical. In doing so he laid his hand upon the railing of the balustrade mentioned, and possibly leaned thereon, when it gave way, falling to the ground below, and carrying the boy with it. From the fall the boy received severe and permanent injuries. In this action recovery is sought for the injuries so suffered. The cause was tried to a jury, which returned a verdict in favor of the appellant for $2,000. A motion for judgment notwithstanding the verdict, or in the alternative for a new trial, was interposed, and the first branch of the motion was sustained. A judgment of dismissal followed, and from the judgment this appeal is prosecuted.

The reasons which actuated the court in sustaining the motion are not disclosed by the record, save as they can be gathered from the arguments of counsel opposing and supporting the judgment entered. On many of the material issues we find no substantial dispute in the evidence. That the respondent is the owner of the premises, that he leased them to the mother of the injured boy, that the part of the porch which gave way was defective and dangerous, and not discoverable by ordinary inspection, that it did give way when put to use by the boy, that by reason thereof he received severe and permanent injuries, and that he was guilty of no negligence which contributed to his injury, the evidence abundantly sustains. Indeed, it seems to us that the jury could hardly have reached an opposing conclusion.

[1] The only question upon which there is any substantial dispute is whether the respondent, at the time the lease was entered into, had actual knowledge of the defect. The evidence on the question is that of a former tenant, who testified to the defective condition of the porch and to having informed the respondent of the fact. The porch is a double structure, having a floor leading out from each of the stories, and it is contended that the former tenant's evidence is uncertain, in that it is not clear as to which part of the porch he was referring. But to our minds this question is hardly in doubt. The evidence was directed entirely to the condition of the upper part of the porch, and, even were his statements entirely general, the inference would follow that he was referring to the part in dispute. But it was not thus general. His attention was called specially to the railing which gave way, and he testified that it was loose and dangerous, and that he told the respondent of its condition. We can but conclude, therefore, that the court was in error in his holding that there was no substantial evidence to support the verdict.

[2] The appellant asks us to direct the entry of a judgment in accordance with the verdict. But the motion for a new trial was not disposed of by the trial court, and the respondent is entitled to have its judgment upon that question. The judgment entered will therefore be reversed, and the cause remanded, with instructions to pass upon the motion for a new trial.

If the motion is granted, a new trial will be had as of course; if overruled, the court will enter judgment in accordance with the verdict.

HOLCOMB, C. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

STATE ex rel. ALLEN, Highway Com'r, v. PUBLIC SERVICE COMMISSION.
(No. 15754.)

(Supreme Court of Washington. June 22, 1920.)

1. Ferries ⟸29 — Statute regulating same held a special and not general law.

The law of 1854 (Laws 1854, p. 354), putting ferries under the control of county commissioners, was a special law on the subject of ferries alone, and was not a general law.

2. Ferries, ⟸29—Public Service Commission cannot regulate service and rates.

The Public Service Commission Law did not repeal by implication Rem. Code 1915, §§ 4998–5011, and the Public Service Commission has no jurisdiction over ferries; jurisdiction over ferries being fixed in the county commissioners.

3. Statutes ⟸162—Special law, when repealed by implication.

In order to effect a repeal of a former special law by a subsequent general law by implication, it must appear that the subsequent statute covers the whole subject-matter of the former and was intended to take its place.

Holcomb, C. J., dissenting.

Digitized by Google

En Banc.

Mandamus by the State, on the relation of James Allen, Highway Commissioner of the State of Washington, to compel the Public Service Commission of the State of Washington to exercise jurisdiction over a certain ferry for the purpose of regulating rates. Peremptory writ denied.

M. F. Gise, of Pomeroy, for petitioner.

L. L. Thompson, Atty. Gen., and R. M. Burgunder, Asst. Atty. Gen., for respondent.

MOUNT, J. The relator brings this action in mandamus to compel the Public Service Commission to exercise jurisdiction over a certain ferry for the purpose of regulating the service and the rates of such ferry. The Public Service Commission has refused to exercise jurisdiction over ferries because it is of the opinion that the exclusive jurisdiction over and control of ferries is vested in the county commissioners of the various counties of the state under the provisions of sections 4998 to 5013—1, inclusive, Rem. Code. The case presents but one question, namely: Did the act of 1911, known as the "Public Service Commission Law," repeal by implication sections 4998 to 5011, Rem. Code, relating to ferries? These sections will hereafter be referred to as the "Ferry Law."

[1-3] The Ferry Law was originally passed in 1854, and, with various amendments, the last of which was made in 1915, constitutes sections 4998 to 5013—1, Rem. Code. These sections make a complete law relating to ferries. This law provides that the board of county commissioners of any county in the state may grant a license to any person entitled to keep a ferry across any lake or stream within its respective county for a term not exceeding five years. It provides for an annual license fee to be paid to the county, the manner in which licenses may be granted, and the duties of the licensee. It also provides that the county commissioners may fix the rates of ferries and penalize the licensee for failure to perform the duties of ferryman. It gives to the county commissioners complete control of ferries within their counties. That control has been exercised since 1854 to the present time. In 1905 (Laws 1905, p. 145 et seq.) the Legislature passed an act establishing a Railroad Commission and giving that commission certain powers over railroads within the state. This act was amended in 1907 (Laws 1907, pp. 275, 536 and 691), and in 1909 (Laws 1909, p. 191) additional powers were given to the Railroad Commission, so as to include express companies and telephone and telegraph lines. In 1911 (Laws 1911, p. 538) the Legislature passed the Public Service Commission Law, making the former Railroad Commission the Public Service Commission, giving that commission certain powers over public utilities generally, and expressly repealing the acts above referred to as the Railroad Commission acts in none of these acts relating to railroads or other public service corporations is any mention made of the law relating to ferries.

The relator argues that the law in relation to ferries, passed in 1854, was a general law because at that time ferries were about the only public utilities which existed in this state. It is true that many of the public utilities we now have did not then exist, but there were other public utilities, such as vessels plying upon the waters of the state, stagecoaches upon the highways, and no doubt canals. It seems too plain for argument that the law of 1854, relating to ferries, was a special law upon the subject of ferries alone. While it is true that the act of 1911, at section 8, defines the term "vessel" to include every species of water craft used in the conveyance of persons for hire, we think that term applies to vessels other than ferries licensed as such, and while the act of 1911 defines the term "public service companies" to include every common carrier, and while it is also true that a ferryman is a common carrier, we are of the opinion that it was not the intention of the Legislature, in passing the act of 1911, to repeal, by implication or otherwise, the Ferry Law, because, in order to effect a repeal of a former act by implication, it must appear "that the subsequent statute covers the whole subject-matter of the former one and was intended to take its place." State ex rel. Johnson v. Clausen, 51 Wash. 548, 99 Pac. 743; Hewitt-Lea Lumber Co. v. Chesley, 68 Wash. 53, 122 Pac. 993; White v. North Yakima, 87 Wash. 191, 151 Pac. 645. At page 554 of 51 Wash., at page 745 of 99 Pac., in the first case cited, we quoted from Meade v. French, 4 Wash. 11, 29 Pac. 833, as follows:

"Hence the rule obtains that repeals by implication are not favored, and courts will seek to harmonize the laws and preserve them, rather than declare them abrogated or repealed; and if by any reasonable construction they can stand together, they will both be enforced. * * *"

If it had been the intention of the Legislature to supersede any part of the law relating to ferries, we think it would have made that intention plain. At the time the Public Service Commission Act was pending in the Legislature, three days after its passage the Legislature authorized port districts to acquire and operate ferries (Laws 1911, p. 418); and in 1915 (Laws 1915, p. 59) the Legislature authorized the county commissioners of certain counties to construct and maintain interstate ferries, thus indicating that the power as defined by the Ferry Law

Digitized by Google

over ferries was not taken away from the county commissioners. The Public Service Commission is not given power to license ferries or to say when or where a ferry may be constructed or operated. There is no word in the Public Service Commission Act of 1911 regarding ferries. The power to license them is therefore, without doubt, left to the county commissioners as provided in the Ferry Law. It follows, therefore, that the Public Service Commission Act does not attempt to cover the whole subject of ferries and does not take its place. Ferries are local to the counties in which they are situated, and it is reasonable to suppose that the Legislature determined that the local county authorities could fix and regulate rates and service as well as the Public Service Commission, and for that reason did not repeal, and did not intend to repeal, any part of the ferry law.

The writ is therefore denied.

MITCHELL, FULLERTON, MAIN, TOLMAN, PARKER, BRIDGES, and MACKINTOSH, JJ., concur.

HOLCOMB, C. J. I dissent. This case presents solely a question of statutory construction, namely: Whether or not the provisions of sections 4998 to 5013, Rem. Code, which are referred to as the "Ferry Law," have been repealed by chapter 117 of the Laws of 1911, known as the "Public Service Commission Law."

The contention is made that the Ferry Law is a special act, and therefore is not repealed by the Public Service Commission Law, a general enactment. In construing a law, to determine whether or not it is special, that is, whether it applies to particular or whether to all persons or things of a class, it becomes necessary to deal in relative terms. No matter how restricted may appear the scope of the persons or things dealt with in a law under one set of circumstances, they perhaps constitute all of the larger class as it actually existed under changed surroundings. To determine whether the subject-matter of the law constitutes all of the class, or only individual or particular persons or things of a class, it is necessary to consider it in the light of the circumstances and conditions existing as of the time of the enactment of the statute in question. This is in conformity with the general trend of decisions by the courts on the subject.

"They [statutes] are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment." In re Bergeron, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917A, 549.

"All will concede that in construing the act of 1862 we are to look to the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did." Platt v. Union Pac. R. R. Co., 99 U. S. 48, 60, 25 L. Ed. 424, 428.

"But courts * * * may with propriety [in construing a statute] recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it." U. S. v. Union Pac. R. R. Co., 91 U. S. 72, 79, 23 L. Ed. 224, 228.

To the same effect see St. John's Military Academy v. Edwards, 143 Wis. 551, 128 N. W. 113, 139 Am. St. Rep. 1123; Bloomer v. Todd, 3 Wash. Terr. 599, 612, 19 Pac. 135, 1 L. R. A. 111. So here, in determining whether the Ferry Law, passed in 1854, is a special enactment or a general one, we must bear in mind the surrounding circumstances as of the time of its enactment. At that time it is certain that few of the public utilities, now enumerated as the subjects of the Public Service Commission Law, were in existence in the then territory. In fact, it becomes almost conclusive, as one ponders the thought, that men were not dependent upon public utilities throughout the territorial limits as they are to-day, with the exception of possibly one—ferries. Moreover, because of the lack of bridges, to the people of the territory ferries were of greater importance than they are at the present time. These are things which we may judicially notice. McAdam v. Benson Logging & Lumbering Co., 57 Wash. 407, 107 Pac. 187; Wentworth v. McDonald, 78 Wash. 546, 139 Pac. 503. When the Legislature enacted the Ferry Law it legislated upon almost the whole field of public utilities as then existing. Viewed in this light, I am unable to say that sections 4998 to 5013, Rem. Code, being the Ferry Law, related to particular persons or things of a class, within the definition of a special act. It therefore stands to-day as a general enactment, even though, read in the light of present day conditions, it deals with a subject of very limited scope.

When the Legislature in 1911 enacted chapter 117, being "An act relating to public service properties and utilities providing for the regulation of the same, fixing penalties for the violation thereof, making an appropriation and repealing certain acts," with a saving clause as to the effect of the act upon municipalities, it legislated upon the entire subject as then existing, as the territorial Legislature had in 1854 when it passed the Ferry Law. Moreover, by the terms defined and used in Public Service Commission Law, § 8, it renders itself repugnant to the Ferry Law. It defines the term "common carrier," as used in the act, to include "all * * * steamboat companies * * * owning, operating, managing or controlling any such agency

Digitized by Google

for public use in the conveyance of persons or property for hire within this state," and defines "steamboat company," as in the act employed, to include "every corporation, company, association, joint stock association partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, leasing, operating or managing any vessel over and upon the waters of this state." The term "vessel," when used in the act, is defined to include "every species of water craft, by whatsoever power operated, for the public use in the conveyance of persons or property for hire over and upon the waters within this state (excepting rowboats and sailing boats under twenty gross tons burden, open steam launches of five tons gross and under, and vessels under five gross tons propelled by gas, fluid, naphtha or electric motors)." It is manifest by the foregoing enactments that the intention of the Legislature, when passing the Public Utilities Act, was to embrace public carriers upon navigable waters of every kind. In modern terms, terms which we can conceive had not been popularly used at the time of enacting the earlier act, it legislated upon the same subject and by implication repealed the former act.

"As a general rule, the enactment * * * of statutes manifestly designed to embrace an entire subject of legislation operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old; for the old legislation will be impliedly repealed by the new, even though there is no repugnancy between them." 25 R. C. L. 924, 925.

Chapter 117 of the Laws of 1911 manifestly is designed to embrace the entire subject of public utilities, and the intention of the Legislature to repeal the former act is clearly implied.

Respondents suggest that, while three prior acts are expressly repealed in the Public Service Commission Law, the Ferry Law is not, and contend therefrom that it was not the intent of the Legislature to repeal the latter act. The acts expressly repealed were of recent date and embraced piecemeal legislation on utilities then more prominently before the public, and I can only conclude that the failure to expressly repeal the act of 1854 was an inadvertence. Certain sections of the old Ferry Act are clearly repugnant to the General Public Utilities Law, but they can easily be eliminated and leave the ferries subject to the Public Utilities Law as a harmonious whole.

The peremptory writ should be granted.

SLOAN SHIPYARDS CORPORATION v. THURSTON COUNTY et al.
(No. 15534.)

(Supreme Court of Washington. June 29, 1920.)

1. Taxation ⟸79—Contract with government held not to make Emergency Fleet Corporation owner, so as to exempt materials from taxation.

A contract between a shipyard and the United States Shipping Board Emergency Fleet Corporation, providing that upon certain payments certain materials should become the property of the owner of the ship to be built, *held* not to make the Emergency Fleet Corporation the owner of material on hand, so as to relieve the shipyard from payment of taxes thereon.

2. Taxation ⟸79—Apparent owner of personalty subject to taxation.

Taxes are not a lawful charge on property, unless assessed in the name of its owner; but this does not mean that the person assessed must have a perfect and unincumbered title to the property, but only that he should be vested with the apparent legal title, or with the possession coupled with such claims of ownership as will justify the assumption that he is such owner; assessors not being required to go behind the record and search out unrecorded transfers, or anticipate the judicial settlement of a title which is in litigation.

En Banc.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Action by the Sloan Shipyards Corporation against Thurston County and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank C. Owings, of Olympia, for appellant.

Thos. L. O'Leary and W. W. Manier, both of Olympia, for respondents.

MOUNT, J. This action was brought to cancel a tax levied against the property of the plaintiff. The complaint alleges that the property assessed to the plaintiff was not its property, and that it did not own the property on the 1st day of March, 1918, the date fixed by law when the property was required to be assessed. Upon issues joined the case was tried to the court without a jury. The court found that the property was the property of the plaintiff, and for that reason dismissed the action. The plaintiff has appealed.

There is no dispute upon the facts, which may be briefly stated as follows:

The appellant is a corporation owning a shipbuilding yard and plant in the city of Olympia. On the 11th day of March, 1918, the assistant treasurer of the appellant

Digitized by Google

made a detailed list of the personal property of the appellant for the purpose of assessment, as follows:

Items of Property.	No.	Assessed Value.
Donkey and logging engines, pile drivers, hoisting engines, etc.....	7	$ 30,000 00
Lumber (M feet)		100,000 00
Manufacturers' materials and manufactured articles, including brick, stone, building materials, etc.....		225,000 00
Manufacturers' tools, implements, and machinery, including engines and boilers and donkeys.....		220,000 00
Total		$575,000 00

This list was returned to the assessor of Thurston county, and the assessor accepted the figures as the true value of the property, and fixed the value of this property for taxation purposes for the year 1918 at the sum of $287,500, the same being 50 per cent. of the true value, which method prevailed in assessing all other property in Thurston county. The total tax levied for all purposes for that year was 59.63 mills. The tax levied against the property of the appellant was $17,143.63. After the assessment no complaint was made to the county commissioners or the board of equalization. Thereafter the levy was made, and the county of Thurston distributed the taxes to the state, the city, and the school district, as required by law. Thereafter the appellant made a tender to the treasurer of Thurston county of the sum of $7,453.75, claiming that this was the amount of tax it owed upon the property which it owned. The treasurer refused to receive this amount in full payment, and this action was brought to set aside all of the tax levied, except the sum of $7,453.75, which was tendered to the county, and the tender made good.

It was the duty of the appellant, upon the trial of the case, to show that it did not own the property which was assessed against it. It was admitted upon the trial, and is admitted here, that the appellant was the owner of the first and fourth items in the detailed list furnished by the appellant to the county assessor, but that it was not the owner of the second and third items therein on the 1st of March, 1918, because at that time these items were owned by the United States Shipping Board Emergency Fleet Corporation, and that the property of that corporation was not subject to taxation. In order to show this fact, the appellant offered in evidence a contract entered into between the appellant company and the United States Shipping Board Emergency Fleet Corporation (hereinafter referred to as the Emergency Fleet Corporation), which contract provided for the construction of 16 wooden ships by the appellant for the Emergency Fleet Corporation. This contract provided, among other things, for the payment for these vessels as follows: (1) That 11 per cent., or $53,900, should be paid on each ship within 30 days after signing the contract, upon production of a sworn statement that the contractor had theretofore expended, or was committed on material contracts for expenditures, on the work under the contract in an amount equal to such payment; (2) that 11 per cent., or $53,900, should be paid on each ship within 60 days after signing the contract upon production of a like sworn statement; (3) that 13 per cent., or $63,700, should be paid when the keel of each ship was laid and half in frame; (4) that 13 per cent., or $63,700, should be paid when all in frame, and the keelsons of each ship in; (5) that 13 per cent., or $63,700, should be paid when the ship was three-fourths sealed, bottoms and bilges planked; (6) that 13 per cent., or $63,700, should be paid when cabin work was one-third completed; (7) that 13 per cent., or $63,700, should be paid when engines were ready for shipment from constructor; and (8) that 13 per cent., or $63,700, should be paid upon acceptance of the ship after sea trial. Paragraph VI of this contract provided as follows:

"It is agreed that as the payments provided therein are made by the owner (Emergency Fleet Corporation) on account of materials ordered by or assembled or set up in the yard of the contractor (appellant) or used in the construction thereunder the same to the extent of the payments made shall become the property of the owner."

[1] It was shown upon the trial that prior to March 1, 1918, the Emergency Fleet Corporation had advanced to the appellant the sum of $3,144,800, and that the appellant had earned up to that time $2,170,700. It is argued on these facts that the Emergency Fleet Corporation was the owner of the lumber and manufacturers' material, amounting to $325,000, listed by the assessor as the property of the appellant. We think this falls far short of proving that the Emergency Fleet Corporation at that time was the owner of these particular materials. The provision of section VI of the contract above quoted is to the effect that the Emergency Fleet Corporation shall be, as between the parties to the contract, the owner of materials ordered or assembled or set up in the yard of the contractor to the extent of the payments made thereon. On the 1st of March, 1918, when the assessment was required to be made, the appellant was in possession of the shipyards and had control thereof, and had possession of all the personal property therein situated. Provision VI of the contract between the appellant

Digitized by Google

and the Emergency Fleet Corporation simply gave the Emergency Fleet Corporation a lien upon the materials in the yard to the extent of the payments made upon those particular materials. The extent of those payments was not shown, but, even if shown, as between the appellant and all the world besides the Emergency Fleet Corporation, the appellant owned all the property in its possession.

[2] The rule in regard to the ownership of property for the purpose of taxation is stated in 37 Cyc. at page 788, as follows:

"Ordinarily, and in the absence of statute to the contrary, property is taxable only to the person who is the owner thereof at the date for its listing or assessment, or the date fixed by statute as of which its ownership for purposes of taxation is to be determined; and taxes are not a lawful charge on property unless assessed in the name of its owner, and any attempt to enforce the payment of taxes assessed and charged to the wrong person will be ineffective. This does not mean that the person assessed must have a perfect and unincumbered title to the property, but only that he should be vested with the apparent legal title, or with the possession coupled with such claims and evidences of ownership as will justify the assumption that he is the owner; and assessors are not required to go behind the records and search out unrecorded transfers or anticipate the judicial settlement of a title which is in litigation."

See, also, 26 R. C. L. § 315.

We think this must necessarily be the correct rule. It follows, therefore, that since the appellant was in possession of this property, claiming to be the owner, and being the actual owner as to everybody except the Emergency Fleet Corporation, and representing to the assessor that it was the owner, and having the apparent legal title, coupled with possession, is sufficient evidence of ownership in the appellant. We are satisfied, therefore, that the trial court properly found that the appellant for the purpose of assessment was the owner of the property on the 1st day of March, 1918, and is therefore liable for the whole tax.

Both appellant and respondent in their briefs have devoted considerable space to an argument upon the question of estoppel. Since we have concluded that the property in question was, for the purposes of taxation, the property of the appellant on the 1st day of March, 1918, it is unnecessary to consider the question of estoppel.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., and MITCHELL, MAIN, PARKER, TOLMAN, BRIDGES, and MACKINTOSH, JJ., concur.

STATE v. TERRIEN et al. (No. 15923.)

(Supreme Court of Washington. June 25, 1920.)

1. **Criminal law ⟸1092(4), 1099(6)—Filing of statement of facts or bill of exceptions within time jurisdictional.**

The filing of a statement of facts or bill of exceptions within statutory time is jurisdictional, and after this time has expired court cannot permit statement of facts or bill of exceptions to be filed.

2. **Criminal law ⟸1090(1)—Failure to file bill of exceptions or statement of facts leaves for review questions arising on record.**

That no bill of exceptions or statement of facts has been filed within statutory time does not require that a dismissal of an appeal be granted; appellants still having the right to present any question which may arise on the record aside from the bill of exceptions or statement of facts.

3. **Criminal law ⟸1106(3), 1130(4)—Appellant for cause shown may be allowed to file transcript and serve and file briefs after time fixed.**

The failure to file a transcript and serve and file briefs within time fixed by law is not jurisdictional, and the court may, if good cause be shown, extend the time and permit brief and transcript to be filed after the expiration of the statutory period.

Department 1.

Appeal from Superior Court, Kittitas County; John B. Davidson, Judge.

Walden J. Terrien, James Rogers, Ovid Richards, Harry Adams, Max Mashner, and Adolph Sartoris were convicted of crime, and appeal. On motion to dismiss appeal. Motion denied.

Ralph S. Pierce, of Seattle, for appellants.

Arthur McGuire and C. R. Hadley, both of Ellensburg, for the State.

MAIN, J. This is a motion by the respondent to dismiss the appeal because: First, a transcript of the record has not been filed by the appellants within the time fixed by law, or at all; second, that no statement of facts or bill of exceptions has been filed within the time fixed by law, or at all; and, third, that no brief on appeal has been served or filed by the appellant. The appellants admit failure to comply with the statutory requirements as to the filing of a transcript, statement of facts, and brief. They resist the motion to dismiss and ask that the time for perfecting their appeal in this court be extended until the 1st day of August, 1920. The facts which it is claimed excuse the delay are shown by affidavit.

[1-3] We will first consider the effect of the failure to file a statement of facts or bill of exceptions within the 90-day period fixed

Digitized by Google

by statute. Under the holdings of this court the filing of the statement of facts or bill of exceptions within the statutory time is jurisdictional, and after this time has expired the court cannot extend the time and permit a statement of facts or bill of exceptions to be filed. American Fuel Co. v. Benton, 98 Wash. 26, 167 Pac. 346; Universal Motor Co. v. McGeorge, 104 Wash. 344, 176 Pac. 331. It does not follow, however, that the appeal should be dismissed because no bill of exceptions or statement of facts has been filed within the time fixed by law, and because the court cannot now extend the time. The appellants still have the right to present any question which may arise upon the record aside from the bill of exceptions or statement of facts. The failure to file a bill of exceptions or statement of facts not requiring the dismissal of the appeal, the next question to be considered is whether the appeal should be dismissed because of failure to file the transcript and serve and file the briefs in accordance with the statutory requirements. The failure to file the transcript and serve and file the briefs within the time fixed by law is not jurisdictional, and the court may, if good cause be shown, extend the time or permit the brief and transcript to be filed after the expiration of the statutory period. Northwestern, etc., Bank v. Griffitts, 18 Wash. 69, 50 Pac. 591; Prescott v. Puget Sound Bridge & D. Co., 30 Wash. 158, 70 Pac. 252; Ellis v. Bardin, 36 Wash. 122, 78 Pac. 677; Weiffenbach v. Puget Sound B. & D. Co., 103 Wash. 240, 174 Pac. 10. Whether this appeal should be dismissed for failure to file the transcript and serve and file the brief within time depends, therefore, upon whether a sufficient excuse has been shown for the delay. Without reviewing in detail the facts which it is claimed show excusable neglect, it may be said that in our opinion a sufficient excuse has been shown and the court in the exercise of its discretionary power will permit a transcript and brief to be filed. The case in the ordinary course would not have reached this court for assignment at the present May term. The delay has not, therefore, resulted in a postponement of the hearing here on appeal. The appellants' time for perfecting their appeal in this court will be extended to August 1, 1920.

The motion to dismiss the appeal is denied.

HOLCOMB, C. J., and PARKER, MITCHELL, and FULLERTON, JJ., concur.

STATE v. SUTTLE. (No. 15926.)

(Supreme Court of Washington. June 25, 1920.)

Department 1.

Appeal from Superior Court, Kittitas County.

Fred Suttle was convicted of crime, and appeals. On motion to dismiss. Defendant given time within which to perfect appeal.

Ralph S. Pierce, of Seattle, for appellant.

Arthur McGuire, C. R. Hadley, and E. K. Brown, all of Ellensburg, for the State.

PER CURIAM. This is a motion to dismiss the appeal, and presents the same questions as the case of State of Washington v. Terrien et al., 190 Pac. 1017, just decided. Upon the authority of that case the appellant will be given until August 1, 1920, to perfect his appeal in this court.

STATE v. BROWN et al. (No. 15945.)

(Supreme Court of Washington. June 25, 1920.)

Department 1.

Appeal from Superior Court, Benton County.

F. A. Brown and C. T. Neilson were convicted of crime, and appeal. On motion to dismiss appeal. Motion denied.

Ralph S. Pierce, of Seattle, for appellant.

G. W. Hamilton, of Prosser, for respondent.

PER CURIAM. This is a motion to dismiss the appeal, because the appellants have not served and filed a brief within the time limited by law, or at all. The same excuse for failure to file the brief in this case is made as in the case of State v. Terrien et al., 190 Pac. 1017, just decided. Upon the authority of that case the motion to dismiss the appeal will be denied, and the appellants be given until August 1, 1920, to perfect their appeal in this court.

CITIZENS' NAT. BANK OF ROSWELL v. BEAN et al. (No. 2403.)

(Supreme Court of New Mexico. May 27, 1920. Rehearing Denied June 10, 1920.)

(Syllabus by the Court.)

1. Witnesses ⇐183½, New, vol. 9 Key-No. Series—Rule precluding verdict against administrator on opposing party's evidence unless corroborated held not to apply where deceased maker's signature is admitted.

Section 2175, Code 1915, which precludes an opposite or interested party from obtaining a verdict, judgment, or decision against the heirs, executors, administrators, or assigns of a deceased person upon his own evidence in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence, has no application to a suit against the administrator of a deceased maker of a promissory note, where the signature of such deceased maker is admitted.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

2. Bills and notes ⟸493(3)—Burden of showing want of consideration rests upon defendant until he offers evidence shifting burden.

Under section 618, Code 1915, every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value, and in a suit upon a negotiable promissory note the burden of showing that there was want of consideration rests upon the defendant, and if the defendant offers any evidence which shows, or tends to show, want of consideration, then it is incumbent upon the plaintiff to show by a fair preponderance of evidence upon the whole case that there was consideration.

Appeal from District Court, Chaves County; McClure, Judge.

Suit by the Citizens' National Bank of Roswell, N. M., against R. P. Bean, Jr., administrator of R. P. Bean, Sr., and others, with cross-complaint against plaintiff and Guy H. Herbert. Demurrer to counterclaim overruled, and judgment for defendant administrator on a directed verdict, and plaintiff appeals. Reversed and remanded, with directions to grant plaintiff a new trial.

A. J. Nisbet, of Roswell, for appellant.
H. M. Dow, of Roswell, for appellees.

ROBERTS, J. Appellant sued appellee R. P. Bean, Jr., as administrator of the estate of R. P. Bean, Sr., deceased, on a promissory negotiable note for $1,000. The note had been executed and delivered to the appellant by the deceased in his lifetime. The complaint was in the ordinary form and alleged that the note was past due and unpaid, and asked for attorney's fees. The administrator answered, admitted the execution of the note but denied that it was issued for a valued consideration, and for defense by way of new matter set up in detail the transaction leading up to the execution and delivery of the note, which in brief was as follows:

Bean, Sr., and one Guy H. Herbert had been negotiating for the purchase by Bean from Herbert of a farm known as the "Williams place," for which Bean was to pay $5,000. On November 4, 1915, the parties executed an escrow agreement, which was as follows:

"Escrow agreement between R. P. Bean and G. H. Herbert. Each party deposits $1,000.00 as forfeit to guarantee delivery of deed to 640 acres by Guy H. Herbert to R. P. Bean, known as Williams place, and guarantee payment of purchase price by R. P. Bean to G. H. Herbert upon delivery of deed by Herbert to Bean. Total purchase price to be $5,000.00. Deed to be delivered within 10 days.

"[Signed] Guy H. Herbert.
"R. P. Bean, Sr."

Bean did not have the $1,000, so he executed the note in question to the bank for the purpose of securing the money. The bank put up with the escrow a cashier's check for the $1,000, which later was delivered to Herbert by Mr. Jaffa, the cashier.

[1] It was the contention of the administrator that Jaffa was never authorized to deliver the money to Herbert, and this want of authority was set up in the answer by way of new matter. A second defense and cross-complaint against the bank and Herbert was filed in which the administrator sought to recover back from either one, or both parties, the $1,000, in the event the administrator was held liable on the note. Demurrer was filed to the counterclaim on the ground that Herbert was not a necessary party, which was overuled; and, as both parties answered the counterclaim thereafter, it is probable that the ruling on the demurrer was waived. The matter is not of much consequence in so far as the bank is concerned, as the vital question to it is the ruling of the court, on the trial, that it could not recover on the promissory note because it was unable to produce evidence to corroborate the testimony of its cashier to the effect that Bean received the consideration for the note. The point arose as follows:

Appellant offered the note in evidence and announced that it would rest. Appellee Bean then put in evidence the escrow agreement and certain other unimportant matters. Appellant then called Jaffa, its cashier, and he testified in detail to the facts leading up to the execution of the note. He said that the money had been put up in escrow out of the proceeds of the note; that Bean ordered him to pay the money to Herbert, which he did. Herbert was called as a witness and testified that Bean had agreed to pay the money to him and told him that he would order the cashier of the bank to turn it over. At the conclusion of the evidence Bean moved the court for an instructed verdict because appellant had not shown a consideration for the note, and it was his contention that appellant was required to corroborate the testimony of Jaffa, its cashier, to the effect that Bean, the deceased, had ordered him to pay the money over to Herbert. The court held that both Herbert and Jaffa were interested parties, and that under section 2175, Code 1915, this evidence was not sufficient to warrant a recovery. This section of the statute provides that in a suit by or against the heirs, executors, administrators, or assigns of a deceased person an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. This statute was fully

Digitized by Google

discussed by the court in the case of Union Land & Grazing Co. v. Arce, 21 N. M. 115, 152 Pac. 1143.

The trial court in a memorandum opinion referred to the case of National Rubber Supply Co. v. Oleson & Exter, 20 N. M. 624, 151 Pac. 695, and stated that under this decision, before the appellant could recover, it would have to produce corroborating evidence to show that a consideration was given for the note. The court was in error, and that case afforded no warrant for such a holding. That was a suit upon an account for supplies furnished upon a written order by the agent of the plaintiff. The deceased had signed no order for the goods, and of course plaintiff's right to recover there depended solely upon word of mouth testimony.

[2] In the present case the execution of the note was admitted, and, that being so, section 618, Code 1915, applied. This section reads as follows:

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

Under this statute, when the note was put in evidence, the appellant had made out a prima facie case as to consideration, and at that point was entitled to a recovery, absent any proof to the contrary by the personal representative of the maker of the note. The statute first referred to (section 2175, supra) applies only where in a suit against the heirs, executors, administrators, or assigns of a deceased person an opposite or interested party undertakes to recover, or defeat a recovery, by his own uncorroborated word of mouth testimony. In reason it can have no application where such opposite or interested party is not seeking to recover or defeat a recovery upon his own uncorroborated word of mouth testimony, but produces a written contract, signed by the deceased party, or, as here, a promissory note, which admittedly was signed by the deceased. Hence, when the note was put in evidence and the signature of the deceased admitted or proved, appellant was entitled to recover, and it was incumbent upon the administrator to produce sufficient evidence of lack of consideration to overcome the prima facie case, before appellant was required to produce more evidence to show consideration.

In Daniel on Negotiable Instruments (6th Ed.) § 164, the author says:

"Under the statute, the burden of showing that there was want of consideration rests upon the defendant, and, if the defendant offers any evidence that shows or tends to show want of consideration, then it is incumbent upon the plaintiff to show by a fair preponderance of evidence, upon the whole case, that there was consideration."

Some courts hold that, as a bill or negotiable note imports a consideration, it is incumbent upon the defendant to carry the burden of proof of a plea of no consideration; while others hold that, in the absence of any statutory provision, when the evidence has been introduced to rebut the presumption which the statute raises, the burden is upon the plaintiff to satisfy the jury upon all the evidence and by the preponderance of evidence that there was a consideration.

So far as this case is concerned, it would be wholly immaterial which rule was applied, because in either event it would be for the jury to say whether upon the whole evidence consideration was shown, and as to the question of consideration section 2175 would have no application.

Hence it follows that the trial court was in error in instructing the jury to return a verdict for the appellee, Bean, and the cause will be reversed and remanded to the district court, with instructions to grant appellant a new trial; and it is so ordered.

PARKER, C. J., and RAYNOLDS, JJ., concur.

Ex parte WALLACE.

WALLACE v. BLANCHARD et al.

(No. 2452.)

(Supreme Court of New Mexico. Feb. 24, 1920. On Motion for Rehearing, May 22, 1920.)

(Syllabus by the Court.)

1. Adoption ⟸7, 12—Consent of putative father not required.

Under section 17, Code 1915, only the consent of the mother of an illegitimate child is required for its adoption. The consent of the putative father of a bastard child is not required for its adoption, nor is it essential that notice should be given to such father of the petition for adoption.

2. Habeas corpus ⟸99(1)—Custody of child may be given without consent of or notice to parents.

As the parents have no property right in a child, its custody may be given to others, even without the consent of the parents and without notice to them.

3. Bastards ⟸15—Putative father not entitled to custody against adopting parents.

While the putative father of a bastard child might be entitled to its custody as against strangers, he would not be entitled to its custody as against adopting parents, upon whom rests a legal duty to support, educate, and care for such child.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

4. Bastards ⇐95, 104—At common law a bastard could not inherit and had no heirs, except of his own body.

At common law a bastard was looked upon as a son of nobody, and sometimes was called "filius nullius," and sometimes "filius populi," a child of the people, having no father and being incapable of inheriting, nor could he have heirs but of his own body.

(Additional Syllabus by Editorial Staff.)

On Motion for Rehearing.

5. Bastards ⇐15, 16—Statute permitting illegitimate children to inherit does not change rights as to their custody.

Code 1915, § 1850, as amended by Laws 1915, c. 69, entitling illegitimate to inherit, the other statutory conditions appearing, although there were legitimate children, deals only with the right of inheritance, and does not cast upon the putative father the duty to support, care for, and educate such children during their minority, or change the rights of custody as between the putative father and those claiming the custody of such children under an attempted adoption.

6. Common law ⇐12—Poor laws of England not adopted as part of common law.

The poor laws of England, under which the putative father was required to support his illegitimate child, did not, by the adoption of the common law, become a part of the law of the state.

Appeal from District Court, Chaves County; Bratton, Judge.

Habeas corpus by James Day Wallace, on behalf of Hazel May Wallace and Pauline Minta Wallace, minors, and James Day Wallace, against W. E. and Francis L. Blanchard, to obtain the custody of the two minors. Custody awarded to petitioner, and respondents appeal. Reversed, with instructions to set aside judgment and to restore the custody of the minors to respondents.

H. B. Hamilton, of Carrizozo, and Gibbany & Epstein, of Roswell, for appellants.

L. O. Fullen, of Roswell, for appellee.

ROBERTS, J. Petitioner was awarded the custody of two minor children by habeas corpus proceedings. This appeal is from final judgment therein.

The facts, briefly stated, upon which the case must be decided, are as follows:

Respondents are brothers, and in the year 1918 they were living on the same ranch in Lincoln county, this state. It is conceded by counsel for petitioner that respondents are morally and financially qualified and able to have the care and custody of the infants herein named. In 1918, Mrs. Kaiser, a sister of petitioner, got in communication with the respondents by advertising that she had in her possession two girls, aged 10 and 12 years, for whom she desired to find a suitable home. As a result of the advertisement and subsequent correspondence, the children were delivered to respondents herein, and afterwards the respondents attempted to adopt them under the provisions of chapter 2, Code 1915, in the probate court of Lincoln county.

The children were the illegitimate children of one Effie May Searles, a married woman, now deceased, and petitioner claims to be the putative father of such children. That he is the father is conceded by respondents. Petitioner bases his right to the custody of the children upon the fact that he is the putative father; that under the statutes of New Mexico he was entitled to notice of the adoption proceedings; and that not having consented thereto, nor receiving notice of the proceeding, the order of adoption as to him was null and void.

The trial court evidently agreed with petitioner, because judgment was entered giving him the custody of the children. At the time the children were adopted the sister of petitioner, Mrs. Kaiser, informed respondents that the father of the girls was dead, and it appeared upon the hearing that at the time she delivered the girls to respondents she had not heard from her brother for about three years. He had left the children with his sister, with the agreement that she was to keep them together and return them to him when he should return home and reclaim them.

The trial court made no specific findings of fact, but generally found the issues in favor of the petitioner. We understand from the record that the moral fitness of the parties to the case and custody of the children was not considered by the trial court, and this question did not enter into the determination of the case. No opportunity was given the respondents to produce evidence as to the moral fitness of petitioner. The petitioner has resided at Ft. Scott, Kan., or Kansas City, Mo., practically all his life; and while affidavits were presented to the court attached to the return, showing the moral unfitness of petitioner, these were stricken upon motion of petitioner, and the court refused to postpone the hearing until witnesses could be produced or depositions taken to prove the same facts. The court refused the postponement, we assume, upon the theory that such a question was not involved in the case, if in fact the putative father had received no notice of the proceedings. Nor do we believe that the question of abandonment influenced the determination of the question by the trial court. It is somewhat difficult to determine the exact theory upon which the case was tried in the court below because of the pleadings in the case and the failure of the court to make specific findings of fact.

In petitioner's brief, after discussing the point raised by respondents to the effect that,

Digitized by Google

as the children were born in wedlock—that is, the mother Effie May Searles, had a living husband, and it was not shown that they did not have access to each other—petitioner could not bastardize the children by the assertion that he was their father, because the question was not raised in the trial court. He proceeds:

"So, going directly to the point of the right of a putative father to have the possession, control, and care of his children, and to the necessity of his consent for any proceedings against them, appellee says:

" 'The rule is well settled that the mother of an illegitimate or bastard child has a legal right to its custody, superior to the right of the father or any other person, but there is another rule of law which is equally well settled, and that is this: That while the legal right of the mother of a bastard is superior to that of the father, and although the right of the father to the custody of his bastard child is inferior to the right of the mother, his right is superior to the right of any other person, and, on the death of the mother, he becomes entitled, as against the world, to the care and custody of the child.' "

Thus we conceive the determinative question in this case to be: (a) Is the putative father of a bastard child required to consent to its adoption? and, (b) if not required to consent, is it essential that notice should be given to him of the adoption proceedings? This requires a consideration of the law of adoption and the right of a putative father to the care and custody of his children, independent of statute.

[1] The adoption of children is governed by chapter 2, Code 1915, §§ 13 to 25, inclusive. Section 13 provides that any minor child may be adopted by any adult person in the cases and subject to the rules prescribed in said chapter. Section 15 requires the consent of the husband and wife if living together and the child is legitimate. Section 17 provides that an illegitimate child cannot be adopted without the consent of its mother, if known and capable of consent. Section 19 requires the filing of a petition in the probate court by the party seeking to adopt, in which he is required to set forth the facts entitling him to adopt the child, and provides for the appearance before the probate judge of the party whose consent is required, if resident within the state, and the filing with the probate judge of the consent, if the parties who are required to consent are nonresidents of the state, which consent must be acknowledged as required by the statute.

Sections 21 and 22 read as follows:

"Sec. 21. Upon satisfactory proof that a child is abandoned and unprovided for by its parents or relatives, the probate judge shall permit such child to be adopted without the consent of its parents or relatives, upon the execution of the agreement hereinbefore required of the applicant."

"Sec. 22. The probate judge must examine all persons appearing before him pursuant to the provisions of this chapter, and if satisfied that the interests of the child or children to be adopted will be promoted by the adoption by applicant, he must make an order declaring the child to be adopted by the applicant and thenceforth to be regarded and treated in all respects as the child of the person adopting; or if the applicant be such an association or corporation as mentioned in this chapter, the probate judge must make an order declaring such child or children to be adopted by such association or corporation, and thenceforth such association or corporation to be considered as having the custody and control of such child or children, in place of its natural guardians."

From other sections of the statute it will be seen that it is the policy of the Legislature of this state to place the supervision of children of indigent parents, or who have been abandoned, under the control of the probate courts of the various counties. For example, section 232 gives to the probate court the power to apprentice minors whose parents are living, but who have not the means of maintaining their children, or willfully neglect to support and educate them. Under chapter 50, dealing with guardian and ward, the probate court is given the power to appoint guardians for minors, and may appoint a guardian of a minor, although the parents of such a child are living, and may appoint guardians for illegitimate children, and in its discretion may not only invest the guardian so appointed with the control of the property of such ward, but may give to the guardian the custody of the ward.

Reverting to the adoption statute, it will be observed that under section 17 only the consent of the mother of an illegitimate child is required for its adoption. The statute not recognizing any right in the father of an illegitimate child in case of adoption, the question then to be solved is, was he entitled to notice of the adoption proceeding independent of statute? We believe it to be universally conceded that the parents have no property right in their children. The right which they have is a natural right, but in all cases the state is parens patriæ to the child, and it has power to, by legislation, control the right of the child to inherit, to take it from its parents, and give it into custody of others, to determine what is for the best interests of the child, and that which will promote the welfare of the state. In other words, the will of the state in such matters is supreme, and in all such cases the Legislature may prescribe what notice, if any, shall be given to the parents of the child to be affected by the contemplated change of its status.

[2, 3] As the parents have no property right in the child, its custody may be given to others, even without the consent of the parents, and without notice to them. Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802,

Digitized by Google

18 L. R. A. (N. S.) 926. In the case cited the court said:

"Nor have the parents any inherent right of property in their minor child of which they can in no way be deprived without their consent. They are the natural guardians of their child, entitled to its custody, with the right to appropriate its earnings, and may recover damages for any interference with their rights by a wrongdoer. Horgan v. Pacific Mills, 158 Mass. 402, 35 Am. St. Rep. 504, 33 N. E. 581. But this right is not an absolute and uncontrollable one. It will not be enforced to the detriment or destruction of the happiness and well-being of the child. See the strong opinion of Brewer, J., in Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321. The same doctrine is laid down in Clark v. Bayer, 32 Ohio St. 299, 310, 30 Am. Rep. 593. As the child owes allegiance to the government for the country of its birth, so it is entitled to the protection of that government, which must consult its welfare, comfort, and interest in regulating its custody during its minority. Mercein v. People, 25 Wend. (N. Y.) 64, 103, 35 Am. Dec. 653; United States v. Green, 3 Mason, 482, 485, Fed. Cas. No. 15,256. The right of the parents is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to care for and protect the child; and the law secures their right only so long as they shall discharge their obligation. Nugent v. Powell, supra [4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17]; Gishwiler v. Dodez, 4 Ohio St. 615; Ex parte Crouse, 4 Whart. 9, 11."

In a note to the case of Allison v. Bryan (Okl.) 30 L. R. A. (N. S.) 146, the editor of the note says:

"It is frequently provided by statute that the consent of natural parents need not be obtained or notice given them of proceedings to adopt a child whom they have abandoned, or who has been taken from them by some judicial proceeding on the ground of improper guardianship or other similar ground. In such cases the existence of the fact authorizing the adoption is jurisdictional, and the court has jurisdiction of the proceeding on the finding by it of the existence of this fact, whether based upon proper evidence or not; and the judgment or order of adoption entered therein is conclusive, at least as to the parties to the proceedings and those claiming through or under them."

Cited in support of the text are the following cases: Re Camp, 131 Cal. 470, 63 Pac. 736, 82 Am. St. Rep. 371; Re McKeag's Estate, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80; Leonard v. Honisfager, 43 Ind. App. 607, 88 N. E. 91; Egoff v. Madison County, 170 Ind. 238, 84 N. E. 151; Dupre's Succession, 116 La. 1091, 41 South. 324; Re Edds, 137 Mass. 346; Tiffany v. Wright, 79 Neb. 10, 112 N. W. 311; Re Larson, 31 Hun, 539; Von Beck v. Thomsen, 44 App. Div. 373, 60 N. Y. Supp. 1094, affirmed without opinion in 167 N. Y. 601, 60 N. E. 1121; Parsons v. Parsons, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17.

In many instances it would be fatal to the welfare of the child to hunt up the parents and give notice to them of the contemplated adoption proceedings. Take the case of abandoned children of parents who become so degraded that they willingly profit on the ruination of their children. They abandon the child, and some responsible, perhaps wealthy, married couple desire to adopt the child. The parents of the child appear and resist the proceedings, or remain silent, and knowing where the child is located, in after years harass the child and its adopted parents. All will agree that where parents abandon their children, and leave them a charge upon the community, they have forever forfeited all right to the custody of such child; that in such case it is far better for the child and the state that it be given into the keeping of some one who will bestow upon such child the care, love, and affection which it cannot receive from its own unnatural parents, and that in the future the child should never know the parents who gave it birth, and then failed to discharge their parental duty.

That the adoption proceedings undertaken by the respondents herein was valid and binding as to them, and not subject to collateral attack by the parties thereto or their privies, is well settled. See the note to the case of Beatty v. Davenport (Wash.) 13 Ann. Cas. 585. Here, then, we have a decree of adoption valid as between the parties, namely, the adopted children and the respondents, which respondents cannot impeach collaterally. Under our statute the parents of a legitimate child could of course attack the decree or contract of adoption collaterally, if entered or agreed to without their consent, where such parents had never abandoned their child; but this right would exist in such parents only because the statute requires their consent, unless the child has been abandoned. The same is true of the mother of an illegitimate child; but does the putative father of an illegitimate child have this right? He is not such a father as is recognized under the law of this state. Only in one instance is there any mention of his rights in regard to his illegitimate children, and that is under section 1850, which gives such children the right to inherit from their father whenever they have been recognized by him as his children, but such recognition must have been generally notorious or else in writing; and in such event they inherit from the father only when he has no legitimate children. But in no instance under the statute is he charged with any duty toward such children or with any liability for their support and maintenance. Nor can he be required under any statute of this state to support and maintain such children.

Digitized by Google

It would be a strange doctrine that would give to a man the custody of a child without casting upon him the correlative duty of supporting the child. It is the duty to support and maintain the child that gives to the father and mother the right to the custody of the child and to its earnings during minority. If petitioner is correct in his contention here, he would be entitled to the custody of the child without a correlative duty to support, and that as against an adopting parent upon whom the law casts an absolute duty to support.

Petitioner contends that the following citations show that the putative father of a bastard is entitled to the custody of the child over every other person except the mother. 3 R. C. L. Bastards, § 23; Aycock v. Hampton, 65 L. R. A. 689, note; Appeal of Pote, 106 Pa. 574, 51 Am. Rep. 540; Allison v. Bryan, 21 Okl. 557, 97 Pac. 282, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468, 2 Am. & Eng. Enc. of Law, 142; 7 C. J. Bastards, § 29; Barela v. Roberts, 34 Tex. 554. Other cases will be found in the note to the case of Aycock v. Hampton, 65 L. R. A. 693, which hold that a reputed father is entitled to the custody of the bastard child as against all persons except the mother; but a reading of the cases cited will show that in each instance the decision is influenced by some statutory provision. The English cases cited give the reputed father the right to the custody of the child because, under various British statutes regulating the care and maintenance of the poor of the different parishes, the father of an illegitimate child may be required to give bond for the support of such child; and, it being the duty of the father to support the child, the courts there hold that, as against every one except the mother, he is entitled to the custody of the child; but we believe this right to the custody there rests solely upon the duty imposed upon the father to support the child, and in all the American cases cited it will be found that statutes casting a like duty upon the father influenced the decision of the court. This is shown by the following quotation from Kent's Commentaries, vol. 2, p. 215:

"The mother or reputed father is generally in this country chargeable by law with the maintenance of the bastard child; and in New York it is in such way as any two justices of the peace of the county shall think meet; and the goods, chattels, and real estate of the parents are seizable for the support of such children, if the parents have absconded. The reputed father is liable to arrest and imprisonment until he gives security to indemnify the town chargeable with the maintenance of the child. (a) These provisions are intended for the public indemnity, and were borrowed from the several English statutes on the subject; and similar regulations to coerce the putative father to maintain the child, and indemnify the town or parish, have been adopted in the several states."

[4] At common law a bastard was looked upon as the son of nobody, and sometimes was called "filius nullius," and sometimes "filius populi," a child of the people, having no father, and being incapable of inheriting, nor could he have heirs but of his own body.

Under section 1850, Code 1915, in this state illegitimate children are permitted to inherit from their mother. If we assume that at common law the putative father of a bastard would be entitled to the custody of the child as against every one except the mother, it would by no means follow that such father would be here entitled to the custody of the child as against an adopting parent. Under the common law, as we have seen, such a child had no relatives, could not inherit, and that no one could inherit from it except the heirs of its body. The rights of the mother to the custody of the child eliminated, it may probably be held that the right to its custody was a contest only between strangers, and that as between such the natural right of the putative father would receive recognition. But there is no reason for the recognition of such natural right, where the child has parents by adoption, in every way qualified to raise the child, and able financially to give it a good education and fit it to discharge its duty to the state as a citizen. In such a case it is not a contest between strangers, in no way legally related to the child. It is a contest between a putative father on one side, not legally related to the child, and upon whom no enforceable duty rests, to care for the child under the law of this state, and on the other the adopted father, legally related to the child, and upon whom rests the duty to support and educate. Under our statutes here notice to the putative father is not required, nor is his consent to the adoption essential. That the adoption of a bastard child can be had without such notice to, or consent of, the father was decided by the Supreme Court of Massachusetts in the case of Gibson, Appellant, 154 Mass. 378, 28 N. E. 296.

Thus the question for determination is as to the right to the custody of the child as between the putative father and the adopting parents. Every consideration of public policy and the welfare of the child demands that the child remain with the adopting parents. Under our statute (section 22, Code 1915) the adopted child inherits from its parents, and it is the policy of the law here that children should have the benefit of a parental home, where a legal duty rests upon some responsible person to rear, educate, and care for the child. Upon the respondents in this case, under the adoption proceeding, his duty rests. If the child should be given to the putative father no responsibility under our law rests upon him to continue to care for, educate, and maintain the child. No unqualified legal right would exist in the child

Digitized by Google

to inherit from him, and he might take the children to-day and abandon them to-morrow, and no law exists under which he could be punished therefor. Every consideration looking to the welfare of the children in this case would seemingly require that they remain in the custody of the respondents. As the putative father, under our statute, is not entitled to notice, it follows that he has no right to question the validity of the adoption proceedings. In 12 R. C. L. p. 1230, it is said:

"As a general rule, a person applying for a writ to secure the release of another must show some interest in such person or some authorization to make the application; and a mere stranger or volunteer, in no way entitled to the custody of, or responsible for the welfare of, an infant, nor invited by the infant, its parents or guardian, to sue out a writ, has no right to its issuance."

It would unsettle the status of many adopted children in this state were this court to give its approval to the contention of petitioner. It is a matter of common knowledge that many illegitimate children have been placed in good homes in this state, and have been adopted by people who have learned to love them as their own. The welfare of such children and the happiness of their adopted parents certainly require and demand that such relation be not subject to attack by one who, under the statute, is not required to be consulted or notified of the adoption proceeding. To so hold would place a weapon in the hand of some scoundrel by which he could extort blood money from people who were undertaking to discharge a duty to the child which he did not have the manhood to undertake. If notice to him was essential, in order to bind him, and absent such he would be entitled to reclaim the child upon the death of the mother, then he could demand the child from the adopting parents after they had become so attached to the child that their love could not be measured by earthly possessions. It is better for the state and for the children that he have no such right, and we so hold.

From what has been said it follows that the court was in error in awarding the custody of the children to the petitioner. The case will therefore be reversed, with instructions to the district court to set aside its judgment and restore the custody of the children to the respondents, and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

On Motion for Rehearing.

H. B. Hamilton, of Carrizozo, and Gibbany & Epstein, of Roswell, for appellants.

A. B. Renehan, of Santa Fé, and James M. Hervey, of Roswell, for appellee.

ROBERTS, J. On motion for rehearing new counsel appear for appellee and challenge the correctness of the former opinion in this case upon numerous grounds, supported by a very able and elaborate brief. We deem it necessary to notice only two points made in the motion and brief, being content as to the others with the former opinion.

[5] It is called to our attention that section 1850, referred to in the opinion, providing when illegitimate children may inherit from the father, was amended by chapter 69, Laws 1915, so that now such children would inherit, the other statutory conditions appearing, although there were legitimate children. This is the only effect the amendment has bearing in any manner upon this case. But it does not cast upon the putative father the duty to support, care for, and educate such children during their minority. The statute in question only has to do with the right of inheritance, and its existence or nonexistence would not change the rights of the parties in this case in so far as the custody of the children is concerned.

[6] The second point to be noticed is the contention that the poor laws of England, under which the putative father was required to support his bastard child, became, by our adoption of the common law, a part of our law. This admitted, and there would be a basis for the contention that the putative father was entitled to the custody of the bastard child. But these poor laws were local to England, and no state, so far as we are aware, has ever held that by the adoption of the common law such poor laws were introduced into the adopting state.

The former opinion will be adhered to, and the motion for rehearing denied; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

Digitized by Google

FIRST NAT. BANK OF ELIDA v. GEORGE et al. (No. 2385.)

(Supreme Court of New Mexico. March 18, 1920. Rehearing Denied April 24, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⇐99—Question on attachment appealable to Supreme Court.

By statute, Codification 1915, § 4336, questions arising on attachment proceedings may be appealed to the Supreme Court "either before or after rendition of judgment on the indebtedness sued for."

2. Attachment ⇐184—General judgment and execution does not waive attachment.

In absence of statutory requirement, in an attachment suit a general judgment, execution, and levy on the property attached, while judgment does not mention the property attached nor order a special execution against it, does not thereby waive the attachment lien on said property.

3. Appeal and error ⇐1001(1)—Verdict supported by substantial evidence not disturbed.

The verdict of a jury which is supported by substantial evidence will not be disturbed on appeal.

4. Trial ⇐261—Incorrect instructions as to defendant's residence, etc., properly refused.

Instructions requested which do not correctly state the law in an attachment case as to defendant's residence or nonresidence, his absence from his usual place of abode, etc., are properly refused.

Appeal from District Court, Roosevelt County; Bratton, Judge.

Suit in attachment by the First National Bank of Elida against Cleve George and another with attachment. From a judgment dismissing the attachment, plaintiff appeals. Affirmed.

John T. McClure, of Roswell, and T. E. Mears, of Portales, for appellant.

George L. Reese and James A. Hall, both of Portales, for appellees.

RAYNOLDS, J. This is a suit in attachment brought by the plaintiff, the First National Bank of Elida, appellant here. A judgment by default was obtained in the principal case and an appeal taken to this court in cause No. 2370, entitled First National Bank of Elida, Appellee, v. Cleve George et al., Appellants, 189 Pac. 240. In case No. 2370, judgment of the district court was affirmed. Subsequently the attachment issue involved in said cause was tried by the court with a jury, and upon a verdict in defendant's favor judgment was entered dismissing the attachment. From this judgment of dismissal the present appeal is taken to this court.

The appellee has moved to dismiss the appeal on various grounds, one of which is that there is nothing for the appellate court to try, as the attachment issue could not be appealed after the main issue has been tried and appealed.

[1] We think this contention is without merit. The statute, section 4336, Code 1915, by its terms allows appeal to the Supreme Court in attachment cases on the attachment issue, either before or after the rendition of the judgment on the indebtedness sued for.

[2] Again, it is urged on motion to dismiss that the attachment lien has been waived by taking a judgment and issuing execution on the main case. It appears by the record in the present suit and in case No. 2370 that a personal judgment was taken against appellee George, in which no mention is made of the attachment, nor is an order entered to sell the attachment property. After this judgment was obtained execution was issued, levy made, and part of the defendant's property sold to satisfy such judgment. Such proceedings, appellee contends, waive the lien of attachment and leave nothing for this court to pass upon. The point is not well taken. The law is that, in the absence of any express statutory requirement, an order mentioning or setting forth the attached property and ordering special execution against it is not necessary, and a general judgment execution thereunder does not discharge the lien of the attachment. 6 C. J. (Attachment) § 1147, p. 485, and cases cited. We have no statute in this state requiring such an order to preserve the attachment lien. The motion to dismiss is therefore denied.

The attachment affidavit and the answer denying the allegations therein constituted the issue which was submitted to the jury in the trial of this case below. The affidavit on which the attachment was based alleged as grounds for attachment: (1) That the defendant Cleve George was a nonresident of the state of New Mexico and did not reside within the state of New Mexico; and (2) that said Cleve George had absented himself from his usual place of abode in this state so that the ordinary process of law could not be passed upon him. In the trial of the case, the jury, in reply to two special interrogatories submitted to them, found that the defendant Cleve George was a resident of New Mexico and resided in New Mexico at the date of the attachment affidavit, namely, October 8, 1918, and that he had not absented himself from his usual place of abode in New Mexico on said date so that the ordinary process of law could not be passed upon him. The jury also, in a general verdict, found the issues in favor of the defendant on the attachment affidavit.

The appellant assigns 20 errors, the greater number of which are to the effect that the

Digitized by Google

verdict and special findings were against the preponderance of the evidence, or the weight of the evidence, or not supported by the evidence.

[3] We have read the record carefully, and it fails to bear out these assignments. The evidence is conflicting on certain points, but all the findings are supported by substantial evidence. Under such circumstances, the well-known principle which has often been laid down by this court applies, namely, that this court does not weigh evidence, and that, if the verdict of the jury or the findings of the trial court are supported by substantial evidence, they will not be disturbed on appeal. Goldenberg v. Law, 17 N. M. 546, 131 Pac. 499; Candelaria v. Miera, 13 N. M. 361, 84 Pac. 1020.

[4] Appellant contends that the court erred in refusing to instruct the jury as requested in his instruction No. 1, as follows:

"You are instructed that if you believe from all the evidence before you that the defendant Cleve George, on the 8th day of October, 1918, was not actually residing in and living at some place of abode in the state of New Mexico, and that on said 8th day of October, 1918, he, the said Cleve George, was actually residing and living at a place of abode in some state other than the state of New Mexico, giving to the words 'actually residing and living' their common, usual, and ordinary meaning; and you further believe from the evidence that on said date said Cleve George was indebted to the plaintiff upon the note introduced in evidence—then your verdict should be in favor of the plaintiff."

There was no error in the refusal of this instruction. The fact that a resident of New Mexico is not at the time actually residing and living at his place of abode or some other place of abode within the state does not give a creditor the right to attach his property for nonresidence. He may be temporarily absent and not actually living and residing in New Mexico. The purpose of the attachment law is not to give the right to seize property of one who is not actually residing and living in the state. Under this instruction, if the jury found that on the 8th day of October, 1918, the defendant was not actually, personally and physically at his home or place of abode in New Mexico, his property would be subject to attachment. This is not the law, and the court committed no error in refusing to give the instruction.

Appellant further contends that the court erred in refusing to give a second instruction requested by him to the effect that the jury must find for the plaintiff if they believed from all the evidence that the debtor's absence was protracted for an unreasonable time, and the time of his return to his usual place of abode was indefinite and uncertain, and the character and extent of his absence are such as to hinder and delay his creditors for an unreasonable time in bringing suit, issuing and serving process for the collection of its debt owing by the defendant, and that the defendant's return to New Mexico was doubtful or questionable on the 8th day of October, 1918.

The court properly refused this instruction, as it submits to the jury the question of unreasonable or reasonable time of the defendant's absence, and whether it was a protracted or short absence; whereas, the real ground for the attachment is, not the length of time the defendant is absent from the state, but whether he has concealed himself, absconded or absented himself from his usual place of abode so that the process of law could not be passed upon him, and does not depend upon whether he is away a long or short time, or whether the jury considers his absence is for a reasonable or unreasonable time.

Appellant also urges that the court erred in refusing an instruction tendered by it to the effect that the test of residence under the attachment law of New Mexico is that summons, subpœna, or any ordinary process of law can be passed upon him, etc. This is not the correct test of residence under the attachment law, and the court committed no error in refusing it. A subpœna must be served personally, and there is no such thing as a substituted service for such process; but a summons may be served in different ways, as is shown by our statute upon service by publication, and section 4532, Code 1915, designates four different manners or methods in which original process may be served. If the defendant had a residence in New Mexico, service could be made upon him there, although the summons might not have been delivered to him personally. He could not, however, have been subpœnaed as a witness with personal service on him, and the instruction stating that residence, under the attachment law, meant such residence as enabled a subpœna to be served upon him personally, is an incorrect definition of residence and nonresidence as used in our attachment law.

Finding no error in the record, the judgment below is affirmed, and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

Digitized by Google

BLISS TOWN-SITE CO. v. MORRIS-ROBERTS CO.

(Supreme Court of Idaho. May 29, 1920. Rehearing Denied July 10, 1920.)

1. Deeds ⟸140—Exception of railroad right of way held not to refer to land adjacent thereto.

A deed to a tract of land contained the following exception: "Saving and excepting further such railroad right of way as was granted to Oregon Short Line Railway Company, its successors and assigns, by acts of Congress; said Oregon Short Line running through said conveyed lands with its main line." *Held*, that the exception did not refer to land adjacent to the right of way granted by act of Congress to the railroad company for station grounds.

2. Covenants ⟸14—"Grant, bargain, sell, convey, and confirm" do not imply covenant of seizin.

A covenant of seizin is not implied from the use of the words "grant, bargain, sell, convey, and confirm," contained in a deed.

3. Covenants ⟸14—Covenant of seizin is not implied from the word "grant."

Under Comp. St. 1919, § 5384, a covenant of seizin is not implied from the use of the word "grant" in a deed.

4. Covenants ⟸102(1)—No breach of covenant of warranty until eviction by paramount title.

A breach of a covenant of warranty does not occur until eviction from the land conveyed by one having paramount title.

5. Covenants ⟸102(2)—Eviction breaching covenant of warranty need not be from the entire premises.

To constitute an eviction which will operate as a breach of covenant of warranty, the ouster need not be from the entire premises, but from part only of them.

6. Covenants ⟸88—Failure to make warrantor a party in action against warrantee does not release warrantor.

Failure to make a warrantor a party to an action against a warrantee by one seeking to establish a paramount title and right to possession of a tract of land does not release the warrantor from liability upon his covenant of warranty.

Appeal from District Court, Gooding County; Wm. A. Babcock, Judge.

Action by the Bliss Town-Site Company against the Morris-Roberts Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. A. Walters, of Twin Falls, and W. B. Bissell, of Gooding, for appellant.

A. F. James, of Gooding, for respondent.

RICE, J. [1] This is an action to recover damages for breach of a covenant in a deed by which appellant conveyed certain property to a predecessor in interest of respondent. The description in the deed of the land conveyed reads as follows:

"The east half of the southeast quarter of section 6, in township 6 south, of range 13 east, of the Boise meridian in Idaho; saving, excepting, and reserving, however, from this conveyance the schoolhouse and one acre of ground upon which it is situated; saving and excepting, further, such railroad right of way as was granted to Oregon Short Line Railway Company, its successors and assigns, by acts of Congress; said Oregon Short Line running through said conveyed lands with its main line."

A controversy arose over a ten-acre tract adjacent to the right of way for station buildings, etc., granted to the railroad company by the act of Congress, March 3, 1875, of which the railroad company recovered possession some time subsequent to the execution of the deed. The appeal is from a judgment in favor of plaintiff.

The description in the deed is not ambiguous, and the exception and reservation therein contained clearly refer to the right of way and not to land for station grounds adjacent thereto.

[2-5] Appellant's main contention is that the action is for breach of a covenant of seizin; that the breach occurred upon the delivery of deed; and that the action for damages is therefore barred by the statute of limitations. This contention is without merit. The deed itself contains no covenant of seizin. The complaint does not allege that there was a covenant of seizin in the deed; neither is a covenant of seizin implied from the words of conveyance, "grant, bargain, sell, convey, and confirm," contained in the deed. Aiken v. Franklin, 42 Minn. 91, 43 N. W. 839, 6 L. R. A. 360; Frost v. Raymond, 2 Caines (N. Y.) 188, 2 Am. Dec. 228.

C. S. § 5384, makes provision for the covenants implied by the word "grant" in a deed, but the covenant of seizin is not provided for therein. The deed, however, contained the following:

"To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the parties of the second part and to their heirs and assigns, against the said party of the first part, and its successors and assigns, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend."

While the foregoing is defective, we think it amounts to a general covenant of warranty. As such, it runs with the land, and was not breached until eviction under a paramount title. The complaint sufficiently alleges a breach of covenant of warranty as to the ten acres in question. "To constitute an eviction which will operate as a breach

Digitized by Google

of covenant of warranty, the ouster need not be from the entire premises, but from part only of them." 7 R. C. L. p. 1155, § 69.

Appellant contends, however, that he was a necessary party to the full determination of the action wherein the Oregon Short Line Railroad Company established its title and right to possession of the ten acres in controversy, and therefore, under the provisions of the statutes of the state of Idaho for the purpose of avoiding a multiplicity of suits, the action against it is barred.

[6] Failure to notify a warrantor of the pendency of an action against a warrantee by one seeking to establish a paramount title and right to possession of a tract of land, or failure to make a warrantor a party in such action, does not release him from liability upon his covenant of warranty. The only question that can be raised on account of such failure relates to the right of the warrantee to offer the judgment in that action in evidence in an action against the warrantor for breach of his covenant of warranty. Council Imp. Co. v. Pac. & Idaho, etc., Co., 29 Idaho, 113, 157 Pac. 258; Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565, and note. In this case the paramount title of the Oregon Short Line Railroad Company to the ten acres above mentioned was admitted, and the only issue with reference to it raised by the pleadings was as to eviction of respondent by the railroad company.

The evidence introduced at the trial was sufficient to sustain the findings of the court and the judgment entered thereon.

The judgment is affirmed, with costs to respondent.

MORGAN, C. J., and BUDGE, J., concur.

UDELAVITZ v. KETCHEN et al.

(Supreme Court of Idaho. June 25, 1920.)

1. Evidence ⟸433(4)—Parol evidence is admissible to show that deed because of mutual mistake did not express the real intent.

When a mutual mistake is properly alleged either in a complaint seeking affirmatively to have the deed reformed or in an answer as a defense against an action seeking to enforce strictly the terms of the deed, parol evidence is admissible for the purpose of establishing the fact that the deed as actually written does not express the real intent of the parties, but fails to do so because of such mutual mistake.

2. Deeds ⟸69—Reformation of Instruments ⟸19(1)—Mistake set up by parties seeking affirmative or defensive relief must be mutual.

In order to entitle a party to such relief either affirmatively or by way of defense upon the ground of mistake, it must appear that the mistake was mutual.

3. Deeds ⟸196(1½), 211(2)—Reformation of Instruments ⟸43, 45(4)—Evidence of mutual mistake must leave no reasonable doubt thereof; burden of proof is on party alleging mistake.

The evidence of the mutual mistake must be so clear and satisfactory as to leave no fair and reasonable doubt that the writing does not correctly embody the real intention of the parties. A mere preponderance of the evidence will not suffice, and the burden of proof is on the party alleging the mutual mistake.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action of ejectment by Fannie Udelavitz against John A. Ketchen, executor of Lewis Larson, Sr., deceased, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Karl Paine, of Boise, for appellants.

Ira E. Barber and W. H. Davison, both of Boise, for respondent.

BUDGE, J. On December 23, 1912, Lewis Larson, Sr., now deceased, and Emuline Larson, then his wife, made, executed, and delivered to respondent a warranty deed, purporting to convey all of lot 3 and the northeast half of lot 2 in block 3 of Riverside addition to Boise, as the same is laid out and designated on the official plat of said addition on file in the office of the county recorder of Ada county. Lot 3 lies on the northerly side of lot 2. Some time prior to the conveyance, a fence had been built, supposedly along the northerly boundary of lot 3, but in fact along a line 5 feet 3 inches south thereof, approximately parallel therewith. This action was brought to eject appellants from that part of lot 3 lying between the fence and the northerly boundary of lot 3 as the same is designated on the recorded plat.

[1, 2] The real contention in this case arises upon the issue raised by appellants' affirmative defense set up in their answer, wherein they allege the giving of the deed containing the description already set out, and further allege that the description therein contained is erroneous, in that it includes all of lot 3 instead of that part only lying south of the fence; that at the time the deed was executed and delivered the parties to the deed each believed that the fence formed the northerly boundary of lot 3; that respondent intended to acquire, and appellants intended to convey, only the property lying to the south thereof; and that the erroneous description was the result of a mutual mistake committed by all of the parties to the deed; and deny ownership or the right to possession of respondent to the strip of land in question.

The case was tried to the court. Findings

Digitized by Google

of fact and conclusions of law were filed, and a judgment entered for respondent, directing the ouster of appellant from the land in question. This appeal is from the judgment.

Appellants assigned as error the insufficiency of the evidence to sustain the findings of the court, which are to the effect that they intended to sell, and respondents intended to buy, the property as described in the deed. They maintain, on the contrary, that the evidence shows that the parties to the deed were mutually mistaken describing the premises therein as "all of lot 3 and northeast half of lot 2." They insist the evidence shows what the grantors intended to sell and the grantees to buy was the premises as they were fenced, and which were numbered "607 South 13th Street." These contentions of appellants are not borne out by the record.

The record contains evidence tending to show how the fence came to be placed 5 feet and 3 inches south of the lot line. It also shows that Mrs. Larson believed that the fence was on the true line, and that she first learned that it was not when demand was made of her by respondent for possession of the strip of land in controversy some time after the deed was given and prior to the institution of this action. There is no evidence in the record as to any conversation had between the grantors and the grantee at or prior to the execution and delivery of the deed with respect to this boundary line or with respect to the land which the grantors intended to convey or the grantee intended to acquire. There is no evidence that respondent was buying the land as bounded by the fence. There is no evidence that the Larsons told her that they were selling her the land bounded by the fence. The most that can be said of the evidence is that it shows the fence was not on the true boundary line, and how it came to be where it was; but as to whether or not there was a mutual mistake between the parties, in writing or causing to be written into the deed an erroneous description of the property actually intended to be conveyed, the record is silent.

Before relief can be granted either in an original action therefor or when relied upon as an equitable defense, it must appear that the mistake was mutual. Hoback v. Kilgores, 26 Grat. (Va.) 442, 21 Am. Rep. 317; Massie's Adm'r v. Heiskell's Trustee, 80 Va. 801; Houser v. Austin, 2 Idaho, 204, 10 Pac. 37, and other cases herein cited.

[3] The evidence must be clear and satisfactory, leaving but little, if any, doubt of the mistake. It must be made out by the clearest and most satisfactory testimony such as to leave no fair and reasonable doubt on the mind that the writing does not correctly embody the real intention of the parties. A mere preponderance of the evidence will not suffice, and the burden of proof is on the party alleging the mutual mistake. French v. Chapman, 88 Va. 317, 13 S. E. 479; Farmville Ins. Co. v. Butler, 55 Md. 233; Wood v. Patterson, 4 Md. Ch. 335; Houser v. Austin, and other cases cited supra.

The court found as a conclusion of law that appellants were estopped and precluded from asserting that the deed conveyed or invested respondent with title other than as per the terms and description thereof. This is assigned as error.

When a mutual mistake is properly alleged either in a complaint seeking affirmatively to have the deed reformed or in an answer as a defense against an action seeking to enforce strictly the terms of the deed, parol evidence is admissible for the purpose of establishing the fact that the deed as actually written does not express the real intent of the parties, but fails to do so because of such mutual mistake. Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, and note; note to Durkin v. Cobleigh, 17 L. R. A. 270, 272; Arguello v. Bours, 67 Cal. 447, 8 Pac. 49; Hoppough v. Struble, 60 N. Y. 430; Mutual Trust Co. v. Polymero, 54 Misc. Rep. 379, 105 N. Y. Supp. 1024; Mecker v. Dalton, 75 Cal. 154, 16 Pac. 764, 766; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637, 639; King v. Dugan, 150 Cal. 258, 88 Pac. 925, 927; Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190.

Appellants having failed to prove that the description contained in the deed was the result of a mutual mistake, the conclusion of the court that they were estopped was not prejudicial error.

Finding no reversible error in the record, the judgment is affirmed. Costs are awarded to respondent.

MORGAN, C. J., and RICE, J., concur.

HATFIELD v. JORDAN, Secretary of State. (S. F. 9504.)

(Supreme Court of California. June 19, 1920.)

States ⇐116—Act providing for bond issue held unconstitutional for failure to make proper provision for payment of principal.

St. 1919, p. 1182, providing for a $10,000,000 bond issue, and for maturity of first lot of bonds on January 2, 1931, but making no provision for the creation of a fund available for the payment of any principal until the 1st day of February, 1931, *held* void, under Const. art. 16, for failure to provide ways and means for payment of the principal, and to create a sinking fund for payment of principal, to commence at a time after the incurring of such debt of not more than a period of one-quarter of the time of maturity of such debt.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

In Bank.

Application for writ of mandate by George J. Hatfield against Frank C. Jordan, as Secretary of State, to require him to comply with the provisions of an act for the issuance of bonds in furtherance of the Land Settlement Act. On demurrer to petition. Alternative writ discharged, and proceeding dismissed.

Milton D. Sapiro, of San Francisco, for petitioner.

Gregory & Goodell, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in mandate. An alternative writ was issued, and the matter has been submitted for decision on a demurrer to the petition.

The proceeding involves the question of the validity of an act of the Legislature, entitled "An act to provide for the issuance and sale of state bonds to create a fund to carry out the objects of an act entitled 'An act creating a state land settlement board and defining its powers and duties and making an appropriation in aid of its operations,' approved June 1, 1917, and any and all acts amendatory thereof or supplemental thereto; to create a sinking fund for the payment of said bonds; to define the duties of said officers in relation thereto; to appropriate money for the expense of printing and advertising the sale of said bonds; and to provide for the submission of this act to a vote of the people," approved May 27, 1919. Stats. 1919, p. 1182.

The act is one authorizing a bonded indebtedness of $10,000,000, and therefore, under article 16 of the Constitution, can take effect only in the event that it is submitted to the people at a general election and receives "a majority of all the votes cast for and against it at such election." By the act it is provided that the secretary of state shall publish the act at the expense of the state in at least one newspaper in each county or city and county throughout the state for three months preceding the next general election. Claiming that the act is invalid for want of compliance with certain requirements of article 16 of the Constitution, the secretary of state has refused to make such publication and states that he will not make the same. Hence this proceeding.

Article 16 of the Constitution substantially provides that the Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of $300,000, except in certain instances not material here,

"unless the same shall be authorized by law for some single object or work to be distinctly specified therein, *which law shall provide ways and means, exclusive of loans*, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within seventy-five years of the time of the contracting thereof." (Italics are ours.)

It further provides that such law shall be irrepealable until the principal and interest shall be paid and discharged, and also that—

"Such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability."

In view of these provisions it is essential to the validity of the proposed law submitted to the people for ratification that it (the proposed law) "shall provide ways and means, exclusive of loans," for the payment of principal and interest as the same falls due, with a limitation of 75 years as the maximum period for which the indebtedness may be created. All this, as we understand it, is conceded by petitioner. Such provision as to the principal may, and perhaps must, be made by providing such a sinking fund as is described in the article, and by this law no other method is attempted. The claim of respondent is that the proposed law does not purport to provide "ways and means" to pay either all of the interest as it falls due, or all of the principal as it falls due. As already suggested, the only provisions therein as to the source of any such payments are those with relation to a sinking fund, thereby provided for, from which all such payments are to be made. It is also claimed that such adequate provision as to a sinking fund for the payment of the principal as is required by article 16 is not made, in that the same is not made to commence at a time after the incurring of the debt "of not more than a period of one-fourth of the time of maturity of such debt or liability." Full consideration of the matter forces us to the conclusion that the objections of respondent are in part, at least, well based, with the result that the proposed law must be held violative of article 16 of the Constitution.

The bonds authorized, aggregating in number 32,000, and in amount $10,000,000, are to bear date January 2, 1921, and to bear interest at the rate of 4½ per cent. per annum, payable semiannually, except that the first payment of interest is to be made on January 2, 1922, on so many of said bonds as are theretofore sold. They are to be sold at auction in such parcels and numbers as directed by the Governor, on request of the land settlement board, the state treasurer detaching from bonds sold all interest coupons which have matured before the day of sale, and the purchaser paying any interest already accrued on any remaining coupon. The first 800 of said bonds, aggregating

Digitized by Google

$250,000, mature and are payable January 2, 1931; the second $250,000 of said bonds mature and are payable January 2, 1932; the third $250,000 on January 2, 1933; and so on each year to January 2, 1971.

As to the sinking fund the act provides:

"For the payment of the principal and interest of said bonds a sinking fund, to be known and designated as the 'land settlement sinking fund' shall be, and the same is hereby created as follows, to wit: The state treasurer, after the second day of January, *1931* [italics ours], shall, on the first day of each and every month thereafter, after the sale of said bonds, take from the land settlement fund [a fund provided by the Land Settlement Act of June 1, 1917 (Stat. 1917, p. 1566), as amended May 23, 1919 (Stat. 1919, p. 838)] such sum as, multiplied by the time in months, the bonds then sold and outstanding have to run, will equal the principal of the bonds sold and outstanding at the time said treasurer shall so take said sum from said land settlement fund, less the amount theretofore taken therefrom for said purpose, and he shall place the sum in the land settlement sinking fund created by this act." Section 5.

It was further provided:

"And to provide means for the payment of interest on the bonds that may be sold and outstanding, said treasurer shall monthly take from the land settlement fund, and pay into said land settlement [sinking] fund, an amount equal to the monthly interest then due on all bonds then sold, delivered and outstanding."

Payments of interest and principal are to be made from this sinking fund. These are the only provisions in the proposed law relating to the sinking fund, except a provision to the effect that, where a purchaser of a bond pays a sum as accrued interest, the amount shall be paid into the land settlement sinking fund for the purpose, of course, of being paid out again on the interest coupon when it matures and is presented.

It may be conceded that sufficient provision is made by the proposed law for the payment of interest on the bonds sold as it falls due; the treasurer being expressly required to take monthly from the land settlement fund and pay into the land settlement sinking fund an amount equal to the monthly interest then due on all bonds then sold, delivered and outstanding. Although not clearly expressed, this provision may perhaps be construed as requiring such action by the treasurer each month after the sale and delivery of the first bonds disposed of, instead of waiting until January 2, 1931. However, this may be, it seems perfectly clear that the act does not provide ways and means for the payment of the first $250,000 principal of the bonds which mature and are payable January 2, 1931. As we have seen, the only attempted provision is by way of the sinking fund created by the act. There is no provision whatever for the putting into that fund of any money available for the payment of any principal whatever until the 1st day of February, 1931, while the first $250,000 of the bonds mature January 2, 1931. It is not until February 1, 1931, that the treasurer is authorized to begin taking from the land settlement fund on the 1st day of each and every month and placing in the sinking fund money to be kept and used for the payment of the principal. Moreover, the sinking fund must be such as is specified in the constitutional provision, which plainly requires that the same shall "commence at a time after the incurring of the indebtedness of not more than a period of one-fourth of the time of maturity of such debt or liability." This, of course, means that the actual placing of money to the credit of the sinking fund for the payment of principal shall commence at the time stated, and doubtless it also contemplates that the provision so made shall be adequate to the full payment of principal as it falls due. Assuming that the bonds will all be at once sold, as we must in determining the validity of the act, it is obvious that as to all bonds maturing on and before January 2, 1961, the sinking fund does not "commence at a time after the incurring of the indebtedness of not more than a period of one-fourth of the time of maturity of such debt or liability." A simple calculation will show that this means that, as to $7,750,000 of the $10,000,000, the sinking fund does not "commence" at as early a date as is required in view of the constitutional provision. We can see no escape from the conclusion that the act must be held invalid for the reason that it does not measure up to the requirements of article 16 of the Constitution.

It has seemed to us quite possible that the specification of the date of "the second day of January, *1931*," in section 5 of the act, was inadvertently made, and that "the second day of January, *1921*," was really intended. To guard against any possible error in the printed volume of statutes, we obtained from the office of the secretary of state a certified copy of the enrolled bill as approved by the Governor, and find that the act is correctly set forth in the published statutes. It is hardly necessary to say that we have no power to make any change in the provisions of the act, and that we must accept it as truly expressing the intent of the Legislature.

The alternative writ of mandamus heretofore issued is discharged, and the proceeding dismissed.

We concur: SHAW, J.; OLNEY, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

Digitized by Google

STRAUS v. EATON et al. (Civ. 2949.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920.)

1. Frauds, statute of ⇐115(3)—Paper route lease signed only by lessor's wife held binding on lessee as the party to be charged.

Though a lease of a paper route was void as to the lessor under the statute because his name was signed only by his wife, lessee in a suit on his bond for performance thereof is, as to the contract, "the party to be charged" for newspapers furnished by lessor, and for which in the lease lessee promised to pay, and the contract as signed by lessee is binding on him, and furnishes a sufficient consideration for his bond for performance of the contract, and establishes the liability of both him and his sureties.

2. Husband and wife ⇐23—Parol authorization to wife to assign claim under lease of newspaper route held valid.

Where the owner of a newspaper route orally authorized his wife to lease it to defendant, telling her that he could not attend to the business of defendant, and that she would have to look after the lease matter and attend to the business, such authority *held* broad enough to empower her to collect the amount due, and incidentally to assign the claim if necessary or convenient, in view of Civ. Code, § 954, providing that a thing in action arising out of an action may be transferred by the owner.

3. Pleading ⇐218(3)—On demurrer plaintiff should have been required to specify number of articles furnished for which claim was made.

In an action for an amount due by the lessee of a newspaper route to lessor's assignee, where the complaint alleged that lessor furnished papers to lessee under the terms, and during the continuation of their agreement and upon the price therein stated, in a certain sum, when defendants demurred under ground of uncertainty as to the number of papers delivered, plaintiff should have been required to state such number.

4. Contracts ⇐322(5)—Evidence held insufficient to sustain verdict for balance due under lease of newspaper route.

In an action for a balance due under a lease of a newspaper route, evidence as to the number of papers delivered and for which defendant was liable *held* not to sustain a finding for plaintiff in the amount found by the jury.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by B. A. Straus against J. B. Eaton and others. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. T. Kendrick, of Los Angeles, for appellants.

B. F. Woodard, of Los Angeles, and A. W. Hare, of Santa Cruz, for respondent.

CONREY, P. J. On the 1st day of August, 1914, one A. V. Dunsmoor was the owner of a newspaper route of the Los Angeles Daily Times, covering certain territory in Glendale, Cal. The complaint alleges that on that day Dunsmoor entered into an agreement with defendant Eaton. By the terms of that agreement, as shown in the complaint, Dunsmoor leased to Eaton the described territory of the city carrier service of the Los Angeles Times, for a period of two years from the date of the writing, August 1, 1914. This writing was signed by the defendant J. B. Eaton, and also was signed, "A. V. Dunsmoor, by Anna A. Dunsmoor," but was not signed by A. V. Dunsmoor. On the same day, defendant Eaton as principal and the other two defendants as sureties executed to A. V. Dunsmoor a bond in the sum of $1,000, conditioned for the performance by Eaton of the terms of said contract. In the alleged contract it was provided that Dunsmoor would furnish papers to Eaton, and that Eaton would pay Dunsmoor therefor at the rate of $1.40 per hundred copies. This action was brought to recover an unpaid balance alleged to be due for papers delivered to Eaton under that contract. Judgment was entered against the defendants in the sum of $924.35. On motion for new trial, the court ordered that the motion be granted, unless the plaintiff consented to a reduction of the amount of the judgment to the sum of $716.89. The plaintiff filed written consent to such reduction. The defendants appeal from the judgment.

[1] The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on account of sundry uncertainties in the complaint, including the point that the complaint did not show the number of copies of the newspaper that were received by Eaton from Dunsmoor for service on the route mentioned in the complaint. These demurrers were overruled. Appellants claim that the purported contract was invalid because it was not signed by A. V. Dunsmoor, nor by any person having written authorization from him. Civ. Code, § 1624, subd. 1, and section 2309. It is true that in the complaint it was not alleged that Anna A. Dunsmoor had received any authority in writing from A. V. Dunsmoor to enter into a contract for him or in his name. And at the trial of the action the only attempt on the part of the plaintiff to establish such agency is found in the testimony of Mrs. Dunsmoor that she is the wife of A. V. Dunsmoor, and that prior to August 1, 1914, he told her that he could not attend to the business with Eaton, and that she would have to look after the lease matter and attend to the business. But it is likewise a fact that the defendant Eaton received from

Digitized by Google

A. V. Dunsmoor a large number of the newspapers for which, in the written instrument signed by him, he had promised to pay, and that in this action Eaton is, as to the contract, "the party to be charged" thereon. Harper v. Goldschmidt, 156 Cal. 245, 104 Pac. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124. In that decision the court quoted Chitty on Contracts, where it was said that the reason why a party may sue on a contract although it may be void against him for want of his signature under the statute of frauds is that the signature is prescribed as "necessary evidence of a contract," and not as an essential or constituent part of the engagement itself. Under the law as thus defined, we think that the contract, as signed by Eaton, was binding upon him. This being so, it furnished a sufficient consideration for the bond, and thus establishes the liability of the sureties on the bond, as well as that of their principal.

[2] Appellant contends also that the evidence is insufficient to support the finding that the claim was assigned by A. V. Dunsmoor to the plaintiff. Section 954, Civil Code, provides generally that a thing in action arising out of an obligation may be transferred by the owner. It is only in particular instances, as in claims for wages or salary, that the assignment must be in writing. Civ. Code, § 955. So A. V. Dunsmoor could have made an oral assignment of the indebtedness sued on herein. Therefore he could orally authorize an agent to make the assignment in his behalf. We think that the authorization of Mrs. Dunsmoor, as shown by her testimony, was broad enough to give her power to collect the amount due, and incidentally to assign the claim if in the exercise of her discretion as agent she found such assignment to be necessary or convenient.

[3] The complaint did not show the number of copies delivered. It was only alleged that Dunsmoor furnished papers to Eaton "under the terms of said agreement and during the continuance of said agreement, and upon the price therein stated, in the sum of $1,249.45"; that no part of said sum has been paid, except, etc. When the defendants demurred on the ground of uncertainty directed to this point, plaintiff should have been required to state the number of papers delivered. While this might be regarded as an unimportant error if there were no other objections to the judgment, we rule upon this point so that the error may be corrected if the matter shall be again presented in the court below.

[4] On the evidence introduced, and about which there is no dispute, the amount of the judgment is in excess of the amount due. It was stipulated that the items set out in the bill of particulars correctly show the number and character of the papers furnished. The total number shown, including 4,119 Sunday papers, is 55,326, which at the rate specified in the agreement would amount to $774.56. The complaint admits that $325.10 of the amount due for the papers furnished has been paid. It follows that the findings, with respect to the amount due and unpaid, are not sustained by the evidence. For that reason the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

Ex parte BAYLES. (Cr. 913.)

(District Court of Appeal, First District, Division 2, California. May 18, 1920.)

Larceny ⇐3(3)—Taking property to enforce lien not "grand larceny," though wrongful.

Where tenant in apartment house agreed that landlord would have a lien on unpaid charges, and also agreed that he would leave the apartment clean on vacating it or pay for cleaning it, action of landlord in seizing articles of tenant because apartment was not left clean could not be grand larceny under Pen. Code, § 484, defining that offense as the felonious stealing, taking, carrying, leading, or driving away the property of another without his consent, as whether it was clean was a disputed question which must be tried in civil action, in view of Civ. Code, §§ 3336, 3379, 3380, and Code Civ. Proc. §§ 509–512, 667, 870.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grand Larceny.]

Application of Hazel Bayles for a writ of habeas corpus to secure his release from Chief of Police of City and County of San Francisco. Petitioner discharged.

C. F. Adams, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Leo R. Friedman, Deputy Dist. Atty., both of San Francisco, for respondent.

LANGDON, P. J. This case comes to us upon a petition for a writ of habeas corpus. The petition alleges that the petitioner is and was at all times mentioned therein the owner and manager of a certain furnished apartment house in San Francisco; that the prosecuting witness, P. Tucker, rented an apartment in said house; that, at the request of said Tucker, petitioner furnished gas and electricity to him from February 16, 1920, to March 31, 1920; that at the time of renting said apartment Tucker signed a receipt, agreeing to the terms and conditions set forth on the back thereof, one of which was that the price of gas and electricity should be charged for in addition to the price agreed

Digitized by Google

upon as the rental of the apartment. Another one of the terms and conditions contained in said agreement attached to the petition is as follows:

"I, ..., also agree to leave the said apartment, the linen and bedding therein, clean and in good condition, or to pay the charges for cleaning and laundering the same; if said rent or any part thereof, or any charge hereunder, remain unpaid after the same becomes due, according to the terms hereof, or if any obligation hereunder remains unperformed," the owner may remove the personal property of the tenant, and after three months may sell the same at public auction, etc.

It is alleged in the petition that the apartment was vacated by Tucker on March 31, 1920, and was not left clean, and that petitioner was obliged to clean the same; that petitioner charged Tucker $3 for cleaning said apartment; also that a blanket and comforter used by Tucker in said apartment were left soiled, and a charge of $1.50 was made by petitioner for cleaning the same, which charges Tucker refused to pay; that the petitioner on said 31st day of March did take and carry away one sewing machine and one victrola of the value of $225, the property of said Tucker, and refused to permit said Tucker to have the same, and claimed to hold said property for a lien of $9.75, which amount included the charge for gas and electricity, breakage of chinaware, etc., cleaning of linens, blankets, etc., and the charge of $3 for cleaning of the apartment. Upon April 2, 1920, Tucker swore to a complaint in the police court of the city and county of San Francisco, charging petitioner with the crime of grand larceny. A warrant was issued upon said complaint, and on April 5th petitioner was arrested. The hearing came on regularly on April 21, 1920, and upon said hearing the judge of the police court made an order holding the defendant to answer to the superior court upon the charge. Petitioner contends that the testimony before the committing magistrate shows no reasonable, probable or lawful cause for holding her to answer to the superior court for the offense of grand larceny. The precise contention of petitioner is that the transcript of the testimony shows no felonious intent upon her part.

The testimony in the police court shows that Tucker offered to pay the charges for gas and electricity, breakage, etc., and refused to pay only the charges for cleaning the apartment. The first question presented, therefore, is whether or not petitioner had a lien upon the property for this charge. Section 1861a, Civil Code, as added by St. 1917, p. 1662, provides:

"Keepers of furnished apartment houses shall have a lien upon the baggage and other property of value belonging to their tenants or guests, which may be in such furnished apartment house, for the proper charges due from such tenants or guests for their accommodation, rent, services, meals and such extras as are furnished at their request. * * *"

It becomes unnecessary in this instance to decide whether the charge for cleaning the apartment and blankets at the end of the tenancy was a "proper" charge within the meaning of the statute, for the reason that Tucker himself agreed to what should be proper charges against him in his renting agreement. As before stated, in this agreement he undertook to leave the apartment "clean" upon vacating it, or to pay for cleaning the same; and he agreed that the owner should have a lien upon his personal property for all unpaid charges under the agreement between them. Whether or not the apartment was "clean" when it was vacated, was a disputed matter, as shown by the testimony. "Clean" is a difficult word to define absolutely; it is a relative term. Its meaning to its users varies with the standards of such users; and it has a different significance in its relation to different objects. Mr. Tucker contends the apartment was left as "clean" as it was when he received it. Mrs. Bayles contends that her apartments have a reputation for being always "absolutely sanitary and immaculate," and that the apartment was not "clean" according to that standard, but that the services of a man were required for three days to clean the kitchen alone. However, this delicate question of fact does not fall to our lot for determination. If Mrs. Bayles was entitled to hold these articles until she was paid the price of cleaning the apartment, provided said apartment was not sufficiently cleaned before being vacated, then a dispute over the condition of the apartment would not so change the petitioner's legal position as to make her guilty of grand larceny in holding possession of the property under a claim of lien which would exist if she proved her contention about the uncleanliness of the apartment. For, even though the standard of cleanliness exacted by the petitioner should be found by the jury to be an unreasonable standard, and not the standard contemplated by the agreement between the parties, yet we think petitioner would not be guilty of grand larceny. The record discloses no evil or felonious intent upon the part of the petitioner; she was merely seeking to enforce her civil rights as she believed them to exist. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. Section 484, Pen. Code. Every taking by one person of the personal property of another without his consent is not larceny. Felonious intent is of the essence of the crime of larceny. People v. Devine, 95 Cal. 227, 30 Pac. 378. If a jury should determine that the apartment was clean according to the standard contemplated by the parties at the time they made their agreement, at the time petitioner

Digitized by Google

took possession of the goods, and that therefore no money was due petitioner for cleaning the same, Mr. Tucker could be amply compensated in damages for the wrongful detention of his property. Section 667, Code Civ. Proc., and section 3336, Civ. Code. But this question must be tried out in a civil action, and not in a criminal proceeding. Section 3379, Civ. Code; section 3380, Civ. Code; sections 870, 509, 510, 511, and 512, Code Civ. Proc.

The petitioner is discharged.

We concur: NOURSE, J.; BRITTAIN, J.

WILLIAMS v. A. R. G. BUS CO. (Civ. 3439.)

(District Court of Appeal, First District, Division 2, California. May 19, 1920.)

1. Damages ⟸131(4)—$1,500 not excessive for shock and injuries from automobile accident.

$1,500 *held* not excessive damages for one injured by automobile bus overturning, where his back was wrenched and his nervous system shocked and he was unable to resume his work for six weeks.

2. Appeal and error ⟸1004(1)—Grounds for setting award aside as excessive stated.

The power of an appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law or is such as to suggest at first blush passion, prejudice, or corruption on the part of the jury.

3. Appeal and error ⟸295—Excessiveness of damages reviewable only if raised by motion for new trial.

If defendant appellant in personal injury action considered verdict for plaintiff the result of passion or prejudice, its remedy lay first in a motion for new trial addressed to the trial court; it being too late to raise the point for the first time on appeal.

4. Evidence ⟸127(3)—Complaints of pain admissible.

In a personal injury action, testimony by the wife and mother of plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering from his injuries *held* admissible.

Appeal from Superior Court, San Bernardino County; Howard A. Peairs, Judge.

Action by Archie G. Williams against the A. R. G. Bus Company. From judgment for plaintiff, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

Ralph E. Swing, of San Bernardino, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it in the sum of $1,500, recovered by plaintiff as damages for personal injuries. The plaintiff was riding as a passenger in an automobile bus owned and operated by the defendant between Ontario and Riverside, Cal., when the automobile overturned.

[1, 2] The first point raised by the defendant is that the damages are excessive. The testimony shows that the plaintiff received a cut about an inch deep in the hip, which required a closure of the wound with stitches; that his back was wrenched and strained; that his leg and arm were bruised, and that his body was rendered stiff and sore, and his nervous system shocked by reason of his experience; that at the time of the trial he was still suffering from this nervous shock which made him constantly apprehensive in the performance of his work of driving an automobile. He spent nine days in a hospital, and was confined to his bed at his home for two weeks additional. He was unable to resume his work for six weeks, and his clothing, including an overcoat and suit, were ruined. He also incurred hospital and doctors' bills. Under such circumstances, we think the verdict of $1,500 is not so grossly excessive as to call for the interference of an appellate tribunal. It has been repeatedly held in this state that the power of an appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Hale v. San Bernardino, etc., Co., 156 Cal. 716, 106 Pac. 83; Wheaton v. North Beach, etc., Co., 36 Cal. 591; Varcoe v. Lee, (Sup.) 181 Pac. 223.

In the case of Bond v. United Railroads, supra, it is said:

"The trial court should be vigilant to set aside verdicts where there is reason to believe this has been done, or that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant. We have cause to fear that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. [Citing cases.] Practically, the trial court must bear the whole responsibility in every case."

[3] Furthermore, it appears that the appellant made no motion for a new trial. If it considered the verdict the result of passion or prejudice, or a disregard of the instruc-

Digitized by Google

tions of the trial court, its remedy lay first in a motion for a new trial addressed to the trial court. It is said in the case of Chiarini v. Rochon, 1 Cal. Unrep. 540, that, if this matter is not brought before the attention of the trial court in a motion for new trial, it is too late to raise the point for the first time on appeal. It is stated in Bond v. United Railroads, supra:

"If a motion for a new trial on this ground is properly and regularly interposed, that court would have power to reduce or set aside the verdict. In the absence of such motion, it should have granted the plaintiff's motion to render judgment for $4,500, unless the amount was so obviously the result of passion, prejudice, or a disregard of the instructions as to justify the court in ordering a new trial of its own motion. As it did not do so, it is to be presumed that there was no cause for such action."

[4] Appellant also complains of the admission of testimony by the wife and mother of plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering. This testimony was properly admitted under a well-recognized rule of evidence. 1 Greenleaf on Evidence (16th Ed.) § 162a et seq., p. 254; Green v. Pac. Lumber Co., 130 Cal. 435, 62 Pac. 747; Evarts v. Santa Barbara, etc., Ry. Co., 3 Cal. App. 712, 86 Pac. 830; Lange v. Schoettler, 115 Cal. 388, 393, 47 Pac. 139.

There are no other assignments of error which require discussion.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

PIONEER TRUCK CO. v. HAWLEY.
(Civ. 2784.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920. Hearing Denied by Supreme Court July 19, 1920.)

Appeal and error ⟸931(7)—Assumed on appeal in replevin that defendant's possession was within issues, though not pleaded.

On appeal from a judgment in favor of plaintiff in an action to recover possession of personal property, it must be presumed, where no demurrer was filed in the case and court made findings as to defendant's possession, that the fact of defendant's possession at the commencement of the action was at the trial treated as a fact within the issues and properly determined by the court, although not properly pleaded.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Pioneer Truck Company against H. W. Hawley. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 179 Pac. 447.

Jensen & Jensen, of Los Angeles, for appellant.

Warren E. Libby, of San Diego, for respondent.

CONREY, P. J. The plaintiff brought this action to recover judgment for possession of a certain described auto truck, or the value thereof if a return cannot be had, and for damages. Judgment having been entered in favor of the plaintiff, the defendant appeals therefrom, and the case is brought here upon the judgment roll alone.

Appellant claims that it nowhere appears, either from the complaint or the findings, that appellant ever had possession of the property sought to be recovered, and that for that reason the judgment should be reversed. He relies upon the rule that in an action of this kind the plaintiff cannot recover without alleging and proving that at the time of commencement of the action the property was in possession of the defendant. Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414.

In the case at bar the only allegations touching the defendant are that, at a stated time a few days prior to the commencement of this action, the plaintiff demanded possession of said property from the defendant, and that defendant has failed, refused, and neglected to deliver the same to the plaintiff; "that plaintiff is damaged by the unlawful holding of said property in the sum of $25 for each and every day the same has been withheld since said 17th day of January," etc. The answer of the defendant was equally noncommittal and silent on the subject of defendant's possession of the truck, but denied the allegations above noted. The findings of fact affirm the demand by plaintiff, the failure and refusal of defendant to deliver the property to plaintiff, and declare that the plaintiff is damaged in a stated sum by the detention of said truck. In the "conclusions of law" it was further stated that the defendant "withholds possession thereof unlawfully from said plaintiff."

If the complaint does not wholly fail to touch upon the subject of possession of the property by defendant at the commencement of the action, it must at any rate be admitted that the implication of such possession is very defectively conveyed. Respondent contends, however, that since no demurrer was filed in the case, and since the court made findings as above stated, and it is not made to appear that any question was raised in the court below concerning the sufficiency of the complaint, this court must now assume, in favor of the findings and judg-

Digitized by Google

ment, that the fact of defendant's possession of the truck at the commencement of the action was at the trial treated as a fact within the issues and properly to be determined by the court. On this ground we think that the judgment should be sustained. In Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 324, et seq., 147 Pac. 90, this subject is fully discussed. There it was conceded that the complaint failed to show a certain fact without which the action would not lie; nevertheless it appeared that the case had been tried and determined upon the theory that the issue was presented in the case. The court held that a defendant should not be permitted to stand by and, without objection, allow an issue to be tried as though properly presented by the pleadings, and on appeal escape the consequences by claiming that the complaint failed to present such issue. The difference between that case and this is that there the facts as to the conduct of the trial and the manner in which the evidence was received were before the Court of Appeal, whereas in the present case we have only the judgment roll. But in Gervaise v. Brookins, 156 Cal. 110, 103 Pac. 332, the Supreme Court, upon a consideration of the pleadings and findings alone, determined that it appeared with reasonable certainty that the case was tried upon the theory that the answer put in issue the value of certain property, although technically that issue had not been properly presented by the pleadings. That being so, the court denied to the appellant the right to have the point considered that there was no such issue. The case of Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 60, was cited wherein "the presence in the record of a finding of the fact which it was claimed was not in issue was considered a sufficient showing that the cause was tried upon the theory that the fact was in issue."

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

In re CRUICKSHANK. (Cr. 711.)

(District Court of Appeal, Second District, Division 1, California. May 17, 1920.)

1. Attorney and client ⟸57 — Appellate court in disbarment proceedings concluded by finding on conflicting evidence.

In disbarment proceedings, regardless of the rule that guilt must be shown beyond a reasonable doubt, appellate court cannot disturb finding of trial court based on conflicting evidence that attorney should be disbarred for fraudulent use of money obtained to be used for specified purpose as an offense involving "moral turpitude," which is anything done contrary to justice or honesty and with the purpose of defrauding another regardless of whether such acts rise to dignity of a crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moral Turpitude.]

2. Attorney and client ⟸53(2)—Code provision as to proof of false pretenses not applicable in disbarment proceedings.

Pen. Code, § 1110, specifying the character of proof required in order to convict one of false pretenses, is not applicable to disbarment proceeding against attorney who obtained money by fraudulent pretenses as to use to which it would be put.

3. Attorney and client ⟸46 — Attorney may be disbarred for defrauding his partner.

Conceding that partnership existed between attorney and another whom the attorney defrauded by acts constituting moral turpitude, such fact would be no defense to disbarment therefor.

4. Attorney and client ⟸55—Refusal of new trial not error where affidavits showed omissions to get evidence in.

An order disbarring an attorney cannot be reversed for refusal of new trial on affidavits showing merely that certain things were omitted to be done at trial in securing evidence to exonerate respondent conceding that counsel were inefficient.

5. Attorney and client ⟸57 — Reasons for disbarment no part of record on appeal.

In disbarment proceedings, reasons for disbarring stated by the judge are no part of judgment and have no place in the record on appeal.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Vernon Cruickshank, an attorney and counselor, was disbarred, and he appeals. Affirmed.

Henry G. Bodkin and Ford & Bodkin, all of Los Angeles, for appellant.

Frank F. Oster, of Los Angeles (Vernon M. Brydolf, of Los Angeles, of counsel), for respondent.

SHAW, J. The trial of defendant, an attorney at law, upon an accusation filed by the Los Angeles Bar Association charging him with the commission of acts involving moral turpitude, resulted in a judgment of disbarment, from which, and an order overruling his motion for a new trial, he appeals.

The gist of the accusation is that appellant obtained from Henry Goetz the sum of $10,000 upon the representation that the same would not be used otherwise than in the construction and equipment of a certain plant and patented process for extracting ore from the black sands of certain lands located near Watsonville, Cal., wherein he and one J. R.

Digitized by Google

Ghiselin owned a controlling interest; that, instead of using the money for such purpose, he divided the same between himself and Ghiselin, both of whom appropriated the money to their own uses. That such was the theory adopted by the trial court conclusively appears from this statement made in the course of the trial, wherein the judge said:

"The only issue is what this money was going to be used for. All they claim is that they said the money was not used for what Mr. Cruickshank said it was going to be used. * * * That is all I am going to try. * * * The question is whether he (Cruickshank) represented that it would be used for a certain purpose and did not use it for that purpose. That is all there is, and that is all the complaint states."

While the evidence is to some extent conflicting, that of Goetz, which the court accepted as true, tends to show the following facts: That he and appellant had for many years been intimately acquainted and the latter had from time to time acted as his attorney in certain matters. In September, 1917, he, at the request of appellant, called at the latter's office, when appellant told him he had a proposition that was going to make lots of money; that he, with Ghiselin, was interested to the extent of 70 per cent. in a patented process to separate iron ore from black sand upon which they had an option, and needed $10,000 towards putting up the plant. Goetz said he did not want to gamble, but could let him have the money, provided his banker approved, to which Mr. Ghiselin, who was present, replied: "We are not going to give our secrets away." Whereupon Goetz said, "That lets me out," to which a Mrs. Thorkildsen, who was present, replied, "Well, all right, I will put up the money." Thereupon Goetz left the office, followed by appellant, who expressed his friendship for the former and the fact that there were tremendous profits in the proposition, and that, notwithstanding Mrs. Thorkildsen was going to put up $10,000, which he thought sufficient for the purpose, nevertheless they should have the additional money on hand for use as an emergency fund, since other money might be needed to complete the plant, and its equipment; and hence it was desired that they be prepared with money for such purpose, and that, if the money so advanced by Mrs. Thorkildsen was insufficient for the purpose, then and only in such case would his money be used therefor. Meanwhile he was assured the money was to be deposited and kept in bank. Goetz visited the property in company with appellant and Ghiselin, at which time he was cautioned by appellant and Ghiselin not to talk about the business in the presence of others, and by their acts and representations he was favorably impressed with the merits of the proposition. Upon returning to Los Angeles, Goetz was shown certain photographs of the proposed plant, tending to convince him that the plant could be erected for the money obtained from Mrs. Thorkildsen, and on September 21, 1917, when Goetz gave the check, appellant, in his office, said to him:

"Henry, we don't really need your money. I have money in the safe, $10,000, but I will not use that money (represented by the Goetz check) for any other purpose than what it is intended for."

Whereupon Ghiselin got up and pulled out the drawer in the safe and showed him the money. In delivering the check, Goetz said to appellant that he did not want Ghiselin to have anything to do with it, and stated:

"Now, Vernon, here is my check, hoping and trusting that everything you told me is nothing but the truth."

He had full confidence in the appellant and advanced the money to him, believing that it would be kept in the bank at Watsonville and only used in case the money obtained from Mrs. Thorkildsen was insufficient to erect the plant, in which case the money so advanced would be used towards such purpose; otherwise returned to him. Goetz obtained the money by borrowing it from his bank, appellant agreeing to reimburse him for such rate of interest as he was compelled to pay therefor, and voluntarily, it seems, proposed giving him a contract for a 5 per cent. interest in that of appellant and Ghiselin, similar to one which appellant said they were giving to Mrs. Thorkildsen. This receipt recited that Goetz had loaned them $10,000, in consideration of which they conveyed to him a 5 per cent. interest in the option therein described and in certain alleged patent rights in the machine to separate iron and steel from the black sands therein mentioned. No part of the money so advanced went into the construction of any plant or process, but upon receiving it appellant gave one-half thereof to Ghiselin, and the former used a part of his share in a trip to New York, made for the purpose, as claimed by him, of financing the black-sand proposition. There is much other evidence touching the question, but that referred to tends to show that appellant and Ghiselin engaged in a dishonest scheme to obtain the $10,000 from Goetz and did not intend to use it towards the completion of the proposed plant, but did at the time intend to appropriate it to their own use, and thus by deceiving Goetz he was fraudulently induced to advance the money, no part of which, other than $1,600, did he collect.

Appellant insists that a proceeding for disbarment is criminal in character, and therefore the proof, as in the trial of a criminal case, must show the defendant to be guilty as charged beyond a reasonable doubt, and insists that, notwithstanding the testimony of Goetz, it does not, when considered with tes-

Digitized by Google

timony offered by defendant, establish a case justifying his disbarment, in support of which he cites a number of authorities from other jurisdictions.

[1] What was said by the Supreme Court, in answering a like contention (In re Morton, 179 Cal. 510, 177 Pac. 453), is appropriate here:

"Basing his contention upon the fact that a proceeding for the disbarment of an attorney is in the nature of a criminal proceeding (In re Alameda County Bar Ass'n, 35 Cal. App. 534, 170 Pac. 432), counsel insists that, to warrant disbarment, the evidence, like that required to justify a verdict of guilty in a criminal case, must be clear, positive, and such as to establish both the motive and commission of the act charged beyond a reasonable doubt. In support of this proposition he cites a number of authorities from other jurisdictions, an examination of which, however, shows that none of them involved cases on appeal where the court was called upon to review the sufficiency of the evidence in support of the finding, but what was said therein related to proceedings of disbarment over which the court, in some of the cases having recourse to a referee in the taking of the evidence, assumed original jurisdiction, acting as a trial court, as In re Houghton, 67 Cal. 511, 8 Pac. 52. None of them constituted authority for appellant's claim, when applied to a court charged with the duty of reviewing the testimony, but do announce the rule that in such cases the accused should not be convicted unless the trial court is convinced, by clear and satisfactory evidence, or, as said in some cases, beyond a reasonable doubt, of his guilt. However this may be, this court, in a like case involving a like question (Matter of Danford, 157 Cal. 425, 108 Pac. 322), has, in effect, held that in disbarment proceedings, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but that such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had."

Hence, since the trial court in the exercise of its function believed the testimony of Goetz, and, though conceding its denial on the part of defendant, we cannot say the evidence was insufficient to justify the implied finding of the court that defendant was guilty of acts constituting moral turpitude, which is anything done contrary to justice or honesty and with the purpose of defrauding another, regardless of whether such acts rise to the dignity of a crime. In re Disbarment of Coffey, 123 Cal. 522, 56 Pac. 448; In re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L. R. A. 856. On the contrary we hold appellant's contention in this regard to be without merit.

[2] Neither is there any merit in the contention that section 1110 of the Penal Code, which specifies the character of proof required in order to convict one of false pretenses, is applicable to a case of this character.

[3] Another argument made by appellant is that there existed between appellant, Goetz, and Ghiselin the relationship of copartners. This is based upon the fact that appellant and Ghiselin conveyed to Goetz 5 per cent. interest in their option. We are unable to perceive any merit in the contention. But conceding the existence of the copartnership, such fact would not constitute any defense to a proceeding brought against an attorney for acts constituting moral turpitude in defrauding his partner.

[4] In support of a motion for a new trial made by defendant, he filed an affidavit wherein it is alleged that the court abused its discretion in (a) denying a few minutes continuance of the case to allow appellant to secure the evidence of the president of the Bar Association as to the alleged fact that Goetz had exonerated appellant from any misconduct; (b) that an affidavit by complainant exonerating appellant was in the possession of the secretary of the Bar Association; (c) that after the alleged misconduct of appellant he acted as attorney for Goetz; (d) that prior to the disbarment proceeding Goetz sued appellant and Ghiselin and in his complaint and testimony offered at the trial made statements inconsistent with his testimony given in this proceeding; (e) that the disbarment citation was returnable October 9, 1918, and the case was tried October 15, 1918, over the objection of appellant, during which time appellant's counsel was sick and appellant unskilled in the trial of a lawsuit and therefore unable to present a proper defense. As to all of these, and other like contentions, a sufficient answer thereto is that the record discloses no such applications made during the trial of the case, and no facts are stated in the affidavit showing the discovery of any new evidence which was not known and accessible to defendant at the time of the trial. There is nothing in the record showing that defendant, when the case was set down for trial, made any objection thereto upon the ground that the time was too short for him to prepare his defense, or that he asked for continuance in order to produce the evidence of the president of the Bar Association. On the contrary, the effect of the affidavit is to merely show that defendant omitted the doing of things which he thereafter felt that he should have done in protecting his interest at the trial. It may be, as suggested by appellant, that such omissions were due to the inefficiency of counsel then appearing for him; but the court cannot, in the absence of a duly authenticated record showing error, reverse an order upon such ground.

At the close of the trial the court, in rendering its judgment, said:

"I realize the seriousness of disbarring an attorney, but the accused is not doing a very substantial amount of law practice, according to his own statements, and there would not be much damage done by disbarring him."

Digitized by Google

[5] It has been repeatedly held that the reasons stated by a judge in deciding a case are no part of the judgment and have no place in the record, and hence present nothing to be considered in reviewing a judgment on appeal therefrom. However, we may say that in arriving at its decision we cannot believe the trial court was in the slightest degree influenced by the limited extent of defendant's law practice.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

VAUGHN v. FEY. (Civ. 3350.)

(District Court of Appeal, First District, Division 2, California. May 14, 1920. Rehearing Denied June 11, 1920. Hearing Denied by Supreme Court July 12, 1920.)

1. Cancellation of instruments ⟸1—Suit for "rescission" held synonymous with suit for "annulment."

A suit to "rescind" a contract cannot be differentiated from a suit to "annul" the contract; the two words being used interchangeably.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Annul; Rescission.]

2. Contracts ⟸260—Entire contract may be rescinded for partial failure of consideration.

Where a contract is entire, there is a right of rescission thereof for a partial failure of consideration under Civ. Code, § 1689, providing that plaintiff offers to restore to defendants everything of value received under the contract in view of section 1691.

3. Contracts ⟸266(1)—Plaintiff held entitled to rescission only upon return of value received.

Where plaintiff has entered into a contract with defendant whereby defendant was to advance money to pay for time and materials for the building of a model of an invention for automatically changing phonograph needles and for a patent thereon, plaintiff *held* not entitled to rescind on the ground of partial breach without returning or offering to return everything of value received by him.

4. Contracts ⟸266(1) — Personal receipt of consideration not essential to duty to return on rescission.

In a suit to rescind a contract for the construction of a model and procurement of patent on a device for changing phonograph needles because of partial breach thereof by defendant, that part of the money paid by defendant had not been paid directly to plaintiff, but to the Patent Office and to vendors of materials, did not excuse plaintiff from his obligation to return consideration paid for his benefit.

Appeal from Superior Court, City and County of San Francisco; J. W. Mahon, Judge.

Suit by J. L. Vaughn against Charles Fey to annul a contract. From a judgment for plaintiff, defendant appeals. Reversed.

Maurice R. Carey, of San Francisco, for appellant.

Devoto, Richardson & Devoto, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment annulling a contract which had been entered into between the parties hereto. J. L. Vaughn, being the inventor of certain improvements on an automatic phonograph, embodying in particular a new invention for automatically changing the steel needle used for producing the sound from the records, desired to perfect and patent this device, and for this purpose entered into a contract, on June 22, 1916, with Charles Fey, by which contract Fey agreed to advance money to pay for all of the materials required for the building of a model and to furnish shoproom for the building of the same, and to pay to Vaughn $20 each week for a period of 90 days from the date of the agreement, to cover the time Vaughn would be engaged in working upon the model, and also to advance a sufficient sum to cover the cost of securing a patent in the United States upon the said invention, to be applied for when the working model was completed and perfected. In consideration of this agreement by Fey, Vaughn agreed to transfer to Fey a one-half interest in any patent which he might obtain in the United States upon his said invention.

This agreement is set out in full in the complaint herein, and it is alleged that the defendant failed and refused to advance the money necessary for the patent. There is no allegation of an offer to restore what the plaintiff received from the defendant under the contract, and the prayer of the complaint is that the contract between the parties be annulled.

The defendant's demurrer was overruled, and he answered, denying a breach of said contract on his part, and pleading full performance thereof. He also set up as an affirmative defense that the plaintiff had not returned nor offered to return the consideration received from the defendant under the contract. This latter allegation was admitted by the plaintiff upon the trial, and no evidence was offered by him to excuse his failure to place the defendant in statu quo. It was further admitted by the plaintiff at the trial that the defendant had supplied the workroom, tools, and equipment for the building of the model, and had expended the sum of $95 for materials, equipment, etc.,

Digitized by Google

used in the construction of the same; that he had paid to the plaintiff $100 in weekly payments of $20 each during the period plaintiff was engaged upon the work; that he had advanced the sum of $230 for the purpose of paying the expense of securing a patent upon the said invention; that thereafter the Patent Office refused to issue one patent covering all the elements of the invention, but insisted upon a "divisional" patent; and that plaintiff, without consultation with defendant, then directed that the money advanced by the defendant be applied to obtaining a patent upon the main device, which patent was duly issued. Plaintiff then asked the defendant for an additional $85 to cover the cost of a separate patent upon the device for changing the steel needle. Defendant refused to advance this last-mentioned sum, and the controversy arises over this refusal; it being admitted by the plaintiff that in all other particulars the defendant fully kept and performed all of his obligations under the contract.

The defendant and appellant in support of his allegation of full performance urges that the contract calls for only one patent, and that in advancing the money to secure one patent defendant fulfilled his part of the contract. However that may be, the admitted facts show that the defendant has expended the sum of $425, in addition to furnishing shoproom, tools, and equipment for the completion of the model, and the testimony of the defendant is that he expended a larger amount.

Upon these facts, the court decreed an annulment or rescission of the contract, and made no provision in the decree for a return to the defendant of the money which he had parted with under the contract.

[1] The respondent's position is not well taken in seeking to differentiate a suit for the annulment of this contract from a suit for a rescission of a contract. The two words are used interchangeably. Haines v. Stilwell, 5 Cal. Unrep. Cas. 27, 40 Pac. 332; Words and Phases, vol. 7, p. 6139; Bouvier's Law Dictionary; 1 Black on Rescission and Cancellation, p. 1; Webster's New International Dictionary.

[2] We have, then, a suit in equity for the rescission of a contract. Without going into the question of whether or not the plaintiff it entitled under the contract to demand from the defendant money to defray the expenses of obtaining a second patent, and, conceding for the purpose of a decision of this case, that he was so entitled, and that the defendant failed in that particular to fulfill his contract, it is obvious that defendant's breach constituted only a partial failure of consideration. Where a contract is entire, there is a right of rescission thereof for a partial failure of consideration under section 1689, Civil Code. Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305. But it is also stated in said last-mentioned case that the pleadings contained an allegation that everything of value received under the contract had been restored by the party rescinding to the other party. Sterling v. Gregory, supra, 149 Cal. at page 118, 85 Pac. 305. It is said in the case of Fountain v. Semi-Tropic L. & W. Co., 99 Cal. 677, 683,[1] that in case of rescission each party to the contract must restore to the other everything of value received and pay for labor performed for him under the contract, no matter at whose instance the rescission is made. The decision cites, upon this point, numerous California cases.

In the case of Bohall v. Diller, 41 Cal. 532, at pages 535 and 536, it is said:

"When a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent on the vendor, in order to work that result, to restore to the vendee whatever he has paid on the contract. * * * The plaintiff has failed to allege a repayment or tender of the amount paid by the defendant, at the execution of the contract. He therefore cannot proceed to recover the possession of the premises on the ground of the rescission of the contract."

The language of these various decisions but declares the law as announced in section 1691, Civil Code, which expressly provides that rescission, when not accomplished by consent, can be accomplished only by the use on the part of the party rescinding of reasonable diligence to comply with the following rules:

"* * * 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

See, also, Hammond v. Wallace, 85 Cal. 522, 531, 532, 24 Pac. 837, 20 Am. St. Rep. 239; Buena Vista Fruit & V. Co. v. Tuohy, 107 Cal. 243, 255, 40 Pac. 386; Hite v. Merc. Trust Co., 156 Cal. 765, 767, 106 Pac. 102; Walsh v. Standart, 174 Cal. 807, 811, 164 Pac. 795; Maginess v. West. Securities Corp., 38 Cal. App. 56, 175 Pac. 277.

[3] It seems plain, therefore, conceding that the defendant has partially breached his contract, and that this breach entitles the plaintiff to rescind the same, that nevertheless plaintiff may only do so upon returning to the defendant everything of value received by plaintiff from the defendant.

[4] It is idle to urge that, because a part of the money was not paid directly to the plaintiff, but to the Patent Office for the patent, and to the vendors of materials for supplies to be used in completing the model, the plaintiff, therefore, has received nothing which he is obligated to return. The money was paid under the contract for the benefit

[1] 84 Pac. 497.

Digitized by Google

of the plaintiff and to enable him to perfect his invention, and he accepted the benefits thereof in the way of materials to complete his model and letters patent upon his invention. The situation is not different in principle from what it would have been had the money been paid to plaintiff personally.

The judgment is reversed.

We concur: NOURSE, J.; BRITTAIN, J.

IMPERIAL VALLEY AUTO CO. v. TONEY. (Civ. 3099.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920.)

Replevin ⟸103(4)—Judgment for defendant for affirmative relief not sustained by answer.

In action for possession of personalty, in absence of claim in answer for return of property, etc., judgment granting defendant affirmative relief of such return or value cannot be sustained save as a judgment for costs, under Code Civ. Proc. §§ 627, 667.

Appeal from Superior Court, Imperial County; R. Y. Williams, Judge.

Action by the Imperial Valley Auto Company, a copartnership, against Minnie May Toney, administratrix of the estate of C. E. Toney, deceased, substituted for J. C. Harcleroad, doing business as J. M. Harcleroad & Son. From judgment for defendant, plaintiff appeals. Affirmed as modified.

Chas. L. Childers, of El Centro, for appellant.

James W. Glassford, of El Centro, for respondent.

CONREY P. J. Action brought by plaintiff to recover possession of personal property. Judgment for defendant, and the plaintiff appeals therefrom. The judgment roll is the only record before us.

The judgment, in terms, is that the defendant recover from plaintiff the said personal property, or, if delivery thereof cannot be had, then the defendant have judgment in a stated sum (found to be the value of the property, less a certain allowed credit), and for costs.

The answer filed by defendant did not claim a return of the property. Indeed, there is nothing in the pleadings or findings to indicate that the property was delivered to the plaintiff, or was not all the time held in possession of the defendant. Under such circumstances, that part of the judgment which grants to the defendant affirmative relief cannot be sustained, except as a judgment for costs. Code Civ. Proc. §§ 627 and 667; Banning v. Marleau, 101 Cal. 238, 35 Pac. 772.

It is ordered that the judgment be modified by striking therefrom that part thereof which provides that defendant recover the described automobile, or, in case delivery thereof cannot be had, that defendant have and recover the sum of $405.90.

As so modified, the judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

BORGMEYER v. SOLOMON. (Civ. 2776.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Contracts ⟸175(3) — Evidence held to show unconditional contract with architect.

In an action by an architect for services, evidence *held* sufficient to sustain the trial court's finding in favor of plaintiff of an unconditional contract.

2. Trial ⟸397(1)—Specific findings not necessary as to affirmative evidentiary matters alleged in answer.

In architect's action for service, where defendant's answer did not set up a conditional contract, or make the defense that plaintiff architect had not complied with the conditions required of him, the affirmative matters alleged were merely of an evidentiary nature in connection with defendant's denial that he contracted with plaintiff architect, and as to such matters specific findings were not necessary.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by E. G. Borgmeyer against J. B. Solomon. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, 178 Pac. 544.

Haas & Dunnigan, of Los Angeles, for appellant.

Philip Cohen, of Los Angeles (Walter F. McEntire, of Los Angeles, of counsel), for respondent.

CONREY, P. J. This action was brought by the plaintiff to recover fees alleged to be due to him from the defendant on a contract for professional services which were rendered by the plaintiff as an architect. It was found by the court that the defendant employed the plaintiff as such architect to prepare plans and specifications for the erection of a hotel building at a described location in the city of Los Angeles, and agreed to pay therefor the sum of $900, which sum was to cover the cost of superintending the erection and construction of the building; also, that the plaintiff prepared plans and specifica-

Digitized by Google

tions, as required by the defendant, and has at all times been ready, willing, and able to perform the services of superintending the erection and construction of the said building, but the defendant has refused and still refuses to erect and construct said hotel building in accordance with the plans and specifications prepared by the plaintiff, and has refused to pay, etc. Judgment was rendered in favor of the plaintiff, and the defendant appeals therefrom.

Appellant contends that the findings above mentioned are not sustained by the evidence. In support of his contention that the evidence is not sufficient to establish the contract of employment on the terms stated in the complaint and found by the court, appellant insists that the evidence without conflict shows that the contract of employment was conditioned upon plaintiff procuring a tenant for the contemplated building, acceptable to the defendant. While an examination of the record shows that there was testimony given by the defendant and others tending to prove that the contract of employment was conditional, as above stated, yet such evidence was not without conflict. On the contrary, there is evidence strongly tending to show that the contract was free from such condition. This evidence showed, among other things, that the plaintiff was introduced to the defendant by one Seigel, a contractor, and that the plaintiff told the defendant that, if defendant was willing to take a little less rent than he was proposing to demand, plaintiff was sure he could get him a tenant; that very promptly thereafter the plaintiff, through an agent, obtained the name of a prospective tenant and informed defendant that he had a tenant for the hotel; that this tenant, one Mrs. Verhaar, is the same person who afterwards became the tenant of defendant's building after it had been constructed by the defendant on plans prepared by an architect other than the plaintiff; that, shortly after plaintiff's first conversation with defendant, an interview took place between plaintiff and defendant and Mrs. Verhaar, at which time Mrs. Verhaar stated that she would take the house if the plans suited her, but would not sign the agreement until the plans were completed; that the plaintiff prepared the plans and completed them about four weeks after the time of said interview at which Mrs. Verhaar was present; that during these four weeks the defendant and the contractor were present at the plaintiff's office many times, examining the plans and making suggestions concerning the same; that before the plans were prepared the defendant directed the plaintiff to go ahead with their preparation and promised to pay fees amounting to 3 per cent. of the cost of the proposed building, such cost being estimated at $30,000. The testimony of the witnesses indicates that in their preliminary negotiations the defendant was influenced by the prospect that the plaintiff might aid him in procuring a tenant for the proposed building and that such probable tenant had been found. But this testimony was not compelling upon the court to find that the procuring of such tenant entered into and became a part of the actual employment of the architect to prepare the plans and specifications. After those plans and specifications had been completed, the defendant refused to proceed according to those plans and specifications, or to avail himself further of the services of the plaintiff. No reason or excuse for such refusal appears in the record; although it does appear that the defendant, with the assistance of other architects, erected a hotel building at the proposed location and that Mrs. Verhaar became the tenant thereof.

[1] Being satisfied with the court's finding of an unconditional contract, we need not discuss the second point of appellant, which is that, assuming that plaintiff was bound to procure a tenant, he did not comply with that condition.

[2] Finally, appellant contends that the court "failed to find on the material issue raised by the answer that the contract was a conditional one," and that the judgment should be reversed, for that reason. The affirmative matters stated in the answer and to which this argument is directed are, in fact, not sufficient to present the defense that there was a conditional contract. On the contrary, those matters were pleaded only as a part of the defense that there was no contract of employment whatever. The affirmative matters in question stated that the plaintiff made a proposition to the defendant concerning a lease to be made to a prospective tenant to be produced by the plaintiff and proposed that plaintiff act as architect in making the plans and superintending the construction of such building; and then alleges that no agreement was made with the plaintiff by the defendant for the drafting of plans or specifications of said building, or the supervision of the construction of the same, and that such plans as the plaintiff did prepare were prepared wholly and solely at his own instance, and not on request of defendant or pursuant to any employment by the defendant. It thus appears that the answer did not set up a conditional contract or make the defense that the plaintiff had not complied with the conditions required of him thereby. This being so, the affirmative matters stated were merely of an evidentiary nature in connection with defendant's denial that he made any contract with the plaintiff. As to matters so pleaded in the answer, specific findings were not necessary.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

Digitized by Google

PEOPLE v. RICCOMINI et al. (Cr. 502.)

(District Court of Appeal, Third District, California. May 26, 1920.)

Criminal law ⟹1130(4)—Appeal ordered submitted on record where no brief filed in time.

Where no brief has been filed within the required time, and where no extension of time has been requested or granted, the case will be ordered submitted upon the record.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Victor Riccomini and another were convicted of having entered a store with intent to commit larceny, and they appeal. Affirmed.

Roy Lewis and B. E. Gaddis, both of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The clerk's and reporter's transcripts in this case were filed in this court on December 27, 1919. The case was regularly placed on the April, 1920, calendar, and, when called, counsel for appellants requested and were granted 30 days' time in which to file an opening brief. Such time having expired without the filing of a brief, and no extension of time having been requested or granted, the case is now ordered submitted upon the record.

By an information filed in the superior court by the district attorney of Sacramento county, defendants were charged with having, in September, 1919, entered the store of O. Morelli, in the city of Sacramento, with intent to commit the crime of larceny. Defendants were jointly tried, the jury found them guilty, and they were sentenced by the court to imprisonment in the state prison.

We have carefully examined the record, and are satisfied that there was sufficient evidence to justify the verdict of guilty. The law was correctly stated to the jury by the court, and we discover in the record no error prejudicial to the defendants.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.: BURNETT, J.

SEABOARD NAT. BANK OF SAN FRANCISCO v. BELDEN et al. (Civ. 3342.)

(District Court of Appeal, First District, Division 1, California. May 19, 1920.)

1. Bills and notes ⟹140 — Though renewal notes were given, action may be on original obligation.

Though a corporation gave renewal notes in place of the original, yet, where there was nothing to indicate that the original obligation was extinguished, action might be brought thereon instead of the renewal notes.

2. Bills and notes ⟹296—Indorser for value after maturity cannot set up defenses.

Where a corporation after maturity indorsed notes to plaintiff for value, defenses available to the maker were not available to the corporation, the indorser's warranty (Civ. Code, § 3116), not permitting, and so such defenses were not available in an action to recover on stockholder's liability.

3. Corporations ⟹215—Stockholder's liability is primary and unaffected by guaranty of the debt.

The liability of stockholders of a corporation is primary, and a stockholder cannot escape because a corporate creditor held a guaranty of the corporation's obligations.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Seaboard National Bank of San Francisco against Leo V. Belden and others. From the judgment for plaintiff, defendant Fred G. Jones appeals. Affirmed.

W. B. Rinehart, of Oakland, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

KOFORD, Judge pro tem. This is an appeal by the defendant Jones from a judgment in an action brought to recover on a stockholder's liability, as a stockholder of the Luther Burbank Company, a corporation. The indebtedness upon which this judgment against appellant was rendered was evidenced by eight promissory notes, as follows: Five notes executed by the corporation to the plaintiff directly, and three notes executed to the corporation by Joseph H. Clark and subsequently indorsed over to and sold to the plaintiff by the corporation.

Appellant contends: First, that the five corporation notes were paid and extinguished by new notes given in their place; second, that the Clark notes were by the corporation indorsed to the plaintiff after maturity, and were taken by plaintiff subject to defenses; and, third, that plaintiff had received a guaranty of all the liabilities of the corporation, and for that reason cannot enforce the liability of the appellant.

[1] The evidence upon the first point is to the effect that new notes were given in the place of the five original notes. The action was upon the original liability evidenced by these notes. The new notes were renewal notes. There is nothing in the evidence to support the contention that the original obligation, as evidenced by these five notes, was extinguished by the giving and accepting of new notes. The action was properly brought upon the original obligation, even

Digitized by Google

though the original notes had been surrendered (Bonestell v. Bowie, 128 Cal. 511, 61 Pac. 78; Clark v. Berlin Realty Co., 33 Cal. App. 50, 164 Pac. 333), and there being no express agreement that the renewal notes should constitute payment, and such notes not having been in fact paid (Comptoir d'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. 28).

[2] It is not apparent how appellant's rights are in any way affected by the Clark notes being indorsed by the corporation to the plaintiff after maturity. Such defenses as might exist would be in favor of the original maker, Clark. If the corporation had any defenses, appellant neither pleaded nor offered to prove them and has not even suggested what they are to this time. But if there were any defenses they would not be available to the corporation as indorser for value. The indorser's warranty would not permit it. Civ. Code, § 3116.

[3] Neither is there any merit in appellant's third point that the guaranty of the liability of the corporation is in any sense a defense available to appellant sued on stockholder's liability. The liability of the stockholders of a corporation is direct and primary, arising coincidentally with the debt of the corporation, and is not changed nor affected by the existence of a guaranty. London & S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; Eva v. Andersen, 166 Cal. 420, 137 Pac. 16.

The judgment appealed from is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

PEOPLE v. BLISS. (Cr. 885.)

(District Court of Appeal, First District, Division 2, California. May 17, 1920. Hearing Denied by Supreme Court July 16, 1920.)

1. Criminal law ⟸970(7)—Indictment and information ⟸154—Objection to information not waived by failure to demur and properly presented by motion in arrest.

The objection that the information did not state facts sufficient to constitute a public offense was not waived by failure to demur and was properly raised by a motion in arrest of judgment, under Pen. Code, §§ 1004, 1012, 1185.

2. False pretenses ⟸26—Information held defective.

Information charging that the defendant made certain false representations as to the value of her property and the amount of her income, and that defendant, knowing such representations to be false, agreed to sell named person, for the sum of $300, a one-third interest in a group of mines, which admittedly was owned by defendant and was worth $100,000, in consideration of such person agreeing to work for defendant, *held* not to state facts constituting offense of obtaining money under false pretenses; there being no causal connection between the false representation and the parting with the money, and no facts showing that the named person was defrauded.

3. False pretenses ⟸9—Pretenses must be a material element in inducing parting with money.

In charging the crime of obtaining money under false pretenses, the false pretenses must be shown to be a material element in inducing the prosecuting witness to part with his money or property.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Florence W. Bliss was convicted of obtaining money under false pretenses, and from judgment of conviction and from order denying her motion for a new trial, she appeals. Reversed.

J. R. Cunnyngham and H. H. McPike, both of San Francisco, and G. L. Jones, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of obtaining money under false pretenses, and also from an order denying defendant's motion in arrest of judgment. There are a number of grounds of appeal enumerated in the notice of appeal, but the appellant urges upon our attention but one of these matters, and, as this objection, in our opinion, is decisive of the case, it will be unnecessary to discuss any of the others.

The objection is that the information fails in two respects to state facts sufficient to constitute a public offense: First, because no causal connection is shown or can be inferred between the representations alleged to be false and the parting with the money; and, second, because the information fails to allege facts showing that the complaining witness, Lansdale, was defrauded.

[1] The objection to the information is a matter of substance, and not of form, and was not waived by a failure to demur, and was properly raised by the motion in arrest of judgment. Pen. Code, §§ 1004, 1012, 1185; People v. Ross, 103 Cal. 425, 428, 37 Pac. 379; People v. Smith, 103 Cal. 563, 566, 37 Pac. 516; People v. McKenna, 81 Cal. 158, 22 Pac. 488.

The information alleges that the defendant made certain representations to W. R. Lansdale with fraudulent intent. The representations are then set out. In the brief filed on behalf of the state these allegations are summarized as follows:

"(1) That defendant was the owner of a valuable mine in the state of Nevada known as the Lucky Girl group of mines.

Digitized by Google

"(2) That said mines were of the value of $100,000.

"(3) That defendant had on deposit in the Central National Bank of Oakland $4,700.

"(4) That defendant had on deposit in said bank $25,000 to her credit as executrix and sole legatee of the McIntyre estate.

"(5) That defendant was worth over $1,000,000 and was the owner of property in New York of the value of over $1,000,000.

"(6) That defendant was the owner of ten sections of wheat land near Alberta, Canada, worth over $1,000,000.

"(7) That defendant owned two large hotels, seventeen granaries, and a traction engine all situate near Alberta, Canada.

"(8) That defendant had left Canada because that country had gone dry and she was compelled to close the bars of the hotels.

"(9) That defendant received an income of $6,500 payable every 40 days.

"(10) That she had given instructions to the Canadian Bank of Commerce to transfer all money on deposit with said bank, amounting to the sum of $6,500 to the Elko National Bank, Nev., and that said sum would be on deposit to her credit January 1, 1918.

"(11) That she had discharged her attorney, and that he had attached and garnished her money in the sum of $4,700 on deposit in the Central National Bank of Oakland, and that she was thereby prevented from withdrawing any part thereof."

It is then alleged that these representations, with the exception of the first and second, are false and untrue. Then follows an allegation that the defendant knew the representations were untrue, and that Lansdale, believing said representations, and being deceived thereby, was induced by reason thereof to enter into a certain agreement. The terms of the agreement are then specified, and they are that the defendant would hire and employ said Lansdale and his wife and son at specified salaries at the Lucky Girl group of mines, and that the defendant would sell and convey to said Lansdale an undivided one-third interest in said group of mines. In consideration of which agreement, said Lansdale paid the defendant $300. It is alleged that Lansdale, "in pursuance of said promises, representations, and agreements so made by said Florence W. Bliss, and being deceived thereby, did then and there pay over and deliver to the said Florence W. Bliss the sum of $300." There is no direct allegation, nor any allegations from which it might be inferred, that the defendant did not own the Lucky Girl group of mines; that they were not worth $100,000; that Lansdale and his wife and son were not employed by the defendant; and that they did not get a one-third interest in the said mine.

[2, 3] It seems clear, therefore, that there is no causal connection shown between the allegations alleged to be false and the parting with the $300 by Lansdale. It is a well-settled rule that, in charging the crime of obtaining money under false pretenses, the false pretenses must be a material element in inducing the prosecuting witness to part with his money or property. People v. Kahler, 26 Cal. App. 452, 147 Pac. 228; People v. Haas, 28 Cal. App. 182, 151 Pac. 672; People v. Canfield, 28 Cal. App. 792, 154 Pac. 33.

It is contended by the respondent that this case fairly falls within the rule of the case of People v. Griesheimer, 176 Cal. 44, 167 Pac. 521. In that case it is said:

"While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the 'Fatherland Magazine,' a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby."

In the present case it not only does not appear by necessary or even possible inference that the money was paid because of the representations which are alleged to have been false, but it is expressly charged in the information that the money was paid for a specific purpose; i. e., in consideration of a promise to give to Lansdale a one-third interest in a valuable gold mine owned by defendant, and in further consideration of the promise by the defendant to employ Lansdale and his family at that mine. It is apparent that, if one is purchasing an interest in a mine and securing employment therein, an inducing representation would be as to the ownership and value of the mine. It is clear that the representations concerning these facts were the inducing cause for the parting with the money, and these representations are not alleged to have been false. The only representations alleged to have been false are representations totally disconnected with the purpose for which Lansdale parted with his money. A similar question is presented in the case of People v. Kahler, supra; indeed, that case seems to present a legal situation closely analogous to the one here. That case is discussed and approved in the case of People v. Canfield, supra.

In the Kahler Case it is said:

"While not alleged, it is no doubt true that Cogan was induced to buy the drums and traps in reliance upon defendant's promise to give his son musical instruction and to secure him employment as soon as he was sufficiently proficient. It was this promise which induced the prosecutor to deal with him, and not the representation of existing facts in reliance upon

Digitized by Google

the truth of which Cogan believed that defendant would fulfill his promise."

So in the present case it was the promise to convey a one-third interest in the mine and to employ the prosecutor and his family which caused him to enter into the agreement with the defendant and to part with his money, and not the representations of existing facts as to defendant's wealth, which latter may have given the prosecutor additional reason to believe that the defendant would fulfill her agreement, but were not the consideration upon which he parted with his property.

Furthermore, the information fails to allege facts showing that Lansdale was defrauded. There is no allegation that Lansdale did not receive from the defendant just what it is alleged she agreed to give him—a one-third interest in this mine and employment for himself and family. There can be no presumption that Lansdale did not receive these things, in the absence of an allegation to that effect, and, if he received what defendant had agreed to give him, there would be no offense on the part of the defendant. People v. Tufts, 167 Cal. 266, 270, 139 Pac. 78. It is clearly apparent that, if defendant did own the mine, which was of the value claimed, and did give to Lansdale a one-third interest therein, and employment for himself and family, it would be immaterial in a criminal inquiry whether or not she falsely represented that she owned in addition thereto a million dollars worth of real property in Canada and a million dollars worth of real property in New York, or all the wealth of the Aztecs, as Lansdale was not led to believe that he would be entitled to any interest in any property except the mine.

The motion in arrest of judgment should have been granted, as the information was insufficient to charge a public offense.

The judgment is reversed.

We concur: BRITTAIN, J.; NOURSE, J.

PIDGEON v. SAN DIEGO CONSOL. BREWING CO. (Civ. 3311.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1920.)

1. Corporations ⟸264—Stockholder's liability on obligation created by law barred in three years; "time when liability was created."

A stockholder's liability to his corporation is an obligation created by law, barred at the expiration of three years from the time when the liability was created, the words referring to the time "when the liability was created," as set forth in Code Civ. Proc. § 359, applying to the time when the corporation made the contract out of which the liability arises, and not to the time of any breach by the corporation.

2. Corporations ⟸264 — Corporation's contract of sale created contingent liability when made and before order placed thereunder.

Under contract for sale of beer by corporation in which defendant held stock, made with plaintiff suing to enforce defendant stockholder's liability, liability of the corporation, within Code Civ. Proc. § 359, barring obligations created by law, was created when the contract was made, and before plaintiff placed an order for beer.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by P. F. Pidgeon against the San Diego Consolidated Brewing Company, a corporation. From judgment for defendant, plaintiff appeals. Affirmed.

W. J. Mossholder, of San Diego, for appellant.

Eugene Daney and Lane D. Webber, both of San Diego, for respondent.

CONREY, P. J. Appeal by the plaintiff from a judgment entered in favor of the defendant in an action to recover from the defendant, on its statutory liability as a stockholder of the Mission Brewing Company, a corporation, a fixed proportion of an alleged indebtedness of the Mission Brewing Company to the plaintiff. The judgment was entered pursuant to an order sustaining the defendant's demurrer to the complaint without leave to amend the complaint. One of the grounds of demurrer was that the action is barred by the provisions of section 359 of the Code of Civil Procedure.

The complaint was filed on the 17th day of September, 1918. The complaint sets forth the terms of a contract entered into on the 11th day of August, 1913, between plaintiff and the Mission Brewing Company under which, at a stated price per barrel, the company agreed to sell and deliver beer to the plaintiff as ordered. The complaint alleged, in effect, that said contract was in force at all times from the making thereof to and including the 6th day of July, 1918, at which time the Mission Brewing Company refused to further perform the contract and notified the plaintiff that it would not thereafter deliver beer to him, except at a stated price per barrel, which was very much higher than the price fixed by the contract. Further allegations show loss and damage to the plaintiff by the refusal of the Mission Brewing Company to comply with the terms of said agreement.

[1] The question presented by this appeal has been fully discussed and should be regarded as having been permanently settled by recent decisions of the Supreme Court.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

The rule is thereby established that in cases of this kind a stockholder's liability is an obligation created by law, which is barred at the expiration of three years from the time when the liability was created; that the words referring to the time "when the liability was created," as set forth in section 359 of the Code of Civil Procedure, apply to the time when the corporation made the contract out of which the liability arises, and not to the time of any breach of the contract by the corporation. For a full statement of the law on this subject it is only necessary to refer to such late cases as Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939 and Chambers v. Farnham (Sup.) 187 Pac. 732.

[2] We think there is no merit in appellant's contention that under the contract set out in the complaint no liability was created (within the meaning of the code section above cited) against the Mission Brewing Company "until Pidgeon placed an order for beer. Each time he placed an order for beer a new liability arose." It is now too clear for further argument that, if the Mission Brewing Company was ever liable to the plaintiff by reason of the transactions mentioned in the complaint, that liability must have arisen out of the contract of August 11, 1913. This being so, the statute limiting the time for the commencement of an action against a stockholder for a breach of that contract began to run in favor of the stockholder at the date of the contract.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

SMYTH v. FITCH (WILLIAMS et al., Interveners). (Civ. 2143.)

(District Court of Appeal, Third District, California. May 14, 1920.)

1. Insane persons ⇐29—Order restoring grantor to competency sufficient to show capacity.

Order restoring grantor to competency on day of execution of deed *held* sufficient to support finding as to mental capacity to execute deed on such day.

2. Deeds ⇐211(1)—Evidence held to show mental competency of grantor.

Evidence *held* to show that mother was mentally competent at the time of her execution of deed to daughter.

3. Deeds ⇐210 — Evidence held to prove grantee's compliance with condition of deed requiring her to support grantor.

In daughter's action to quiet title to land, conveyed by mother by deed conditioned on daughter's support of mother during her lifetime, evidence *held* to sustain finding that daughter complied with the condition.

Appeal from Superior Court, El Dorado County; Geo. H. Thompson, Judge.

Action by Florence Agnes Smyth against Oscar Fitch, as administrator of the estate of Emily Charles, deceased, in which Major S. Williams and another intervened. Judgment for plaintiff, and interveners appeal. Affirmed.

William F. Bray, of Placerville, for appellants.

J. F. Pullen, of Sacramento, for respondent.

BURNETT, J. The action was in the usual form to quiet title to certain real property in the county of El Dorado. The appellants herein became parties by a complaint in intervention, in which they alleged failure of consideration, fraud, and undue influence on the part of plaintiff in obtaining the deed which she claims; and, upon the issues thus raised, a trial was had, and the findings and judgment were in favor of plaintiff. The appeal was taken under the alternative method, but appellants have not presented in their brief any of the evidence upon which they relied or to which they desired to direct the attention of this court, as required by section 953c of the Code of Civil Procedure. Nevertheless, we have examined the record, and are satisfied that, contrary to the contention of appellants, the findings are amply supported, and that we would not be justified in disturbing the conclusion of the lower court. We may state the salient facts as follows: Emily Charles, a widow, and mother of eight children, among whom were the plaintiff and the interveners herein, was for many years prior to her death in 1916 the owner of a 160-acre farm in said county. On February 24, 1908, she was declared to be mentally incompetent by the superior court of that county, and Manfred J. Williams, a son and one of the appellants herein, was appointed guardian, but never qualified or acted as such. On March 27, 1911, she was restored to competency by said court, Judge Arnot presiding, and a judgment of restoration duly made and entered, from which no appeal has ever been taken. After her restoration and upon the same day she made, executed, and delivered to one of her daughters, Florence Agnes Smyth, respondent herein, a deed of said tract of land, wherein she "granted, bargained and sold, conveyed and confirmed" the same to said daughter in consideration of the sum of $10, and also in further consideration of the performance by the grantee of certain conditions, including the constant personal presence of the grantee upon said farm, and also the furnishing by her to the grantor of food, clothing, medical attendance, nurse's care, and the defraying of the ex-

Digitized by Google

pense of the last illness, final interment of the grantor after death, said deed providing for reversion in case of a breach. Appellants contend in their brief that the evidence is insufficient to support the finding of the court that the grantor was competent to make such deed, and also that the grantee complied with and carried out the conditions therein prescribed.

[1, 2] As to the first of these contentions, the order restoring the grantor to competency, which was admitted in evidence without objection, would be sufficient to support the finding as to her said capacity. Moreover, this was supplemented by the testimony of various witnesses, who expressed their opinion that the old lady was capable of transacting business and of understanding the nature of the transaction resulting in the execution of said deed. From the evidence which was thus presented we deem it sufficient to quote from the deposition of C. E. Peters, an attorney at law, as follows:

"I saw her on that date [March 11, 1911], in the courtroom of the superior court, El Dorado county, and also at my office. Judge Arnot presided in the superior court. Mrs. Florence Smyth, daughter of Mrs. Charles, Major Williams, son of Mrs. Charles, and possibly Harry Williams and Manfred Williams were present at the session of the superior court, and I was there at that time. After proper proceedings the court made an order restoring Mrs. Charles to mental competency. That was followed by a judgment which was duly entered in the records of the court. After the court proceedings Mrs. Florence Smyth and Mrs. Charles went to my office, and a deed was drawn, conveying certain property to Mrs. Smyth, and, as I remember it, reserving a life interest to Mrs. Charles. I have not seen the deed since it was executed. The deed was acknowledged by Mrs. Charles before Hon. Chas. A. Swisler, notary public. I was also satisfied that Mrs. Charles was fully competent, mentally, to execute the instrument. She was quite old at that time, about 80 years, I believe, and she showed keen alertness and understanding. She was especially practical for a woman of her years; her only hindrance being that she was somewhat deaf. The deed was made by Mrs. Charles without any influence or duress against her of any kind. She did it willingly and voluntarily, stating that she believed it to be the best thing for her to do, considering her circumstances, health, and years."

As to the other point, plaintiff herself testified as follows:

"Q. You promised and agreed and bound yourself to certain conditions expressed in this deed? A. Yes. Q. Among others to support and maintain the party of the first part as long as she lived, and that you should furnish at your expense food, clothing, medical attendance, nurse's care, and the expenses of the last illness —funeral expenses and various other conditions expressed in the deed; you agreed to do that, did you? A. Yes. Q. You did all of that? A. I did. Q. To the best of your ability you complied with all of the conditions of the deed? A. I did. Q. Giving your mother kind attention and care? A. Yes. Q. You have paid for the funeral expenses and erected a monument upon her grave? A. I did. Q. Paid the various expenses of the ranch and taking care of your mother? A. I did."

[3] The foregoing evidence would be sufficient, of course, to support the finding of the court as to the said conditions, but we may add that she was corroborated by the testimony of other witnesses.

We think the appeal is without substantial merit, and the judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

LEAVER v. SMITH et al. (Civ. 3307.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1920.)

1. Execution ⇐283—After year purchaser may quiet title, although no deed has been issued.

Under Code Civ. Proc. §§ 700, 702, providing that the purchaser at execution sale acquires all the title of the judgment debtor, and that right of redemption is lost in a year, a purchaser, despite sections 703 and 706, relating to possession during period of redemption, is at the end of a year possessed of absolute title, and may quiet the same against the judgment debtor in suit for that purpose, though no deed has been issued.

2. Judgment ⇐585(2)—Previous judgment against plaintiff bar to second action.

As under Code Civ. Proc. § 1963, subd. 18, it is presumed all issues which might have been decided in a previous action between the same parties were disposed of, a previous judgment against a purchaser at execution sale, in an action to quiet title brought against the judgment debtor more than a year after sale, is a conclusive adjudication which will bar a subsequent action, notwithstanding at the time of the first suit to quiet title a deed had not been issued, for under sections 700 and 702 the purchaser had complete title, and on production of evidence thereof was entitled to recover regardless of lack of deed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by P. J. Leaver against Samuel T. Smith and others. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. T. Kendrick, of Los Angeles, for appellants.

M. I. Grossman, of Los Angeles (Charles M. Ackerman, of Los Angeles, of counsel), for respondent.

JAMES, J. In this action to quiet title plaintiff had judgment and defendant appeals. The complaint was in the usual form

Digitized by Google

appropriate to the character of the action. In addition to a general denial, the defendant made a special plea in his answer by alleging a former judgment between the parties for the same cause. That portion of the answer is as follows:

"That heretofore, to wit, on the * * * day of March, 1917, an action was commenced by the plaintiff in this court against each of these defendants, wherein it was alleged that the plaintiff was the owner of said property and wherein it was also alleged that the defendants, and each of the defendants, had no right, title, or interest in said property; that the said defendants appeared in said action and the said cause came on regularly for trial before said court on the 11th day of December, 1917, and thereupon said court duly made and gave judgment against the plaintiff and in favor of defendants, thereby adjudging that plaintiff take nothing in said action and that defendants recover their costs."

Samuel T. Smith is the only defendant interested, as the action was dismissed as to Anna May Smith, who was first named in the complaint as Jane Doe. The trial court made particular findings by way of showing the facts upon which the judgment was predicated. From these findings it appears that appellants here, in 1914, became a judgment debtor of one Leaver; that upon execution being levied against the real property herein involved, then belonging to appellants, a sale was made and the property was purchased by the plaintiff, the judgment creditor; that the execution sale was made on the 3d day of February, 1916; that no redemption of the premises having been made in the meantime, deed was delivered to the purchaser on the 11th day of December, 1917. As to the former judgment pleaded by appellants, the court made its findings as follows:

"That it is true that an action was commenced in March, 1917, by plaintiff in this action, and against defendant in this action, for the purpose of quieting title to the premises herein described; that all of the allegations contained in the further and separate answer to plaintiff's complaint, set out in the answer of defendants herein, are true."

Conclusions of law followed, wherein it was determined that the plaintiff should have a decree quieting his title to the property described in the complaint.

[1, 2] It is appellants' contention that the plea of the former judgment adjudicating the same matter between the same parties was sustained by the evidence, and that the court should have held that the plaintiff was estopped from re-asserting claim to the property described. No question is made as to the correctness of the findings of fact in their material parts. From such findings and from the undisputed evidence exhibited in the bill of exceptions we may summarize the occurrences material for consideration as follows: Execution sale of the defendants' property was made and certificate of sale was given and recorded on February 3, 1916; deed to the same was delivered December 11, 1917. Plaintiff's first action to quiet title was commenced (as appears from the court's findings) in March, 1917; trial of that action was had on December 11, 1917, and judgment entered on December 18, 1917. This action, being the same in form as the preceding action, to wit, to quiet title to the same property against the same defendants, was commenced on October 23, 1918, and judgment was rendered on January 21, 1919. While the evidence heard at the trial of the first action is not shown, we can surmise that the plaintiff was refused a decree in the first action because at the time the action was commenced a deed had not been issued to the property; the opinion of the trial judge evidently being—for it is emphasized here in the brief of respondent—that a cause of action to quiet title would not mature upon the execution sale until formal deed was issued; that conclusion being derived from the assumption that the purchaser at an execution sale, and until he secures a deed, obtains only an equitable title which is not sufficient to sustain a cause of action as against the holder of the legal title. Before considering further the question just suggested, attention is called to the fact that, as the execution sale was held and certificate of title issued on February 3, 1916, the full period for redemption had expired prior to the commencement of the first action in March, 1917. In other words, that at the time plaintiff commenced his first action the right of redemption had been lost in the judgment debtor, and the plaintiff was entitled, upon demand, to his deed. Code Civ. Proc. § 702. It is important to the question of the alleged estoppel which the first judgment worked against the plaintiff to inquire as to the character of title which the purchaser at an execution sale is endowed with from the time he receives his certificate of sale. Section 700 of the Code of Civil Procedure provides that—

"Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property. * * *"

The effect of this provision is to confer upon the purchaser full title, except that within the ensuing period of 12 months after sale an equity of redemption is possessed by the judgment debtor. When the full period of 12 months has elapsed there no longer exists any equity in the judgment debtor; hence the purchaser becomes possessed of an absolute title at that time. Such was the case here at the time plaintiff commenced his first action to quiet title to the real property. The issuance of a deed was not essen-

Digitized by Google

tial to the vesting of title in the plaintiff; nor was such deed necessary and indispensable evidence of the title of the plaintiff. Respondent has cited Knight v. Fair, 9 Cal. 117, which is favorable to his contention that upon the sale of real property under execution an equitable title only is conferred upon the purchaser. That case, however, is considered in Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648, and attention is called to the fact that Knight v. Fair was decided under the Practice Act when the state of the law was different from that which was carried into the Code. The court, in Pollard v. Harlow, supra, said:

"The language of section 700 of the Code of Civil Procedure is, that upon the sale of the property 'the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto,' which is to say unequivocally that he acquires the legal as well as the equitable title. The only qualifications are, that (when not a leasehold of less than two years' unexpired term) the property shall be 'subject to redemption'; that a deed shall be subsequently given (Code Civ. Proc. § 703); and that pending the time for redemption the possession shall remain with the defendant (Code Civ. Proc. § 706). But no one of these qualifications is inconsistent with the vesting of the legal title in the purchaser. With regard to the first, the case is simply the familiar one of a legal title, defeasible upon the happening of a condition subsequent; and as to the second, the deed gives 'to the purchaser no new title to the land purchased by him, but is merely evidence that the title has become absolute.' Robinson v. Thornton, 102 Cal. 680."

As to the binding effect of the former judgment: That judgment was between the same parties as appeared in this suit; the cause of action was stated substantially in the same manner. In the first action plaintiff alleged ownership of the property and sought to quiet title against the claims of the defendants. Plaintiff was called upon there to furnish evidence of any title that he had, or be estopped from further asserting a claim based upon the same evidence.

"If the cause of action in which the judgment was rendered was the same as the cause of action in which the judgment is pleaded, and both actions have been brought to obtain relief at law or in equity upon the same cause of action, the last action is subject to the estoppel of the judgment in the former action. And the judgment as rendered in that action is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case (Phelan v. Gardner, 43 Cal. 306); and the presumption of law is that all such issues were actually heard and decided (subdivision 18, § 1963, Code Civ. Proc.)." Parnell v. Hahn, 61 Cal. 132.

It therefore appears that the plaintiff, at the time he brought his former action, could have made proof of the sale under execution to him of the real property and the receipt of the certificate of sale. As that sale was had and certificate made and recorded on February 3, 1916, it would have appeared that at the time the former action was commenced no equity of redemption was left with the defendant; hence that the plaintiff had become possessed of an absolute title. In other words, it appears that plaintiff in the first action could have introduced precisely the same evidence as he introduced at the second trial to prove his title, with the one exception that at the second trial he offered the additional evidence of the deed issued to him. As we have before stated, we do not consider that the production of the deed was in any wise necessary to the proof of title of the plaintiff derived under the execution sale. His case was complete without the production of such a deed.

The situation, then, is that the first judgment was entered against the plaintiff upon the merits upon the same essential evidence that was received in the second case, and under such circumstances we have no doubt that the first judgment should be held to have adjudicated the rights of the parties to this action; hence the plaintiff is estopped from bringing the defendant a second time into court for the same cause. The first judgment was not appealed from, and at the time of the trial of this action (although not at the commencement of the action) had become final.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

HUBBARD et al. v. JURIAN et al.
(Civ. 3329.)

(District Court of Appeal, First District, Division 1, California. May 18, 1920. Hearing Denied by Supreme Court July 16, 1920.)

1. Appeal and error ⇐1097(2)—Opinion on former appeal law of case.

A decision of the appellate court on a former appeal, a petition for hearing in Supreme Court being denied, was the law of the case on a subsequent appeal, even though the Supreme Court departed from the doctrine of the decision after judgment was entered on the remittitur.

2. Mechanics' liens ⇐132(8)—Work done by architect immaterial on question when work on building ceased.

Painting of window panels under direction of architect to protect them from cracking in the sun, by persons other than the contractor, was properly overlooked by court in determining when work on building ceased, especially where such work was trivial.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

3. Mechanics' liens ⇐113(2)—Lien of stop notice subordinate to other liens.

The equitable garnishment occasioned by a stop notice served on owner under Code Civ. Proc. § 1193, attaches only to such sum as might be payable to the contractor after the extinguishment of liens.

4. Costs ⇐203—Defendants not "adverse parties," so as to require service of cost bill.

Where defendants took separate appeals, and remittitur provided, "Appellants to recover costs," appeals resulting in a modification of the judgment by the reduction thereof as to some defendants, and an increase as to one, the latter was not an "adverse party" to the other defendants, under Code Civ. Proc. § 1033, so as to require service on it of a cost bill.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by A. L. Hubbard and others against A. Jurian, G. W. Odell, and the Maryland Casualty Company. From an adverse judgment, and an order refusing to strike out a cost bill, plaintiffs appeal. Affirmed.

See, also, 35 Cal. App. 757, 170 Pac. 1093.

Ralph C. McComish, of San Jose, for aplants.

F. H. Bloomingdale, of San Jose, and James Walter Scott, of San Francisco (James J. Harrington, of San Francisco, of counsel), for respondents.

KOFORD, Judge pro tem. Two appeals are involved here. Plaintiffs appeal from the portion of the judgment foreclosing the mechanics' liens of some of their assignors, and denying relief for the claim of Hubbard & Carmichael, one of plaintiffs' assignors. Plaintiffs also appeal from the order of the trial court refusing to strike out the cost bill for costs on a former appeal.

The present plaintiffs are the executors of the original plaintiff, now deceased. When this case was originally tried, the judgment in favor of the then plaintiff included the Hubbard & Carmichael lien filed July 2, 1913. The defendants each appealed from the judgment and order denying a new trial. On this appeal the judgment was modified in certain respects, including the disallowance of this particular lien, on account of the claim of lien having been filed too late. Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093. Upon the going down of the remittitur, the trial court entered judgment in accordance with its directions upon the same findings of fact, but containing recitals of the appeal and decision on appeal. Thereupon plaintiffs moved for a new trial, which was denied, and then took this appeal from a portion of the judgment.

Appellants, in seeking a reversal of the judgment, contend (1) that the finding that Odell and Jurian were estopped from claiming that the work had been abandoned prior to March 10, 1913, by reason of having alleged in their answer that the abandonment occurred on or about that date should prevail over the finding that the contractor ceased from all labor on the building on March 1, 1913, which it is argued (2) is not supported by the evidence. Appellant also urges (3) that Hubbard & Carmichael Bros., having filed a stop notice under section 1184, Code of Civil Procedure, were entitled to be paid out of the money in the hands of the owners belonging to the contractor, which was found to be $948; and (4) that a laborer or materialman may recover from the surety of the contractor without having perfected a lien.

[1] The decision on the former appeal of this case disposes of most, if not all, of the points, and therefore is the law of the case with respect to the question decided on that appeal. The doctrine of the decision on the former appeal in this case on the fourth point above urged by appellants has been departed from by the Supreme Court, since the judgment herein was entered on the remittitur, in the later case of General Electric Co. v. American Bonding Co. (Sup.) 182 Pac. 444, notwithstanding that a petition for hearing in the Supreme Court of the former appeal of Hubbard v. Jurian, supra, was denied by that court. But our decision on the former appeal must still be considered to be the law as far as this case is concerned. It is a final judgment as to that point, and for all purposes of this particular case it remains established, whether it may be afterwards thought to be right or wrong. With respect to this point on appeal, appellants recognize that this court is bound by its former decision.

But with respect to the other three points on appeal appellants assert that there is no law of the case. First, they point out that in the first decision the word "estoppel" is not used, and that therefore their first point is still open for decision. We do not agree with this. Although the word "estoppel" is not used, as is claimed, yet the decision fully discusses this point, and decides that the defendants' pleading as a whole is of such a nature that it does not estop them, and that the finding as to the date of abandonment stands. We quote from the decision as follows:

"It is contended upon behalf of the respondent Hubbard that the claim of lien of Hubbard & Carmichael which was filed on July 2, 1913, was within time, because it was filed within 120 days from March 10, 1913, 'on or about' which date the answer alleged work on the building was abandoned. In this behalf it is urged that this date, by reason of the aver-

Digitized by Google

ments of the answer, was admitted by the defendants to be the date when work ceased upon the building, and that as a consequence the trial court should have accepted that date as the time of cessation of labor despite evidence to the contrary, and that the finding of the trial court that work ceased upon the building on March 1, 1913, was, in so far as the Hubbard & Carmichael claim was concerned, unauthorized, and cannot therefore be permitted to prevail over the admitted fact. In support of this contention we are cited to the familiar rule that an admission made in the pleading is binding on the party making it, that a fact admitted by the pleadings of an opponent need not be proved, and that any evidence introduced contrary to such admission must be disregarded by the trial court when making its finding. In our opinion this rule has no application to the situation presented by the pleadings in the present case. The burden of proof was upon the plaintiff to show that his assignor, Hubbard & Carmichael, had filed their claim of lien within the statutory time after constructive completion of the building. Bloom's Law of Mechanics, Supp. p. 258. The answer of the defendants squarely and sufficiently denied the allegation of the complaint that the building was completed on June 20, 1913. This denial made it incumbent upon the plaintiff to proffer proof showing that the claim of lien had been filed within time. Moreover the phrase 'on or about March 10th,' as used in the answer, is indefinite and uncertain, and might therefore consistently mean several days before or after that date, and, inasmuch as the exact date of the completion of the building or the cessation of work thereon was a material fact to be determined by the court below as a foundation for the allowance or rejection of the claims of lien, it cannot be said that the allegation in question was such a definite admission of fact as would preclude the necessity for the taking of evidence or the making a finding thereon. The finding of the trial court that work on the building ceased on March 1, 1913, and that such cessation continued for more than a period of 30 days, being sufficiently supported by evidence, it follows that the Hubbard & Carmichael lien, which was filed July 2, 1913 (123 days after March 1, 1913), was just 3 days too late, and therefore should not have been allowed."

[2] It is thus stated in the decision that the finding of the date of cessation of labor is sufficiently supported by the evidence. Appellants contend that, as they were respondents on that appeal, they could not attack that finding at that time, but that, being appellants now, they may do so. However this may be, we are still of the opinion that the evidence is sufficient to support the finding that the contractor ceased from all labor upon the contracts on March 1, 1913. The work done on March 4, 1913, was painting window panels under direction of the architect to protect them from cracking in the sun, and was trivial in amount. It was properly overlooked by the trial court, not so much because it was trivial, but because it was not done on the contract, nor by the contractor. This amount of painting should be compared with any steps taken by the owner looking to the protection of his property from deterioration, as distinguished from improving it constructively, by either the contractor, or owner, or going ahead in any manner with the contemplated work.

[3] Appellants contend that the third point, touching the stop notice, was discussed in the former decision only with respect to the premature payment made to the contractor; that this court can now decide that this stop notice should be given effect, operating, not upon the premature payment of $1,315, but on the money remaining in the hands of the owners and due the contractor at the time of the service of the withhold notice. Appellants state that the trial court found this amount to be $948. There is no finding to this effect directly, but it is arrived at by computation. The contract prices were $5,260 and $3,600, which, together with extras, make a total of $9,222. The owners paid installments of $900, $1,315, and a further sum of $1,315, together with the sum of $4,744.59, to complete the work after abandonment, making a total of $8,274.59 cost to the owner without paying liens. The difference between this cost and the contract price, with extras, is $948, ignoring cents.

Is this amount available to plaintiffs under the stop notice, in face of the fact that there are valid liens greatly in excess of this sum? The judgment distributes this sum proportionately among the several valid lien claimants, and also gives them judgment against the sureties on the statutory bond filed by defendant Maryland Casualty Company. Therefore, while the amount of $948 was due the contractor under the terms of his contract in one sense, it is not in another. He will never receive it, and is not entitled to it. Code Civ. Proc. § 1193.

It was said in Hughes Bros. v. Hoover, 8 Cal. App. 145, 84 Pac. 681:

"The contention of appellant that it was entitled to a personal judgment against the owner, growing out of the notice to withhold money, is not tenable. The equitable garnishment, which is said to be occasioned by such notice, attaches only to such sum as might be payable to the contractor after the extinguishment of the liens, for until such liens are extinguished no sum is payable from the owner to the contractor."

Plaintiffs, by reason of the stop notice, therefore, were not entitled to judgment against the owner, nor to be paid out of this fund to the exclusion in whole or in part of the valid lien claimants. This disposes of all the points of the appellants on the appeal from the judgment.

[4] The appeal from the order of the trial court refusing to strike out the cost bill on appeal is based on the fact that the defendants Jurian and Odell did not serve the cost

Digitized by Google

bill on the defendant Maryland Casualty Company as well as upon plaintiffs. The two defendants were appellants there, having taken separate appeals, and plaintiffs' predecessor was the respondent. The remittitur provided, "The appellants to recover costs on this appeal." It is claimed that, inasmuch as the modification of the judgment resulted in a reduction of the judgment against appellants Odell and Jurian, and an increased judgment against appellant Maryland Casualty Company, said last-named appellant was in fact an "adverse party" to its coappellants Odell and Jurian, as that term is used in Code of Civil Procedure, § 1033. The remittitur did not allow one appellant to recover costs from the other, but only from the respondent (appellants here). The appellants filing the cost bill did not ask for judgment for costs against their coappellant.

We must hold, therefore, that those appellants were not adverse parties to each other, that it was not necessary that the cost bill be served on the Maryland Casualty Company, and that the trial court properly refused to strike it out on that ground.

The judgment and order appealed from are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

LAWSON v. TURLOCK UNION HIGH SCHOOL DIST. et al. (Civ. 2179.)

(District Court of Appeal, Third District, California. April 28, 1920. Hearing Denied by Supreme Court June 24, 1920.)

1. Schools and school districts ⟸69—School district trustees may change location of high school in a city.

Under Pol. Code, § 1742, as amended by St. 1919, p. 1086, a board of trustees of a school district may change the location of a high school located in an incorporated city.

2. Constitutional law ⟸48—Statute not declared unconstitutional, except for most cogent reasons.

A strong intendment exists in favor of an act of the Legislature, and a court should declare it unconstitutional only for the most cogent reasons.

3. Statutes ⟸93(6)—Statute permitting trustees to change location of high school in city not invalid.

Pol. Code, § 1742, as amended by St. 1919, p. 1086, is not obnoxious to Const. art. 4, § 25, subd. 28, which provides that the Legislature shall not pass local or special laws prescribing the powers and duties of officers of school districts, in that it permits trustees to change the location of a high school in an incorporated city; the classification being reasonable, and not arbitrary.

Application by E. W. Lawson for certiorari to review action of Jesse Jaderberg and others, as Trustees of Turlock Union High School District. Writ denied in the District Court of Appeal, and hearing denied in the Supreme Court.

Hawkins & Hawkins, of Modesto, for petitioner.

L. J. Maddux, of Modesto, for respondents.

PREWETT, Presiding Judge pro tem. This is an application by petitioner for a writ of certiorari to above-named respondents to review the action of said respondents, as trustees of Turlock Union High School District, in changing the site of the high school from its former position in said city to another about one mile distant. It is contended by petitioner that the trustees exceeded their powers in ordering the change. Although the record in the matter is somewhat voluminous, the actual question to be determined is very narrow.

Turlock is an incorporated city, and prior to October, 1919, said high school district owned and maintained a high school upon certain premises within said city which premises had been regularly selected and designated for that purpose. The union district covers an extensive area of territory outside of the corporate limits of said city and includes said city. In October, 1919, said trustees by a majority vote changed said high school from its former position to a tract of about 23 acres situated in another part of the city. In February, 1920, petitioner herein commenced an action in injunction in the superior court in an effort to restrain said trustees from proceeding with said proposed change. Judgment was rendered against him, and his appeal is now pending therefrom.

[1] 1. Waiving the question whether petitioner has a speedy remedy by appeal, the decisive point against him is that the amendment to section 1742 of the Political Code, enacted in 1919 (St. 1919, p. 1086), justifies the board in its action. The portion of said section relevant to this inquiry now reads as follows:

"With the following exception, no change of location of any high school when once established, shall be made except upon a petition to the superintendent of schools who has jurisdiction of the high school district, * * * and then only upon the affirmative vote of two-thirds of the qualified electors of the high school district voting at an election called by the superintendent of schools, for that purpose. Such election shall be called and held, and the returns thereof made to the superintendent of schools, in the same manner as in the case of the election for the formation of the district: Provided, however, that when any location has been once established in any of said districts,

Digitized by Google

and said location lies within the corporate limits of any incorporated city or town, any change of location within the corporate limits of said city or town may be made upon any such change of location receiving the vote of a majority of the board of trustees of any such district whenever a new building is to be erected."

The proviso is the portion added by the amendment of 1919. Its terms are clearly broad enough to justify the action taken by the trustees if the act is open to no constitutional objection.

[2, 3] 2. It is claimed, however, that the amendment is obnoxious to that provision of the Constitution which provides that the Legislature shall not pass local or special laws prescribing the powers and duties of officers of school districts. Const. art. 4, § 25, subd. 28. Admittedly the amendment does prescribe the powers and duties of school officers. If the amendment is neither local nor special, it is immaterial whether the term "school districts," as used in the above-cited provision of the Constitution, is broad enough to include high school districts. A strong intendment exists in favor of an act of the Legislature, and a court should declare it unconstitutional only for the most cogent reasons. The amendment in question applies to all high school districts in the state that have a school building within the limits of an incorporated city. This means, potentially, every high school district in the state, for if it has no school building within an incorporated city to-day it may have one to-morrow. Classification that is reasonable, and not arbitrary, does not vitiate a statute. 6 Ruling Cases, 372. The distinction established by the Legislature is not an arbitrary one. There are sufficient differences between a location in a city and one in the country to justify the classification established in the amendment. Conceding that the change of site from one point to another in the same city is a change of location, within the purview of the amendment, the fact that such change could be for only a limited distance, while in the country it might be for many miles, is itself a sufficient difference in conditions to save the amendment. Moreover, the opportunity for securing favorable sites within a city is manifestly less than in the open country. In dealing with many owners of a block within a city, flexibility of power to contract for options, wider discretion, and greater facility for rapidity of action are necessary. In the country, a removal to a new location, miles distant from a former site, might inconvenience large numbers of pupils, while, ordinarily, the greatest possible removal within a city could not greatly inconvenience any one. In the country, serious or dangerous obstacles to travel, even though the removal be for only a short distance, might operate to deny the benefits of the school to many persons, while such a result is scarcely possible in a city.

These distinctions exist. They are sufficient to justify the classification established in the amendment. That they are sufficient, in the opinion of the law-making body, to demand such classification, is answered by the adoption of the amendment.

The writ is denied, and the proceeding dismissed.

We concur: BURNETT, J.; HART, J.

Opinion of Supreme Court in bank denying hearing.

PER CURIAM. The application for a hearing in this court after decision by the district court of appeal of the third appellate district is denied.

We deem it necessary to say, however, that the decision must not be taken as a precedent for the proposition that certiorari will lie to review decisions of a tribunal, board or officer, not made in the exercise of judicial functions (Code Civ. Proc. § 1068), nor for the proposition that the order of the trustees of a union high school district changing the location of a high school building is other than a legislative or executive act. Hopping v. Richmond, 170 Cal. 612, et seq., 150 Pac. 977.

(All concur.)

BAR DUE v. COX. (Civ. 3326.)

(District Court of Appeal, First District, Division 1, California. May 24, 1920. Hearing Denied by Supreme Court July 23, 1920.)

1. Appeal and error ⟸761—Assignments of error insufficient.

Objections in a brief to the judgment and actions of the trial court, merely stated without citation of authority or any argument beyond bare statement of point, present nothing for consideration on appeal.

2. Adjoining landowners ⟸10(3) — Evidence showing erection of high fence was malicious.

In an action under St. 1913, p. 342, to have a fence erected on defendant's premises declared a private nuisance, evidence *held* to warrant a finding that the fence was maliciously erected for the purpose of annoying plaintiff.

3. Adjoining landowners ⟸10(3)—Spite fence statute constitutional.

St. 1913, p. 342, providing that any fence or other structure in the nature of a fence, unnecessarily exceeding 10 feet in height, maliciously erected or maintained for the purpose of annoying owner of adjoining property shall be deemed a private nuisance which may be abated, is not unconstitutional.

Digitized by Google

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by N. Bar Due against Sarah Cox. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur E. Nathanson, of San Francisco, for appellant.

J. H. Morris, of San Francisco, for respondent.

WASTE, P. J. The plaintiff brought this action to have a certain fence, wholly erected and maintained upon the premises of the defendant, declared a private nuisance, and removed forthwith, or reduced to a height not exceeding 10 feet. He also prayed that the defendant be enjoined and restrained from preventing or interfering with plaintiff, should plaintiff undertake to abate and remove the fence, or go upon the property of the defendant for that purpose. The action was predicated upon the alleged ground that said fence was maliciously erected and maintained to annoy plaintiff, and any of his tenants who might occupy his flats, and upon the theory that the fence excluded the light and air of plaintiff's tenants, to the annoyance and prejudice of plaintiff, and to the damage of plaintiff's property. At the conclusion of plaintiff's testimony, defendant moved for a nonsuit, which was denied. Defendant then introduced considerable testimony. On submission of the case judgment was rendered for the plaintiff, and the defendant appeals.

The action is brought by the plaintiff under the provisions of the act of the Legislature of May 28, 1913 (Stats. 1913, p. 342), which provides that any fence or other structure in the nature of a fence, unnecessarily exceeding 10 feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property, shall be deemed a private nuisance, for the abatement of which such owner or occupant may enforce the remedies prescribed in the sections of the Civil Code.

[1] Appellant in his opening brief specifies some eleven points as "questions involved in this action." He presents, however, but two with that particularity which invites our consideration. The remaining objections to the judgment and action of the trial court are merely stated without citation of authority, or any argument beyond the bare statement of the point. As an example we cite appellant's sixth point, "Errors of Law in Denying Defendant's Motion for a Nonsuit." In his brief, under the title "Motion for Nonsuit," he merely quotes verbatim the reporter's transcript of the motion, made in the court below, and the court's ruling, without a single comment. At another point in the brief appellant inserts the heading "Insufficiency of the Evidence to Sustain the Findings of Fact, Conclusions of Law and the Judgment," followed by some 77 pages of extracts from reporter's transcript, without argument, comment, or suggestion as to why this testimony is insufficient. In his closing brief appellant merely asserts that there is "no substantial conflict" in the testimony. We are not called upon to consider points so stated. Gray v. Walker, 157 Cal. 381, 386, 108 Pac. 278; Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

In view of the importance of the legal questions involved, however, we have examined the contention that the act of the Legislature, under which the suit was brought, is unconstitutional, and have read much of the evidence in the transcript, to determine for ourselves its sufficiency to sustain the finding of the court, that the fence in question unnecessarily exceeds 10 feet in height, and was maliciously erected, and is so maintained, for the purpose of annoying the plaintiff and his tenants.

[2] The plaintiff and the defendant are adjoining property owners. Some years prior to the commencement of the suit the plaintiff moved an old dwelling to the rear of his lot, so that it practically abuts on defendant's property. The latter, thereafter, erected, wholly within the line of her own property, the fence in question, but so close to the rear of plaintiff's structure that it effectively shut off the view from the lower windows of plaintiff's house and obstructs the light and air thereof. Defendant has grown vines over this tight board fence, which she waters at times, and the testimony is that the water is thrown through the cracks of the fence, and wets the interior of the lower flat of plaintiff's premises. Defendant has constantly prevented workmen engaged in repairing plaintiff's premises from in any way going upon her lot and has exhibited an embittered feeling and a defiant attitude toward the plaintiff and his tenants. From photographs and the evidence of witnesses it is apparent that the fence effectually boards up the lower windows of plaintiff's lower flat. There does not seem to be any necessity for it being maintained at a height in excess of 10 feet. This is evidenced by the fact that the fence on the property line of defendant adjoining another owner is of a different character and not so high. The fact of its peculiar construction, the way it is maintained in front of plaintiff's property, the attitude of defendant as testified to by various witnesses, and the whole circumstances surrounding its erection and maintenance, plainly indicate a malice on the part of defendant toward the plaintiff. This, we think, was the only logical conclusion to be drawn from the evidence, and was the ultimate fact for the trial court to determine, in the light of these circumstances.

Digitized by Google

[3] In support of her contention that the act is unconstitutional, defendant relies upon two decisions of the Supreme Court of California, construing the act of the Legislature of March 9, 1885, "regulating the height of division fences and partition walls in cities and towns." This act is set out in full in the case of Western Granite & Marble Co. v. Knickerbocker, 103 Cal. at page 114, 37 Pac. 192. The gist of that decision is that the fence there under consideration was a division fence and that it was not competent for the Legislature to vest in the adjoining proprietor the power to prevent his neighbor from building such a structure on his own property, provided it is not a nuisance. The other case is Ingwersen v. Barry, 118 Cal. 342, 50 Pac. 536, which is based upon the Western Granite Case. The act we are now construing was, however, passed after these decisions, and, judging by their context, with the purpose of supplying the very element necessary to render it effective, which was missing from the former statute—the malicious maintenance of a private nuisance. Under the authority of Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510, Rideout v. Knox, 148 Mass. 368, 19 N. E. 391, 2 L. R. A. 81, 12 Am. St. Rep. 560, and Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670, we believe it to be constitutional.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

HARRIS v. BURT. (Civ. 3318.)

(District Court of Appeal, Second District, Division 2, California. May 14, 1920.)

1. Appeal and error ⊜371—Stenographic reporter cannot refuse to prepare transcript because fees are not prepaid.

The stenographic reporter cannot refuse to make the transcript provided for by Code Civ. Proc. §§ 953a, 953b, because his fees have not been prepaid.

2. Mandamus ⊜57(1)—Stenographic reporter may be compelled to prepare transcript.

Under Code Civ. Proc. § 1085, providing that a writ of mandate may be issued to compel performance of an act which the law enjoins as a duty from an office, the stenographic reporter may be compelled to prepare the transcript provided for by Code Civ. Proc. §§ 953a, 953b, though his fees have not been prepaid as demanded.

3. Appeal and error ⊜371—Appeal will be dismissed where appellant took no steps to compel reporter to prepare transcript.

Where appellant gave notice of appeal and filed a demand for a transcript in accordance with Code Civ. Proc. § 953a, and gave an undertaking, etc., as well as the undertaking provided for by section 953b, and agreed to pay the clerk the cost of the transcript, but the stenographic reporter refused to prepare the same until prepayment of fees, and appellant took no steps by application for writ of mandate, under section 1085 or otherwise, to compel performance, *held*, though the duty in the first instance was on the clerk, the appeal will be dismissed where the transcript was not filed in time; appellant knowing of the reporter's wrongful demand.

Appeal from Superior Court, Los Angeles County.

Action by M. H. Harris against Bessie M. Burt, a widow. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Appeal dismissed.

R. T. Lightfoot, of Los Angeles, for appellant.

Arthur Wright, of Los Angeles, for respondent.

THOMAS, J. Motion to dismiss appeal. From the record before us it appears that a judgment was entered against the defendant here in the superior court of Los Angeles county on the 21st day of June, 1919, for a total sum of $412.74; that on the 3d day of July, 1919, a notice of appeal to the Supreme Court was filed by the defendant in that court; that at the same time and place defendant also filed a demand for transcript, in accordance with the provisions of section 953a of the Code of Civil Procedure, and gave an undertaking on appeal, with stay of execution, duly approved by the clerk of that court, as well as the undertaking provided for by section 953b, Code of Civil Procedure, in the sum of $100, agreeing to pay to the clerk the cost of preparing such transcript, which undertaking was likewise duly approved by the clerk; and that thereafter the clerk prepared what is usually denominated as the "clerk's transcript," which transcript was regularly filed in the superior court. It also appears that the official reporter who reported the case, Mr. Henry Henderson, received no notice requiring the preparation of a phonographic report of the trial until Saturday, July 26, 1919, and until the receipt of such notice he had no knowledge that defendant intended to appeal the case. On Monday, July 28, 1919, the official reporter wrote, signed, and mailed, with postage prepaid, a letter addressed to defendant's attorney of record, and who appeared before this court in opposition to this motion, which letter was in words and figures as follows:

"Room 560, Court House, Los Angeles, Cal., July 28, 1919. Mr. R. T. Lightfoot, Attorney at Law, 916 Washington Bldg., City—Dear Sir: Saturday noon your notice of appeal and request for transcript in M. H. Harris v. Bessie

Digitized by Google

M. Burt, No. B71930, was handed to me, being the first notice I had had that you desired a transcript, and now, at my first opportunity, I have looked up the case and made an estimate of the cost thereof. The estimate of my fees for the reporter's transcript on appeal is $53.20. If you desire an office copy, the fee will be one-half more, or $79.80. I notice your notice was filed July 8d, but if you have complied with your part of the statutory requirement, the provision as to time of filing transcript being, as I understand, merely directory, your client's rights would, I assume, not suffer by the delay. Having had no communication from you or any one about it until Saturday, I am not to blame. If you wish me to go ahead with the work, upon prepayment of my fees, I will do so promptly. Respectfully yours, [Signed] Henry Henderson, Official Reporter."

The statements contained in this letter are not denied. They are without conflict. Mr. Henderson, in his affidavit into which the foregoing letter is incorporated, says that he heard nothing further regarding the transcript or the proposed appeal "until just recently, when he was informed by plaintiff's attorney of the circumstances of the present motion to dismiss the appeal." Nothing has ever been done by appellant, or any one else, except as above stated. There has not been filed with the clerk of the Supreme Court, or with the clerk of this court, any transcript, brief, or other papers, except those in connection with the motion now before us.

The motion is based upon two grounds: (1) That the transcript of the record in said action has not been filed; and (2) that no points and authorities have been filed. The motion is based upon the certificate of the clerk of the superior court in which said cause was tried, and the affidavit of respondent's attorney.

It is contended by appellant that, having done all that the law requires in order to be entitled to the benefit of an appeal under the so-called "alternative method," she should not be made to suffer because of the neglect, failure, or refusal of the clerk to perform his duty. In this we quite agree. But such things do sometimes happen in the best regulated offices. When they do, and when this fact is known, as in the instant case, by the appealing party, the latter cannot sit idly by, neglecting, failing, or absolutely refusing to avail himself of any of the several provisions of law to compel the performance by the proper officer of his duty in such case, and by such neglect, failure, or refusal succeed in depriving the opposing litigant of the fruits of a righteous judgment (if such it be), and escape the granting of a motion to dismiss the appeal under such circumstances.

There are on file before us two certificates by the county clerk of Los Angeles county. By one of these it is shown that the judgment attempted to be appealed from was entered on June 9, 1919. By the other the same judgment is shown to have been entered on June 21, 1919. Which certificate is correct, we do not assume to say, but have given appellant the benefit of our doubt, and have accepted the latter as showing the correct date of entry.

[1, 2] Section 953a of the Code of Civil Procedure provides, among other things, that—

"Any person desiring to appeal from any judgment * * * to the Supreme Court or any of the District Courts of Appeal, may * * * file with the clerk of the court from whose judgment * * * said appeal is taken * * * a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony * * * be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment."

With this provision in mind, there being nothing before us to show when, if at all, appellant was served with notice of entry of the judgment from which she attempts to appeal, and the notice of appeal, as we have already seen, having been filed on July 8, 1919, it will be assumed that such notice was filed as by said section provided. From the certificates of the clerk referred to, it appears that no transcript of the phonographic report of the trial has been prepared or filed "in the office of the county clerk, as demanded, and for which bond was given, and the time for settling and approving same has expired."

There is conflict in the evidence as to whether appellant's attorney ever made demand on the court reporter for such transcript, except by filing such notices and undertakings with the clerk as stated. Appellant's attorney says that he did make such demand; while the reporter, on the other hand, says that appellant's attorney "has not communicated with affiant, either verbally or in writing, relative to said transcript." We think, however, that this is immaterial. At any rate, we are certain that for a long time, taking the affidavit of appellant's attorney at its full face value, the latter well knew that such transcript had not been prepared, and that the reason for it was according to his own statement, as set forth in his affidavit:

"That said Henderson *refused at all times* to deliver said stenographic report unless he should have been paid in advance therefor by the defendant and appellant." (Italics ours.)

"Where an appeal is taken under the alternative method provided by sections 953a and 953b of the Code of Civil Procedure, it is the duty of the stenographic reporter to make a transcript of the report of the trial within twenty days after the notice of appeal has been given" and the bond provided for in said sections has been filed, "and to file such transcript with the clerk. He cannot refuse to so file because his fees remain unpaid." Gjurich v. Fleg, 160 Cal. 331, 116 Pac. 745.

Digitized by Google

Rule 2 of the Supreme Court (176 Pac. vii), provides that—

"The appellant in a civil action shall, within forty days after an appeal is perfected, except as hereinafter stated, serve and file the printed transcript."

Following this is a provision covering the procedure where the appeal is taken by the method adopted in the case at bar. Section 3 of that rule provides that—

"The time above limited may be extended by written stipulation, or by order, based on affidavit, showing good cause therefor."

Section 953a, supra, provides that—

"Upon receiving said notice *it shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial.*" (Italics ours.)

Section 1085, Code of Civil Procedure, provides that a writ of mandate—

"may be issued * * * to any * * * person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station. * * *"

Here, then, are indicated various methods which appellant might have pursued, and by so doing avoid her present unfortunate situation, the first of which would have cost nothing but a few moments for the preparation of the necessary papers, and their service upon the stenographer. The second would probably have produced the desired result with but little inconvenience or expense on the part of appellant. For we cannot believe that any stenographer would disregard the order of the judge in whose department he was reporting, particularly upon such judge calling his attention to the case of Gjurich v. Fleg, supra. The latter method —writ of mandate—without doubt would have resulted satisfactorily.

With these facts before us, and considering the same in the light of the case above cited (where the Supreme Court, in intimating what might be considered the proper procedure, said: "In this view of the law it was, of course, within the power of the appellant to have had mandate issued against the stenographic reporter to compel him to file his transcript with the clerk as the law contemplates, and in ordinary cases appellant's failure to do this within a reasonable time might be construed to be such lack of diligence as to justify the dismissal of an appeal")—that case having been decided July 1, 1911, more than eight years ago—we think that a denial of respondent's motion would be a miscarriage of justice, and would transcend the limits of both precedent and reason.

[3] It was not to respondent's interest to take any steps other than those taken here. Appellant cannot in one breath insist that she believes her attempted appeal to be well taken and in the next that it is immaterial to her whether the stenographer ever prepares and files such transcript. If it be contended that appellant had the right to await the pleasure of the stenographer, we answer that in availing herself of such right she must use it in such a way as not to infringe upon the rights of respondent here. There being, as we have seen, legal methods by at least one of which appellant could have compelled the reporter to act, and failing or refusing to avail herself thereof, she cannot now be permitted to take advantage of her own neglect and by so doing defeat this motion. In our opinion the legal maxim, "The law helps the vigilant, before those who sleep on their rights," applies here.

It is therefore held that because of the facts with which we are confronted, and for the reasons herein expressed, the motion presented must be granted.

The appeal is dismissed.

We concur: FINLAYSON, P. J.; WELLER, J.

CRAIG v. GOMES et al. (Civ. 3347.)

(District Court of Appeal, First District, Division 1, California. May 25, 1920.)

Limitation of actions ⊂⇒48(7)—Junior mortgage not prior where senior mortgagee in possession, though mortgage barred by limitations.

Where mortgagors sold mortgaged property and took second mortgage thereon, and where purchasers sold property to holders of first mortgage, who took possession before their first mortgage became due, mortgagor's assignee of second mortgage, on foreclosure thereof, after first mortgage, was barred by limitations, and, while holders thereof were in possession of land, was not entitled to priority over first mortgage because of its being outlawed, since mortgagees in possession could not be ejected nor interfered with in any manner until payment of mortgage debt, even though mortgage was barred by limitations.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by H. S. Craig against L. R. Gomes and others. From judgment rendered, plaintiff appeals. Affirmed.

H. S. Craig, of Oakland, in pro. per.

Sans & Hudson, of Watsonville, for respondents.

KOFORD, Judge pro tem. The appeal is on the judgment roll, and the following statement of facts is taken from the findings:

J. L. Rankin (plaintiff's assignor) and his

⊂⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

wife, on July 12, 1913, executed a $3,000 mortgage due in one year, 1914, to Lillian R. Higman. This mortgage was assigned by the mortgagee and her successors several times, and came at last, on January 5, 1914, to defendants L. R. Gomes and Mary Gomes, his wife. After the making of said mortgage Rankin and wife transferred or sold the mortgaged premises to James Lomas, his wife, and William R. Orr, and the said grantees either coincidently or later (the findings do not show which) executed to said Rankin a second mortgage on the property for $1,500 on May 4, 1914. This is the mortgage which plaintiff, as the assignee of said Rankin and wife, foreclosed in the court below. On September 11, 1916, the Lomases and said Orr, who had purchased from the Rankins as aforesaid, conveyed the property to defendant L. R. Gomes and Mary Gomes. Thereupon Gomes and wife were the owners of the property, and also the mortgagees in the first mortgage, and the mortgage had not then outlawed. Then on September 29, 1916, Mary Gomes transferred to her husband, L. R. Gomes, all her interest, both in the property as a part owner, and in the said $3,000 mortgage, as mortgagee. The defendant L. R. Gomes has been the owner and in possession ever since the last-named date. It is therefore to be seen that the defendant went into possession before his mortgage outlawed.

This suit by plaintiff to foreclose the second mortgage of $1,500 was commenced shortly after the first mortgage had become barred by the statute of limitations. The decree of foreclosure provides that the first mortgage of $3,000, although barred by the statute of limitations, is a first lien and prior to the lien of plaintiff's $1,500 mortgage.

The sole question on appeal raised by plaintiff is that the first mortgage should not have been given a priority over his mortgage on account of its being outlawed.

Plaintiff does not contend that there has been a merger, and merger is not applicable under the facts. See Anglo-California Bank v. Field, 146 Cal. 644, 80 Pac. 1080, and 154 Cal. 513, 98 Pac. 267. He contends for the application of the principle that a junior mortgagee may invoke the aid of the statute of limitations against a prior mortgage, even though the mortgagor of the prior mortgage, as between himself and the mortgagee, may have waived its protection. Wood v. Goodfellow, 43 Cal. 185; California Bank v. Brooks, 126 Cal. 198, 59 Pac. 302; Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744.

The defendant contends for the application of the principle that a mortgagee in possession, even though his mortgage becomes barred, cannot be ejected nor interfered with in any manner by the mortgagor until the mortgage debt is paid. Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Brandt v. Thompson, 91 Cal. 462, 27 Pac. 763; Peshine v. Ord, 119 Cal. 312, 51 Pac. 536, 63 Am. St. Rep. 131; Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919, L. R. A. 1916B, 1209; Cameron v. Ah Quong, 175 Cal. 377, 384, 165 Pac. 961.

We think that this is the correct principle to apply here. Rankin (plaintiff's assignor) is the very man who executed the first mortgage. In morals and equity he should pay it before he is given any judgment which may result in ousting the first mortgagee. The mortgagee in possession went into possession before his mortgage became barred. The second mortgage was executed while the first was a valid subsisting first lien, not barred, and not even due.

The cases relied upon by appellant do not deal with a first mortgagee in possession, and their doctrine cannot be extended to a case of this kind in violation of such plain equitable considerations as exist here. While plaintiff here is the assignee of Rankin, he has no greater rights than his assignor. Furthermore, the doctrine of the cases last cited has been extended to the assignee of the original mortgagor and is not limited to the mortgagor himself. Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

FURLOW PRESSED BRICK CO. v. BALBOA LAND & WATER CO. et al. (Civ. 2975.)

(District Court of Appeal, Second District, Division 1, California. May 14, 1920.)

[This case, which appeared in the advance sheets, was included by inadvertence before it was ready for publication, and has been taken out of the permanent edition.]

NOBLE v. NOBLE.

(Supreme Court of Oregon. Sept. 28, 1920.)

1. Divorce ⟸93(3)—Complaint held to show cruel and inhuman treatment.

Complaint for divorce of husband against wife, charging cruel and inhuman treatment and personal indignities through free association with other men while plaintiff was in the military service in France, *held* to state facts sufficient to constitute a cause of suit.

2. Divorce ⟸91—Complaint, using word "resident" instead of "inhabitant," sufficient.

Husband's complaint for divorce for cruel and inhuman treatment and personal indigni-

Digitized by Google

ties, alleging that plaintiff had been a "resident" of Oregon ever since the marriage of the parties in 1917, was sufficient to give the court jurisdiction, though not using the term "inhabitant," the words "resident" and "inhabitant" being used synonymously in L. O. L. § 509, requiring plaintiff in suit for divorce to be an inhabitant of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inhabitant; Resident.]

3. Divorce ⇐104—Amendment to show plaintiff "inhabitant" of state, as well as "resident," held proper.

In a husband's suit for divorce, the complaint alleging that he was a "resident" of the state, though such amendment was unnecessary, the trial court had a right to permit amendment of the complaint by inserting the words "and an inhabitant" after "resident" to bring it beyond all doubt within L. O. L. § 509.

Department 2.

Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Suit for divorce by John C. Noble against Elsie Vivian Noble. From decree for plaintiff, defendant appeals. Affirmed.

This is a suit for divorce. The complaint alleged, in substance, the marriage of the parties in Coos county, Or., on April 23, 1917; that plaintiff has been a resident of the state of Oregon ever since said marriage, and charged defendant with cruel and inhuman treatment and personal indignities, rendering life burdensome, the substance of such charge being as follows: That this plaintiff was, on or about the 4th day of December, A. D., 1917, duly inducted into the military service of the United States of America, and was sent to France and there engaged in the war against Germany and her allies with the American Expeditionary Forces; that while this plaintiff was in such military service, the said defendant, disregarding her marital status and the rights of this plaintiff, went to Portland, Or., and there represented to various and divers persons that she was a single woman, and during the entire time there went by the name of Elsie Wolfe, her maiden name, among the persons with whom she was thrown in contact, and thereafter began to accompany and go to dances with other men, the names of whom are unknown to this plaintiff, and allowed such other men to call upon her constantly and associated with them in public places in said city of Portland intimately and in the same manner as if she were unmarried, and conducted herself in an unbecoming and unseemly manner with them, and in the presence of mutual acquaintances of the plaintiff and defendant spoke disparagingly of this plaintiff, and stated that she would never return to him, and so conducted herself as to cause a great public scandal among the acquaintances, friends, and relatives of this plaintiff, all of which became known to this plaintiff on his return from France, and caused him great mental pain and suffering, and greatly and deeply humiliated him, and all of which acts, statements, and conduct of the defendant were calculated to have such effect, and were done by the defendant purposely and intentionally and with intent to wound and injure the feelings of the plaintiff and to bring public disgrace upon him and into the contempt of all right-thinking persons, and all of which will cause the impairment of the plaintiff's health and tends to permanently destroy his peace and happiness, and will so do unless the bonds of matrimony are dissolved and the plaintiff is freed from his marital obligations and duties.

The defendant answered, denying the charges, and alleging that plaintiff has been guilty of cruel and inhuman treatment in falsely making and circulating reports of the character set forth in the complaint, and asked for a decree of divorce from plaintiff.

Upon the trial the court found in favor of plaintiff upon all the allegations, and later a decree was entered, granting plaintiff a divorce.

After the testimony had been taken and before a decree had been entered, the defendant's counsel moved the court to dismiss the suit for the reason that the complaint did not state facts sufficient to constitute a cause of suit, and because the court did not have jurisdiction, for the reason that there was no pleading or proof that plaintiff was an inhabitant of the state at the commencement of the action and for one year prior thereto, as required by section 509, L. O. L. Thereupon the plaintiff's counsel asked and obtained leave to amend the complaint to correspond with the proof by inserting the words "and an inhabitant" after the word "resident," which application was allowed, and thereafter findings and a decree were made and entered, as above stated, from which decree defendant appeals.

Seneca Fouts, of Portland (Chas. I. Reigard, of Council Bluffs, Iowa, on the brief), for appellant.

L. A. Liljeqvist, of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1, 2] Without going into the matter in detail we are of the opinion that the complaint states facts sufficient to constitute a cause of suit, and such of the testimony as has been brought here in the transcript supports the finding of the court. The jurisdictional question raised seems to depend upon a supposed distinction between the word "resident" as used in the complaint and the word "inhabitant" used in section 509, L. O. L. In fact, the brief submitted by

Digitized by Google

defendant seems to be predicated entirely upon this supposed distinction. We are of the opinion that whatever subtle distinction may be drawn in the definition of these terms by lexicographers, or in other statutes, they are synonymous so far as this statute is concerned. A reading of the section, as italicized below, makes this construction evident. It reads as follows:

"In a suit for the dissolution of the marriage contract, the plaintiff therein must be an *inhabitant* of the state at the commencement of the suit, and for one year prior thereto; which *residence* shall be sufficient to give the court jurisdiction, without regard to the place where the marriage was solemnized, or the cause of suit arose."

The words are used interchangeably and it is not probable that the Legislature ever had in mind a construction which might in some instances prevent a bona fide resident of the state from prosecuting a cause of suit for divorce, arising during his temporary or enforced physical absence from the state.

None of the cases cited from this state, when properly considered, sustain appellant's contention. In Miller v. Miller, 67 Or. 359, 136 Pac. 15, it is true Justice Burnett quotes from an opinion of Justice R. S. Bean in which the latter drew a distinction between residence and domicile, saying that they were not synonymous, but in the main opinion Justice Burnett held that a person who had been absent in Idaho for three years, and who then returned to a former residence in Oregon, she all the time during her absence having had the intention to return, was such a resident and inhabitant of Oregon as to bring her within section 509, L. O. L. In the opinion Mr. Justice Burnett treats the words "resident" and "inhabitant" as synonymous, as shown in the following quotation:

"In determining the residence or permanent habitation of the plaintiff," etc.

And again, quoting from a Wyoming decision:

"We think the rule is that the wife's residence is that of her husband, save in exceptional cases," etc.

To the writer the case seems strongly in favor of respondent's position here.

Reed's Will, 48 Or. 500, 87 Pac. 763, cited by counsel for appellant, was not a case arising under the statute now under consideration. In it the court considered generally the relation of domicile to residence and the opinion has little bearing upon the present contention.

The next case cited by appellant is Parrish v. Parrish, 52 Or. 160, 96 Pac. 1066. The case is not in point here. In that case the complaint, while alleging that the marriage was solemnized in this state and that the plaintiff resided in this state at the commencement of the suit, did not allege that he had so resided for a year next preceding the institution thereof; the distinction urged here was not considered and it is a fair inference from the whole opinion that, if plaintiff had alleged in that case what is pleaded as to residence in the instant case, it would have been held sufficient.

Holton v. Holton, 64 Or. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779, is not in point. In that case the plaintiff sued for a divorce and made no allegation whatever in reference to his own residence. The plaintiff obtained a decree, and 15 months afterwards moved for leave to amend the complaint and findings of fact so as to conform to the proof showing his lawful residence in the state. The court, over defendant's objection, having made such an order nunc pro tunc as of the date of the original decree, the defendant appealed here, where we held that the court, not having had jurisdiction in the first instance, could not obtain it by such an order.

There is not a single primary definition of the term "residence" that does not include inhabitancy, and not a single primary definition of "inhabitant" that does not in some way include residence. There are some refinements in the secondary definition of both terms that introduce technical distinctions, but they have never been applied to statutes similar to this. This being the case, the use of the word "resident" instead of "inhabitant" did not in any event constitute an entire failure to state a jurisdictional fact, but at the most was merely an imperfect statement of it, and as such was subject to amendment at any time before the final submission of the cause.

[3] The cause had not been finally submitted when the motion to amend was filed. It appears from the record that after the testimony had been taken and before the final decree was rendered, defendant's counsel filed a motion which recited that, all the evidence having been offered and both parties having rested and the trial having been concluded and the cause submitted, the defendant now moves the court for an order dismissing the cause for want of jurisdiction and specifying the grounds urged here. Notwithstanding the statement in the motion, that the cause had been submitted, it is self-evident that it has not been, as defendant was by his very motion contesting vigorously the right of the court to proceed further. In this state of the case plaintiff asked leave to amend by inserting the term "inhabitant," which the court permitted, and thereafter decided the case in favor of plaintiff. While the amendment was unnecessary, it was one

Digitized by Google

which the court had a right to permit in order to correct an expression which very technical persons might deem ambiguous.

The decree is affirmed.

HARRIS, JOHNS, and BENNETT, JJ., concur.

ENNIS-BROWN CO. v. RICHVALE LAND CO. (Civ. 2053.)

(District Court of Appeal, Third District, California. May 17, 1920.)

Depositaries ⊂=4—Depositary bound to return a "special deposit."

Where purchaser of crop of corn sent an advance payment therefor to crop mortgagee "to apply on purchase" of the corn, and the crop was a short one, so that the advance payment was, in fact an overpayment in part, the crop purchaser was entitled to recover the amount of the overpayment from the crop mortgagee, under Civ. Code, §§ 1814, 1835, as to depositaries; the deposit being not a general deposit but a special deposit, that is, one limited to a specific and definite purpose, and the title not passing to the mortgagee as it would have done if the deposit had been general in its nature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Deposit.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Ennis-Brown Company against the Richvale Land Company. From judgment for plaintiff, defendant appeals. Affirmed.

J. O. Goldstein, of Chico, for appellant.

Victor L. Hatfield and W. H. Hatfield, both of Sacramento, for respondent.

BURNETT, J. September 14, 1917, the Ennis-Brown Company entered into a contract with W. B. Linn & Son whereby the former agreed to purchase the Egyptian corn growing upon the land occupied by the latter and owned by them. The agreed price was $50 per ton, "free on board boat," and it was stipulated that an advance payment of $4,500 should be made. At the time the crop was estimated at 320 tons, but it actually yielded 115,013 pounds, amounting at said price to the sum of $2,875.30. Plaintiff having advanced said sum of $4,500 was therefore entitled to the return of $1,624.70. The question in the case is whether the cause of action in favor of plaintiff for this amount is legally against said Linn & Son or defendant Richvale Land Company. On September 27, 1917, defendant wrote plaintiff stating in effect that the former understood that the latter had purchased the corn crop of Linn & Son and that said Richvale Land Company had a crop mortgage on said crop and would expect any advancement of the price to be made to said company. On October 1, 1917, plaintiff, not referring to defendant's letter of September 27, wrote defendant as follows:

"Richvale Land Company, Chico, California—Gentlemen: As per instructions from Mr. Axtell, we herewith inclose you our check of $4,500 to apply on purchase price of Egyptian corn bought from W. B. Linn & Son. Kindly have Mr. Linn indorse check in your favor and this will keep the record straight at your end. Please acknowledge receipt of the check and oblige.

"Very truly, Ennis-Brown Company."

The next day defendant answered the letter, as follows:

"We acknowledge receipt of your check for $4,500 to apply on purchase of Egyptian corn from W. B. Linn & Son. Mr. Linn will begin to thresh the first of next week.

"Very truly, Richvale Land Company."

The foregoing correspondence shows the foundation for plaintiff's claim against defendant for the balance remaining after the purchase price of said corn was paid.

We appreciate all that has been said by appellant as to the essentials of a contract. Of course, the parties must agree upon its terms before it becomes a legal and binding obligation. A proposition made by one party but not assented to by the other is of no avail. These elementary principles need no discussion, but we are entirely satisfied that appellant has made a wrong application of them. We may admit that the parties herein might have adopted more apt language to express their intention; at least, they could have been more definite and explicit, but we must not expect such precision and accuracy as would characterize formal instruments deliberately prepared by a capable attorney. However, by fair intendment and common understanding of the terms employed, the letter and the reply being considered together, the correspondence amounts to this: Plaintiff, having sent to defendant the sum of $4,500, directs that it be applied to a single and definite purpose, namely, the "purchase of Egyptian corn bought from W. B. Linn & Son." There was no uncertainty therein. It was understood what purchase was referred to and what price was to be paid. This direction, of course, excluded the application of the money to any other purpose. This is according to a familiar rule of logic. The direction would not have been changed in effect if the plaintiff had directed that the money be applied "on the purchase of said corn and used for no other purpose." The defendant accepted the money and agreed to use it for that purpose. It is true that there was no express declaration that "we

Digitized by Google

agree to apply the money to that purpose," but this is necessarily implied in the statement, "We acknowledge receipt of your check for $4,500 to apply on purchase of Egyptian corn from W. B. Linn & Son." Would the case for plaintiff be any stronger if defendant had written: "We acknowledge receipt of your check for $4,500 and we will apply it on the purchase of Egyptian corn from W. B. Linn & Son." The acceptance of the money for a definite purpose carries the implication that it would be used for that purpose. This seems too plain to require argument. The money, therefore, having been accepted for a definite and specific object, and the purpose having been accomplished, what is the obligation of the defendant as to the residue, which was not needed for the purchase of the corn? There can hardly be any difference of opinion as to that question. The residue belonged to plaintiff, and it was the legal and moral duty of defendant to return it to the owner.

We need not quibble as to the proper legal terminology to characterize the relation of the parties. In a general sense, though, it is proper to say that a trust was created by express agreement, and it imposed upon defendant the obligation to pursue the course we have indicated. More specifically stated, the Richvale Land Company became a voluntary depositary within the meaning of section 1814 of the Civil Code, providing:

"A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary."

As to the use to which the deposit may be put, necessarily the will of the depositor controls. However, the Legislature, in section 1885 of the Civil Code, has recognized this limitation in the following language:

"A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor."

Herein the only consent granted by plaintiff to defendant was to apply the money "on the purchase of Egyptian corn bought from W. B. Linn & Son." The depositary, therefore, had authority to use it for no other purpose.

Appellant makes the mistake of supposing that the case involves a general deposit, whereas, we are dealing with a special deposit. It is special because it was limited to a specific and definite purpose. The title did not pass to defendant as it would have done if the deposit had been general in its nature. The deposit constituted a bailment with the title remaining in the bailor, and the bailee acquired no right to make general use of the property. The distinction between the two kinds of deposits is clearly pointed out in Anderson v. Pacific Bank, 112 Cal. 601, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228, and People v. California, etc., Trust Co., 23 Cal. App. 199, 137 Pac. 1111, 1115.

Appellant also claims that the trial court erred in allowing interest from October 31, 1917, instead of January 25, 1918, when the demand was made for the payment of the residue. No doubt the general rule as to interest on deposits is correctly stated in Anderson v. Pacific Bank, supra, and Barrere v. Somps, 113 Cal. 97, 45 Pac. 177, 572, wherein it is held that interest is allowable from the date of demand. Herein, however, the court found on sufficient evidence that there was an actual conversion of the money on said October 31; and section 3336 of the Civil Code permits the recovery of the interest from that time. Moreover, we are not furnished with a copy of the pleadings upon which the action was tried, and we must assume that no issue was tendered as to this point. Indeed, we might go further in the assumption that it was admitted in the answer that a demand was made on said October 31. It may be added that the reduction of the amount recovered would be inconsiderable if effect were to be given to appellant's contention in this respect.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

TENNANT v. CLINE et al. (Civ. 3085.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1920.)

Fraudulent conveyances ⟸308(9) — Whether possession of chattels changed to satisfy statute a jury question.

Whether there had been such change of possession of automobile, alleged to have been sold by a husband to plaintiff, suing for conversion the sheriff who seized the car as the husband's, under attachment process issued at the instance of the wife, as satisfied Civ. Code, § 3440, *held* for the jury under the evidence that the husband was living with plaintiff, and that both he and she used the car after the claimed sale.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Myrtle Tennant against John C. Cline and others. From judgment for defendants, plaintiff appeals. Affirmed.

Newmire & Watkins, of Los Angeles, for appellant.

Joseph Musgrove, of Los Angeles, for respondents.

JAMES, J. Appellant brought this action to recover for the alleged conversion of an

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Digitized by Google

automobile which is claimed to have been improperly seized under attachment process by defendant Cline, as sheriff.

Lucy C. Gentry, in a divorce action against Harry V. Gentry, obtained judgment in April, 1916, for a monthly allowance for the support of herself and minor children and for an additional sum of $2,000, which represented her interest in the community property. The judgment remaining unsatisfied in February, 1919, Lucy C. Gentry caused the sheriff to levy on the automobile of which the plaintiff here later claimed to be the owner. From the statement of the testimony, as it is set forth in the bill of exceptions, it appears that the plaintiff had been named as the corespondent in the divorce action brought by Lucy C. Gentry against her husband, and that for a long period of time, up to the date when the automobile was taken under the writ, Gentry and this plaintiff lived in a four-room flat, and that no other person resided therein; that the automobile in question was used by both of them. The plaintiff testified that she was the owner of the automobile, having purchased it from Gentry in April, 1917, paying him $150 for his interest in the machine; that after she received the bill of sale Gentry continued to use the car with her permission, and that both of them drove it; and that Gentry had the same use of the car after the bill of sale was made as he had before, with the permission of the plaintiff. The testimony of the plaintiff and of other witnesses further showed that in all dealings with respect to the purchase of the car and the payment of the installments on account thereof, and the making of a loan which was obtained when a chattel mortgage (executed by Gentry) was given upon the security of the machine, Gentry acted alone, excepting that one bill for repairs amounting to a considerable sum was paid personally by the plaintiff. There was testimony of the daughter of the Gentrys as to a statement (made subsequent to the alleged making of the bill of sale) by plaintiff wherein the plaintiff affirmed that the automobile belonged to Gentry. The deputy sheriff who served the writ at the time the car was taken possession of by the sheriff testified that he went to the flat occupied by plaintiff and Gentry, and that Gentry went with him to the garage in the rear of the flats and backed the automobile out of the garage to the street and turned it over, saying: "You won't keep that car long, because it belongs to my father."

Defendants, in their answer, alleged that the pretended sale of the automobile by Gentry to the plaintiff was fraudulently made without consideration and with intent to prevent Mrs. Gentry from reaching the property or writ of execution under a judgment. The case as presented to the jury, however, seems to have left to be resolved, not the question whether actual fraud was intended to be committed in the regard mentioned, but whether, under section 3440, Civil Code, there had been such a change of possession and control of the automobile as between Gentry and this plaintiff as to transfer title as against Mrs. Gentry, who was a judgment debtor of the transferor. That section requires, in order that an effectual transfer of title of personal property may be had, that there be "an actual and continued change of possession of the things transferred." The trial court instructed the jury generally as to the requirements of the law in the regard noted, and further gave this additional instruction:

"You are further instructed that if you find that H. V. Gentry, prior to the time of delivering to plaintiff, Myrtle Tennant, said bill of sale, dated the 5th day of April, 1917, had the use of said automobile, and that thereafter subsequent to the delivery of said bill of sale he still continued to have the use and control of said automobile in the same manner and to a like extent, that there is no such delivery as the law contemplates as requisite to constitute a valid transfer."

It is contended that the court erred in so instructing the jury, and it is argued that because of the relation and association between Gentry and the plaintiff, this instruction was not applicable and constituted prejudicial error. We are cited to the case of Morgan v. Ball, 81 Cal. 93, 22 Pac. 331, 5 L. R. A. 579, 15 Am. St. Rep. 34. In that case the parties between whom the transfer was alleged to have been made of a mare, colt, and buggy were husband and wife, and the court said that, notwithstanding the husband continued to have the use of the property, the wife could maintain her title. The court, however, stated in the opinion that it had been proclaimed by the husband that the property was that of the wife and had been publicly known and recognized as hers by all who used it, the court saying:

"She did not refuse her husband the use of it, but she did take it into possession at once and continuously keep and use it as hers as to all the world, and it was not in any way used or possessed by her husband, except as subordinate to her dominion, possession, and control."

That decision does, to some extent, bear the intimation, as appellant contends, that where the relationship of husband and wife exists possession by the husband of the property alleged to have been transferred will not preclude the wife from maintaining her title. However, the latter case of Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200, refers to Morgan v. Ball, supra, and contains the following declaration:

"The fact that a vendor and vendee are husband and wife, or parent and child, is no reason why the provisions of the statute should

Digitized by Google

receive a different or more liberal construction. Those conditions give the statute no additional elasticity. The rule of construction is the same in all cases, and the relationship existing between the parties is a matter wholly immaterial."

And, moreover, in this case it appears that the parties were not related at all. They occupied the same four-room flat for reasons of their own, and, so far as the evidence shows, did not hold a partnership interest in the particular property alleged to have been converted. It was for the jury to determine from the facts, under the court's instructions, as to whether there had been such transfer and change of possession of the property as would sustain plaintiff in the cause of action asserted.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

GUY v. LEECH et al. (Civ. 3376.)

(District Court of Appeal, First District, Division 2. California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Estoppel ⟸83(3)—Seller of lumber held estopped as against building mortgagee to set up he did not accept trust deed in place of lien.

Seller of lumber to contractor who represented to lender to contractor on mortgage that trust deed to him, the seller of lumber, would be inferior to the building loan mortgage, *held* estopped as to set up against the mortgagee that he did not accept the deed in payment for his lumber and in lieu of any lien therefor.

2. Estoppel ⟸110—Building mortgagee not required to plead as against material man asserting lien.

Though the general rule is that an estoppel must be pleaded, there is an exception where the party is without knowledge that his claim must ultimately rest upon an estoppel, as in the case of a building mortgagee claiming against one who sold lumber to the contractor, and now claims a lien after representing to the mortgagee that he accepted trust deed in place thereof.

3. Appeal and error ⟸1122(2) — Appellate court cannot make findings.

The appellate court has no power on appeal to make as a basis for judgment, findings for the trial court.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by George P. Guy, doing business under the fictitious name and style of the Pico Heights Lumber Company, against Harry R. Leech and others, and Sarah L. Bond. From judgment decreeing plaintiff's mechanic's lien to be superior to her first mortgage, the last-named defendant appeals. Reversed.

C. L. Kilgore, Jas. W. Miller, and J. E. Carson, all of Los Angeles, for appellant.

G. C. De Garmo and Haas & Dunnigan, all of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from that portion of a judgment which decrees that the mechanic's lien of plaintiff is superior to the first mortgage held by defendant and appellant upon certain real property in the county of Los Angeles. There were three actions involving the same issues, which were consolidated by the trial court and tried at the same time. In one of the actions the plaintiff Haslwanter sought to foreclose a mechanic's lien, and Sarah L. Bond, the appellant here, was made one of the defendants, as she held a first mortgage upon the property. This lien was decreed to be superior to the mortgage, and appellant does not object to this portion of the judgment, but states in her brief that the same has been paid.

In the second suit George P. Guy sought to enforce a mechanic's lien against the property and to have it declared superior to the mortgage. This was resisted by the mortgagee, Bond. Before a determination was had of the questions raised in these suits, the mortgage became due by reason of default in some of its terms, and the mortgagee, Bond, sought to foreclose the same in yet another suit, in which said lien claimants were joined as defendants. It was stipulated that the complaints in the mechanic's lien foreclosures should be considered the answers and cross-complaints of said claimants in the mortgage foreclosure suit of Sarah L. Bond. The actions were consolidated, and the one issue presented in them all was whether or not the mechanic's lien of the respondent was superior to the mortgage. The court found that it was, and from such determination the appellant prosecutes this appeal.

The facts with relation to this question are: Harry R. Leech was a builder, and he borrowed from Sarah L. Bond $3,000 for the purpose of building a house. For this amount he gave her his note, which was secured by a mortgage upon the house, then partially constructed. This mortgage was dated May 9 and recorded May 19, 1917. Leech had previously built houses, which were financed by building loans, and had purchased the lumber therefor from the respondent. In borrowing the money to carry on the work he had given first mortgages, and the respondent had furnished the lumber and had taken deeds of trust subject to the first mortgages upon the property upon

Digitized by Google

which the work was being done. In this instance Leech and Guy—it is admitted by both of them—undertook to make the same arrangement, and Guy agreed to furnish the lumber and to take a deed of trust in payment therefor, subject to the first mortgage. He did furnish the lumber in accordance with this understanding, and it was used in the construction of the house. This construction work was well under way when Leech applied to Mrs. Bond's agent, Patterson, for the loan of $3,000. Mr. Patterson testified that he called up Mr. Guy on the telephone when Leech applied for the loan; that he told him that he considered the loan of $3,000 "pretty heavy, but Mr. Leech tells me that you are taking a trust deed for your lumber and material which would help the loan." Patterson then told Guy that one of his clients was already "mixed up" in some litigation over a loan, and he did not wish this to happen again, and he asked him expressly whether he was taking a trust deed for the lumber and material subject to the first mortgage, and Guy said "Yes." The respondent Guy, in his own testimony, states that he has heard the testimony of Mr. Patterson, and that Mr. Patterson correctly testified as to the conversations and transactions between them. After these representations Mrs. Bond made the loan on May 19, 1917. In June, 1917, Leech executed a trust deed to Guy for $747, the amount of the lumber bill. He executed his note for said amount and sent it to Guy directly, and sent the trust deed securing the note to be recorded. It was duly recorded on June 4, 1917, and, under the instructions from Leech, was sent by the recorder to Guy. Apparently, so far, everything was satisfactory to all parties, and the transactions were in accordance with the understanding of all persons concerned. It is because of subsequent events, occurring after this trust deed went into effect, that Guy seeks to escape the effect of his action in agreeing to accept the trust deed in payment.

Within a month Leech became involved in financial difficulties and did not complete the house. It appears from the record that the plumbing and a portion of the painting, and other minor matters, were left uncompleted, and that it would cost about $200 to finish the house. Leech ceased work upon the house, and the cement contractor, Halswanter, who had not been paid, filed his notice of lien for $230, which lien was adjudged in these consolidated actions to be superior to the mortgage, and is not disputed by the appellant.

In October, 1917, Leech being in default in the payment of interest upon the first mortgage, Mr. Patterson, the representative of the mortgagee, telephoned to Guy, who had the trust deed, and Guy said that he would pay the interest as soon as he could get a deed from Mr. Leech conveying the property to him. He later paid the interest and said he had received a deed from Leech. Guy had called upon Leech in October and had asked what was to be done about completing the house, and Leech had told him that he was trying very hard to dispose of the house, and Guy had suggested that Leech deed the property to him to avoid the expense and trouble of a foreclosure of his deed of trust. Leech asked for more time, which was granted, and later, upon another request from Guy, he executed a quitclaim deed to Guy.

In November, 1917, Guy filed his notice of lien and returned to Leech the trust deed and note and the quitclaim deed. He made no reconveyance of the property, but merely returned to Leech the evidences of the transfer of interest to himself. So far as the record shows, the trust deed is still on record unreleased and affects the title to this property. Guy now seeks to enforce his mechanic's lien. He takes the position that he accepted the trust deed in payment for his lumber upon the understanding that it was to be subject only to the first mortgage, and upon the understanding that the house would be completed by Leech, and that, as an intervening lien has accrued and the house is not completed, he does not wish to rely on his trust deed, but wishes to enforce his mechanic's lien. His explanation of his return of the quitclaim deed to the property, given to him in October by Guy, is that it was not a grant deed and was not signed by the wife of Leech, and that therefore it was not a deed satisfactory to him, and he had consequently returned the instrument to Leech.

We may eliminate the question of the sufficiency of the second deed and of Guy's acceptance thereof; for it appears to us that the facts regarding the trust deed are decisive of this case. Respondent agreed, as appears by his own testimony, to accept the trust deed in payment of his debt, which trust deed was to be inferior to the building money mortgage given to Mrs. Bond. He represented to Mrs. Bond that this would be done after he had been told that she would consider the loan a heavy one unless he agreed to do this; in other words, he, by his representations, caused her to believe in the security of the loan and to advance the money. The advancement of this money by her for the building was an advantage to him, as he was selling the lumber, and had sold lumber under such conditions to Leech for several other houses. He acted in accordance with his representations and took the trust deed. His later disappointment in regard to the action of Leech in not paying the cement bill and in not completing the house cannot affect the rights of Mrs. Bond. This is a matter between Guy and Leech. The arguments of respondent that Leech has not fulfilled his part of the contract, and

Digitized by Google

therefore Guy is not bound thereby, would be pertinent if the contest was between Guy and Leech. The value of Mrs. Bond's security is impaired because Leech has not completed the building, and, for the same reason, the value of Guy's security is impaired. Leech has not fulfilled his duty toward either of them. Each took this chance with reference to Leech. There appears to be no reason why Guy should shift his share of this burden upon the shoulders of Mrs. Bond in addition to her own share of the burden.

The question of law involved here is carefully discussed, both upon principle and authority, in the cases cited to us by the appellant, most of which are reviewed by our own Supreme Court in the case of Martin v. Becker, 169 Cal. 301, at page 309 et seq., 146 Pac. 665, Ann. Cas. 1916D, 171. It is said in the case of Martin v. Becker, supra, in enumerating the different classes of cases in which the taking of new or additional security operates to destroy an existing lien, that, where it would be fraud upon other claimants to permit the earlier lien to be held valid, equity interposes and declares it to have been waived or lost by the taking of the later security, or, what is in effect the same, erects a bar to its enforcement.

[1, 2] The respondent is estopped to set up as against this appellant that he did not accept the trust deed in payment for his material and in lieu of any lien which the law allowed to him therefor. Respondent seeks to avoid the force of the facts constituting the estoppel by reason of the fact that the estoppel was not pleaded. While it is true that the general rule requires an estoppel to be pleaded, yet it has been held that there is an exception to this rule where the party is without knowledge that his claim must ultimately rest upon an estoppel. Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 Pac. 559. In the present case the appellant did not rely upon an estoppel as the foundation of her claim. She believed and alleged that Guy had accepted the trust deed in payment of his debt. The evidence upon the trial disclosed the fact that Guy was denying his acceptance of this trust deed. In rebutting this contention, facts were introduced in evidence which would constitute an estoppel. Under such circumstances appellant was entitled to take advantage of these facts, although they had not been pleaded. It is said in Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, that an estoppel in pais may be shown by way of equitable rebuttal, and that it is only when the plaintiff must rely upon an estoppel in pais in order to maintain his action at all against the defendant that it must be pleaded. In the present case it is admitted that Guy agreed to take the trust deed in payment; the trust deed to him was put upon record; he had told Mrs. Bond's agent that he would accept it subject to the first mortgage, and she alleged that he had so accepted it in payment. It was only when he sought to evade these facts that the estoppel needed to be invoked as an equitable rebuttal.

[3] There are, however, no findings upon which we could order a judgment to be entered decreeing the priority of appellant's mortgage lien. We have no power to make findings for the trial court. Blood v. La Serena L. & W. Co., supra. Therefore the judgment, in so far as it relates to the lien of the respondent Guy, and in so far as it decrees that lien to be superior to the mortgage of the appellant, is reversed.

We concur: NOURSE, J.; BRITTAIN, J.

GEORGE et al. v. STENSLAND et al.
(Civ. 3378.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Appeal and error ⟸1170(1)—Lack of service on husband of defendant wife harmless to wife.

Where a wife, sued for legal services in connection with her separate estate and transactions before marriage, was aided in her defense at every step by her husband, a practicing attorney, the fact that he was not served though named in the complaint as a defendant as John Doe was harmless to the wife, and no ground for reversal of judgment against her alone, under Const. art. 6, § 4½.

2. Appeal and error ⟸1073(3) — Defendant called indifferently by two names may not complain of judgment in one of such names.

Defendant wife, called indifferently by the name of Clarke or Stensland, who adopted the latter name in her notice of appeal, the two persons being completely identified in the record as herself, cannot complain that judgment was entered against her in the name of Clarke-Stensland.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Jesse George and Charles B. McCoy, copartners, against Elizabeth G. Clarke Stensland, sued as Elizabeth G. Clarke, and John Doe. From judgment for plaintiffs, defendant Stensland appeals. Affirmed.

Theodore Stensland and J. T. Reed, both of San Diego, for appellant.

Jesse George and Charles B. McCoy, both of San Diego, for respondents.

Digitized by Google

LANGDON, P. J. This is an appeal by the defendant, Elizabeth G. Clarke, from a judgment entered on a verdict of a jury for $514, in the superior court of San Diego county, in an action for the recovery of the reasonable value of attorneys' fees for professional services rendered by the plaintiffs to the appellant.

This appeal was originally taken not only from the judgment, but also from an order denying a new trial, and from an order of nonsuit on a cross-complaint, and from an order made in proceedings supplementary to judgment and execution. It is stated, however, by the appellant in her opening brief, that she "waives and abandons any and all her rights to appeal from said order denying a new trial, and from said order in supplementary proceedings," and prosecutes her appeal exclusive thereof.

The principal point argued by the appellant, and the one she states to be the important feature of the case, is that the judgment was erroneously entered by reason of the fact that said judgment was entered against a married woman in a cause in which she was sued as the wife of another party defendant, named in the complaint as "John Doe," and said husband of appellant was not served with summons in the action.

The facts pertinent to a discussion of the objection present some unusual features, and it will be necessary to state them rather fully. The plaintiffs sued, as aforesaid, to recover for legal services. The defendants named in the complaint are Elizabeth G. Clarke and John Doe. It is set out in the complaint that the services for which recovery is sought were contracted for by the defendant, Elizabeth G. Clarke, "being then and there an unmarried woman, and in the management of her own affairs." It is further set out in the complaint as follows:

"Plaintiffs further allege that they are informed and believe, and on such information and belief allege, that since this cause of action accrued, the defendant, Elizabeth G. Clarke, has married one John Doe, whose true name is unknown to these plaintiffs, but the plaintiffs have not sufficient information to determine whether or not, if defendant is married, her husband is a necessary party defendant, and plaintiffs pray that if it shall appear that the said defendant, Elizabeth G. Clarke, is married and that her husband is a necessary party, he may be joined and his true name as defendant herein inserted, and that the true name of the defendant, Elizabeth G. Clarke, be inserted herein in the event that she is shown to be married."

Answer and cross-complaint was filed by Elizabeth G. Clarke, in which she did not deny the allegation of the complaint upon information and belief, with reference to her marriage. She made no mention of this allegation in any way, and answered under the name of Elizabeth G. Clarke. Appellant's position is that, as the allegations of the complaint regarding defendant's coverture were admitted by a failure to deny the same, it became the duty of the plaintiffs to ascertain, by deposition or otherwise, the name of her husband, and to substitute such name for the fictitious name and serve him with summons.

The plaintiffs did, however, attempt to ascertain the facts regarding defendant's marriage by their demurrer to the answer and cross-complaint, in which demurrer one of the grounds urged is:

"The said answer to plaintiffs' first cause of action is uncertain in that the said answer admits that the defendant, Elizabeth G. Clarke, is married, by failing to deny the allegation of the complaint that she is married, but does not give her true name nor the true name of her husband, nor allege or set forth facts from which it can be determined whether or not her husband is a proper or necessary party defendant."

Another ground of demurrer to the answer and cross-complaint is that cross-complainant, Elizabeth G. Clarke, has not legal capacity to sue in that she admits in her answer and cross-complaint that she is married, and that the cross-complaint does not show that the action is one within any of the exceptions mentioned in section 370, Code of Civil Procedure. This demurrer was overruled, obviously because the property sought to be recovered under the cross-complaint was alleged to have been the sole and separate property of Elizabeth G. Clarke, and for the recovery of such property she had the right to sue alone. The attorney filing the cross-complaint was Theodore Stensland, and he appears throughout as attorney of record for the defendant, Elizabeth G. Clarke. In the answer to the cross-complaint, plaintiffs allege:

"Plaintiffs and cross-defendants are informed and advised and therefore allege the fact to be that at the time when the defendant, Elizabeth G. Clarke, claims to have become the owner of the draft mentioned and described in the first paragraph of her cross-complaint, and for some time prior thereto, the said defendant and cross-complainant was the wife of Theodore Stensland, her attorney herein; that the exact date of the marriage of the said Elizabeth G. Clarke and Theodore Stensland is unknown to these plaintiffs and cross-defendants; that Elizabeth G. Clarke is not the true and proper name of the defendant and cross-complainant, and John Doe is not the true name of the husband of the said defendant and cross-complainant, Elizabeth G. Clarke, but that the true name of said Elizabeth G. Clarke is Elizabeth G. Stensland, and the true name of the husband of the said Elizabeth G. Clarke is Theodore Stensland, who was and is her attorney herein, and that there are no facts set forth in said cross-complaint establishing or tending to establish that Theodore Stensland is not a necessary party cross-complainant and defendant as hereinafter more specifically set forth and shown."

Digitized by Google

After the granting of motions to strike out portions of the answer to the cross-complaint, relating to the necessity of joining appellant's husband as a cross-complainant, the cause went to trial upon these pleadings. Plaintiffs never amended their complaint by inserting the true name of the husband of Elizabeth G. Clarke. It does not appear in the record that the husband was or was not served under the fictitious name or otherwise. It would seem, therefore, that in support of the judgment we must assume that the service was duly made. However, even in the absence of this assumption, and assuming for the moment that the record must affirmatively show that the husband was served, we do not believe this error calls for a reversal of the judgment under the peculiar facts presented for our consideration.

Defendant, Elizabeth G. Stensland, did not object to the defect of parties by either demurrer or answer, nor otherwise, and upon the verdict of the jury upon the essential questions of fact involved the court rendered judgment against her alone.

Reliance is placed by the appellants upon the cases of McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817, and Fassio v. Woolfrey, 37 Cal. App. 754, 174 Pac. 700, holding that, the husband, being a necessary party defendant in cases where the wife is sued, he must not only be named in the complaint, but served with summons. Respondent's reply to this contention is that under the holding in the case of Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618, it is said that, although the husband is a necessary party defendant and the failure of plaintiff to make him a defendant would defeat his right of recovery if objection be properly presented, yet it is further provided by section 434, Code of Civil Procedure, that if no objection be taken to the defect of parties, either by demurrer or answer, the defendant must be deemed to have waived the same.

We are not unmindful of appellant's position that she could not properly demur for nonjoinder of parties since her husband was joined in the complaint as John Doe; that she had a right to expect that he would be served with summons in due time. However, she did not object to the entry of the judgment upon this ground, and her situation with reference to the demurrer would be of more weight and importance under other circumstances than those presented to us here. For the peculiar facts of this case certainly show that the defendant was not deprived of any possible right or advantage by reason of this oversight, that the purpose of the Code provision in question has not been subverted by plaintiffs' inadvertence, and that the case presents, clearly, a situation designed to be covered by section 4½, art. 6, of our Constitution. The husband of appellant is admitted to be a practicing attorney, and to have represented his wife in every stage of the litigation herein involved; he had actual notice of everything that occurred; he is not bound by the judgment and could not have been. The judgment relates to a matter connected with the wife's separate estate, and to transactions occurring previous to the marriage. It is said in McDonald v. Porsh, supra, and in the case of Terry v. Superior Court, 110 Cal. 85, 88, 42 Pac. 464, and some others, that the Code provision for joining the husband in such actions is not to the end that the husband or his property may be bound by the judgment, but solely that he may be able to aid his wife in her defense.

[1] Under the peculiar facts of this case, this purpose was fully accomplished, for the husband aided and conducted her defense at every step.

It would seem, therefore, that this is essentially one of those harmless errors which does not affect the merits of the judgment, and which comes within the remedial influence of the aforementioned amendment to our Constitution. It is held in Work v. Campbell, 164 Cal. 343, 349, 128 Pac. 943, 43 L. R. A. (N. S.) 581, in Lamb v. Harbaugh, 105 Cal. 680, 690, 39 Pac. 56, and in Baldwin v. Second Street, etc., Co., 77 Cal. 390, 19 Pac. 644, that a defect of parties is not a matter going to the jurisdiction of the court; and indeed that holding necessarily follows from the holding in many cases that it is a defect which may be waived by failure to demur.

[2] Some objection is made by appellant that the judgment is entered against her as Elizabeth G. Clarke Stensland. In her testimony on the trial, she stated that her name at that time was Elizabeth G. Clarke Stensland, but that she might be called by either the name of Clarke or Stensland. It is to be noted that she answered under the name of Clarke, and only upon her examination at the trial did she admit that her proper name was then Stensland. She has adopted the name of Stensland in her notice of appeal. The two persons are completely identified in the record. It would appear, therefore, that appellant has no complaint that judgment was entered against her in the name which she admits is at present her proper name. Thompson v. Alford, 135 Cal. 52, 66 Pac. 983; Alameda County v. Crocker et al., 125 Cal. 101, 57 Pac. 766; Bogart v. Woodruff, supra.

Some further objections are made by appellant with regard to the giving of instructions by the court, but we consider these to be without merit.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

Digitized by Google

HUTCHISON v. HOLLAND et al.
(Civ. 2980.)

(District Court of Appeal, Second District, Division 1, California. May 24, 1920. Hearing Denied by Supreme Court July 22, 1920.)

1. Principal and agent ⟸145(2) — Recovery against undisclosed principal may be had only on nonnegotiable notes.

Where a negotiable note is executed unqualifiedly, recovery thereon cannot be had against an undisclosed principal, but such recovery may be had where the note is not negotiable.

2. Principal and agent ⟸23(5)—Evidence held not to show undisclosed principal.

Evidence *held* insufficient to sustain a finding that one of defendants was the undisclosed principal of another who made notes secured by mortgage.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by C. S. Hutchison against John P. Holland and others. Judgment against the named defendant, and he appeals. Reversed.

J. R. Whittemore, of Los Angeles (F. L. Anderson, of Los Angeles, of counsel), for appellant.

Ben F. Gray and Geo. S. Hupp, both of Los Angeles, for respondent.

JAMES, J. Defendant Holland appeals from a judgment entered against him. The action was brought to recover a balance due on two promissory notes. The notes were executed by defendant Marie C. Heath, and certain real property was made security for the payment thereof, against which a trust deed was executed. Appellant did not join in the making of the promissory notes or the deed; in fact, his name did not appear in the instruments referred to at all. The notes, as before mentioned, were two in number. One was made payable to Elizabeth E. Curtis, and the second to Helen C. Brennan. The two last-named persons indorsed the same, and they were transferred to Nina A. Hutchison, who paid therefor $1,750. At the time the trust deed and notes were executed there was a first mortgage lien against the property, amounting to $3,000; hence the trust deed became second in order of security. Default was made in the payment of the notes, and upon sale of the property under the trust deed being had, a small part only of the principal debt evidenced by the notes was realized. Nina A. Hutchison transferred her interest to the plaintiff here, and this suit was brought to collect the deficiency. It was alleged in the complaint, and the court found the facts accordingly, that Holland was tho undisclosed principal of Marie C. Heath. While rendering judgment against Holland, the court found in favor of Marie C. Heath, and determined that she was not liable for any part of the money claimed.

[1] It is the contention of appellant that, where a promissory note is executed unqualifiedly, it cannot be asserted that there exists any undisclosed principal against whom recovery may be had. Respondent has cited ample authority to show that appellant is correct only in his statement of the law where the notes considered are negotiable; that, where the notes are not negotiable, an undisclosed principal may be held.

[2] Admitting that the notes here exhibited are of the character which permits recovery against an undisclosed principal, it is the contention of appellant that under the evidence the court was not justified in finding that Holland held any relation of principal such as to make him liable to the plaintiff therefor. As the evidence discloses, Holland presented the trust deed and notes to the plaintiff, who was Nina A. Hutchison's agent, and recommended their purchase as a good investment; he stated to plaintiff that Marie C. Heath was the owner of the property; he also informed plaintiff of the existence of the $3,000 first mortgage lien; plaintiff and Nina A. Hutchison visited the property for the purpose of investigating the character of the security offered; after examining the property plaintiff closed the deal on behalf of his principal and paid to Holland $1,750, and received the promissory notes of Marie C. Heath, which were indorsed with the names of the payees. Throughout the transaction up to this point it was not claimed by the plaintiff or his principal that Holland pretended to have any interest in the property or the notes. Plaintiff further testified that, when interest installments became due and were unpaid, he demanded payment of Marie C. Heath, and she referred him to Holland, and Holland in turn referred him back to Marie C. Heath, stating that she would take care of it. Holland testified that he had no interest in the transaction other than that he received a commission. He stated that it was a fact that Marie C. Heath held the title to the property only for Curtis and Brennan, who were "Eastern" ladies, and that he (Holland) was the agent of Curtis and Brennan; that upon sale of the promissory notes secured by the trust deed to Nina A. Hutchison he (Holland) had, after deducting his commission, remitted the remainder of the money to Curtis and Brennan. The testimony of Holland stands uncontradicted. It may have been that the court disbelieved his statements, but, as the record discloses them, the statements of Holland do not bear the imprint of inherent improba-

Digitized by Google

bility; hence we must conclude that they amounted to substantial evidence, and that the court was not authorized to disregard them. Accepting Holland's testimony at its face value, it did not establish that he occupied the position of an undisclosed principal toward Nina A. Hutchison, or this plaintiff. That Marie C. Heath is liable upon the note obligation there can be no possible question. She made the notes, executed the trust deed, was in fact the record owner of the real property concerned, and was accepted by the Hutchisons in that relation. We are at a loss to understand why the court by its judgment relieved the maker of the notes from the duty to respond to the claim of the plaintiff.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

CONRAD v. LA PLANTE. (Civ. 3377.)

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

1. Appeal and error ⟸1011(1)—Trial court's findings on conflicting evidence conclusive.

Where the trial court had the witnesses before it and the evidence is clearly conflicting, its findings of fact are conclusive.

2. Bills and notes ⟸516—Evidence in action on notes held to sustain finding for plaintiff.

In action on promissory notes for money loaned, evidence *held* such that if the appellate court could substitute its conclusion for that of the trial court as to which witnesses were worth believing, it must sustain trial court's views in favor of plaintiff.

3. Appeal and error ⟸1071(1)—Error in findings held harmless.

In action for money lent, a finding that the loan was not made at an earlier date, if erroneous, was harmless to the defendant, and would not support reversal; there being no plea of statute of limitations.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Kokoa B. Conrad against William Parsons, in which William La Plante, as defendant's executor, was subsequently substituted. Judgment for plaintiff, and defendant appeals. Affirmed.

E. R. Young, of Los Angeles, for appellant.
Dana Ong, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for respondent.

NOURSE, J. Defendant appeals from a judgment rendered against him and in favor of plaintiff for $2,750 upon a complaint containing four causes of action, the first three of which were upon promissory notes and the fourth for money loaned in the amount of $1,500. The attack upon the judgment is confined to that portion of it which relates to the fourth cause of action.

The facts material to the opinion are: In November, 1915, plaintiff delivered to defendant $3,000 and received from him shares of stock in the National Film Corporation of the par value of $2,000. As a part of the transaction it was agreed that the plaintiff should be employed as an actress or performer by the National Film Corporation at a salary of $40 per week. After plaintiff's money had been obtained by the defendant she was employed for a period of two weeks, and paid the stipulated salary. Thereupon the corporation ceased to do business, and permitted its charter to lapse through its failure to pay the state license tax. In February, 1916, plaintiff called upon defendant and made a demand for the return of her money, and thereupon defendant gave her $250 in cash, the three notes which are the basis of the first three causes of action herein, amounting to $1,250, and, as the plaintiff alleged and testified, promised to give her $1,500 more. The evidence relating to the transactions in November and February is conflicting. On behalf of plaintiff it is shown that the original transaction was a loan of $2,000, evidenced by a promissory note and secured by certificates of stock of the National Film Corporation of the par value of $2,000. The second installment of $1,000 it is claimed was also loaned to defendant by plaintiff, for which she received neither note nor security. On behalf of defendant it is claimed that the original transaction was a sale of 3,000 shares of the National Film Corporation at par for the sum of $3,000, which, admittedly, were of no value whatever. Defendant was president of this company.

The weakness of defendant's position in this respect is found in his own testimony to the effect that the company was at that time "broke, and everybody knew it," and that the stock was worthless; also in the testimony of one Miller, an agent of defendant, that "our company was practically broke, and we didn't know whether we were going to get another dollar in or not; and I was broke, and everybody else was broke; so it was a very uncertain proposition." Then the witness Hale, an employé of Parsons at the time of the original transaction, testified regarding the conversations had in his presence between defendant and Miller, as follows:

"Mr. Miller said we had a sucker, in plain English, talking of a woman who got money, and going to put in so much money, lend so much money, but you have to use her. I says, 'Has she ever done acting?' I was told no. I says, 'Good night'—that is my favorite expression. Then I was explained to use this wo-

Digitized by Google

man's money, we can't make any— Q. Who stated this? A. Mr. Parsons. Q. Did he say who the woman was? A. Miss Kokoa, Princess Kokoa—Kokoa Baldwin. Q. Was there anything more stated there with reference to the— A. She was to put $3,000 in—she was to loan $3,000 to the company, for which she was to receive some National stock security. She was to receive stock for security and this $3,000, or whatever the sum was—I can't swear to that, judge—that sum, but it was in the thousands—we were to make two pictures and get some money— Q. Who said that? A. Mr. Parsons. Q. At the time when Mr. Miller was present? A. Well, Mr. Miller was in and out of the studio; I can't exactly say that he was out. Mr. Miller was present on one occasion when discussing this money matter; he was to get his share out of it, $500, for getting the money, and I got $150 out of it, two weeks' work.

"The Court: Who said Mr. Miller was to get $500 out of it? A. Parsons told me that this money Mr. Miller was to procure and from this money he gets a commission of $500, which only would leave us $2,500 to make the pictures. * * * Q. Have you stated all that was said about lending the money? A. Well, lending the money—I don't know who it was made to directly, but Mr. Parsons was to give security of National stock for the loan of the money. I remember he said that, laughing, he says, 'I gave her some security, National Film Corporation stock.' "

[1, 2] In addition to this it is admitted that defendant, who was practically the sole owner of the stock of the corporation, had failed to pay the state license tax, so that the corporation forfeited its right to do business at about the time this transaction was had. On this evidence the trial court was required to determine whether he should believe the evidence offered on behalf of the plaintiff or the confessions of fraud and swindling offered to support the position of the defendant. Conflict in the evidence is clear, and even if this court could substitute its conclusion for that of the trial court, it would not be disposed to do so, in view of the character of the evidence offered by defendant.

The evidence relating to the transaction occurring on February 15, 1916, is confined solely to the conflicting testimony of plaintiff and defendant; they being the only persons present at any time while the transactions were had. The plaintiff testified that she returned to defendant his promissory note and the stock which she asserted had been delivered to her as security, and that in return therefor defendant paid her $250 in cash, gave her three notes amounting to $1,250, and promised to pay her $1,500 more at a future date. Defendant testified that plaintiff appealed to him in a destitute condition, requesting him to buy back the stock which he claimed to have sold to her in the preceding November, and he gave her $250 therefor, though he knew at the time that the stock was worthless; that the three notes were given with the understanding that they would be payable only in the event that defendant was able to sell one of the pictures in which plaintiff had participated, and that no promise of any nature was given regarding the payment of $1,500 nor any other sum than that evidenced by the three notes.

It is argued that plaintiff's story is incredible because, having taken written promises to pay $1,250, it is highly improbable that she would have accepted a verbal promise to pay $1,500 with no written evidence thereof. But defendant's story regarding this transaction is just as incredible. The trial court had both witnesses before it, it had rejected defendant's testimony regarding the transaction of November, 1915, and was in a position to determine whether plaintiff's story of the February transaction should be believed. The finding of the court upon this issue cannot be disturbed.

[3] It is argued by appellant that the evidence does not support the finding that the sum of $1,500 was loaned on or about the 15th day of February, 1916, as alleged in the fourth cause of action. In this connection it is said that, accepting plaintiff's story of the entire transaction, this loan was made in November, 1915, and not at the time alleged in the complaint. The judgment carries interest from the 15th day of February, 1916, and defendant is not harmed by the finding that the loan was not in fact made at an earlier date. This is especially true in a case where, as here, the plea of the statute of limitations is not made. Thus, if the finding was erroneous, it was harmless error which would not support a reversal.

For the reasons given the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

Digitized by Google

RUMETSCH v. DAVIE et al. (Civ. 3226.)

(District Court of Appeal, First District, Division 2, California. May 17, 1920.)

1. Municipal corporations ⟸187—Police pension computed on basis of salary at time of disability.

Under Charter of Oakland, § 91, amended to give police corporal $1,620 a year instead of $1,500 a year as formerly, and section 95, authorizing a pension on disability computed on basis of one-half the salary attached to rank held one year prior to retirement, a corporal retired less than one year after amendment is entitled to pension based on $1,620.

2. Statutes ⟸190—Construed to avoid ambiguities.

It is the duty of the courts to interpret statutes in such manner that they may be free from ambiguity and not to be ingenious to find ambiguities in them because of extraneous matters.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Mandamus proceedings by Herman O. Rumetsch against John L. Davie and others, as members of Board of Trustees of the Police Relief and Pension Fund of the City of Oakland. From a judgment granting writ, respondents appeal. Affirmed.

H. L. Hagan, City Atty., and Leon E. Gray, Deputy City Atty., both of Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

BRITTAIN, J. The defendants appeal from a judgment awarding the plaintiff a peremptory writ of mandate in effect directing them to approve his claim as a retired corporal of police in the city of Oakland for one-half the amount of salary attached to the rank he had held for one year prior to his retirement. The facts are admitted, and the only question to be determined is whether the respondent is entitled to pension computed on a basis of the salary he was receiving at the date of retirement or that which he was receiving one year prior to retirement.

The charter of the city of Oakland was adopted in 1911. By section 91 it was provided that—

"The officers and members of the police department shall receive as annual compensations: * * * Corporals—$1,500.00. * * * Said compensations shall be paid in equal monthly installments. No compensation higher than those herein specified shall be paid to any officer. * * *"

Section 95 was as follows:

"Any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty, upon his filing with the board of trustees a verified petition, setting forth the facts constituting such disability, and the cause thereof, accompanied by a certificate signed by the chief of police, the captain of the division to which he belongs, and by two regularly licensed physicians of the city, recommending his retirement upon a pension, on account of such disability, may be retired from the department upon an annual pension, equal to one-half the amount of salary attached to the rank which he held one year prior to the date of such retirement, to be paid to him during his life, and to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service in the rank he occupied at the time of his retirement."

Under these provisions, when an officer who had held the rank of corporal for one year prior to his retirement was retired, he was paid one-half the amount of salary attached to the rank at the date of his retirement. Since that was the salary attached to the rank one year prior to the retirement, it was also equal to one-half the salary attached to the rank at that time. The language of the section was in no sense ambiguous or uncertain.

In 1919 the people of Oakland amended section 91 of the charter, and it became effective on the approval of the Legislature on January 17, 1919. As amended, it provided that—

"The officers and members of the police department shall receive annual compensations comprising their salaries of not less than: * * * Corporals—$1,620.00. * * * Said compensations shall be paid in equal monthly installments. * * *

"No other or further deduction shall be made from the pay of any officer or member of the department for any fund or purpose unless the same is authorized by this charter.

"No compensation or salary less than those herein specified shall be paid to any officer or member of the police department. * * *"

The respondent held the rank of corporal on April 1, 1918, and on April 1, 1919, the appellants, constituting the board of trustees adopted a resolution by which he was retired on account of physical disability received in the performance of his duty as corporal. Under the terms of the charter his salary is payable to him quarterly. The first payment on July, 1919, was made on the basis of a salary of $1,500. He presented a claim for the second quarter on the basis of salary at $1,620, plus the ratable shortage on the first payment. The appellants refused to allow the claim on the sole ground that the petitioner was entitled only to the salary attached to the rank of corporal one year prior to the date of retirement.

Under section 95, if the disability is removed, the pension will cease, and the respondent will be restored to the service in the rank he occupied at the date of his retirement. If he should be so restored, under the

Digitized by Google

provisions of section 91, as amended, he will immediately be entitled to salary at the rate of $1,620 a year. While he is on the retired list, it would seem to be entirely consistent with the language, as well as the purpose, of section 95, that he should receive as pension one-half the amount he would receive as a corporal if on active service. This court has no hesitation in determining that the amount of the pension is fixed by the salary attached to the rank of the retired man at the time of retirement, provided he held that rank for the period of one year prior to the date of retirement. If, in amending section 91, the people of Oakland had intended to change the plain and unambiguous meaning of section 95, without doubt they would have in terms amended the section. The amendment of section 91 did not serve to import an ambiguity into section 95, which had theretofore been free from uncertainty. It is the duty of the courts to interpret statutes in such a manner that they may be free from ambiguity, and not to be ingenious to find ambiguities in them because of extraneous matters, nor is it their duty to assume the function of the law-making power. Section 95 cannot be given the construction contended for by the appellants without amending it by interpolating a clause limiting its effect and changing its clear meaning. The conclusion reached coincides with the rule adopted in the city and county of San Francisco upon a similar provision of its charter. (Opinions City Attorney, Percy V. Long, January 20, 1908.)

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

SUGAR LOAF ORANGE GROWERS' ASS'N v. SKEWES. (Civ. 2825.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1920.)

1. **Evidence ⟹354(13)—Ledger account made up from memoranda admissible to prove items of charge.**

In an action for an indebtedness due on book account as balance on picking, hauling, washing, packing, and shipping defendant's oranges, ledger account, contained in book kept by plaintiff showing its account with defendant, *held* admissible to prove items constituting charges for picking, hauling, washing, and packing, ledger having been made up from memoranda received by plaintiff in his regular course of business so that entry might be regarded as original.

2. **Limitation of actions ⟹54(2)—"Mutual, open, and current account" defined.**

As respects the application of Code Civ. Proc. § 337, subd. 2, a "mutual, open, and current" account is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Sugar Loaf Orange Growers' Association against H. G. Skewes. From judgment for plaintiff, defendant appeals. Affirmed.

Benjamin Lewis, Mab. Copland Linneman, and H. N. Linneman, all of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

CONREY, P. J. As stated in the complaint, the cause of action sued on herein is an alleged indebtedness of the defendant to the plaintiff "upon a mutual, open, and current book account, said sum of $532.07 being the balance due and owing to plaintiff for the picking, hauling, washing, packing, and shipping of defendant's oranges during the season of 1912, together with certain moneys advanced by the plaintiff therefor at defendant's request, after deducting therefrom and crediting to the defendant all moneys received by the plaintiff for the defendant from the sale of defendant's oranges." The principal contention of appellant is that the court erred in overruling his objection to the introduction in evidence of a ledger account contained in a book kept by the plaintiff and showing its account with defendant. It is claimed that no sufficient foundation was laid for the admission in evidence of said ledger account. To the extent of $508 the account shows the items charged for picking, hauling, washing, and packing the oranges taken from defendant's orchard, together with a selling charge of 10 cents per box for the 750 packed boxes as shipped. The remaining items consist of an "account sales," showing the receipts from the sales and the charges for freight and refrigeration and for auction commission. The net result of the "account sales" was a balance of $24.07 debited against the defendant, thus making the total balance of $532.07, constituting plaintiff's claim. The witness E. F. Wolever was secretary and general manager of the plaintiff. Plaintiff's method of doing business was described by this witness. Plaintiff is a growers' organization which handles the growers' crops on an estimated cost basis. The Mutual Orange Distributors is a corporation having its central office at Redlands, Cal., which acts as the selling agent for a group of orange growers' associations, the plaintiff being one of those associations. In the instant case, the plaintiff agreed to pick, haul, and pack defendant's oranges and cause the same to be

Digitized by Google

shipped and sold through the agency of the Mutual Orange Distributors. This was done, and the account sued upon is the result of that transaction.

It appears from the testimony of Wolever that he personally paid out all of the moneys constituting the items charged against the defendant, and that he was personally acquainted with the facts with respect to the picking, hauling, washing, and packing of the oranges and the payment of the 10 cents per box commission to the Mutual Orange Distributors. He did not count and observe every detail, but he saw the work going on in defendant's orchard, and saw the fruit received at the packing house. For actual time of the work of the men in the orchard and in hauling he relied upon information furnished to him by the plaintiff's foreman at the orchard, the receiving clerk at plaintiff's packing house, and upon statements of the pickers themselves, all of which was in the usual course of business of the plaintiff. The entries made by Wolever in the ledger account were the original and only book entries made by the plaintiff; that is to say, the ledger entries were not copies from any other book or memorandum of the plaintiff.

[1] From the foregoing evidence we are satisfied that the ledger was admissible in evidence to prove the items constituting the first-mentioned charge amounting to $508. As to the "account sales," a separate statement will be made herein. The rule of evidence applying to account books is stated in Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 Pac. 657, as follows:

"In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in the regular course of the business; that the business is of a character in which it is proper or customary to keep such books; that the entries were either original entries or the first permanent entries of the transactions; that they were made at the time, or within reasonable proximity to the time of the respective transactions; and that the person making them had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business. 1 Elliott on Evidence, §§ 458 to 463, inclusive; 2 Wigmore on Evidence, § 1554; 2 Jones on Evidence, § 322."

Counsel for appellant concede that Mr. Wolever did have knowledge, either direct or indirect, of the transactions concerning the packing, etc., of the oranges, and lay the emphasis of their objection upon that part of the ledger constituting the "account sales." The witness Wolever testified that he represented the plaintiff as one of the subsidiary associations making up the Mutual Orange Distributors, and was a member of the board of directors of the Mutual Orange Distributors. As such director he was familiar with the system under which the fruit was shipped, sold, and accounted for through that agency. The Mutual Orange Distributors shipped to various representatives throughout the country the fruit received by it, and the sales were made through these representatives, who then reported to the Mutual Orange Distributors by rendering in each case an "account sales" in the form of duplicate carbon copies containing the several statements of account. One of these duplicates is kept by the Mutual Orange Distributors as its record of the transaction, and the other is sent to the fruit growers' organization. Thus, in the instant case there were three "account sales," one for each of the three cars in which the fruit was shipped. One came from Cleveland, one from New York, and one from Boston. All of the sales were made at auction. Of the duplicate copies so received by the Mutual Orange Distributors, one of each was delivered to the plaintiff. It was from those statements that the entries were made by Mr. Wolever in the ledger account introduced in evidence in this action. The witness Wolever testified that the accounts of sales thus furnished constituted all of the memoranda and data which under that method of doing business are used in making settlements. In connection with the cross-examination of Mr. Wolever, the defendant called for the said accounts of sales furnished to plaintiff by the Mutual Orange Distributors, and introduced them in evidence. They are in the record as Defendant's Exhibit R, and correspond in amounts to the entries contained in the ledger account. No evidence to contradict them was offered by the defendant. It appears to us that if there was any error in the reception of the ledger account in evidence as covering these items of the "account sales," such error is cured by the introduction in evidence of said Exhibit R at the instance of the defendant himself. Having been received by the plaintiff in the usual course of business, they constituted a reasonable basis of authority to the plaintiff to pay out the balance charged to it on the loss incurred by the sales, and to charge to the defendant the amount so paid out by the plaintiff for his account. Considered in this light, the ledger entry itself may be regarded as the original entry of the account of the plaintiff against the defendant.

[2] Appellant next contends that the evidence is insufficient to support the court's finding that the account sued upon is true and correct, "and constitutes an open, current, mutual, and book account." We think that the evidence established the character of the account as a mutual, open, and current account; it being within the following definition:

Digitized by Google

"An unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand. * * *" Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 253, 146 Pac. 692; George Rice & Sons v. Cowan, 189 Pac. 132.

This being so, the cause of action was not barred by the statute of limitations, since the action was commenced within the period of four years from the time when the cause of action accrued. Code Civ. Proc. § 337, subd. 2.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

GROVER et al. v. MORRISON. (Civ. 2162.)

(District Court of Appeal, Third District, California. May 18, 1920.)

1. Judgment ⟸251(1) — Contributory negligence put in issue by cross-complaint.

In action for damages from automobile collision, in which defendant filed cross-complaint for damages to his own automobile as due to plaintiffs' negligence, a verdict for neither party, based on plaintiffs' negligence as well as defendant's, *held* warranted by the pleadings, as against the objection that contributory negligence was not pleaded, as all the pleadings and the issues submitted by them were necessarily to be considered in their entirety.

2. Trial ⟸29(3)—Court's question whether witness was "guessing" at distance testified to not error.

In automobile collision case, where witness had testified the wreck was a certain distance from the end of a bridge, the court was not without legal right to ask the witness whether he was "guessing" at the distance; this being no more than inquiry whether his statement was based on measurement or estimate.

3. Trial ⟸29(2) — Trial judge's inadvertent statement as to evidence which had been given not error.

In automobile collision case, the trial judge's inadvertent statement, in ruling on the admission of testimony, that two witnesses had testified that plaintiffs' machine was moved after the accident, which statement, on plaintiffs' counsel's calling attention to its incorrectness, was in a measure corrected by a subsequent observation by the judge, *held* not valid ground for objection.

4. Witnesses ⟸358—Cross-examination of impeaching witness as to drunkenness held proper.

Defendant's witness, having testified that plaintiffs' witness was drunk shortly before the automobile collision upon which the action was based, was properly asked by plaintiffs' counsel on cross-examination whether he was not drunk himself, and whether it was a fact that up to that time for months he did not draw a sober breath; it being proper to show that he was so intoxicated as not to be able to know whether plaintiffs' witness was intoxicated or to be under the impression that every person he met or saw, and not he, was in a state of intoxication.

5. Appeal and error ⟸1048(6)—Exclusion of cross-examination as to witness' intoxication held harmless.

Exclusion of cross-examination as to a witness' being intoxicated *held* not prejudicial.

6. Trial ⟸232(3)—Instruction as to recovery not being justified because of instruction as to damages held not error.

In automobile collision case, an instruction that the jury were not to understand they were to give damages simply because the court instructed on the measure of damages *held* not error.

7. Trial ⟸333—Ungrammatical verdict not error.

In automobile collision case, where defendant filed cross-complaint for damages to his machine, a verdict against both parties and that neither party "are" entitled to damages, although ungrammatical, was sufficiently clear.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Dewey S. Grover and Mae Grover against John Morrison, who filed a cross-complaint. From judgment awarding no damages to either party, plaintiffs appeal. Affirmed.

W. H. Carlin, of Marysville, for appellants.
Ray Manwell, of Marysville, for respondent.

HART, J. Plaintiffs brought the action to recover from defendant damages for injuries received by plaintiff Mae Grover in an automobile collision, alleged to have been caused by the negligence of the defendant, for physicians', nurses', and hospital charges incurred by her, and for damages to plaintiffs' automobile. Defendant filed a cross-complaint in which he asked for $600, damages to his automobile, claiming that the collision was due to the negligence of the plaintiffs. Trial was had before a jury, which found "against the plaintiffs and against the defendant and further find that neither party is entitled to damages." Judgment was accordingly entered, from which judgment plaintiffs prosecute this appeal.

It is first contended by appellants that the evidence is insufficient to justify the verdict.

Crossing the Yuba river, at the city of Marysville, is a bridge which, with its approaches, commences at the termination of D street, in said city, and is approximately

Digitized by Google

2,200 feet in length to the southerly bank of said river. The roadway on said bridge is 24 feet in width, with a raised sidewalk on each side 3 feet in width and railings on the outside of each sidewalk.

On the 8th day of December, 1917, at about the hour of 4 o'clock in the afternoon, with the sun shining, plaintiffs, husband and wife, drove upon the south end of the bridge in a Ford automobile on their way to Marysville. Plaintiff Dewey S. Grover testified that upon driving upon the bridge he traveled on the east, or right-hand, side at a speed approximately of 10 or 12 miles an hour and was traveling carefully. When he was about halfway across the bridge he saw approaching him a small tractor, driven by a man named Davis, coming south from the north end of the bridge on the west side. A little further on he saw defendant's machine coming around the left-hand side of the tractor to pass it. The witness testified:

"It kept coming right towards me. I was running along probably a foot or two from the sidewalk of the bridge. I supposed he would turn off in just a minute, which they do lots of times; people will run close to you and then turn off, but he kept coming, and when I saw he wasn't going to stop I jammed my car into the sidewalk, commenced stopping it, tried to stop it. When he got right up close, about 20 or 25 feet away from me, he turned out to the right right quick, to the west, and he didn't turn fast enough to miss me; his car caught on the corner of my car kind of sloping and jammed my car into the bridge and broke one of my wheels down; the hind end of his car flew around kind of catercornered across the bridge, toward the west and southerly. When we stopped my car was on the sidewalk, the hind wheels; his car was sitting against my car, sitting across the bridge; we were both kind of across the bridge then. The left-hand corner of defendant's car struck the left-hand corner of mine. When the collision came my car was right up against the east sidewalk of the bridge, probably 3 inches from it. Before the collision I should judge the defendant was going probably 20 miles an hour; he was going pretty fast."

The plaintiff Mae Grover testified practically to the same facts as did her husband. She was severely injured, and people in a passing automobile took her and her husband to Marysville.

William Davis, called as a witness for plaintiffs, testified that he was a tractor driver, and on the day of the collision was driving a tractor on the right-hand side of the bridge going south, and was about a third of the way or nearly halfway across the bridge when defendant's machine pulled around from behind him and ran into Grover's machine, who was coming north on the east side of the bridge. He said the defendant's automobile "had about 150 feet clearance to get on the other side, but it didn't seem to get there. He turned trying to make it go on the right, on his own side, but he didn't make it fast enough before they collided." The witness described the positions of the two automobiles after the collision, placing them about as plaintiffs did. He said he helped carry defendant's car around so he could pass. On cross-examination the witness was asked if he was drunk or sober at the time of the collision, and answered that he wasn't either one, but that he had had a couple of drinks.

J. J. Degire, a stableman residing at Marysville, at the time of the collision was hauling gravel with a two-horse team and wagon. As he drove on to the bridge from the south end he saw the accident and drove to the place. He testified:

"I got up and helped get the machines out of the way so I could come on to town." He described the location of the two cars. "I helped Mr. Davis, the tractor driver, move Mr. Morrison's machine out of the way so he could get by."

On cross-examination the witness said that Davis was sober so far as he could see.

Two other witnesses, one of them being R. C. De Witt, called on behalf of plaintiffs, testified that they saw the Ford after the collision, and that it was on the east side of the roadway.

The defendant testified that he had noticed Davis in the city of Marysville driving the tractor toward the bridge; that when he (defendant) drove upon the bridge there was no vehicle of any kind ahead of him on the bridge; that when he got fairly on the bridge he was traveling at a rate of about 10 or 15 miles an hour. He testified:

"I saw another machine coming towards me close up to the center, until he got so close to me that I had no chance to get away, and he was probably then 6 inches too close to me; he was over enough on my line so I couldn't turn off and get away fast enough to get away from him; he was coming along pretty fast speed."

His description of how the collision occurred, as to the positions of the two cars, was about as already given. He said that he, a man named Strawn, and a colored man moved defendant's car to the sidewalk on the west side.

On cross-examination the defendant first stated, as he did in his direct examination, that when the collision occurred the plaintiffs' car was "over the center (of the bridge) on my side." On further cross-examination as to this point, his answers were not as positive as they previously were. He, for instance, said:

"I don't know that he was over the center; he was at the center; he was at the center; he might have been over. Q. Would you say his left wheel would be at the center? A. I suppose so. * * * Q. How much space, approximately, does it require for your auto-

Digitized by Google

mobile to pass through, taking the full width of the machine at its widest part? A. Seven feet, probably 6½ or 7, I should judge. I don't know that would cover everything, fenders and all. Q. You came together and your left front wheel struck and locked with the left front wheel of plaintiffs' machine? A. Yes. Q. Both wheels were broken, were they? A. Yes, sir."

David Morrison, a brother of the defendant, testified that he was in a Ford machine and drove behind a tractor on the bridge, passed it, and saw there had been a wreck. He stopped and saw his brother and Strawn and another man move his brother's car to the west side of the center of the bridge, plaintiff's car being on the east side of the center, but he said it was not up on the sidewalk on the east side; the wheels might have been a foot or so from the sidewalk. James Strawn testified to having assisted in moving defendant's car.

[1] It is plainly apparent from the testimony, of which the foregoing statement embraces a correct epitome, that, when the collision occurred, both the plaintiffs and the defendant were driving very close to the center line of the bridge. At any rate, this court must so view the situation. It is likewise also apparent that upon the question whether, when the collision occurred, the two machines were both running on and along the center line of the bridge, there exists a sharp conflict in the evidence. In fact, there is a pronounced conflict in the evidence upon the question whether, at the time of the accident, the machine of the plaintiffs, who were traveling in a northerly direction, was or was not running beyond the west of the center line of the bridge a few inches. It is true that the defendant, after having on direct examination positively testified that the plaintiffs' machine was on the west of the center line of the bridge a few inches when the collision took place, was not so positive on that point on his cross-examination; still, it was for the jury, under such state of the testimony, to determine what was the fact in that regard. But, in any event, the evidence appears to be such as that the jury could well have found, as it did find, that both machines, when they collided, were traveling so close to the center line of the bridge that it would be very difficult to determine, if, indeed, it could justly be determined at all, which of the two, the plaintiff or the defendant, was to blame for the collision, or, in other words, whether it was the defendant's negligence or that of the plaintiff or the contemporaneous negligence of both that was the proximate cause of the injury. It follows, therefore, that this court is in no position to hold, as a matter of law, that the finding of the jury that both the plaintiff and the defendant were equally at fault, and that the accident would not have occurred but for the simultaneous negligence of both, is not supported by the evidence. The verdict, in effect, implies, of course, that, while the defendant was guilty of negligence, the plaintiff was guilty of contributory negligence, in the absence of which the collision and the injuries resulting therefrom to the plaintiff Mae Grover and to plaintiffs' machine would not have happened; and in this connection we notice the contention of the counsel for the appellants that contributory negligence upon the part of the plaintiffs is not set up or pleaded as a defense by the defendant, and, not being so pleaded, the defendant cannot avail himself of the defense of contributory negligence. But the reply to this contention is to be found in the averments of the cross-complaint filed by the defendant. In that pleading the defendant, asking for affirmative relief against the plaintiffs, alleged and charged in appropriate language that the collision and the consequent damage were due directly and solely to the negligence of the plaintiff Dewey S. Grover, in that, when the accident occurred, the latter was driving his machine on the west of the center line of the bridge. This is, of course, a straight allegation that the plaintiff himself, by his own negligence, directly contributed to the collision, and thus the issue of contributory negligence upon the part of the plaintiffs was expressly and directly submitted by the pleadings. The cause was not, as is often true where a cross-complaint is filed, and the real, vital issues are made up and tendered by an answer thereto, tried alone upon the cross-complaint and the answer of the plaintiff thereto. Each of the parties was seeking affirmative relief, and the case was necessarily tried upon all the pleadings of both parties—that is, upon all the issues involved in all the pleadings filed—and hence, as above suggested, to ascertain what the vital issues of fact to be determined by the jury were, all the pleadings and the issues submitted by them were necessarily to be considered in their entirety. Thus viewing the situation as to the issues of fact involved in the action, as they were made up by the several pleadings of the parties, it is plainly manifest, as above stated, that one of the important questions of fact raised by the pleadings as a whole and which the jury were required to consider and determine was whether the plaintiff Dewey S. Grover himself was guilty of negligence which proximately contributed to the collision and its consequences.

It is to be said, however, that the counsel for the appellants does not appear to be so insistent upon the proposition that there is no substantial support in the evidence for the verdict or upon the point that the issue of contributory negligence upon the part of the plaintiff Dewey S. Grover is not properly raised by the pleadings as he is upon the proposition that, in view of the asserted un-

Digitized by Google

satisfactory character of the evidence as a foundation for the finding of the jury, certain alleged erroneous rulings of the court upon the question of the legal propriety of certain testimony should, with certain alleged erroneous instructions as to the law of the case, be held a sufficient predicate for a judgment of reversal. These assignments will now briefly be considered.

During the direct examination of R. C. De Witt, a witness called for plaintiffs, he was asked where on the bridge he saw any evidence of collision. The question was objected to, counsel for defendant saying:

"This collision occurred about 10 minutes after 4; all these machines had been moved.

"Mr. Carlin: There is no evidence that the plaintiffs' machine was moved at all.

"The Court: Two witnesses testified it was moved.

"Mr. Carlin: Not the plaintiffs' machine; no witness testified at all that plaintiffs' machine was moved at any time.

"The Court: That is not asking about the plaintiffs' machine.

"Mr. Carlin: That is only preliminary.

"The Court: I will hear it; answer the question. A. I should judge 350 feet somewheres from the north end.

"Mr. Carlin: What did you see there?

"Counsel for Defendant: Same objection.

"The Court: It is very evident if that is true there was quite a change in the machines.

"Mr. Carlin: How many feet? A. About 350 feet.

"The Court: 427 feet.

"Mr. Carlin: Would you say 350 feet was exact, or might it be 427? (Objected to as leading, immaterial, irrelevant, and incompetent.)

"The Court: I will let him answer. You didn't measure it? A. No, sir.

"The Court: Just guessing at it? A. Just guessing at it.

"Mr. Carlin: What did you see? A. I saw a Ford and another car in front of it."

The point made by counsel as to the foregoing is that the court, in stating that the plaintiffs' machine had been moved from the position in which it was left by the collision, there having been no testimony that it was moved at the time referred to by the witness De Witt, "trenched upon the province of the jury." It is further objected that the court trespassed upon the domain of the jury when it stated that there was evidence of a collision on the bridge about "427 feet" from the north end thereof; the witness having previously estimated that the distance was about 350 feet from the north end of the bridge, and, further, that the court was without legal right to ask the witness if he was merely making a guess as to the distance.

[2, 3] There is nothing so serious in the action of the court thus referred to and criticized, assuming it to be justly amenable to all that is said against it, as to justify us in declaring that thereby the jury were unduly influenced in their consideration of the case or led to reach the conclusion evidenced by their verdict. The court had the right to ask the witness whether he was giving a mere approximation of the distance, or, what amounts to the same thing, "guessing at the distance," or whether his statement as to the distance was based upon an actual measurement thereof. Counsel would not say or contend that he or the attorney on the other side, according as the exigency of the situation might require it, would not be allowed properly to ask such a question or inquire whether a witness, in stating distances, based his testimony in that respect on actual measurements or a mere guess or approximation, and certainly, if counsel may ask such a question, it cannot be error for the court to ask it, if the question is propounded by the latter in a proper manner, or so that the jury may not infer that it is the desire or sole purpose of the court thus to discredit the witness or prejudice his testimony in the minds of the jury. As to the suggestion of the court that the machine of the plaintiffs had, before the witness saw any "evidence of a collision," been moved from the position in which it had been left as a result of the collision, it will be noted that, after counsel for plaintiffs stated that there was no testimony that the machine had been moved, the court remarked that the question objected to had no application or reference to plaintiffs' machine, and this observation by the court in a measure corrected its previous alleged misstatement as to the removal of said machine. Moreover, counsel for the plaintiffs having called attention to the fact that there was no testimony up to that stage of the case showing that plaintiffs' machine had been moved, the jury, we must assume, must also have then recalled that there was then no such testimony before them, and we must further assume that, if there was no proof of the plaintiffs' machine having been moved, the jury would not assume that there was on the mere inadvertent intimation by the court that such testimony had been given before them. We cannot perceive any merit in the objection here considered.

[4] The witness Davis, as above shown, testified in behalf of the plaintiffs. On cross-examination he was asked if he was not under the influence of intoxicating liquor at the time the accident, which he claimed to have witnessed, occurred. He denied that he was then intoxicated. The defendant called one L. P. Worden as a witness, who testified that he had seen the witness Davis as the latter was leaving Marysville with his tractor on the day of the collision, and that Davis was drunk. Counsel for plaintiffs, on cross-examination, asked the witness whether he was not drunk himself and whether it was a fact that up to that time for months he did not draw a sober breath. Objections to both questions were sustained, and referring to the second one, the court said:

Digitized by Google

"Mr. Carlin, that is not a proper question to ask. I have ruled. The witness is entitled to protection on the stand, and I am going to protect him; it isn't right to ask insulting questions of the witness, and don't do it any more."

[5] We are at a loss to understand the theory upon which the court disallowed the cross-examination. The obvious purpose of proving that Davis was intoxicated was to show that his mental condition was such at the time of the collision as that he was not able to form a proper or an accurate conception of the circumstances under which the collision occurred, or, in other words, to show that his testimony was unreliable and could not be depended upon; and the cross-examination of Davis on that line, as well as any testimony offered in impeachment of his denial of having been drunk at the time in question, were proper. Upon identically the same theory, it was proper for the plaintiffs to show, if it could be done, that Worden was himself intoxicated to an extent that he was thus rendered incapable of knowing or determining whether Davis was intoxicated, or whether, being intoxicated himself, and experiencing the usual effects of such a condition, his brain was susceptible to the impression that every person he met or saw, and not he, was in a state of alcoholic intoxication. But, while we doubt not that the ruling excluding the cross-examination was error, we do not feel that we are justified in holding that it was prejudicial to the rights of the plaintiffs. In other words, we cannot say that the jury's conclusion was affected by the ruling, or that a different result would have followed from the allowance of the cross-examination. Davis denied that he was intoxicated at the time of the accident, and it was for the jury to determine from his testimony, as compared to that of Worden, what his condition as to sobriety was. Furthermore, as above shown, the testimony of Davis was only corroborative of that of the plaintiffs as to the claim of the latter that the defendant, at the time of the collision, was driving on the east of the center line of the bridge, and, even with the testimony of Davis given upon the theory that he was in a perfect state of ebriety when the collision happened, the state of the evidence, as before declared, was such as that the jury might still be in serious doubt as to which of the parties was directly responsible for the accident, and thus have been brought to the conclusion at which they arrived, to wit, that both were equally at fault.

The several instructions given by the court at the request of the defendant, and to which objection is here made because, as is the contention, they do not state the law correctly, may be summarized as follows: That the jury are not to understand that they are to give damages simply because instructions involving the statement of the rule as to the measure of damages are addressed to them by the court; that such instructions have no application where the liability of the defendant has not been established, "and should not be understood as conveying any intimation that in the opinion of the court the plaintiff is entitled to damages or not" (instruction No. 1); "that if you believe from the evidence that the plaintiffs and defendant approached each other from opposite directions on what is commonly known as the D street bridge, and that their automobiles collided on the center line of said bridge, and that if ordinary care had been exercised on the part of both plaintiffs and defendant, and there was room for the said parties to have turned further to their right-hand sides of said bridge, respectively, thus avoiding any collision, then I instruct you that it is the law that both parties were negligent, and neither party may recover as against the other" (instruction No. 5); that, if neither party was negligent, neither can recover from the other (instruction 7); that, if both parties were equally guilty of negligence, then neither can recover (instruction 8); and the giving by the court to the jury of the form of verdict which they returned into court.

[6] The instructions thus referred to, although in some respects awkwardly phrased, stated the law correctly to the jury. Obviously the jury were not legally authorized to award damages to either party if the liability of neither was established by the evidence merely because the court explained to them the rule as to the measure of damages in such a case as this; and a more obvious proposition could not be stated than that if neither party was negligent, or if both parties were equally guilty of negligence, simultaneously committed, neither was entitled to recover against the other. By instruction No. 5 the court clearly meant to say, and undoubtedly the jury so understood the instruction, since it could bear or convey no other meaning than that if, when the collision occurred, both parties were driving on the center line of the bridge, then both were equally guilty of negligence contemporaneously occurring, and that in that case neither was entitled to a verdict for damages as against the other. As so understood, the instruction involved a correct enunciation of the rule in such a case. It may be added here that the court, in its charge to the jury, gave a full and fair statement of all the principles of law pertinent to the case as it was made by the evidence.

[7] The complaint against the form of the verdict returned by the jury possesses no merit. Its effect was merely to find against the plaintiffs on their complaint and against the defendant on his cross-complaint, and "that neither party *are* entitled to damages."

Digitized by Google

Although a little out of shape in its grammatical construction, the verdict is in language sufficiently clear and explicit to put beyond doubt the proposition that the result reached by the jury was that neither of the parties to the action was entitled to recover against the other.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

THORNBURGH v. HAUN. (No. 9732.)

(Supreme Court of Oklahoma. June 22, 1920. Rehearing Denied July 24, 1920.)

(Syllabus by the Court.)

1. Brokers ⟹63(1)—When real estate broker has earned his commission stated.

Where a real estate broker furnishes a purchaser ready, willing, and able to buy upon the terms and conditions proposed by the seller, such agent has earned his commission, and, if thereafter the seller refused to comply with his contract, the agent is not required to procure or tender to the seller an enforceable contract.

2. Appeal and error ⟹1001(1)—Verdict not disturbed where supported by evidence.

In a civil action, triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial erors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict and finding of the jury will not be disturbed on appeal.

Error from Superior Court, Okmulgee County; R. E. Simpson, Judge.

Suit by G. F. Haun against Wright Thornburgh. Judgment for plaintiff, and defendant brings error. Affirmed.

L. L. Cowley, of Okmulgee, for plaintiff in error.

Morgan, Pinkston & Hepburn, of Henryetta, for defendant in error.

JOHNSON, J. This is an appeal from the superior court of Okmulgee county, sitting at Henryetta.

On July 11, 1917, the defendant in error, who was the plaintiff below, filed his petition in said court against the plaintiff in error, who was the defendant below, which petition alleged, in substance:

"That plaintiff was a real estate agent at Henryetta, Okl., and that the defendant, a resident of Okmulgee county, Okl., was owner of certain real estate situate in said county, to wit: S. ½ of N. W. ¼ of section 32, township 12 north, range 13 east of I. M. That on the 8th day of February, 1917, Wright Thornburgh listed with the plaintiff and authorized him to procure a buyer for the same at $25 per acre, or a total of $2,000 net, to defendant, with the further agreement that plaintiff was to receive as his commission any sum for which he might sell the land above the sum of $2,000. That thereafter said plaintiff procured a buyer for said land, W. S. Evans, who was then and there ready, able, and willing to buy said land, for the total sum of $2,800, and that the said W. S. Evans paid said plaintiff, as an advance payment on said land, the sum of $100. That the plaintiff immediately notified said defendant that he (the plaintiff) had found said purchaser, who was ready, able, and willing to purchase said property upon the terms and conditions agreed upon by and between said plaintiff and said defendant, but that the defendant refused, and still refuses, to sell said land to W. S. Evans as per said agreement. All to the great damage of said plaintiff in the sum of $800, and that the refusal of said defendant to sell said land to W. S. Evans was without cause, and with the knowledge that the refusal was to the great damage of said plaintiff."

The prayer of said petition was for $800 and costs. The defendant answered by general denial, the cause was tried to a jury, and resulted in a verdict in favor of the plaintiff in the sum of $645, for which sum the court rendered judgment, and in due time this proceeding in error was commenced by the defendant filing his petition in error in this court, a copy of case-made attached. His assignments of error being: (1) Overruling motion for new trial; (2) verdict is contrary to law; (3) was contrary to the evidence; (4) was contrary to the evidence and a compromise verdict; (5) contrary to the law and evidence; (6) errors of law occurring at the trial; (7) error in exclusion of evidence; (8) in not sustaining the demurrer to the evidence; (9) in not sustaining demurrer to the introduction of the evidence at the commencement of the trial; (10, 11) erred in refusing to give requested instructions; (12, 13) in giving instructions Nos. 2 and 3; (14) in admitting evidence objected to by the defendant.

[1] Counsel for plaintiff in error discuss in their brief most of the foregoing assignments under one proposition, concerning which they say:

"All of the above assignments of error depend upon the answer to the following question: 'Is it necessary for a real estate agent, to recover a commission for the sale of real estate, to procure and present to the seller, signed by a purchaser, who is ready, willing, and able to buy, an enforceable contract in writing, binding the purchaser to take the land according to the terms and conditions agreed upon?' If the answer to the above question is 'Yes' then the above assignments of error are well taken, and the judgment of the lower court must be reversed, and this cause remanded to the lower court, with directions to grant a new trial. If the answer to the above question is 'No' then the above assignments of error are not well taken, and the defendant must look to the other

Digitized by Google

assignments of error for a reversal of the judgment in this cause."

The plaintiff testified in his own behalf as follows:

"Q. Tell the jury, Mr. Haun, in your own way, as briefly as you can, what transaction or dealings you had with Mr. Thornburgh, if any, in relation to his eighty, up north of town here. A. I had a purchaser that wanted to buy land north of town, Mr. R. G. Stone. I was informed that Mr. Thornburgh owned the land on which the Okmulgee coal mine was located, and I called him up over the telephone one day, one evening, I think, about the 2d, or somewhere, of February, this year; told him my name was Haun; that I was in the real estate business at Henryetta; that I had a purchaser for an 80-acre tract of land; understood he owned such north of here; asked him, would he sell it; he said 'Yes,' and I told him I would be up to see him. I went to Okmulgee on the day following, and went into Mr. Thornburgh's office.

"Q. About when was that, Mr. Haun? A. As near as I can say, I think on the 3d of February.

"Q. The 3d of February? A. Yes, sir.

"Q. All right; go ahead. A. I informed myself where Mr. Thornburgh's office was located; went in; found Mr. Thornburgh; never had met him; introduced myself to him; told him I was the real estate man at Henryetta that had phoned him about his tract of land north of town, and asked him what he wanted for it. He told me, 'What do you think that land is worth?' I told him I had looked it over, cut up by ravines and the railroad tracks, I figured about $25 an acre. His reply was that was what he figured it was worth, and he said, 'You sell the land for that net to me, and get your commission above that.' I asked him how much commission he thought I ought to have. He replied it didn't matter to him if it was a hundred dollars an acre, 'Sell it for $25 net to me.' I said, 'I will price the land for $30 an acre.' He said, 'Go to it,' used that word. I came back home and called Mr. Stone—

"By Mr. Cowley: What Stone is that? A. R. G. Stone. Mr. Stone decided to take the 80, and wanted an 80 adjoining it; he just merely wanted that for pasture land. I told him I would try to get that, and I called Mr. Thornburgh, and he wanted to make some reservations—building some houses for his coal miners. I asked him what he would sell it for. '$20.' I told him I would have to get $22.50 an acre. He said, 'All right.' I told him Mr. Stone said he would give that, and I asked Mr. Thornburgh to send down the abstract. Well, a few days went by, and the abstract didn't come, and I called him up. He said Mr. Harlan Read has those abstracts, and he was out of town, I think in New Orleans, and he couldn't get them to me until his return. In the meantime, Mr. Stone said, 'I have talked to some of my friends regarding that land'—

"Q. Don't tell that. You didn't close the deal with Mr. Stone? A. Mr. Stone didn't take the land on account of the smelter smoke; he backed out. Then Mr. Evans, another party, talked about buying the land, and the land was priced to Mr. Evans at $35 an acre. He looked it over; he said he wanted the north 80. In about a week he came into my office one evening; said he had come up to accept that land; wanted me to make up a check of some kind. I believe the Citizens' Bank of Okmulgee—

"By Mr. Cowley: Objected to as incompetent, irrelevant, and immaterial, and ask that it be stricken and the jury admonished not to consider it.

"By the Court: Overruled.

"By Mr. Cowley: Exception.

"A. I wrote out a check, and he signed a check for $100. I told him, 'I wont accept it until I call Mr. Thornburgh; have a seat.' I called him over the phone; told him Mr. Evans had bought the land at $35 an acre, and paid $100 to hold the deal. I asked him to have the abstract sent down; he said he would send the abstract immediately. Several days passed, and the abstract didn't come, and I went up there to his office, and he said he couldn't sell the land; he was selling coal under the land, a coal company had a lease on it. I told Mr. Evans that Mr. Thornburgh wouldn't close the deal. In the meantime he went to work and built a house on this land. Mr. Thornburgh didn't give him any authority to build the house, but he went out—so the coal deal failed, didn't go through."

Mr. T. L. Taylor testified for the plaintiff that he was in the plaintiff's office and heard the conversation between the plaintiff and Mr. Evans, including the telephone conversation between the plaintiff and the defendant, which corroborated plaintiff's testimony fully as to what occurred.

Mr. Evans, purchaser, testified for the plaintiff as to the contract of purchase, fully corroborating the testimony of the plaintiff, and concerning what he did after his contract of purchase he testified as follows:

"Q. What did you do? A. I went up there and put a house on it.

"Q. What did Mr. Thornburgh do? A. We came back home, and was fixing to move up here, and when we got ready to move, why, Mr. Thornburgh had moved somebody in the house.

"Q. In your house? A. Yes, sir; he was in possession of it.

"Q. His tenant still in it? A. Yes, sir—

"By Mr. Cowley: Objected to as incompetent, irrelevant, and immaterial.

"By the Court: Sustained.

"By Mr. Hepburn: I withdraw the question.

"Q. Uncle Billy, were you able, ready, and willing to pay Mr. Thornburgh for his land, if he had delivered the deed? A. Yes, I—

"By Mr. Cowley: Objected to as incompetent, irrelevant, and immaterial, and leading and suggestive, and defendant moved that the answer be stricken out.

"By the Court: Overruled.

"By Mr. Cowley: Save us an exception.

"You say you were? A. Yes.

"Q. If he had furnished you a deed? A. Yes, sir. Q. Did he ever furnish you a deed? A. No, sir. Q. And has not furnished it to you yet? A. No, sir."

The defendant's testimony was in sharp conflict with that of the plaintiff. He denied that he ever agreed to sell the land for $25 an acre; he said he priced it at $25, and agreed to give the plaintiff $100 commission to sell at that price, and denied in toto all

Digitized by Google

knowledge of the deal with Evans as testified to by the plaintiff. Concerning the telephone conversation, he testified as follows:

"Q. But you are positive regarding the Uncle Billy hundred dollars; that didn't take place over the phone? A. He might have said it; if he did, if he did say that, I hold him I couldn't sell it.

"Q. Now, as I understand you, Mr. Thornburgh, this conversation didn't take place at all? A. It didn't; I didn't talk about the sale.

"Q. Did he ring you up that afternoon and tell you he had sold the land at $35 an acre? A. No, sir; never did.

"Q. That conversation didn't take place? A. No such conversation. We had various conversations.

"Q. What I am trying to get at—you deny absolutely the $100 telephone conversation on the afternoon of February 24th, do you? A. Absolutely.

"Q. You know that didn't take place? A. That conversation didn't take place; he might have called me; if he did, I told him I couldn't sell it.

"Q. You say he might have talked to you on the afternoon of February 24th? A. He might have done so; I can't say that he didn't.

"Mr. Hepburn: That's all."

At the conclusion of the testimony, the defendant demurred to the same, and requested a peremptory instruction to the jury, which was refused by the court and excepted to by the defendant. The material part of the court's instructions to the jury was as follows:

"Gentlemen of the jury, you are instructed that if you find from a preponderance of the evidence in this case that the plaintiff, G. F. Haun, had an agreement with the defendant, Wright Thornburgh, to sell 80 acres of land belonging to defendant, described as the south half of the northwest quarter of section 32, township 12 north, range 13 east, in Okmulgee county, Okl., and that on or about the 8th day of February, 1917, the defendant listed said property with the plaintiff for sale, and agreed with plaintiff that he should find a buyer for said land at a price of $25 per acre, net to the defendant, Wright Thornburgh, with the further agreement that the plaintiff was to receive as his commission any sum which he could sell said land over and above said sum of $25 per acre, and that in pursuance of said agreement, the plaintiff procured a buyer for said land on or about the 24th day of February, one W. S. Evans, who was ready, able, and willing to buy said land for the sum of $35 an acre, or the total sum of $2,800 for the tract; and that at the same time the said purchaser, W. S. Evans, paid to plaintiff the sum of $100 as a part payment on said land, and that this payment of $100 was made after a telephone conversation took place between the plaintiff and defendant, and that defendant accepted said sum as part payment on the purchase price, and that said sum was paid with the knowledge and consent of the owner of the land, Wright Thornburgh, and if you further believe from a preponderance of the evidence that the defendant, Wright Thornburgh, instructed the plaintiff, G. F. Haun, to sell the above-described land upon the terms herein set out, and that he agreed to all the terms and conditions of said sale to the purchaser, W. S. Evans, and that he afterwards refused to carry out the terms of said agreement, and refused to furnish the purchaser with a deed to the land, and that upon and owing to his refusal the trade was not made, and the sale was not consummated; and if you further believe from a preponderance of the evidence that by reason of the fact that said sale was not completed the plaintiff in this case, G. F. Haun, was damaged in the sum of $800, or any other sum, then your verdict should be for the plaintiff, in any sum to which you may find he is entitled, not exceeding the sum of $800. If, on the other hand, you believe that the plaintiff has failed by a preponderance of the evidence to make out his case, then your verdict should be for the defendant.

"(2) You are instructed that if you find from a preponderance of the evidence that the defendant authorized the plaintiff to find a purchaser for his said land at a certain stipulated price per acre, and if you further find, from a preponderance of the evidence, that the plaintiff did furnish a purchaser, ready, willing, and able to purchase said land upon the terms and conditions proposed by the defendant, then your verdict must be for the plaintiff, and you should fix the amount of his recovery at any sum to which you think he is entitled, not exceeding the sum of $800."

The plaintiff's cause of action against the defendant is one for damages against the owner of property for failure to comply with his contract to sell. It is such from the pleadings and the evidence, and was tried and submitted to the jury upon that theory, and we think comes clearly within the rule announced by this court in the cases of Robinson v. Okla. Fire Insurance Co., 55 Okl. 52, 155 Pac. 202; Bleecker v. Miller et al., 40 Okl. 374, 138 Pac. 809. In the latter case it was said:

"Defendant contends that the trial court erred in giving to the jury instructions Nos. 4, 5, and 6, for the reason that the same do not tell the jury that it is necessary for plaintiffs to have procured or tendered to defendant an enforceable contract, executed by the proposed purchaser. We do not understand that this is the law. When the defendant sold the land to another purchaser, he by his own act stopped the transaction, and it would have been an idle and useless ceremony to have asked the proposed purchaser to execute a contract of purchase to the property which had already been sold to another. * * * The instructions, among other things, tell the jury that it was the duty of the plaintiffs to furnish a purchaser who was ready, able, and willing to purchase the property upon the terms and conditions prescribed by the defendant. The defendant contends that this purchaser was not ready, able, and willing to buy this property. That was a question of fact, which was submitted to the jury under proper instructions, and there is evidence in the record tending to support the conclusions reached by the jury."

Likewise in the instant case it was the theory of the plaintiff that the defendant

Digitized by Google

breached the contract of sale and refused to deliver the deed. His testimony tended to support his theory, and the verdict of the jury was in his favor. In these circumstances, it would have been an idle ceremony to have required the plaintiff to procure from the purchaser a contract in writing. Smith et al. v. Autry et al., 169 Pac. 623; Strickland v. Palmer, 172 Pac. 932.

[2] The defendant's last assignment of error is that the court erred in overruling hi motion for a new trial. The grounds urged in support of this assignment are, in substance, those usually contained in a statutory motion for a new trial. As we have seen, the record discloses that the testimony in the case was conflicting. The issues involved were properly submitted to the jury, and in these circumstances the verdict of the jury will not be disturbed by this court upon appeal. We are clearly of the opinion that the trial court committed no error in overruling the defendant's motion for a new trial, and for the reason stated the judgment of the trial court is affirmed.

HARRISON, V. C. J., and PITCHFORD, McNEILL, and BAILEY, JJ., concur.

OKMULGEE COUNTY BUSINESS MEN'S ASS'N et al. v. BRYAN. (No. 11384.)

(Supreme Court of Oklahoma. June 29, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⊜568—Notice held not to authorize settlement of case-made in absence of defendant in error.

A notice to defendant in error that case-made would be presented to the trial judge for signing and settling on Friday, April 30, 1920, at 9 o'clock a. m., or "as soon thereafter as the court can hear the same," without mentioning the place where the case-made was to be presented to the trial judge for signing and settling, was not sufficient to confer authority upon the trial judge to sign and settle the same, without his district, in the absence of the defendant in error.

2. Appeal and error ⊜568—Trial judge's absence at time stated in notice for settling a case-made required another notice.

Where plaintiff in error has prepared and served a case-made and has given the prescribed notice of the time when the same will be presented to the trial judge for settlement and signature, but not the place, and the trial judge is absent from the district at such time, and the defendant in error is without knowledge of the place where case-made would be settled, such notice becomes functus officio, and before such case-made can be legally settled and signed, another notice of the time and place of settling and signing must be served upon the opposing party.

3. Appeal and error ⊜638—Settlement and signing of case-made without notice to opposing party is a nullity.

A case-made, settled and signed without notice to the opposite party of the time and place of settling and signing the same, and without the appearance of such party or parties, and without their waiver of such notice, is a nullity, and confers no jurisdiction on this court to decide any question thereunder.

Error from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Action by Clark F. Bryan, doing business under the firm name and style of the O. K. Credit & Collection Service, against the Okmulgee County Business Men's Association and others. Judgment for plaintiff, and defendants bring error. Dismissed.

See, also, 176 Pac. 226.

M. A. Dennis and C. B. McCrory, both of Okmulgee, for plaintiffs in error.

Belford & Hiatt, of Okmulgee, for defendant in error.

JOHNSON, J. Defendant in error commenced this action against plaintiffs in error on an alleged contract and for the collection of certain promissory notes.

Defendant in error filed motion to dismiss this appeal on the ground that the case-made was signed and settled in the absence of the defendant in error and of his counsel, and without notice of the place of such settlement. To this motion there has been no response.

[1, 2] On April 26, 1920, defendant in error was served with notice that case-made would be presented to the trial judge for settlement and signature on the 30th day of April, 1920, at the hour of 9 o'clock a. m., "or as soon thereafter as the court can hear the same." No further notice of settlement was served on defendant in error, and no notice was given of the place where the case-made was to be signed and settled. Attorney for defendant in error makes affidavit that, assuming that the case-made would be signed and settled in the city of Okmulgee, Okmulgee county, at the chambers of the trial judge, he went to such place, and also to the district courtroom in the city of Okmulgee, on the date and at the hour mentioned, and then learned that the trial judge was not in the city of Okmulgee, or within his district, but was at the city of Eufaula, McIntosh county, and that he did not return to the city of Okmulgee on said date. Neither defendant in error nor his counsel was present at the signing and settling of the case-made, or knew where it was to be signed and settled, and neither defendant in error nor his

Digitized by Google

attorney waived notice of the place of signing and settling case-made.

The rule is well settled in this jurisdiction that notice to the defendant in error that case-made will be presented to the trial judge for signing and settling on a certain date and hour, at a certain place, is necessary to confer authority upon the trial judge to sign and settle the same, and that without such notice the trial judge is without authority to sign and settle a case-made in the absence of the defendant in error or his counsel. Sand Springs v. Oliphant, 53 Okl. 528, 157 Pac. 284.

In Baker & Lockwood Mfg. Co. v. Voorhees et al., 165 Pac. 125, it was held that, where plaintiff has prepared and served a case-made and has given the prescribed notice of the time and place the same will be presented to the trial judge for settlement and signature, and the trial judge is absent at such time and from such place, such notice becomes functus officio, and, before such case-made can be legally settled and signed, another notice of the time and place of settling and signing must be served upon the opposite party.

[3] In Southwestern Surety Ins. Co. v. Going et al., 48 Okl. 460, 150 Pac. 488, it was held that a case-made, settled and signed without notice setting a time and place to sign and settle same upon all of the opposing parties, and without their appearance, either in person or by attorney, and without their waiver of such notice, is a nullity, and confers no jurisdiction on this court to decide any question thereunder.

The motion herein is sustained, and the case is dismissed.

HARRISON, V. C. J., and PITCHFORD, McNEILL, and RAMSEY, JJ., concur.

BRADLEY et ux. v. SMITH. (No. 9780.)

(Supreme Court of Oklahoma. June 29, 1920.)

(Syllabus by the Court.)

Mortgages ⇐507—Sale by sheriff on advertised date after his removal held not void.

By virtue of section 1702, Revised Laws 1910, where a sheriff received an order of sale from the district court to sell certain real estate, and advertised the property for sale on the 3d day of March, he may sell the same on said date, although he had been removed from office on the 2d day of March, and the sale conducted by him and approved by the court is not void for the reason he was not sheriff at the time of said sale.

Appeal from District Court, Ottawa County; Preston S. Davis, Judge.

Action by Wesley M. Smith against Napoleon J. Bradley and wife to recover a money judgment on notes and to foreclose a real estate mortgage, in which, after confirmation of sale, defendants filed a supplemental motion to set aside the order of confirmation. Motion overruled, motion for new trial denied, and defendants appeal. Affirmed.

Charles B. Mitchell, Albert D. Bennett, and Dennis H. Wilson, all of Miami, for plaintiffs in error.

L. A. Wetzel, of Miami, for defendant in error.

McNEILL, J. This action was commenced in the district court of Ottawa county by Wesley M. Smith, plaintiff, against Napoleon J. Bradley and wife, to recover a money judgment on certain notes and to foreclose a real estate mortgage given as security on said notes. Personal service was had on the defendants, and judgment was rendered on the 15th day of May, 1914, for the amount of said notes, and for foreclosure of mortgage on certain lots in Miami, Okl. No appeal was taken from the judgment, and the same became final. On the 15th day of January, 1916, an order of sale was issued out of the district court of Ottawa county, directing the sheriff of said county to advertise according to law and sell the lots described in the mortgage. G. O. Gibson was sheriff, and advertised the property would be sold at sheriff's sale on March 3, 1916, at 2 p. m. The return of the officer discloses the sale was conducted by Gibson, and Smith, the plaintiff, purchased the property at said sale. Thereafter on the 19th day of April, 1916, a motion was filed to confirm said sale and on said date the court made an order confirming said sale and ordering the sheriff to execute a deed to the purchaser. On the 29th day of April, the defendants Bradley and wife filed a motion to set aside the order confirming the sale for the reason they had intended to file objections, and further alleged that fraud and deceit was practiced on the court. The motion did not set out what the fraud or deceit consisted of, but simply contained the allegation that fraud and deceit had been practiced.

On April 29, 1916, it appears another motion was filed by the attorney for Mr. Smith to confirm the sale. These motions were never passed on by the court, and attorney for Bradleys contended they are still undisposed of. On April 30, 1917, on motion of the plaintiff, the court made an order directing Ed Freeman sheriff of said county and successor to G. O. Gibson to execute a sheriff's deed to Smith. Thereafter on October 11, 1917, the Bradleys filed a supplemental motion praying that the order confirming the sale be set aside, for the reason that G. O.

Digitized by Google

Gibson, the sheriff of Ottawa county, was removed from office March 2, 1916, and was suspended until the 7th day of September, 1916, and that on the 3d day of March, when the sale was conducted, the said G. O. Gibson was not the sheriff of Ottawa county. To the motion certain affidavits were attached to support this contention. This motion was overruled by the court, and the defendants Bradley filed a motion for new trial, which was overruled, and they have now appealed from said order to this court.

It is the contention of the Bradleys that when G. O. Gibson, the sheriff, was removed from the office on March 2d, and thereafter sold the property on March 3d, that the sale and proceedings by him were void. In this we cannot agree. The Legislature has made provision for just such conditions as this by adopting section 1702, Revised Laws 1910, which is as follows:

"Sheriffs, undersheriffs and deputies may execute and return all such writs and processes as shall be in their hands at the expiration of their office, or at the time of their removal from office, which they shall have begun to execute by service, levy or collection of money thereon."

This statute does not appear to have ever been construed by this court, but an identical statute was construed by the Supreme Court of Kansas in the case of Head v. Daniels, 38 Kan. 2, 15 Pac. 911. The portion of the ninth syllabus is as follows:

"Where a sheriff levies an execution upon real estate, and advertises the property for sale, he may then sell the same, although his term of office expires two days before the sale."

It is unnecessary for us to quote further from the opinion. This case is identical with the facts in the case at bar, and construes an identical statute, and we know of no decisions to the contrary, and see no reason why the same should not be followed.

There being no other reasons set out in the motion why the order confirming the sale should be set aside, no fraud was alleged or attempted to be proven, but the only ground relied upon was that the party who had conducted the sale was not sheriff at the time, but had been suspended. The statute having authorized the sheriff to make said sale, although his term of office had expired, or if he was removed, said proceedings would not be void. It therefore follows the trial court did not err in overruling the motion to set aside the order confirming the sale.

For the reasons stated, the judgment of the court is affirmed.

HARRISON, V. C. J., and PITCHFORD, JOHNSON, and RAMSEY, JJ., concur.

KRAUTER v. KRAUTER. (No. 11249.)

(Supreme Court of Oklahoma. June 29, 1920.)

(Syllabus by the Court.)

Marriage ⟸63—Court decreeing annulment may make equitable division of property jointly accumulated.

In an action where a marriage is found and decreed to be incestuous and void, because the parties were first cousins, the woman having entered into said marriage contract in good faith, the court, while it cannot grant alimony as such, has authority to make an equitable division of the property jointly accumulated by the parties while they lived together as husband and wife.

Appeal from District Court, Tulsa County; Owen Owen, Judge.

Suit by Lucy Krauter against Bert Krauter for annulment of marriage. Judgment for plaintiff making an equitable division of property, and defendant appeals. Affirmed.

H. Tom Kight, of Claremore, for plaintiff in error.

Robinett & Ford, of Tulsa, for defendant in error.

McNEILL, J. This action was commenced in the district court of Tulsa county by Lucy Krauter filing suit against Bert Krauter to have a certain marriage contract entered into on the 18th day of November, 1905, declared null and void for the reason at the time of entering into said contract said Lucy Krauter and Bert Krauter were first cousins and, under and by virtue of the laws of Michigan where said marriage was consummated, the same was incestuous and void, and that the same is incestuous and void under the laws of the state of Oklahoma where the parties reside. Plaintiff alleged that at the time of the marriage she entered into said marriage in good faith and that defendant nor herself had any property, but by their joint accumulations and with the aid and assistance of their parents they had accumulated considerable property consisting of a hotel in Tulsa, valued at $12,000, and a rooming house and drug store in the city of Claremore, valued at approximately $12,000.

The defendant answered admitting the marriage and that the same was incestuous and void by reason of the relation of the parties both under the laws of Michigan where it was consummated and under the laws of Oklahoma where they reside, and alleged that he owned property described in plaintiff's petition, and the property over and above the indebtedness was of the approximate value of $16,000. Defendant alleged that he had always supported the plaintiff, but that the property belonged to him, and asked that the marriage contract be declared

Digitized by Google

void and he be decreed to own all of said property, and further alleged that plaintiff had $2,000 in the bank in Tulsa in her name, being the earnings from the Tulsa property, and asked that the court decree the same to be his property.

Upon trial of the case to the court, the court found, first, that the marriage contract between the plaintiff and defendant entered into in the state of Michigan was incestuous and void, and was incestuous and void under the laws of the state of Oklahoma where they reside. The court found that the parties had accumulated property by their joint efforts amounting to approximately $16,000, and that a partnership existed between the parties since their pretended marriage, and during the time they lived and cohabited together, and that the property should be divided share and share alike. The court further found that plaintiff entered into the marriage contract in good faith. From said judgment the defendant has appealed.

For reversal it is the contention of the plaintiff in error that the marriage, being incestuous and void, was so from its inception, and that plaintiff was not entitled to alimony, nor did she acquire any right in and to any of the property acquired during marriage, but as a matter of law the property accumulated was the property of said plaintiff in error, and defendant in error had no rights therein. The record discloses that the plaintiff and defendant were first cousins, and at the time of their marriage the plaintiff was 15 years of age, and the defendant about 22 years of age. The cases of this kind and character are not very numerous, and the rights of the parties thereunder often present very intricate and delicate questions. If plaintiff in error's position is true, we are confronted with an unusual condition. The defendant in error, a farmer girl 15 years of age, entered into a marriage contract with her first cousin, which under the law was void. At the time of the marriage they had no property. For practically 15 years they worked and toiled together and have saved and accumulated about $16,000 worth of property over and above their indebtedness. The court found that the plaintiff had assisted in accumulating the property and the same was the saving of their joint efforts. Can it be said that under such conditions the defendant in error shall be turned out and receive no benefits from her 15 years of work and the accumulations thereof, and her pretended husband, although a party to the void marriage, reap all the benefits from their joint accumulations, and not only retain the fruits of his labor, but her accumulations also free from any right or claim of the plaintiff? We do not believe that such a contention is tenable under the law, nor can such a harsh and cruel interpretation of the law be sustained.

While it is true the general rule is, when a marriage is void because incestuous or bigamous or for other reasons, the woman acquires no right to dower, curtesy, or alimony notwithstanding she has acted in good faith; a void marriage ordinarily conferring no right upon either of the parties in respect to the property of the other, such as would be conferred if the marriage was valid. But a different question is presented where the property is accumulated during the existence of the void marriage relation. The rights of the parties in regard to their joint accumulations was stated in the case of Fuller v. Fuller, 33 Kan. 582, 7 Pac. 241, as follows:

"It is our opinion, however, that in all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had; and the court in making such division should inquire into the amount that each party originally owned, the amount each party received while they were living together, and the amount of their joint accumulations."

This case was followed by the Supreme Court of Kansas in the case of Werner v. Werner, 59 Kan. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. Rep. 372, wherein the court stated:

"In an action wherein the marriage between two parties is found to be void because one of the parties had a husband or wife living at the time of the invalid marriage, and a decree of nullity is entered, the court, while it cannot grant alimony, as such, has authority to make an equitable division of the property jointly accumulated by the parties while they lived together as husband and wife."

The Supreme Court of California followed the same theory in the case of Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844, and discussed the distinction between the rights that one acquired in the others' property by reason of a void marriage, and the rights acquired in property that was accumulated during the void marriage by reason of the joint earnings and accumulations of the parties as follows:

"The controversy is, not over the property owned by the defendant prior to marriage, or acquired by him alone thereafter, but has to do with the acquisitions of the two parties after marriage, and before annulment. If both have contributed to such acquisitions, each has an interest which did not exist at the time of the marriage. The status quo could not be restored upon annulment, without making some provision for the equitable division of this property. In the absence of fraud or other ground affecting the right to claim relief, there can be no good reason for saying that either party should, by reason of the annulment, be vested with title to all of the property acquired during the existence of the supposed marriage."

The Supreme Court of Washington, in the case of Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900, said:

Digitized by Google

"But, independently of the statute of divorce, we think the court had authority to decree not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding, and within its equity power the district court had full jurisdiction to give adequate relief to the parties. The division that was made was eminently equitable and just."

This same rule of law has been followed by the courts of the state of Texas and announced in the case of Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246. The cases upon this question are annotated in the case of Deeds v. Strode, 6 Idaho, 317, 55 Pac. 656, 96 Am. St. Rep. 263. In the case of Schmitt v. Schneider, 109 Ga. 628, 35 S. E. 145, the Supreme Court of Georgia dismissed a case of the same kind and character, holding that the wife acquired no rights in the joint accumulation, and the court had no jurisdiction to grant relief. With this we cannot agree.

This being a proceeding in equity, the court had jurisdiction of the parties and of their property. Having declared that the marriage was void from its beginning, it was then incumbent upon the court to deal with the property of the parties accumulated by them during said time by their joint efforts. The defendant in this case was asking a court of equity to decree him to be the owner of $2,000 in cash which was in the name of the plaintiff in the bank.

Both parties were in a court of equity asking a court of equity to determine their property rights, and the court had a right to deal with the parties and their property as he found them. The court found that the joint accumulations of these parties consisted of property of the value of some $16,000. The court could not put the parties back in statu quo or in the position they were when they first entered into the void marriage. What as a matter of right and equity would become of this property that was jointly accumulated by the parties? Would a court of equity decree it to be the property of one to the exclusion of the other? We do not think so, and while it may be true that the relation between the parties could not strictly be termed a partnership, but it might be termed a quasi partnership, and the different courts have dealt with the situation on the theory that the relation of the parties created a quasi partnership. We think it is immaterial whether it is called a quasi partnership or not, but the facts bring the case squarely within the rule that a court of equity has the inherent power where the parties appear in said court, and the court has jurisdiction of both the parties and their property to adjudge the marriage void, and settle their property rights acquired during the existence of the marriage relation and make an equitable division thereof. There is no contention made if the court had jurisdiction or authority to make the division he did, that the same is not equitable. The court had jurisdiction to adjudicate the rights of the parties in the property accumulated during said relations.

For the reasons stated, the judgment of the court will be affirmed.

HARRISON, V. C. J., and KANE, PITCHFORD, JOHNSON, and RAMSEY, JJ., concur.

STERLING v. BOUCHER. (No. 11247.)

(Supreme Court of Oklahoma. July 6, 1920.)

(Syllabus by the Court.)

1. **Appeal and error ⟸361(1)—There must be petition in error, setting forth error complained of.**

The proceedings to obtain a reversal of a judgment of a trial court shall be by petition in error, filed in the Supreme Court, setting forth the error complained of. Section 1, ch. 219, Sess. Laws 1917, amending section 5238, Rev. Laws 1910.

2. **Appeal and error ⟸361(1) — Petition in error is jurisdictional.**

A petition in error is jurisdictional, and on failure to file the same this court will dismiss the appeal.

Error from District Court, Marshall County; George S. March, Judge.

Action by J. A. Boucher against W. G. Sterling to quiet title. Judgment for plaintiff, a new trial was granted, and plaintiff brings error. Dismissed.

Mathers & Coakley, of Ardmore, for plaintiff in error.

Geo. Trice, of Coalgate, and E. S. Hurt and A. A. Kelley, both of Madill, for defendant in error.

KANE, J. Motion of the party designated plaintiff in error, but who in fact is defendant in error, to dismiss sets up failure to give notice of appeal in the district court as provided by section 1, chapter 219, Sess. L. 1917, amending section 5238, R. L. 1910; failure to give notice of the time and place to settle and sign case-made, and signing and settling case-made before the expiration of the time allowed for suggesting amendments thereto (Harkins v. McPhail, 187 Pac. 222; Guymon Electric Light & Power Co. v. Spears, 175 Pac. 347); and improper designation of parties on appeal.

[1] From an examination of the record and the docket of this court, it further appears that no petition in error has been filed. A proceeding to obtain a reversal, vacation, or modification of any order or judgment of a

Digitized by Google

trial court shall be by petition in error filed in this court setting forth the error complained of. Section 5288, R. L. 1910, supra. This court will not consider any errors except those assigned or specified. Hopley, Treasurer, etc., v. Benton, 38 Okl. 223, 132 Pac. 808; 3 C. J. 1329, § 1462, and cases cited therein.

[2] A petition in error is jurisdictional. If there is no assignment of error at all this court will, of course, dismiss the appeal. De Vitt et al. v. City of El Reno et al., 28 Okl. 315, 114 Pac. 253; Marvel v. White, 5 Okl. 736, 50 Pac. 87.

For the reasons stated, the case is dismissed.

RAINEY, C. J., HARRISON, V. C. J., and PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

In re BEAN. (No. A-3809.)

(Criminal Court of Appeals of Oklahoma. July 17, 1920.)

(Syllabus by the Court.)

1. **Habeas corpus ⟸85(1)—Petitioner must show facts entitling him to bail.**

Upon an application for writ of habeas corpus to be let to bail, after commitment for a capital offense by an examining magistrate, the burden is upon the petitioner to show facts sufficient to entitle him to bail, when those facts do not appear from the evidence adduced on the part of the prosecution.

2. **Bail ⟸49—On evidence not creating a reasonable doubt of guilt of a capital offense bail will be denied.**

If, upon a consideration of all the evidence introduced on the application for bail, the court is of the opinion that it is insufficient to create a reasonable doubt of the petitioner's guilt of a capital offense, bail will be refused.

3. **Bail ⟸49—Evidence not creating such a reasonable doubt of guilt of capital offense as to entitle to bail.**

Upon this application, the evidence considered, and bail denied.

Petition by M. H. Bean for writ of habeas corpus to be let to bail. Writ denied.

O. L. Rider, of Vinita, for petitioner.

The Attorney General, W. C. Hall, Asst. Atty. Gen., and C. F. Gowdey, Co. Atty., of Nowata, for respondent.

DOYLE, P. J. In this proceeding the petitioner filed in this court on July 7, 1920, his duly verified petition, alleging that he is unlawfully imprisoned in the county jail of Nowata county and deprived of his liberty by the respondent, sheriff of Nowata county; that he has been committed to said jail by an examining magistrate upon a preliminary examination held on the 25th day of October, 1919, on a complaint charging petitioner jointly with one Elmer Deere and one Oscar Sherman with the murder of Fred Avery; that he is not guilty of the crime of murder as charged, and that the proof of his guilt of said charge is not evident, nor is the presumption thereof great; that a trial has been had of his codefendant Oscar Sherman on said charge, and the jury returned a verdict against the said Oscar Sherman of guilty of manslaughter in the first degree; that by said trial of the said Oscar Sherman it has been established that the evidence relied upon to sustain the said charge of murder against petitioner is not sufficient to make proof of said charge evident nor the presumption thereof great; that at the time of the commission of the crime charged against petitioner he was under the age of 21 years; that heretofore he made application to the judge of the district court of Nowata county for bail on said charge, and said application was by said court denied.

The undisputed facts as shown by the transcript of the testimony upon the trial of petitioner's codefendant Sherman are that Fred Avery, deceased, was shot in the perpetration of a robbery by petitioner and his codefendant Sherman. Petitioner and Oscar Sherman each testified that they were present. Petitioner testified that Sherman fired the fatal shot. Sherman testified that petitioner fired the fatal shot. Obviously, the court erred in submitting the issue of manslaughter in the first degree to the jury in the trial of Sherman. A homicide perpetrated without any design to effect death by a person engaged in the commission of a robbery is, under the statute, murder, although the robber did not intend to kill when he fired the fatal shot. See Allen v. State, 16 Okl. Cr. —, 180 Pac. 594.

[1-3] The settled rule of this court is that upon an application for bail by a writ of habeas corpus, after commitment for a capital offense by an examining magistrate, the burden is upon petitioner to show facts sufficient to entitle him to bail, when these facts do not appear from the evidence adduced on the part of the prosecution; and if, upon a consideration of all the evidence introduced on the application for bail, the court is of the opinion that it is insufficient to create a reasonable doubt of the petitioner's guilt of a capital offense, bail will be refused. In re Kerriel, 12 Okl. Cr. 386, 157 Pac. 369, and cases cited. It also appears that petitioner escaped from the county jail pending his trial, and was for some time a fugitive from justice.

Upon the record before us, and without entering into a discussion of the facts, we

Digitized by Google

deem it sufficient to say that in our opinion petitioner is not entitled to be admitted to bail, as a matter of legal right. It is therefore considered and adjudged that the writ be denied and bail refused.

ARMSTRONG and MATSON, JJ., concur.

Ex parte SMITH. (No. A-3739.)

(Criminal Court of Appeals of Oklahoma. July 20, 1920.)

(Syllabus by the Court.)

1. Criminal law ⟸1217—Defendant who has not served his sentence may be taken as on escape.

Where a defendant is tried, convicted, and sentenced to imprisonment, and has not served his sentence, and the same is not stayed as provided by law, he may be arrested as on escape and ordered into custody on the unexecuted judgment.

2. Criminal law ⟸1216(6)—Sentence of imprisonment not satisfied by mere expiration of time.

Expiration of time without imprisonment is in no sense an execution of the sentence, and, where the punishment is imprisonment, the sentence may be satisfied only by serving the imprisonment imposed, unless remitted by death or legal authority.

Petition by Wilson Smith for writ of habeas corpus. Writ refused.

Jeff D. McLendon, of Idabel, for petitioner. The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. In this proceeding petitioner by his counsel, Jeff D. McLendon, presented to this court on April 1, 1920, a petition alleging that he is unlawfully imprisoned in the state penitentiary at McAlester and restrained of his liberty by Fred Sweitzer, warden of said institution; that said imprisonment is under and by virtue of a commitment issued on the 20th day of March, 1920, by the court clerk of McCurtain county, which commitment is predicated upon conviction of petitioner and judgment rendered in the district court of McCurtain county on the 22d day of September, 1917, sentencing him to serve a term of two years' imprisonment in the penitentiary on a charge of embezzlement; that petitioner prosecuted an appeal from said judgment of the Court of Appeals, and on the 19th day of August, 1919, said conviction was affirmed (see 16 Okl. Cr. —, 183 Pac. 515); that in the opinion the court says that, where the record fails to show that the judgment was superseded by the giving of the required supersedeas bond in the court below, the presumption obtains that the judgment was immediately carried into effect by incarceration in the penitentiary; that there was never any mandate in said cause spread upon the minutes or journal of the district court of McCurtain county until the 27th day of March, 1920.

The Attorney General filed a general demurrer on the ground that said petition does not state facts sufficient to entitle petitioner to the relief prayed for.

[1, 2] It has been uniformly held by this court that, where a convicted defendant is at liberty and has not served his sentence, and the same is not stayed as provided by law, he may be arrested as on escape and ordered into custody on the unexecuted judgment, and that expiration of time without imprisonment is in no sense an execution of the sentence. See Ex parte Eldridge, 3 Okl. Cr. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967; Ex parte Alexander, 5 Okl. Cr. 196, 113 Pac. 993; Ex parte Eley, 9 Okl. Cr. 76, 130 Pac. 821; Ex parte Riggert, 33 Okl. 303, 125 Pac. 485.

It appearing that the application is insufficient to show that petitioner is entitled to the writ or rule to show cause, the demurrer was sustained, and the writ refused.

ARMSTRONG and MATSON, JJ., concurring.

GIGOUX v. HENDERSON. (No. 22687.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Bills and notes ⟸337—Bad faith necessary to charge holder with notice.

The rule is followed that in order to charge the purchaser and holder of a promissory note before maturity, with notice of infirmity or fraud in its procurement, bad faith must be shown.

2. Appeal and error ⟸1064(1) — Erroneous instructions probably misleading the jury constitute reversible error.

When the record shows an erroneous instruction which may and probably did mislead the jury, it cannot be said that substantial justice has been done; and the rule against reversal for immaterial error does not apply.

3. Appeal and error ⟸302(3)—Improper evidence not produced on motion for new trial cannot be considered.

Oral testimony touching a certain director's resolution should, under the showing made, have been admitted; but, as it was not produced in support of the motion for a new trial, it cannot be considered.

Appeal from District Court, Sumner County.

Digitized by Google

Action by J. F. Gigoux against John Henderson. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Danforth & Kavanaugh, of Denver, Colo., and Brown & Brown, of Wichita, for appellant.

W. W. Schwinn and W. H. Schwinn, both of Wellington, for appellee.

WEST, J. The plaintiff sued to recover on a promissory note and appeals from an adverse judgment. The defendant suggests that owing to the dates and the forms of notices of appeal the plaintiff has mistaken the date of the judgment, but from the journal entry it appears that the verdict was returned and the judgment entered on February 19, 1918. The motion for a new trial was filed two days later and overruled on May 27, 1919, and the notices of appeal are sufficient to bring before us this ruling. That motion included certain alleged errors occurring at the trial, and these are properly before us for consideration.

The plaintiff, having been a farmer, freight handler, railroad and stationary engineer, and having helped build some stockyards, became a freight clerk and checker at Greeley for the Denver, Laramie & Northwestern Railway Company. This company with several incorporated subsidiary concerns seemed to be engaged in an attempt to build and operate a railroad and float its stock, and especially to raise money therefor. The plaintiff knew a Mr. Johnson who seemed to be the head of all these companies and the active manager of all the enterprises involved, and who made speeches intended to inspire confidence in the success of the desired operations. Mr. Johnson succeeded in inducing the plaintiff to lend $6,000 in all upon his express statement—

"That it was needed to help carry the railroad through to Severence or Black Hollow. * * * This would enhance the value of the realty company and the stock of the other companies."

For the loans making up this amount he took notes signed by a constituent company called the Denver, Laramie Realty Company. Those notes were secured by collateral belonging partly to the realty company and partly to the land and iron company. He testified that he could have had the note of any one of the companies, but he went to Johnson, who told him to take one of the realty company's because he was a stockholder in it. The collateral notes taken as security were made to the land and iron company by a man named Failing, a stockholder living in Denver, and indorsed by Johnson. The latter called the plaintiff over the phone and asked him to come to Denver as he thought he would be able to settle up on the notes. The plaintiff went, taking his notes along expecting payment. When he arrived he was informed by Johnson that he had learned that the Failing notes were of no value, but that he had some gilt-edged paper which he would like plaintiff to take and make another extension. This paper was signed by a man named Henderson whom the plaintiff knew. A new note for $6,000, due in 90 days, was made out, and Henderson's notes as collateral were taken in place of the Failing notes. The Failing notes were good and were shortly thereafter paid.

When the Henderson note sued on herein became due, the plaintiff brought suit, alleging that he had bought this note before maturity indorsed by the payee, by Johnson, president. The defendant denied that the plaintiff paid anything for it, that he was a holder in due course or a bone fide holder, and alleged that its consideration had entirely failed, that it was executed to the railroad company under an agreement that it should not be used for any other purpose than the extension of the railroad, which road had violated its agreement. On the trial counsel for the plaintiff stated that they were not trying to say a good word on behalf of the railroad company or any of the allied companies—

"We are not here to make a brief for their rascality. It stands unique and alone in history."

But it was asserted that the plaintiff had no knowledge of any promise or agreement made to Henderson or as to how his note was obtained.

A companion case was before this court in Gigoux v. Moore, 105 Kan. 361, 184 Pac. 637, where a vivid picture of the enterprise may be found and where some of the matters presented here were finally determined.

Numerous errors are assigned upon the trial court's rulings as to the evidence and instructions given and refused; but, in view of what was said in the former decision, it is deemed unnecessary to take all these matters up at length at this time.

The plaintiff's chief contention is that the court erred in instruction No. 4, which was to the effect that the burden of proof was upon the plaintiff to prove his right to recover, and before the jury would be warranted in finding for him they must believe that upon the 13th day of September, 1911, the railroad company was indebted to the plaintiff upon a loan to it in the sum of $6,000 and that he surrendered certain securities which he held as collateral to such indebtedness, and took certain other collateral including the notes sued on. The fault found with this part of the instruction is that the indebtedness was literally that of the realty and not of the railroad company, but we think the evidence made it so plain that the various concerns involved went upon the theory of the three guardsmen "All for one, and one for all," that no material harm was

Digitized by Google

done by this expression, for, so far as the plaintiff's debt was concerned, it was owed by the railroad company for the money borrowed for its benefit.

[1] But further complaint is made of the same instruction charging that the jury must also find that at this time the plaintiff had no knowledge that the note sued on was procured by fraud or that the defendant had any lawful defense to it, "or that he had any information that would put a reasonable, ordinary, and prudent person upon inquiry in reference thereto. And in the event that you so find, then you are instructed that it would be your duty to find for the plaintiff the full amount of said note, * * * and, unless you so find, your verdict must be for the defendant." This in substance told the jury that, unless they should find that the plaintiff had no such information as to put a reasonable and prudent person upon inquiry, they could not find in his favor. It was made clear in the former opinion that, as in cases of notice of some infirmity in the instrument, bad faith in fact is required, and that mere failure to use ordinary diligence to follow up suggestive facts, or facts arousing suspicion, is not sufficient. Gigoux v. Moore, supra. See, also, Bank v. Reid, 86 Kan. 245, 120 Pac. 339, and Leavens v. Hoover, 93 Kan. 661, 145 Pac. 877. This complaint is met by the suggestion that in instruction No. 5 the court correctly gave the law and told the jury that the plaintiff could not be chargeable for failing to make inquiry unless he had knowledge of some defect, or had such knowledge in taking the note at such time as would amount to fraud. But after giving this instruction, No. 6 was given by the court using this language:

"From the admission in this case there never was a time when the railroad company could have forced the collection of this note. But if the plaintiff has established the fact by a preponderance of the testimony, as defined to you in instruction No. 4, he would have the right to recover regardless of the fact that the railroad company could not recover on the note. The plaintiff is not bound by any representations, private understanding or agreements of which he had neither notice nor knowledge."

[2] This is practically a reiteration of instruction No. 4, and there is nothing whatever in the record to indicate that the jury were not led astray by the charge thus erroneously given. Under these circumstances, it cannot be said that "substantial justice" has been done—which means a fair trial to each of the parties—and the rule against reversals for immaterial error does not apply. Dotson v. Railway Co., 81 Kan. 816, 106 Pac. 1045; Triplett v. Feasel, 105 Kan. 179, 182 Pac. 551.

[3] It was sought to be shown by oral testimony that a resolution had been passed authorizing the assets of one company to be used as security for obligations of any other. An objection was sustained on the ground that it was not the best evidence, although it was testified that no such resolution could be found. It would have been proper to show this by parol. Gillett v. Com'rs of Lyon County, 18 Kan. 410; C. K. & W. R. Co. v. Com'rs of Stafford Co., 36 Kan. 121, 12 Pac. 593; 14 C. J. 376, § 491; 17 Cyc. 504. But as the evidence was not presented on the hearing of the motion for a new trial, it cannot be considered now. Civil Code, § 307 (Gen. St. 1915, § 7209); Collins v. Morris, 97 Kan. 264, 155 Pac. 51.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

All the Justices concurring.

STONE et al. v. JARBALO STATE BANK OF JARBALO. (No. 22733.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Evidence ⇐368(5)—Notice to produce, describing document, held sufficient.

A notice given under section 366, Code Civ. Proc. (Gen. St. 1915, § 7270), is sufficient, although the notice may be defective, if it describes the instrument desired with sufficient particularity to enable the party notified to identify it.

2. Escrows ⇐14(1)—Bank violating instructions as to deed placed in escrow held liable for damages.

If a bank, after receiving a deed from the grantors therein named with instructions to deliver it to the grantee, on the payment of a certain sum of money, delivers the deed on the payment of a smaller sum, the bank is responsible for the damages sustained by the grantors by reason of the delivery of the deed in violation of the instructions.

3. Escrows ⇐14(1)—Evidence sustaining finding that bank received instructions relative to delivery of deed.

There was evidence which tended to show that the bank in the present case received the letter of instructions concerning the delivery of the deed.

4. Depositions ⇐81—May be withdrawn by leave of court for proper certification.

Depositions, by leave of court, may be withdrawn from the files and be returned to the officer before whom they were taken for proper certification.

5. Escrows ⇐14(1)—Bank liable for damages for violating instructions as to delivery of deed.

The grantors in a deed sent it with instructions to a bank to deliver the deed to

Digitized by Google

the grantee on the payment of a certain amount of money. The bank accepted an amount less than that named, delivered the deed, remitted by draft the amount received, and stated that the amount remitted was in full for the purchase price. The grantors immediately notified the bank that they would not accept that amount in full for the purchase price. The grantee in the deed immediately conveyed the land to third parties who mortgaged it. Afterward the grantors cashed the draft. *Held*, that the grantors can recover from the bank the damages sustained by them by reason of the delivery of the deed for an amount less than that named in the instructions.

Appeal from District Court, Leavenworth County.

Action by Harry Stone and another against the Jarbalo State Bank of Jarbalo. Judgment for plaintiffs, and defendant appeals. Affirmed.

John T. O'Keefe, of Leavenworth, for appellant.

W. W. Hooper, or Leavenworth, for appellees.

MARSHALL, J. The plaintiffs recovered a judgment for $1,640.40, and the defendant appeals. The plaintiffs entered into a written contract, dated January 24, 1917, with T. H. Moore, to convey to the latter certain real property owned by the plaintiffs in Leavenworth county, for $4,256.25, of which $100 was paid in cash, and $4,156.25 was to be paid March 1, 1917. The contract was in writing and was in duplicate. Both copies were prepared by H. E. Cockrell, and were by him sent to the plaintiffs who resided in Minnesota. They signed both copies and returned one of them to Cockrell. The contract provided that the contract and deed, when signed, should be deposited in escrow in the Jarbalo State Bank, a corporation. The contract was divided into articles, the first one of which described the land and stated that it was free and clear of all incumbrance except $1,425 and interest. The second article of the duplicate retained by the plaintiffs a copy of which was attached to the plaintiffs' petition contained the following words:

"First parties agree to sell to second party the above described real estate for the sum of forty-two hundred fifty-six $^{25}/_{100}$ dollars ($4,256.25), and to accept pay for same on the following terms: $100 in cash this date deposited in the Jarbalo State Bank to be held in trust until all papers are drawn and signed (contract and deed), and deposited in said bank in escrow and the balance $4,156.25, March 1, 1917, and to convey said real estate as described in Article 1 of this instrument, subject to the incumbrance therein named."

The answer, which was verified, denied the allegations of the petition, and alleged that if the words, "subject to the incumbrance therein named," appeared in the copy of the contract held by the plaintiffs unerased, they were left there by ignorance and mistake on the part of those who signed the contract. The answer also set out all or a large part of the correspondence between the plaintiffs and H. E. Cockrell, the agent who negotiated the contract for the sale of the property. The verified reply denied "each, all and every allegation in said answer contained."

March 1, 1917, W. T. Francis, acting for the plaintiffs, mailed a letter to F. B. Morgan as president of the Jarbalo State Bank, and inclosed the deed from the plaintiffs to T. H. Moore. That letter was as follows:

"Herewith please find deed from Harry and Lottie Stone to T. H. Moore for farm belonging to Harry Stone in Leavenworth county, Kansas, for delivery to T. H. Moore upon payment to you, for delivery to me the sum of $4,256.25; as per contract entered into on the 24th day of January, 1917, between Harry Stone and wife and said T. H. Moore.

"The contract refers to a mortgage of $1,425 now outstanding against this land and also provides that the parties of the second part will pay to you the said sum of $4,256.25, subject to the incumbrance of the mortgage above named.

"On payment to you of said sum of $4,256.25 you may deliver the executed deed to Mr. Moore and remit the $4,256.25 to me."

Morgan had been president of the defendant bank, but was not holding that position at the time the letter was written. He received the letter, and by mail sent it and the deed to T. H. Moore, who was a bookkeeper in the bank. H. E. Cockrell was the cashier. Moore received the deed and reported that fact to Cockrell. The next day Cockrell sent to the plaintiffs a draft for $2,615.85, and in the letter transmitting the draft stated that the draft was in full for the land. The plaintiffs immediately responded that they would not accept the amount remitted as the balance due on the purchase price. The dispute that arose in this manner culminated in the present action.

1. One of the questions argued by the defendant is that the court committed error in excluding from evidence the copy of the contract produced by it on the trial. From the copy produced by the defendant the words, "subject to the incumbrance therein named," had been erased. On March 3, 1919, but before the trial, the plaintiffs notified the defendant and its attorney of record that they requested an inspection and copy of certain letters. That notice contained the following:

"You are hereby further notified that the undersigned as attorney for the plaintiff desires an inspection of the agreement between Harry Stone and Lottie Stone, dated January 24th, 1917, for the sale of the real estate in controversy.

"This demand is made under section 7270 of the Code of Civil Procedure, of the statutes of the state of Kansas for the year 1915."

Digitized by Google

A dispute has arisen concerning the contents of that notice. The plaintiffs contend that the notice named the contract between Harry Stone and Lottie Stone and T. H. Moore, while the defendant contends that the notice was as herein quoted. For the purpose of this discussion we have accepted the contention of the defendant as being true. The defendant did not produce the contract for inspection previous to the time of trial, when the defendant offered it in evidence. The plaintiffs objected to its introduction for the reason that the notice had not been complied with. That objection was sustained. The defendant argues that under the notice given it was not compelled to produce the contract for inspection. The copy of the contract offered by the bank was not set out in the pleadings. The statute, section 366 of the Code of Civil Procedure (Gen. St. 1915, § 7270), under which the notice purports to have been given, reads:

"Either party or his attorney if required shall deliver to the other party or his attorney a copy of any deed, instrument or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence at the trial the original of which a copy has been refused. This section shall not apply to any paper a copy of which is filed with a pleading."

[1] The notice did not strictly comply with the Code, but the court thinks that it was sufficiently definite and certain to enable the defendant, without any possibility of making a mistake, to determine exactly what instrument the plaintiffs desired to inspect. The defendant should have complied with the request at least to the extent required by the statute. The defendant further insists that it was excused from complying with the request by the fact that it did not have control of the copy of the contract. The contract was drawn by H. E. Cockrell, the defendant's cashier, and was with T. H. Moore, its bookkeeper. Evidently one or both of them had the copy of the contract. When the bank was notified of the request of the plaintiffs, Cockrell and Moore must have known of that request, and must have deliberately declined to comply therewith, and the bank cannot escape the consequences of their conduct. The court rightly excluded from evidence the copy of the contract produced by the bank.

[2] 2. The defendant complains of the exclusion of the correspondence between Cockrell and the plaintiffs which the defendant offered in evidence for the purpose of proving the terms of the contract between the plaintiffs and Moore. This action is not between the plaintiffs and Moore, the person with whom they contracted and who was the grantee named in the deed signed by them; the action is against the defendant bank for delivering the deed to Moore contrary to the instructions to the bank. Moore is not a party to the action. No reformation of the contract can be had in this action, and none is asked. The instructions to the bank were to turn over the deed on the payment of $4,256.25. The instructions were not followed. If they could not be followed, it was the duty of the bank, not to construe the contract, but to hold the deed and notify the plaintiffs that their instructions could not be complied with, and to ask for further direction concerning the disposition of the deed. This conclusion is supported by Bank v. Wilson, 101 Kan. 72, 165 Pac. 859, Allen v. Bank, 102 Kan. 592, 171 Pac. 638, Supply Co. v. Bank, 103 Kan. 654, 176 Pac. 129, and Bank v. McCutcheon, 106 Kan. 303, 187 Pac. 697. On this question the correspondence between Cockrell and the plaintiffs was wholly immaterial, and was properly excluded.

Responding directly to the complaint of the defendant, the court says that the plaintiffs introduced in evidence their copy of the contract; it was not ambiguous; it did not require any explanation; and all preliminary negotiations, whether oral or in writing, were merged in the contract. When the defendant failed to introduce in evidence the copy of the contract produced by it, there was no reason for introducing in evidence the negotiations preliminary to the contract.

[3] 3. The defendant denies having received the letter written by the plaintiffs transmitting the deed to F. B. Morgan, the former president of the bank. The evidence clearly shows that Morgan received both the letter and the deed, and tends to show that he inclosed them in another envelope and mailed them to T. H. Moore. The evidence clearly shows that Moore received the deed; he must have received the letter with the deed. Moore informed Cockrell that he had received the deed. Cockrell made out the draft for $2,615.85, and sent it to the plaintiffs. The jury was justified in concluding that Cockrell had knowledge of the letter, and that the bank had received it.

[4] 4. The defendant complains that the plaintiffs were permitted to read in evidence certain depositions taken by them after the depositions had been withdrawn and refiled without notice to the defendant. On the question of notice the record seems to be against the defendant, for the defendant in its abstract states that on April 24 the court made the following order:

"Now on this 24th day of April, 1919, came the plaintiff herein by W. W. Hooper, Esq., one of their attorneys, and also comes the defendant herein by John T. O'Keefe, Esq., its attorney, and thereupon on application of plaintiff's attorney, leave is hereby given plaintiff's attorney to temporarily withdraw depositions of plaintiffs, filed April 22, 1919. to have the notary public properly certify them according

Digitized by Google

to law, to all of which the defendant duly excepts."

The order clearly shows that the defendant had notice of the application to withdraw the depositions and recites the purpose of the withdrawal. Such withdrawal for the purpose named was within the rule established by the authorities. 18 C. J. 722, 723.

[5] 5. The defendant pleaded and now argues that the plaintiffs accepted the money sent to them by H. E. Cockrell in full satisfaction of the purchase price. The evidence tended to show that Moore, immediately upon receiving the deed to the land, conveyed it to other parties who executed a mortgage thereon. Moore therefore could not reconvey the land to the plaintiffs. The received the money on the draft after they discovered that the land had been sold by Moore. In support of its argument the defendant cites Neely v. Thompson, 68 Kan. 193, 75 Pac. 117, Baugh v. Fist, 84 Kan. 740, 115 Pac. 551, and Contracting Co. v. Railway Co., 102 Kan. 799, 172 Pac. 527, where it was held that on a claim the amount of which is disputed the acceptance of an amount less than that claimed, in full satisfaction thereof, discharges the obligation. There was no dispute about the amount of money named in the letter of instructions to the defendant. The defendant could not deliver the deed for less than the amount named, and remit that amount to the plaintiffs and say that a dispute existed concerning the amount that the plaintiffs were to receive for the land. The situation in the present action is more like that described in St. L., Ft. S. & W. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421, where it was held that—

"The payment of a portion of an ascertained, overdue, and undisputed debt, although accepted in full satisfaction, and a receipt in full is given, is not a satisfaction of the balance; and will not, where there is no new consideration, estop the creditor from recovering the remainder of such debt." (Syl. 1.)

And it was also held that—

"Before the acceptance by the creditor of an amount less than is claimed will operate as a settlement or satisfaction of the entire debt, it must have been accepted on an express agreement to that effect." (Syl. 2.)

Even if there were a misunderstanding between the plaintiffs and Moore concerning the amount that the plaintiffs were to receive under the contract, the defendant could not deliver the deed to Moore and escape the consequences of violating the instructions.

The plaintiffs contend that the evidence showed that the bank received the full amount of $4,256.25, but the court has considered the matter as though the bank received only the amount remitted in the draft.

If this action were by the plaintiffs against Moore for the recovery of the balance of the purchase price, the evidence that was introduced would not necessarily establish that the plaintiffs accepted the draft, or the money thereon, in satisfaction of the full amount of the purchase price claimed by them.

Other questions are argued by the defendant, and they have been examined; but the court does not find anything in them to warrant a reversal of the judgment.

The judgment is affirmed.

All the Justices concurring.

HAWLEY v. ANDERSON, County Judge, et al.

(Supreme Court of Oregon. July 6, 1920.)

1. Constitutional law ⇐33—Amendment authorizing increase of indebtedness for road purposes not self-executing.

Amendment of Const. art. 11, § 10, in 1919 (see Laws Sp. Sess. 1920, p. 5), to permit counties to incur indebtedness for permanent roads up to 6 per cent. of the assessed valuation is not self-executing so as to enlarge the debt limit without the enactment of a statute for that purpose.

2. Constitutional law ⇐26—Amendment limiting indebtedness does not preclude smaller limit by Legislature.

Since the legislative powers of the state are absolute except as limited by the Constitution, the Legislature can limit the indebtedness of a county to a smaller amount than the limit fixed by an amendment to the Constitution.

3. Constitutional law ⇐33—Amendment increasing debt limit does not change statute fixing old limit.

The amendment to Const. art. 11, § 10 (see Laws Sp. Sess. 1920, p. 5), limiting county indebtedness for permanent roads to 6 per cent. of the assessed valuation, not being self-executing does not increase the limit of 2 per cent. fixed by Gen. Laws 1913, p. 175, § 19, passed in accordance with the Constitution prior to its amendment.

4. Counties ⇐178 — Election for excessive bond issue does not authorize issue up to limit.

An election for the issuance of county road bonds under Gen. Laws 1913, p. 170, section 4 of which requires the order to declare the minimum amount to be expended upon each specified road, which authorized the issuance of bonds in excess of the limit prescribed by section 19 of that act, does not permit the issuance of bonds up to that limit, since the bond issue of the smaller amount presents an entirely different question from that submitted.

McBride, C. J., and Harris and Johns, JJ., dissenting.

In Banc.

Original proceedings in mandamus by W. P. Hawley against H. S. Anderson, County

Digitized by Google

Judge, and others, constituting the County Court of Clackamas County, Or. Demurrer to alternative writ sustained, and proceeding dismissed.

This is an original proceeding in mandamus. The alternative writ, heretofore issued herein, recites the various steps taken by legal voters of Clackamas county petitioning for an election upon the question of issuing bonds for the construction of permanent roads in the county, and the several proceedings had thereupon by the county court, resulting, finally, in an election wherein a majority of the votes cast favored the issue of 3,400 bonds of the denomination of $500 each, including the final order for such issue, and the advertisement of the sale of a portion of such bonds, including $70,000, par value, maturing in six years, and $70,000, par value thereof, maturing in seven years. It is further recited that the plaintiff submitted bids for the purchase of 100 of such bonds maturing in six years, and 100 thereof maturing in seven years, at par, plus accrued interest, that the county court accepted such bids, and plaintiff has tendered payment therefor in accordance with the terms of his bids, but that defendants have failed and refused to make delivery. From the exhibits which are attached to and made a part of the writ it appears that the proceedings were had under the provisions of chapter 103, General Laws of Oregon for 1913. In the order made by the county court declaring the result of the election, in accordance with section 11 of the act of 1913, supra, occurs the following recital:

"And it further appearing to the court that the total assessed valuation of all property within Clackamas county, Or., as shown by the assessment roll of 1918 and upon which the taxes payable in 1919 are levied, is $28,968,526.48, and that there are no bonds outstanding against Clackamas county for permanent road purposes and remaining unpaid at this time, or at the time of the authorization of this bond issue."

This excerpt is of interest in connection with the fact that the bond issue involved amounts to $1,700,000.

Section 19 of the act reads thus:

"No bond shall be issued under this act that will in the aggregate, together with the bonds outstanding, and the bonds offered to be sold, be in excess of two (2) per cent. of the assessed valuation of the county at the time the bonds are issued."

Section 4 of the act requires that the order calling the election shall declare, among other things, the minimum amount to be expended upon each specified road, and the county court, in obedience to this mandate, included in the order this recital:

"It is further ordered that the following described roads in Clackamas county be built and improved by the money so raised, and that the location of said roads, the beginning and terminus thereof, and the maximum amount to be expended on each be as follows," etc.

Both the petition and the order calling the election contain the following provisions:

"Each road district shall levy special road taxes to prepare the grade, and lay the base for hard surfacing in its district.

"When such grade and base are completed the county court shall, with due diligence, proceed to lay the hard surface.

"The county court is authorized to lay the hard surface with its own plants at force account, or to contract the same: Provided that, if a contract shall be let only for the laying of said hard surface, the county court shall purchase and furnish to the contractor all the material necessary in the laying of the hard surface.

"Each road district shall be authorized at its annual meeting held for the purpose of levying a special road tax to elect three freeholders who shall constitute an advisory committee to confer with the county court in disbursing the road fund belonging to such district."

A demurrer was filed by the defendants challenging the sufficiency of the complaint upon the face of the foregoing recitals.

O. D. Eby, of Oregon City, for plaintiff.

Gilbert L. Hedges, of Oregon City, for defendants.

BENSON, J. (after stating the facts as above). There is but one serious question presented by the defendants upon the demurrer, and that is raised by their contention that the election is invalid because it calls for a bond issue largely in excess of 2 per cent. of the assessed valuation of the property in the county, and therefore violates section 19 of chapter 103 of the Laws of 1913, which is the only statute providing the means whereby a county may hold an election for the issue of bonds for the construction of roads. Plaintiff's reply to this contention is that the limitation expressed in section 19 of the act referred to nas been removed by the latest amendment of section 10, art. 11, of the Constitution, which became effective some months before the inception of the proceedings now under consideration. This section of the Constitution, as originally adopted, read thus:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion; but the debts of any county at the time this constitution takes effect shall be disregarded in estimating the sum to which such county is limited."

In 1911, when the crusade for better highways had become vigorous throughout the state, the people, by an initiative measure, amended this section to read as follows:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed

Digitized by Google

the sum of five thousand dollars, except to suppress insurrection or repel invasion or to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question."

Shortly after this amendment became effective, an election was held in Jackson county wherein a majority of the legal voters determined upon the issue of bonds to the amount of $1,500,000, for the construction of permanent roads, and suit was commenced to enjoin the issue of such bonds in the case of Andrews v. Nell, 61 Or. 471, 120 Pac. 383, 123 Pac. 32. In that case it was held that the constitutional amendment was not self-executing, so far as it enlarged the debt-creating power of the county, and that there could be no election for the issue of bonds thereunder without prior legislation providing the means or procedure whereby the voters of the county might register their wishes in the matter. Following this decision, the Legislature enacted chapter 103, General Laws of Oregon for 1913, which is the act under which the defendants proceeded in the election which is here involved. Prior to the passage of this act, at the general election in 1910, the people, by initiative action again amended section 10, art. 11, of the Constitution to read thus:

"No county shall create any debts or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion or to build and maintain permanent roads within the county; and debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate with previous debts and liabilities incurred for that purpose exceed two per cent. of the assessed valuation of all the property in the county." See Laws 1913, p. 9.

This 2 per cent. limitation was reiterated in section 19 of the act of 1913, supra.

Again, in 1919, under the influence of a vigorous campaign for good roads, this section of the Constitution was amended so that the concluding clause reads as follows:

"And debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate, with previous debts and liabilities incurred for that purpose, exceed six per cent. of the assessed valuation of all the property in the county." Laws of Oregon, Special Session, 1920, p. 5.

[1, 2] Keeping in mind the ruling of this court in Andrews v. Nell, supra, that this section of the Constitution is not self-executing as regards its enlargement of the debt-creating power of counties, it seems to be clearly established by the authorities that section 19 of the act of 1913, limiting such indebtedness to 2 per cent. of the assessed valuation of the county, is still in full force and effect. It is fundamental that the powers of the legislative department of a state are absolute, except as limited by the Constitution. 12 C. J. 804. In other words, the Constitution says to the legislative department, You may provide the machinery whereby counties may issue bonds, incurring an indebtedness for permanent roads, but your machinery is ineffective if it undertakes to authorize such a debt in excess of 6 per cent. of the assessed value of the property in the county. This leaves the Legislature with full power to limit the county to a still smaller indebtedness, as it has done in the act of 1913.

[3] This conclusion is not affected by the fact that the statute was already in existence when the constitutional amendment was adopted. It appears to be the uniform holding of the courts that a constitutional provision which is not self-executing does not affect existing legislation until the enactment of the legislation putting it into effect. 12 C. J. 739; 6 R. C. L. 34; Hall v. Dunn, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193; State ex rel. v. Portland Ry., L. & P. Co., 56 Or. 32, 107 Pac. 958.

[4] It might be (although it is not necessary to decide) that, if the act of 1913 were differently framed, the election in this case could be regarded as valid up to the limit of 2 per cent. of the assessed valuation of the county, but, since the statute requires the order submitting the question to a vote of the people to specify the roads which are to be constructed or repaired, and the minimum amount to be expended upon each of them, it will be readily seen that a bond issue of a much smaller amount would be an entirely different question from that upon which the people have voted. It follows that the demurrer must be sustained, and the proceeding dismissed.

BURNETT, BENNETT, and BEAN, JJ., concur.

McBRIDE, C. J. (dissenting). The proceedings of the county court are regular in form, and there is left the one serious question as to the efficacy of the laws, now on the statute books, to authorize the election by which the issuance of the bonds was authorized.

It is argued by counsel who presents the case on behalf of the defendants that the election is invalid because it calls for a bond issue in excess of 2 per cent. of the assessed valuation of the property in the county, and is therefore in violation of section 19 of chapter 103 of the Laws of 1913, which is the only statute providing the machinery whereby a county may hold an election for the purpose of authorizing an issue of bonds for the construction of roads.

The plaintiff, on the other hand, contends that the amendment to section 10, art. 11, of

Digitized by Google

the Constitution, which was adopted June 3, 1919, and became effective by proclamation of the Governor on June 23, 1919, operated proprio vigore to remove the limitation of 2 per cent. prescribed in section 19, c. 103, supra, and to authorize counties without further legislative action to issue bonds for the construction of roads, subject to the limitation prescribed in section 10 of article 11, as then amended; in other words, that the machinery for holding such elections being already in existence, and no new machinery being required for the purpose, the constitutional amendment furnished full authority to counties desiring so to do to proceed in the manner provided by chapter 103, supra, to hold an election for the purposes above set forth, if the proposed bond issue did not exceed the limitation of 6 per cent. prescribed by the last amendment. If the amendment operated as a grant of power directly to the counties to incur a bonded indebtedness within and up to the limit of 6 per cent. of the assessed valuation of the property subject to taxation, the conclusion is irresistible that the provision is practically, though not technically, self-executing, and that the proceeding here being considered is regular, and a bond issue valid.

If, on the other hand, the amendment is to be construed as merely an authorization to the Legislature to permit, by an act afterwards to be passed, counties to issue bonds within a limit of 6 per cent., but less if legislative wisdom should so determine, then the proceeding herein must fail.

This involves a construction of the section in question, which is a matter not devoid of difficulty, but which seems, in the judgment of the writer, to indicate that the amendment now being considered is and was intended as a direct grant of power to the counties to proceed with the legal machinery then in hand, and which, by force of the amendment, was entirely adequate for the purpose, to provide for permanent roads within their limits without interference from other sections of the state, acting by means of their representatives in the Legislature and without being limited in their action by other sections of the state.

It may be premised that this is not a case like Andrews v. Neil, 61 Or. 471, 120 Pac. 383, 123 Pac. 32, wherein it was attempted to hold an election for the issuance of bonds for road purposes in the absence of any statute authorizing such elections, or providing how or where such proceeding should be initiated. In that case we held that the county authorities could not improvise the machinery for calling and holding such an election, and that the attempt to do so was a nullity for that reason. Thereupon the Legislature passed chapter 103, supra, which enacted a complete Code of Procedure and provided carefully for every step necessary, from the inception of the proceeding to the final issue of the bonds, and which is concededly adequate to the proceeding here initiated, unless the percentage of the issue to be permitted is subject to regulation and restriction by the Legislature.

It may also be premised that, while a constitutional amendment is a law of a higher order than one enacted by the Legislature, it, nevertheless has the same effect upon existing legislation as a law passed by the ordinary methods. Thus it may amend or repeal a prior constitutional or statute provision in conflict with it, just as one statute may amend or repeal a prior one, if such is its necessary effect or intent.

In the instant case it would seem that such an intent is plainly evinced, if we examine the history of constitutional and statutory legislation upon the subject in hand. It is a familiar canon of constitutional construction that the courts, in determining the intent of a statute, will consider the circumstances under which it was enacted, and the mischief to be remedied by its enactment, with a view to so construing it, if reasonably possible, to correct the supposed defect sought to be obviated. Cooley Const. Lim. (7th Ed.) 100, 101.

With this rule in view, we will first examine the history and evolution of the constitutional provision now under consideration.

Section 7, art. 11, of the original Constitution provided in substance that the legislative Assembly should not create any debt against the state in excess of $50,000, with certain exceptions therein noted.

Section 10, art. 11, as originally adopted, is as follows:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion; but the debts of any county at the time this constitution takes effect shall be disregarded in estimating the sum to which such county is limited."

The Constitution was adopted in 1859, when the state did not contain to exceed 50,000 inhabitants, had little taxable property, and was poor in everything except potential natural resources.

A comparison of section 7 with section 10, supra, indicates that, while section 7 is a limitation on the power of the Legislature and addressed expressly to it, section 10 was an inhibition addressed expressly to the counties as such, and in the whole history of legislation upon this subject we find no statute authorizing counties to contract debts within the limit of $5,000. The section was considered as both a limitation and a permission to counties without further legislative action to contract debts within the prescribed limit, and the only cases which ever arose involving a construction of that section were in

Digitized by Google

those instances where it was claimed the limit had been exceeded.

The distinction attempted to be made above seems to have been in the mind of this court in the various cases, wherein it has been held that involuntary indebtedness thrust upon a county by operation of law and which it cannot escape is not within the constitutional inhibition; the substance of judicial reasoning being that, as the county is compelled by law to perform certain duties and to pay for such performance, it does not "create the indebtedness arising therefrom, but that, the obligation being thrust upon it by superior authority, it did not constitute any part of the $5,000 indebtedness contemplated by the Constitution and impliedly authorized thereby.

Returning now to the evolution of the constitutional amendment, in its present shape, we find that in 1910, owing to changed conditions resulting from new means of locomotion and carriage, inadequacy of rail service, and greatly increased population there arose a general demand for improved and permanent roads, and by an initiative measure section 10, supra, was amended to read as follows:

"No county shall create any debts or liabilities which shall singly or in the aggregate * * * exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion or to build permanent roads within the county; and debts for permanent roads shall be incurred only on approval of a majority of those voting on the question."

As before stated, there was no election machinery in existence by which the amended section could be put into execution, and we held that for that reason the counties could not avail themselves of the privilege therein granted until such machinery was provided.

Thereupon chapter 103, Laws 1913, was passed by the Legislature, with the following title:

"To authorize the county courts of the state of Oregon to issue and sell bonds or county warrants of the county for the purpose of building and maintaining permanent highways within the respective counties, and to provide a sinking fund for the purpose of retiring the bonds at maturity; to authorize the several counties of the State of Oregon to hold special elections for the purpose of submitting to the voters of the county the question of the issuance of bonds and warrants; and generally to provide a complete manner of procedure for the issuance of county bonds for the purpose of the building, construction and maintenance of permanent highways."

Pursuant to this act, many counties held elections for the purpose of authorizing the issuance of road bonds, and many extensive improvements were authorized and carried to completion.

In 1919 there arose a general demand for further improvements, and it being conceived that the limit of 2 per cent. on the assessed valuation of property would not raise sufficient funds with which to effect them, and transportation by means of heavy trucks and automobiles having become more and more necessary, the Legislature of 1919 submitted the present amendment, which reads as follows:

"No county shall create any debts or liabilities which shall, singly or in the aggregate, with previous debts or liabilities, exceed the sum of $5000.00, except to suppress insurrection, or repel invasion or to build or maintain permanent roads, within the county; and debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate, with previous debts and liabilities *incurred for that purpose*, exceed six per cent. of the assessed valuation of all the property in the county."

The words in italics indicate the only changes made from the amendment of 1910.

When this amendment was submitted and appeared in the voters' pamphlet there appeared an affirmative argument signed by two members of the Senate and one member of the House, and concurred in by a local good roads committee of Klamath county, setting forth the effect and purposes of the amendment. The members of the Legislature signing this argument were Hon. Geo. T. Baldwin, Senator from the Seventeenth district, Hon. W. W. Banks, Senator from the Fourteenth district, and Hon. G. H. Merryman, Representative from the Twenty-First representative district. The purposes of the measure and the reasons why it should be supported are given as follows:

"(1) The measure is intended to grant to counties the option of voting bonds up to 6 per cent. of assessed valuation for road purposes. It is a matter left entirely with the particular county. As to whether or not, after the passage of this measure, a county votes bonds, will be no concern of any other county.

"(2) Many counties desiring more funds for roadwork are asking that you consent that they burden themselves if they so desire. Your affirmative vote on this measure does not prejudice you in the least, nor cost you a penny.

"(3) If, in the opinion of a county, good roads are a paying investment and badly needed, is it not your duty to vote to allow that county to put the question to its people?

"(4) A private corporation cannot do business with only 2 per cent. of its capital available, much less can a public corporation make necessary improvements on that amount; 6 per cent. is little enough.

"(5) This is a purely local option measure; no county need assume burdens unless it desires.

"Appeal is made to the sense of fairness of voters to grant the opportunity and privilege for which the measure provides."

Digitized by Google

There was no negative argument, and the amendment was adopted at the polls by a large majority.

Under our election system, every voter in the state received this voters' pamphlet, and it is safe to say that those who voted for the amendment did so in the light of the explanation furnished by this official document, and vouched for by eminent members of the Legislature, which prepared and submitted it. That the voters thought they were wiping out and removing the 2 per cent. restriction and substituting a 6 per cent. restriction, and cast their ballots with that intent, must be apparent to any unprejudiced mind.

This brief summary of the history of the legislation on this subject makes it clear to the mind of the writer that it was the intent of the Legislature, when the amendment was submitted, and of the people when they adopted it, to do away with the previous 2 per cent. restriction and to permit the people of the several counties, within the limit prescribed, to say for themselves without legislative interference to what extent they would pledge the credit of their counties for the purpose of securing permanent roads.

The original section may have been restrictive, but both the amendments contain permissive elements in that they allow, and, as heretofore shown, were intended to allow, counties to go beyond the original restriction so long as they did not exceed the prescribed 6 per cent.

What was the mischief to be remedied? Clearly the limitation of the power of the counties to tax themselves for permanent roads, by removing the 2 per cent. limitation so that up to 6 per cent. they would be free to act in the matter as they might choose. The removal of the restriction was an implied grant of the power so to act.

It should be remembered that, in the absence of any restriction, there was in the counties inherent power to contract debts without limitation as to amount. The original section limited the exercise of this power to the creation of a voluntary indebtedness of $5,000. The present amendment still further enlarged the privilege, which, without some constitutional limitation, would have been boundless.

Its effect was not only impliedly to amend the previous amendment, but to amend chapter 103, supra, by implication, by inserting the word "six" instead of "two." It is simply a case of amending a law enacted by the Legislature by another enacted by the people. There was never any necessity for legislative enactment to prescribe the limit within which counties could incur indebtedness. The first amendment did that effectually, but what was then lacking was election machinery by which the counties could exercise the privilege given them by the amendment. Every provision of the Constitution takes effect at once, if there is in existence at the time of its adoption legal machinery by which its mandates can be enforced or its privileges exercised, and there is not an authority in all the reports cited by the defendant to the contrary, and they do not exist.

The question as to whether the amendment is or is not self-executing cuts no figure in this case. A self-executing provision is one which furnishes by its own terms the machinery by which the rights under it may be exercised, but it does not follow that because it does not contain within itself such a formula that the rights granted by it must remain in abeyance, if machinery adequate to carry its provisions into effect already exists, which is the case here. If a farmer purchases a scythe blade, the blade itself is not "self-executing," it will cut no grass until it has a snath, but, if he already has a snath that will serve the purpose, he would be but a foolish and extravagant husbandman if he purchased a new snath instead of using the one he already possessed. The simile is homely, but it seems to the writer to be appropriate in the present instance.

This amendment is no mere voluntary proposition suggested by a group of private citizens, but the solemn and deliberate act of the two great lawmaking bodies of the state acting in conjunction, possessing all the force of a statute and all the supposed sanctity that hedges about a constitutional amendment. Why should the Legislature be required to speak again and say in effect, "Section 19 of chapter 103, Laws of 1913, shall be amended by striking out the figure '2' in line 3, and inserting the figure '6' in lieu thereof, so as to read," etc., when the highest law that can be enacted has by implication done that very thing. To so hold seems to the writer to be clinging to the veriest shadow of an unprofitable technicality at the expense of defeating the intent of the Legislature, when it enacted and submitted the amendment and of the people when they ratified it.

The history of this legislation seems to the writer to show the legislative construction of the effect of the amendment, which is always entitled to weight, and the action of the half dozen or more counties which have acted upon that construction and voted to issue bonds indicates the construction which the people who voted for it placed upon it, and both indicate a common intent that it should become effective with the machinery ready at hand by which this privilege can be put into immediate effect, and it would be little short of a calamity if the people of Clackamas county and other counties which have taken similar action should be required to wait until the Legislature does what is seems to the writer the amendment itself has already done, and go to the expense of another election to authorize the county to

Digitized by Google

do what the amendment has already authorized to be done.

For the reasons above given, I dissent from the majority opinion.

HARRIS and JOHNS, JJ., concur in this dissent.

LIND v. BOULIN.*

(Supreme Court of Oregon. July 6, 1920.)

1. Replevin ⟸100(1)—Decree giving defendant the right to acquire ownership on completing payments held proper.

In replevin action by seller against buyer, who pleaded an equitable defense under L. O. L. § 390, as amended by Laws 1917, p. 126, decree giving plaintiff possession with the right in defendant to acquire ownership by completing payments *held* proper under the pleadings and the statute.

2. Replevin ⟸11(2)—Demand unnecessary where defendant claims title.

In replevin, where defendant claimed title in himself, it was unnecessary for plaintiff to prove a demand.

3. Pleading ⟸261—Refusal to permit amendment to answer changing defense held proper.

Under L. O. L. § 102, where defendant asked for an accounting under allegations as to the contract entitling him to certain price per yard for transportation of building materials, court properly refused to permit him to amend answer so as to allege contract requiring plaintiff to supply him with sufficient work to enable him to make the payments on an automobile truck and violation of such agreement by plaintiff entitling him to damages; such amendment substantially changing the defense and injecting an entirely new issue.

Department 1.

Appeal from Circuit Court, Multnomah County; Geo. R. Bagley, Judge.

Action by Charles E. Lind against William Boulin. Decree for plaintiff, and defendant appeals. Affirmed, with directions.

This proceeding began as an action at law, to replevy a certain motortruck which the complainant alleges had been wrongfully taken by the defendant. The defendant, in accordance with the provisions of section 390, L. O. L., as amended in chapter 95, Laws of 1917, filed his answer, wherein, after a general denial, an equitable defense is pleaded, which, in brief, is to the effect that in 1914 plaintiff was a contractor in Bellingham, Wash., for whom defendant began working with a Standard truck, hauling construction materials for certain highways, under an agreement that plaintiff was to make advances and pay certain expenses for defendant, and keep just accounts of his earnings, and that defendant continued so to work until May 21, 1917, when he traded in his Standard truck for the Velie truck which is the subject of this suit. When this trade was made, he avers that plaintiff made certain advances to defendant, enabling him to make his payments on the truck. Thereafter he continued to work for plaintiff, who agreed to keep him and his truck occupied, but ceased to employ him in the summer of 1918, whereupon he drove his truck to his home in Portland. It is further alleged that plaintiff has failed to keep just and true accounts between the parties, and has not credited him with the customary and reasonable hire for his work, and has charged him with interest on sums which he does not owe. It is also alleged that plaintiff paid for defendant, among other items, $331.94, which was then due from defendant to the Copeland Lumber Company, upon a note and mortgage which was by plaintiff charged to defendant's account, but that plaintiff refuses to satisfy the mortgage upon the records. The prayer is for an accounting and a decree awarding to defendant the sum found to be due, and satisfying upon the records the mortgage. A reply having joined issue upon equitable matters set up in the answer, a trial was had as in equity, and the court made and entered a decree as follows:

"It is ordered, adjudged, and decreed that the plaintiff is the owner of and is entitled to the immediate possession of that certain model 26–A Velie 3½-ton truck, with 148-inch wheel base, with dump body attachment, chassis No. 108, engine No. 13065—E.

"It is further ordered, adjudged, and decreed that the sheriff of Multnomah county, Or., be and he hereby is ordered and directed to deliver the possession of said truck to the plaintiff forthwith.

"It is further ordered, adjudged, and decreed that, in the event the defendant shall pay to the plaintiff on or before 30 days from the date of this decree the sum of $2,962.09, he shall have the right to purchase said truck from the plaintiff, and upon the payment of said sum of money within said time the plaintiff be and hereby is required to deliver a bill of sale of said truck to the defendant and thereby transfer an unincumbered title to said truck to the defendant.

"It is further ordered, adjudged, and decreed that, in the event the defendant fails, neglects, or refuses to pay said sum of $2,962.09 to the plaintiff on or before 30 days from the date of this decree, all of the right of the defendant to purchase said truck shall cease and determine, and that defendant shall have no further interest therein.

"It is further ordered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant his costs and disbursements herein, taxed at the sum of $———."

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 27, 1920.

Digitized by Google

From this decree defendant appeals.

Sanderson Reed, of Portland, for appellant.

A. A. Hampson, of Portland (Dey, Hampson & Nelson, of Portland, on the brief), for respondent.

BENSON, J. (after stating the facts as above). Defendant contends that, since plaintiff has not prayed for affirmative relief, the court exceeded its power in granting him a decree of strict foreclosure. This proceeding was begun as a replevin action, and the defendant followed the procedure set out in chapter 95, Laws of 1917, by pleading an equitable defense, and asking for an accounting, and plaintiff replied, without any specific prayer for equitable relief. The amendment of 1917 was designed to relieve a defendant, having an equitable defense, from the necessity of filing a complaint in the nature of a cross-bill, and permits him to set up such defense in answer to the complaint. The amendment provides that:

"Equitable relief respecting the subject-matter of the suit may thus be obtained by answer, and equitable defenses to new matter contained in the answer may thus be asserted by reply. When such equitable matter is interposed, the proceedings at law shall be stayed, and the case shall thereafter proceed until the determination of the issues thus raised as a suit in equity by which the proceedings at law may be perpetually enjoined or allowed to proceed in accordance with the final decree, or such equitable relief as is proper may be given to either party."

[1] It will be noted that the statute gives a large discretion to the trial court, and properly so. In the case at bar the complaint alleged the ownership of the truck to be in plaintiff, with the right of immediate possession, which was demanded. The answer denied every allegation of the complaint, alleged ownership of the truck and right of immediate possession in defendant, alleging further that, if an accounting should be had between the parties, it would develop that defendant had paid all of his obligations to plaintiff, and that he would be entitled to recover moneys from him. The reply joined issue thereon, and the case proceeded as a suit in equity, wherein the court found that plaintiff had purchased the truck, taking title in himself, and had agreed to sell it to defendant at cost, giving defendant time in which to make the payments. It was further found that, without having made the required payments, defendant wrongfully took possession of the truck and conveyed it from Bellingham, Wash., to Portland, Ore. An accounting was had, wherein it was determined that, while the defendant had made some payments on the purchase price, he still lacked $2,962.09 of having paid the price which would entitle him to any ownership in the property. If these findings are justified by the evidence, the court might have been content to do no more than to award the immediate possession of the car to the plaintiff, but this course would not have been just as to the defendant, and so, in a spirit of fairness, the decree gives him additional time in which to make his payments and acquire ownership of the property. This, we think, was clearly within the province of the court, under the pleadings and the statute.

[2] It is next urged that the evidence does not sustain the allegation that the taking by defendant was wrongful, and that there is no evidence of any demand for the return of the property. It is conceded, of course, that, if the taking was wrongful, no demand for the return is necessary. The evidence as to whether or not the taking was wrongful is to some extent conflicting and uncertain, but it appears from the defendant's answer that he claims title in himself, and the right of possession, a situation which relieves the plaintiff from the necessity of proving a demand. Brown v. Truax, 58 Or. 572, 115 Pac. 597.

[3] It appears from the record that the work done by defendant for plaintiff, after the purchase of the Velie truck, was done at the agreed price $1.52½ per yard, for all of which it is agreed that defendant had received credit. However, defendant sought to show that it was also agreed that he should be supplied with sufficient work at that rate to enable him to make his payments on the truck, and that plaintiff had violated this part of the contract by employing so many trucks that there was not work enough to keep defendant occupied, and that therefore he should be credited with the reasonable value of his services, which he claimed to be $2.50 per hour. In support of this position, defendant, during the trial, asked leave to amend his answer to include allegations of such breach of the agreement. The denial of this application is assigned as error. The defendant's answer is based upon an express contract, which he seeks to have enforced, but by the proposed amendment he would add a new issue, in the form of a breach of contract and damages therefor. Section 102, L. O. L., provides that during the trial amendments to pleadings may be allowed which do not substantially change the cause of action or defense. The amendment in question does substantially change the defense, and injects an entirely new issue, and was properly denied.

We have carefully analyzed the evidence in the case, and are satisfied that the findings made by the trial court are fully justified thereby. The decree is therefore affirmed, with the provision that the 30 days allowed defendant in which to complete his purchase

Digitized by Google

of the truck shall begin with the date when the mandate herein is entered in the lower court.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

JAMES v. WARD.

(Supreme Court of Oregon. July 6, 1920.)

1. Trial ⟸3—Case proceeded with as in equity on filing of answer setting out facts for equitable relief.

Under L. O. L. § 390, as amended by Gen. Laws 1917, p. 126, defendant in an action at law setting up in his answer facts entitling him to relief in equity and material to his defense, the case is properly proceeded with as a suit in equity till determination of the issues thus raised.

2. Vendor and purchaser ⟸85 — No agreement for rescission of contract shown.

Evidence in suit between parties to contract for sale of land *held* not to show agreement that it should be rescinded if title was not perfected by a certain date.

3. Appeal and error ⟸1009(3)—Opinion of trial court in equity case on disputed question of fact entitled to weight.

Opinion of the trial court in an equity case on a disputed question of fact is entitled to great weight because of opportunity had of seeing and hearing the witnesses.

4. Contracts ⟸241—May be modified by waiver of a term and acquiescence therein.

A party to a contract may waive any term intended for his benefit, and this, if agreed to and acquiesced in by the other party, modifies the contract accordingly.

5. Vendor and purchaser ⟸114—Right to rescind for fraud waived by treating contract in force.

A purchaser by treating the contract in force and continuing in possession of the premises enjoying the benefits after knowledge of fraudulent representations waives right to rescind on account thereof.

6. Vendor and purchaser ⟸85—Taking of possession by vendor on abandonment by purchaser not mutual rescission.

The taking possession by vendor of the premises when abandoned by the purchaser does not constitute a mutual rescission of the contract of sale; this being done that a third person, against whom he was prosecuting a suit to quiet title, should not gain an advantage by entering into possession and to protect the buildings.

7. Appeal and error ⟸1073(7)—Allowance of excessive attorney's fee on foreclosure of contract of sale held not immaterial.

Allowance of excessive attorney's fee on foreclosure of contract for sale of land is not immaterial, though there be no personal judgment, and purchaser has indicated intention not to reinstate the contract, as conditions may change and he may desire to redeem.

8. Vendor and purchaser ⟸294—Attorney's fees decreed in suit to foreclose contract of sale should be estimated only on the amount due.

Attorney's fees decreed in suit to foreclose contract of sale of land should be estimated, not on the full balance of unpaid price, but only on the amount found due, by payment of which, with such attorney's fee, it was decreed the purchaser might reinstate the contract.

Department 2.

Appeal from Circuit Court, Lane County; John S. Coke, Judge.

Action by Frances E. James against George D. Ward. There was a decree as asked by the answer in equity, and plaintiff appeals. Modified and affirmed.

See, also, 84 Or. 375, 164 Pac. 370.

On April 14, 1913, plaintiff, Frances E. James, acting through her husband, W. F. James, entered into a contract in writing with defendant, George D. Ward, by the terms of which defendant agreed to sell to the plaintiff a tract of land in Lane county, Ore., consisting of about 640 acres, described in the complaint, for the sum of $18,000, of which $1,000 was paid in cash, and 240 acres of land in South Dakota at the agreed price of $6,000 was taken in part payment therefor, making a total payment of $7,000 at the date of the contract, and the balance of $11,000 was to be paid on or before ten years after date, with interest at 7 per cent. per annum, payable annually. The vendee was to pay all taxes assessed during the time after January, 1913. There were included in the deal with the Lane county farm horses, cattle, and sheep, farm implements, and other personal property variously estimated in value from $1,000 to $2,000, all of which personal property was delivered by defendant to plaintiff with the land. After making the contract plaintiff paid on different dates during the first year $66.

Plaintiff claims that the contract of sale was mutually rescinded by the parties, and brought this action to recover the amount paid thereon. Thereupon the defendant filed an answer in the nature of a cross-complaint in equity seeking to foreclose the contract on account of the default of the plaintiff in the payment of interest and taxes due and unpaid under the contract.

Plaintiff alleges that in July, 1913, plaintiff and defendant entered into a verbal contract by the terms of which the defendant agreed to furnish to plaintiff within a year from the date of the contract an abstract showing clear and perfect title to the land described in the contract; that defendant

Digitized by Google

failed to furnish such abstract at any time. Plaintiff further states that during the winter of 1914 the parties mutually agreed to rescind the contract, and plaintiff surrendered to defendant the possession of the real estate described in the contract. Plaintiff avers that it was mutually understood by and between the parties at the time of signing the contract that the defendant would at once deliver to plaintiff an abstract of title to the Lane county land showing clear title in defendant, and that at the time defendant represented that he had a good title to the land.

Neither the personal property, the abstract of title, nor the South Dakota land was mentioned in the written contract. In May, 1913, plaintiff discovered that the contract failed to provide for an abstract of title to the Lane county land and had some talk with the defendant in regard thereto. It was at this time plaintiff claims defendant agreed that, if he did not furnish the abstract showing good title within a year, or by the time the next interest would become due, the plaintiff would not be required to take the land, and that he would repay her what she had paid thereon.

The defendant claims that at the time of entering into the contract it was verbally agreed that at the time of the last payment to be made under the contract and when a deed was to be delivered he should furnish to plaintiff an abstract of title to the property. The annual interest for the first year came due on April 14, 1914. On August 26 of that year Ward commenced a suit in the circuit court for Lane county to foreclose the contract on account of the failure to pay the interest and taxes. A decree of foreclosure was rendered by the trial court, and upon appeal to this court the decree was reversed, and the suit was dismissed without prejudice to the rights of either party. See Ward v. James, 84 Or. 375, 385, 164 Pac. 370. In the present suit the defendant denies that he agreed to furnish an abstract of title before the interest became due on or before April 14, 1914, or at any time before final payment, or that he agreed to rescind the contract.

It appears that after the execution of the contract plaintiff assigned the same and her interest in the Lane county land and personal property to George R. Rickman and Adaline Rickman, and delivered the possession of the land and personal property to them. They remained in possession thereof until March 20, 1915, when they vacated and abandoned the premises, as plaintiff asserts, on account of the defective title of defendant. Thereupon defendant, Ward, entered into the possession of the land. The personal property was never returned or offered to be returned to Ward. Part thereof seems to have been kept or dissipated by the Rickmans, and a portion thereof was paid to a real estate broker as commission for making the deal between plaintiff and the Rickmans.

To defendant Ward's further and separate answer in equity, showing that the contract had never been rescinded and seeking to foreclose the same, plaintiff replied, setting up all of the facts that were in her amended complaint, and asking that the answer in equity be dismissed, and the issues be tried to a jury as in an action at law.

The trial court found that there was no agreement on the part of defendant to furnish an abstract of title until final payment should be made by plaintiff; that there was no agreement on the part of defendant to rescind the contract; and that the sum of $3,954.12 was then due from plaintiff, Frances E. James, to defendant, George D. Ward, upon the contract, together with $800 attorney's fees in the suit. The court decreed that the contract be foreclosed, "provided that the plaintiff, Frances E. James, shall have a period of six months from the date of this decree to pay into court the amount so found due as aforesaid, together with the attorney's fees and the costs of this action, with interest thereon except as to attorney's fees at the rate of 7 per cent. per annum from the date hereof, and in the event of the payment of such amount the said Frances E. James, plaintiff, shall be entitled to and receive a credit of the sum of $600, the rents collected by the defendant," and upon failure of plaintiff to pay the amount the contract should be foreclosed and the action at law enjoined. From this decree plaintiff appealed.

H. E. Slattery, of Eugene, for appellant.

John M. Williams, of Eugene (O. H. Foster and Williams & Bean, all of Eugene, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1] Plaintiff assigns error of the trial court in assuming jurisdiction of this cause in equity and refusing to relegate the parties to the court of law and in foreclosing the contract. Error is also predicated in the allowance of $800 as attorney's fees. It is first urged by counsel for plaintiff that, "as the plaintiff instituted her action at law first, the court erred in compelling her to submit to the jurisdiction of a court of equity."

Section 390, L. O. L., as amended by General Laws of Oregon, 1917, p. 126, which enacted a radical change in equity practice in this state, provides, among other things that—

"In an action at law where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may set such matter up by answer, without the necessity of filing a complaint on the equity side of the court; and the plaintiff may, by reply, set up equitable matter, not inconsistent with the complaint and

Digitized by Google

constituting a defense to new matter in the answer. Said reply may be filed to an answer containing either legal or equitable defenses. The parties shall have the same rights in such case as if an original bill embodying the defense or seeking the relief prayed for in such answer or reply had been filed. Equitable relief respecting the subject matter of the suit may thus be obtained by answer, and equitable defenses to new matter contained in the answer may thus be asserted by reply. When such an equitable matter is interposed, the proceedings at law shall be stayed and the case shall thereafter proceed until the determination of the issues thus raised as a suit in equity by which the proceedings at law may be perpetually enjoined or allowed to proceed in accordance with the final decree; or such equitable relief as is proper may be given to either party. If, after determining the equities, as interposed by answer or reply, the case is allowed to proceed at law, the pleadings containing the equitable matter shall be considered withdrawn from the case, and the court shall allow such pleadings in the law action as are now provided for in actions of law. No cause shall be dismissed for having been brought on the wrong side of the court. The plaintiff shall have a right to amend his pleadings to obviate any objection on that account. Testimony taken before the amendment and relevant to the issue in the law actions shall stand with like effect as if the pleadings had been originally in the amended form."

The defendant set up in his answer to the complaint in the action at law facts which entitled him to relief in equity and which were material to his defense. The suit is in the same condition as though under the old statute plaintiff had answered the complaint and filed a complaint in equity in the nature of a cross-bill.

The proceedings are in conformity with the statute as amended. The plaintiff had a right by her reply to set up equitable matters not inconsistent with her complaint constituting a defense to the new matter in the answer. The parties had the same rights in this case as if an original bill seeking the relief prayed for in the answer had been filed. There was no error in the interposition of a court of equity.

[2] The case on the merits centers upon the question of whether or not there was a mutual rescission of the contract. Plaintiff and her husband and their minor son testified to the purport that according to their understanding there was an agreement for a mutual rescission of the contract in case defendant did not perfect his title and furnish an abstract of title on or before April 14, 1914.

There has been no offer on the part of plaintiff to make full payment. Indeed, there has been no tender of the amount due under the terms of the contract. Apparently the defendant, at the time the contract was executed, thought he had good title to the land. It is to be regretted that so important a matter as the abstract of title was omitted from the contract. Whatever the agreement or understanding was at the time of the contract, it seems the parties have gone beyond that. Reliance of plaintiff is placed upon a subsequent agreement. On April 14, 1914, plaintiff, with knowledge of the condition of the title of Ward to the land and of the failure of Ward to furnish the abstract by that time and of the alleged false representations of Ward, instead of rescinding the contract or attempting to rescind by a letter of that date which is in evidence called upon Ward to perfect the title. She had obtained an abstract, and, after calling Ward's attention to the defects in the title, used this language in the letter:

"I would therefore request that you take such steps as are necessary to put the title in marketable condition. * * * With reference to the interest credits on the contract I would thank you to give me the credits due on the contract. Possibly the best way would be to notify Mr. Wells, your attorney, to make that notation on the contract for you."

Afterwards Ward instituted a suit to perfect his title and eliminate the objectionable features raised by the attorney who examined the abstract of title for Mrs. James, and acquired quitclaim deeds from various persons, and at the time of the trial of this cause it is conceded, as we understand, that Ward had a complete title to the land. The abstract of title and the various deeds are contained in the record as well as the record of the suit to quiet title.

Scrutinizing the testimony carefully, it would seem that Ward desired time to straighten up his title, and that there never was a meeting of the minds of the parties to the effect that, if the title was not completed by April 14, 1914, that the contract should be rescinded. There has been no offer on the part of plaintiff to return the live stock and other personal property which was sold and delivered by defendant to plaintiff.

[3] The trial court had the opportunity of seeing the witnesses, and hearing them testify, and its opinion on this disputed question of fact is entitled to great weight. We are constrained to note that there is more conflict in the way in which the parties understood the arrangements, or conversations subsequent to the contract than there is in regard to what was said and done. That Ward was to furnish an abstract of title is not disputed. As to when he was to furnish it according to the subsequent arrangement there is a great chance for a misunderstanding on the part of Mrs. James.

[4] One of the parties may waive any terms of the contract which are intended for his benefit, and this, if agreed to or acquiesced in by the other, modifies the contract accordingly. Parties to a contract of any kind,

Digitized by Google

whether written or verbal, may at any time rescind or terminate it by their mutual consent or agreement, and either restore each other to the status quo or fix their respective rights and liabilities upon such abrogation of the contract. They may release themselves from a contract in the same manner that they may bind themselves by a contract. Black on Rescission and Cancellation, § 521. It is stated in section 523 of that work that:

"So long as a contract remains executory, a mutual agreement of the parties to rescind it requires no new or independent consideration, for the release of each of the parties from his duties and obligations under the existing contract is sufficient consideration for his agreement to release the other."

Authority to the contrary is there noted. If Mrs. James ever had the right to demand of Ward an abstract of title showing a marketable title to the Lane county land prior to the time she requested that he complete his title, she waived that right and acquiesced in Ward taking reasonable time to perfect the record of his title.

[5] Plaintiff also seeks to rescind the contract on the ground that Ward falsely represented that he had a good title to the land. The plaintiff and those claiming under her, the Rickmans, remained in possession of the premises and enjoyed the benefits thereof from about the time of the execution of the contract until March 20, 1915, and never during the period after she discovered the alleged defects in the title, which appears to have been prior to April 14, 1914, did she attempt in any way to rescind the contract upon any grounds until she filed an amended answer in the former suit on March 8, 1915, in which they sought to rescind the contract by reason of a defective title.

The general rule is laid down in 39 Cyc. p. 1432, subd. "h," as follows:

"Any action on the part of the purchaser treating the contract as in force, when done with a knowledge of facts creating a right to rescind, amounts to a waiver of the right to rescind because of the existence of such facts."

It is stated in the opinion in the case of Scott v. Walton, 32 Or. 460 at page 464, 52 Pac. 180 at page 181, thus:

"A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract, and sue for damages, or disaffirm it, and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, and especially his remaining in possession of the property received by him under the contract, and dealing with it as his own, will be evidence of his intention to abide by the contract."

This is the established rule. Several material questions bearing upon this case were thoroughly discussed by Mr. Justice McCamant in the former case, 84 Or. 382, 164 Pac. 370.

[6] It is fairly shown in the record that the taking of possession of the property by Ward on March 20, 1915, when it was abandoned by the Rickmans, did not constitute a rescission of the contract. Ward took possession in order that the party against whom he was prosecuting a suit to quiet title would not gain an advantage by entering into possession of the premises and in order to protect the buildings, which had been left with the doors open, and prevent dilapidation of the premises.

Plaintiff has failed to prove an agreement between herself and defendant to restore each other to the status quo, or mutually rescind the contract.

[7, 8] Plaintiff claims error on account of allowance of attorney's fees. Defendant claims that as she has signified an intention not to pay the amount found due upon the contract, the amount of attorney's fees is immaterial; there not being a personal judgment against plaintiff. Conditions may be changed and plaintiff may yet desire to reinstate the contract. It seems the attorney's fees were estimated upon the balance of the contract, $11.000 and interest. The court decreed that the plaintiff might reinstate the contract by paying $3,954.12 together with attorney's fees, which we think from the testimony should be 10 per cent. of $3,954.12 of the amount found due. Plaintiff should be allowed six months from the time of entering the mandate in this cause in the lower court to pay the amount found due upon the contract by the trial court together with 10 per cent. attorney's fees, with interest on the amount of the decree, excepting the attorney's fees, at the rate of 6 per cent. per annum from January 13, 1919, the date of the original decree. Neither party should recover costs upon this appeal.

The decree of the lower court, modified as suggested, is affirmed.

HARRIS, JOHNS, and BENNETT, JJ., concur.

Digitized by Google

ENDICOTT, JOHNSON & CO. v. MULTNOMAH COUNTY.

(Supreme Court of Oregon. July 6, 1920.)

1. Taxation ⟸20—Power limited to persons, property and business within territorial jurisdiction.

The power of taxation though an inherent attribute of sovereignty is limited to the taxation of persons, property and business situated within the territorial jurisdiction of the state imposing the tax.

2. Taxation ⟸98—Rule that personalty follows owner is subject to exception to prevent injustice.

The general rule that personalty follows the owner is invoked to determine the situs of personal property for taxation as a fiction to work out justice, and is not permitted to govern when justice does not demand that it should, and cannot prevail when inconsistent with express provisions of the statute.

3. Taxation ⟸74—Taxable "personal property" includes tangibles and intangibles.

Personal property for purposes of taxation includes intangibles as well as tangibles, so that not only money but promissory notes and accounts are subject to taxation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

4. Taxation ⟸93(1)—Tangible personalty of nonresident taxable where located.

Tangible personal property may be taxed where it is physically located, even though the owner resides in another jurisdiction.

5. Taxation ⟸98—Notes at owner's domicile in another state not taxable.

Promissory notes owned by a resident of another state and held by him at his place of residence are not taxable within the state, though executed by state residents, though the paper on which the note was written is considered the note, so that it may be treated as tangible property.

6. Taxation ⟸98—Notes and accounts due nonresidents may be taxed if owner has "business situs" within state.

Where a nonresident has acquired a business situs within the state, that is, has carried on a business in the state more or less permanent in its nature, the property used in that business, including notes and accounts arising from such business transactions, becomes localized at the place where the business is conducted, and is there taxable.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Business Situs.]

7. Taxation ⟸98—Nonresident manufacturer, represented in state only by salesman, has no business situs.

A nonresident manufacturer, whose only agent in the state is a salesman authorized only to take orders, which are filled directly from the factory, and for which payment is made to the manufacturer out of the state, has no business situs within the state, so as to render accounts and notes for sales within the state taxable.

8. Taxation ⟸93(1)—Statutes held not to tax notes and accounts of nonresident; "personal property."

L. O. L. § 3551, as amended by Laws 1907, c. 268, making taxable personal property situated or owned within the state, and section 3553, as amended by the same chapter, defining personal property to include debts due from solvent debtors, when construed in the light of their legislative history, do not make taxable notes and accounts due from resident debtors to a nonresident of the state, who has no business situs within the state.

9. Taxation ⟸98—Residence of owner is prima facie situs of personalty for taxation.

The domicile of the owner is prima facie the situs of personal property for taxation, so that unequivocal words are ordinarily needed in any tax legislation to separate the personal property from the owner's domicile.

Department 1.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Application by Endicott, Johnson & Co. against Multnomah County, Or., for cancellation of an assessment for taxation. On appeal from the board of equalization the circuit court ordered the assessment annulled, and the county appeals. Affirmed.

The assessor of Multnomah county made an assessment against Endicott, Johnson & Co. for "money, notes and accounts" in the sum of $5,000, and for "office furniture, library, instruments," in the sum of $30. The board of equalization for Multnomah county denied an application made by Endicott, Johnson & Co. for the cancellation of the assessment, and Endicott, Johnson & Co. appealed to the circuit court. After a hearing the circuit court ordered that the assessment be annulled, and the county appealed to this court.

Endicott, Johnson & Co. are manufacturers of shoes, and have their factory and place of business in Endicott, N. Y. W. H. Ambler is employed by Endicott, Johnson & Co. as a traveling salesman. His territory includes all that part of Oregon which is west of Bend; and he visits merchants in that territory, displays samples, takes orders for shoes, and sends the orders to Endicott, N. Y. The orders are filled in Endicott, "billed on 60 days' time," and "the merchants remit directly to the house for the merchandise when the bills are due." Ambler maintains an office in the Worcester Block in Portland, and on the door appear the words, "Endicott, Johnson & Co., Wholesale Shoes, W. H. Ambler, Agent." The furniture in the office is the personal property of Ambler; and, when

Digitized by Google

asked why he caused the name of Endicott, Johnson & Co. to appear on the door in addition to his own, he explained that—

"Endicott-Johnson is much better known than W. H. Ambler; and a merchant looking for the office of Endicott, Johnson & Co. would look for their name, not for mine."

Ambler had no authority except to solicit and send orders for goods to Endicott, N. Y., where they were accepted or rejected, and, if accepted, were filled. Endicott, Johnson & Co. do not maintain a branch office, or a place of business, or a warehouse in Oregon. Merchants buying goods remit to Endicott. There are no moneys deposited to the credit of Endicott, Johnson & Co. in Oregon. On March 1, 1918, the date as of which the assessment was made, Endicott, Johnson & Co. had no property physically located in Oregon. On that date, however, there were unpaid accounts due from Oregon merchants to whom Endicott, Johnson & Co. had sold shoes, and possibly Endicott, Johnson & Co. also had in their possession at Endicott, N. Y., promissory notes given by Oregon merchants for shoes purchased by them.

George Mowry, Deputy Dist. Atty., of Portland, for appellant.

F. M. Saxton, of Nome, Alaska, and Sidney Teiser, of Portland (J. F. Boothe, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). The county concedes that the assessment of $30 against Endicott, Johnson & Co. on account of "office furniture, library, instruments," was properly set aside; but the annulment of the assessment of $5,000 on account of "money, notes and accounts" is strenuously resisted. The county also concedes that the company had no money within its jurisdiction. The position of the county is that, inasmuch as Endicott, Johnson & Co. had no money in Multnomah county, but did have notes and accounts arising out of sales made to Oregon merchants, it must be presumed that the assessment was not intended to cover money, but that it was designed to embrace only notes and accounts. For the purposes of this case, we shall assume, without deciding, that the word "money" appearing on the assessor's records may be ignored, and that the assessment was intended to cover, and that it does cover, nothing but notes and accounts.

It affirmatively appears from the evidence that the company had in its possession at Endicott, N. Y., promissory notes; but it does not clearly appear whether any of these notes were given on account of sales made in Oregon; and, moreover, the findings of the trial court, although indefinite in this respect, rather indicate that it was the opinion of the circuit court that the company did not have any notes signed by Oregon merchants. We shall not attempt to determine what the actual facts are, but we shall assume that the county's contention is correct, and that on March 1, 1918, Endicott, Johnson & Co. did "own notes and accounts that were owing to them from residents of Multnomah county," and that these were the notes and accounts covered by the assessment, and that $5,000 was their aggregate value.

[1] The power of taxation, although an inherent attribute of sovereignty, is necessarily limited to subjects within the jurisdiction of the state exercising the power. "These subjects," as stated in State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. Ed. 179, "are persons, property, and business." A state cannot tax a person or property or a business unless it first acquires jurisdiction over such person, property, or business. It is the prerogative of the Legislature to decide what persons and what property shall be taxed; but legislation of a given state can be made to operate only upon persons and property within the sphere of its territorial limits. A tax imposed without jurisdiction over either persons or property is void. St. Louis v. Ferry Co., 78 U. S. (11 Wall.) 423, 20 L. Ed. 192; Tappan v. Merchants' National Bank, 19 Wall. 490, 22 L. Ed. 189; New York, L. E. & W. R. Co. v. Pa., 153 U. S. 628, 14 Sup. Ct. 952, 38 L. Ed. 854; Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853 (affirming 115 La. 698, 39 South. 846, 9 L. R. A. (N. S.) 1240, 116 Am. St. Rep. 179; City of Augusta v. Kimball, 91 Me. 605, 40 Atl. 666, 41 L. R. A. 475.

[2] The maxim mobilia sequuntur personam expresses a comprehensive and general rule applicable to personal property, and, subject to a considerable number of exceptions, this general rule is, for taxation purposes, invoked to determine the situs of personal property. Callender Navigation Co. v. Pomeroy, 61 Or. 343, 352, 122 Pac. 758. The rule mobilia sequuntur personam does not arise out of any requirements of the Constitution, but is a mere fiction of the law, contrived for convenience and intended to work out justice; and therefore it is not permitted to govern when justice does not demand that it should do so, and it cannot prevail when inconsistent with express provisions of statute. Board of Assessors v. Comptoir National, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. Ed. 232; Union Refrigerator Transit Co. v. Lynch, 18 Utah, 378, 55 Pac. 639, 48 L. R. A. 790; Poppleton v. Yamhill Co., 18 Or. 377, 382, 23 Pac. 253, 7 L. R. A. 449.

[3] Personal property includes intangibles as well as tangibles, for not only money, but also promissory notes, and accounts not represented by any written evidence of indebtedness, are generally treated as property, and therefore subject to taxation. 26 R. C. L. 138.

[4] Notwithstanding the general rule expressed by the maxim mobilia sequuntur personam, it is now firmly established that tangible personal property may be taxed at the

Digitized by Google

situs where it is physically located, even though the owner resides in another jurisdiction. It is not necessary here to discuss the extent or the limitations or the requisites of this established doctrine, for the reason that we are not called upon to decide any question concerning tangibles. While the assessment included the items of "furniture, library, instruments," and "money," it is conceded by the county that Endicott, Johnson & Co. did not have any of these tangibles in Multnomah county; and consequently our attention will be confined to the two intangibles mentioned in the assessment, notes, and accounts.

If Endicott, Johnson & Co. owned any promissory notes given for shoes sold to Oregon customers, the instruments were held in New York, and were not physically located in Oregon. There are cases in which statements may be found indicating a tendency to treat a promissory note, not merely as evidence of property, but as property itself, on the theory that the debt is inseparable from the paper which declares and constitutes it, and hence the paper is deemed to be so important an element of the value of what it represents as to make it analogous to tangible property. Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Wheeler v. Sohmer, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. Ed. 1030; Walker v. Jack, 31 C. C. A. 462, 88 Fed. 576.

[5] Since the owners, Endicott, Johnson & Co., are domiciled in the state of New York, and the notes upon which they are assessed are held by them and are physically located in New York, it will not be necessary to decide whether, as was held in Johnson v. City Council, 3 Or. 13, the situs of a note for property taxation purposes is determined by the domicile of the owner regardless of the physical location of the paper evidencing the debt, or whether, as was indicated in Blackstone v. Miller and kindred cases, a promissory note may be assimilated to tangibles on the ground that it not only declares the existence of the debt, but also constitutes the debt, and the paper itself, being tangible, is capable of physical location.

[6] If jurisdiction to levy a property tax is to be determined solely by the domicile of the owner, then the disputed assessment was void for the reason that the owners of the notes and accounts are domiciled in the state of New York. While it is settled as a matter of constitutional law that the situs of the debt or credit, for the purposes of property taxation, cannot arbitrarily be made to depend solely upon the domicile of the debtor, nevertheless a debt or credit may, in some circumstances, be given a situs for property taxation at a place other than the domicile of the owner. Although it is the general rule that the situs of intangibles cannot be assigned to a place other than the domicile of the owner, and although the domicile of the debtor cannot be made the single determining factor, nevertheless there are recognized exceptions to the general rule; as, where there is such a combination of circumstances as produces what is referred to in the books as a "business situs," as distinguished from the domicile of the owner. A precedent giving concrete illustration of the application of the doctrine of "business situs" is found in Marshall-Wells Hardware Co. v. Multnomah County, 58 Or. 469, 115 Pac. 150. It is impossible to frame an accurate formula which will include every case properly subject to the operation of the rule of "business situs," and exclude every case legally beyond its grasp, for each case is largely dependent upon its own facts. In an exhaustive and well-considered note to Liverpool & L. & G. Ins. Co. v. Board of Assessors appearing in L. R. A. 1915C, 903, 925, the author states that—

"The term 'business situs,' frequently employed by the courts to indicate a situs for credits apart from the creditor's domicile, though not very precise or accurate in its import, does suggest an indispensable condition of such a situs, that is, the necessity of something like a general, or more or less continuous, course of business or series of transactions within the state, as distinguished from mere sporadic and isolated transactions."

In Johnson County v. Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. (N. S.) 493, when referring to the question of "independent situs" for notes and mortgages, the court says:

"Generally the element of separation from the domicile of the owner and fairly permanent attachment to some foreign locality should appear, together with some business use of them, or some power of managing, controlling or dealing with them in a business way."

Where property is used in a business carried on in one state, and the owner of the property is domiciled in another state, the property which is so used in that business becomes localized at the place where such business is conducted, acquires a "business situs," and is taxable at that "business situs"; and so, too, credits arising out of that business, whether they be accounts not evidenced by any writing, or whether they be in the concrete form of notes, may by legislation be made taxable at such "business situs." Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903; Assessors v. Comptoir National, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. Ed. 232; Goldgart v. People, 106 Ill. 25; In re Jefferson, 35 Minn. 215, 28 N. W. 256.

[7] In the instant case, however, we do not find any one of the several circumstances which usually appear, either singly or in combination, in adjudications where it has been held that intangibles had become separated from the domicile of their owner by reason of having been localized at a given "business situs" in a jurisdiction other than the domicile of the owner. There is no

Digitized by Google

branch office or place of business in Oregon. There is no agent in Oregon, except a traveling salesman, and his only authority is to solicit orders. He does not receive payments, and he has no authority to make collections; payments are made by remittances to New York. No goods of any kind are stored in Oregon; but all orders are filled in New York, and the goods are shipped directly to the customer. Endicott, Johnson & Co. are domiciled in New York; they have no property of any kind in Oregon. The record does not disclose whether Endicott, Johnson & Co. is a corporation, or a partnership, or an individual operating under a trade-name, although we infer from the printed briefs that the company is a partnership; but if the company is a corporation it cannot be compelled to pay corporation license fees in this state, for the reason that the business done by it in this state is pure interstate commerce. Vermont Farm Mach. Co. v. Hall, 80 Or. 308, 156 Pac. 1073; Deardorf v. Idaho National Harvester Co., 90 Or. 426, 177 Pac. 33. If, as was done by Marshall-Wells Hardware Company (Marshall-Wells Hardware Co. v. Multnomah Co., 58 Or. 469, 115 Pac. 150) Endicott, Johnson & Co. had localized any part of their business in Oregon so as to create a "business situs" here, then not only the tangibles used here in such business, but also the accounts and notes arising out of such business could be separated from the domicile of the owners, and be made liable for the payment of a property tax; but, as already stated, the circumstances attending the business transacted by Endicott, Johnson & Co. did not create a "business situs" in Oregon, and consequently Multnomah county cannot lawfully levy a property tax on any notes or accounts held by Endicott, Johnson & Co. In other words, a statute designed to tax notes and accounts circumstanced as are the notes and accounts now under consideration would be unconstitutional because of a lack of jurisdiction over them.

[8] While what we have already said is sufficient finally to dispose of this controversy, yet we may with propriety add that an examination of sections 3551 and 3553, L. O. L., when made in the light of the history of these sections, will result in the conclusion that this legislation was not intended to cover notes and accounts like those owned by Endicott, Johnson & Co. Originally section 3551, L. O. L., in part read as follows:

"* * * All property, real and personal, within this state, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law." Deady's Code, p. 893, § 1.

Although this section was amended in 1876 (Laws 1876, p. 69), the quoted part of section 3551 stood unchanged until 1907, when it was amended so as to read as it now appears:

"* * * All personal property situated or owned within this state, except such as may be specifically exempted by law, shall be subject to assessment and taxation in equal and ratable proportion." Laws 1907, c. 268, § 1.

In its original form section 3553, L. O. L., so far as it is material here, was worded as follows:

"The terms 'personal estate' and 'personal property' shall be construed to include * * * all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise. * * *" Deady's Code, p. 894, § 3.

This statute remained unchanged until 1907, when it was amended so as to read as it now appears:

"The terms personal estate and personal property shall be construed to include all things in action, * * * all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage, or otherwise, either within or without this state. * * *" Laws 1907, c. 268, § 3.

In 1890 this court, construing the statutes then in force, and deciding a case where a person domiciled in this state sent moneys into Washington territory and caused them to be loaned there by his agents, who took notes secured by mortgages on real property situated there, and the agents retained the notes and mortgages in their possession, held that this state could not tax the money, notes, or mortgages, basing the decision upon the wording of the statute. Poppleton v. Yamhill Co., 18 Or. 377, 23 Pac. 253, 7 L. R. A. 449. It will be noted that section 3553, L. O. L., defines the "personal property" which, according to section 3551, L. O. L., shall be subject to assessment and taxation; and included in this definition of personal property are "debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise, either within or without this state." It is obvious that the notes and accounts for which Endicott, Johnson & Co. have been assessed are not situated in this state; nor can it be said that they are owned in this state, because the owner is domiciled in New York. See opinion of Mr. Justice Hatch in People v. Barker, 84 App. Div. 469, 83 N. Y. Supp. 33, 37, and see, also, note in 36 L. R. A. (N. S.) 297.

[9] When, as already stated, we read these two sections of the Code in the light of their history, and when we do this, remembering that the domicile of the owner prima facie furnishes the situs of personalty for the purposes of property taxation, and that unequivocal words are ordinarily needed in any legislation designed to separate the personal property from the domicile of the owner, it becomes manifest that the Legislature did not attempt to tax notes and accounts arising out of business transactions like those involved here. Johnson v. City Council, 3 Or. 13; note in L. R. A. 1915C, 904, 910; 26 R. C. L. 287; W. W. Kimball Co. v. Shawnee Co.,

Digitized by Google

99 Kan. 802, 161 Pac. 644, L. R. A. 1917B, 1282; Dallinger v. Rapello (C. C.) 14 Fed. 32; Baars v. Grand Rapids, 129 Mich. 572, 89 N. W. 328.

The final order made by the circuit court annulling the assessment is affirmed.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

BANKERS' TRUST CO. v. RITER et al. (No. 3481.)

(Supreme Court of Utah. July 3, 1920.)

1. Partnership ⟸108—Balance struck and interest of each partner in firm's assets found.

Before one partner can compel another to pay what is claimed to be a firm debt, it must be ascertained that the amount is necessary to settle the firm's affairs, or that the amount owing by the partner is greater than he would be entitled to receive.

2. Partnership ⟸246—Title to realty in partner descends to heirs, subject to equity of surviving partner.

Title to real property in the name of a partner at the time of his death descended as real estate to his heirs, subject only to the equity of the surviving partner to have it applied primarily to the trust for which it was acquired.

3. Partnership ⟸251 — Surviving partner must account to representative of deceased partner.

In addition to the duty of the surviving partner under Comp. Laws 1917, § 7424, to settle the affairs of the firm without delay, etc., it is the duty and right of his administrator or executor on his death to proceed with settlement of the firm affairs, and to account with the representative of the partner first deceased.[1]

4. Partnership ⟸258(7) — Complaint of administrator of deceased partner against heirs of other partner held insufficient.

Allegations of complaint of administrator of deceased partner against heirs of other partner, also deceased, *held* insufficient to state cause of action for the sale price of realty in the name of defendants' ancestor at the time of his death, not embracing allegations whether the estate of defendant's ancestor had ever been administered, or that on settlement of partnership affairs the amount claimed of defendants would not be payable to them by right of their heirship from firm assets, though its allegations were sufficient to authorize plaintiff as administrator of the last surviving partner within the jurisdiction to maintain such an action if the complaint contained the necessary allegations.[2]

5. Partnership ⟸258(2) — Administrator of deceased partner may sue heirs of other partner for proceeds of realty.

Administrator of deceased partner, under facts alleged in his complaint against heirs of other partner for sale price of realty, title to which was in such other partner at his death, *held* entitled to maintain action against defendant heirs for general accounting of firm affairs on showing accounting was necessary coupled with allegations that estate of defendant's ancestor had been closed and his personal representative released.

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Action by the Bankers' Trust Company, as administrator with the will annexed of the estate of George Y. Wallace, deceased, against L. E. Riter, Jr., and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Geo. Y. Wallace, of Salt Lake City, for appellant.

Pierce, Critchlow & Barrette and Rawlins, Ray & Rawlins, all of Salt Lake City, for respondents.

GIDEON, J. The following facts appear from the allegations of the complaint:

The plaintiff, Bankers' Trust Company, is the administrator with the will annexed of the estate of George Y. Wallace, deceased, and as such brings this action. One Levi E. Riter died intestate on or about July 30, 1903. The defendants L. E. Riter, Jr., L. C. Riter, and Isabella C. Riter are his sole heirs at law. The said George Y. Wallace, deceased, and the said Levi E. Riter, deceased, and the defendant Charles W. Lyman, at the death of said Riter and for a long time prior thereto, were copartners doing business under the firm name of L. E. Riter & Co., with equal interests in all the property, business, and assets of said partnership. During the course of the operation of said partnership, and in connection with the same, the said partnership acquired and owned various pieces of real estate, the record title to which was held in the name of the said Levi E. Riter, but in trust for the partnership. The description of certain mining properties, the proceeds from which are sought to be recovered, is given in the complaint. At the death of said Levi E. Riter, and at all times thereafter, the said defendants knew, and now know, the terms and conditions of such trust, and that the mining property described was taken and held by the said Riter, deceased, in trust for said partnership. Since the death of said Riter, the defendants L. E. Riter, Jr., L. C. Riter, and Isabella C. Riter, as the sole heirs at law, well knowing the terms and conditions of said trust, sold and leased the real property held and owned in trust

[1] In re Tripp's Estate, 170 Pac. 976; Sharp v. Sharp, 180 Pac. 580.

[2] Mills v. Gray, 50 Utah, 224, 167 Pac. 358.

Digitized by Google

by their intestate, and collected the rents and proceeds therefrom, and have wrongfully appropriated the same to their own uses and purposes. Notwithstanding frequent requests, they have refused, and still refuse, to account for the same, or to pay a just proportion or share thereof, or any part thereof, to plaintiff. The defendant Charles W. Lyman, the surviving member of said partnership, is a resident of the state of Nebraska. He is not now, and never has been, in possession of said trust property, and has no knowledge concerning the proceeds, rents, or issues realized for the same, and has not accounted and cannot account therefor. Neither said Levi E. Riter, in his lifetime, nor the defendants Riter, since his death, have accounted to the surviving partner for the said trust properties, and defendant Lyman has refused, and still refuses, to require an accounting of the other defendants, and has refused, and still refuses, to bring this action, or to join the plaintiff in the same.

The prayer of the complaint is that the defendants Riter be required to set forth a full account of all the properties and assets of said partnership coming into their possession and under their control, and that each of them be required to pay to the plaintiff what, if anything, shall upon such account appear to be due to the plaintiff from said defendants. General relief is also asked.

To this complaint a demurrer was filed by the defendants Riter on the ground of uncertainty; also that it does not state facts sufficient to constitute a cause of action. The defendant Lyman was without the jurisdiction of the court, and did not appear in the action. The demurrer was overruled, and subsequently an answer was filed. When the matter came on for hearing before the court counsel for plaintiff, apparently under some understanding or agreement, made an extensive and detailed statement of what purported to be the facts to be considered by the court. At the close of the statement objection was made to the introduction of any testimony and the matter was argued and submitted, and afterward the court entered its judgment, designated a decree of dismissal, in which it was adjudged that the action be dismissed.

It is not entirely clear from the record whether the court considered the facts stated by counsel in his opening statement in arriving at the conclusion to dismiss the action, or whether the ruling was based upon the insufficiency of the allegations of the complaint to entitle the plaintiff to any relief. Counsel for defendants, at the close of the opening statement of plaintiff's counsel, in addressing the court said:

"Now, if the court please, we desire to object at this time to any evidence whatever in this case, because from the pleadings, supplemented by the statement of counsel here, very full, indeed, it is apparent as a matter of law that this action is not well founded and cannot be sustained."

Later on, during that same argument, the following colloquy between counsel was had:

"Counsel for Plaintiff: Pardon me. Do I understand that counsel is now addressing himself to a demurrer to the evidence?

"Counsel for Defense: Yes.

"Counsel for Plaintiff: Or to an opening statement?

"Counsel for Defense: No. To a demurrer, a general demurrer, and a motion to exclude all evidence and to dismiss the case."

The matter was thereupon submitted to the court, and thereafter the court entered its decree of dismissal. In the recitals of that decree the following language appears:

"Counsel for plaintiff then stated to the court the facts which constitute the cause of action against the appearing defendants and which he expected to prove at the trial, whereupon counsel for the defendants moved to dismiss the complaint herein and to render judgment in favor of the said defendants and against the plaintiff upon the ground and for the reason that the facts stated by the plaintiff do not show a cause of action against the said defendants or either of them."

Whatever may have been the reasons in the mind of the court for its conclusion in dismissing the case, whether upon the pleadings alone or the pleadings supplemented by the opening statement of counsel, we rest our conclusion and order made herein solely upon the question of the sufficiency of the allegations of the complaint to entitle the plaintiff to the relief sought.

It does not appear from the record whether the estate of L. E. Riter deceased has ever been administered. Whether any administrator has ever been appointed, and, if so, whether the estate has been closed and the administrator discharged, or whether the title to the real property, the proceeds of which are in question, was ever confirmed in his heirs at law by a decree of distribution is not disclosed. The allegations are that after the death of Levi E. Riter the defendants Riter, "as his sole heirs at law," knowing the condition of the trust sold the property in question and received the proceeds thereof and applied them to their own use. There is no allegation that upon the settlement of the partnership affairs the amount now claimed to be wrongfully in the possession of the defendants would not be payable to them by right of their heirship from the assets of the partnership. Neither is there an allegation that the amount sought to be recovered is required or needed to pay the partnership debts or the expenses of administering the affairs of said partnership. In short, there are no

Digitized by Google

facts stated in the complaint showing a right in the plaintiff to the proceeds of the sale of the real property as against the defendants after an adjustment of the partnership affairs. For aught that appears in the complaint, after an accounting and settlement of the partnership affairs, not only all of the amount now claimed to be wrongfully held by defendants might be due them, but a larger amount might be found to be coming to them from said partnership. As has been well stated by the Supreme Court of Montana in Silver v. Eakins, 55 Mont. 210, 175 Pac. 877, to require the defendants to pay the money to the plaintiff in this action when it might be found upon an accounting that they are entitled to retain it and would receive it back "would be an idle ceremony."

[1] The great weight of authority seems to be, in this country at least, that, before one partner can compel another partner to pay what is claimed to be an indebtedness to the partnership, it must be first ascertained that the amount is necessary in settling the partnership affairs, or that the amount owing by such partner is a greater amount than he would be entitled to receive upon striking a balance and finding the interest of each partner in the assets of the partnership. Silver v. Eakins, supra; Baughman v. Hebard (Okl.) 166 Pac. 88; McGorray v. O'Connor (C. C.) 79 Fed. 861; Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086; Kwapil v. Bell Tower Co., 55 Wash. 583, 104 Pac. 824; Kirby, Ex'r, v. Lake Shore & M. S. R. Co. (C. C.) 14 Fed. 261; Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. Rep. 740; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 302, 61 Am. St. Rep. 637.

[2] It should be remembered that the judgment sought against defendants is for the sale price of real property the title to which was in L. E. Riter deceased at the date of his death. The title to such property descends as real estate to the heirs subject only to the equity of the surviving partner to have it applied primarily to the trust for which it was acquired. Adams v. Church, supra; Darrow v. Calkins, supra.

By the provisions of Comp. Laws Utah 1917, § 7724, the surviving partner is entitled to possession of the partnership assets and has the right to settle its business. He is also charged with the duty of settling the affairs of the partnership without delay, and to account with the executor or administrator of a deceased partner, and to pay over to him such balance as might be payable to him in right of the decedent. The section will be found in full in the opinion of this court in In re Tripp's Estate, 170 Pac. 976.

[3] By that statute it is made the duty of the surviving partner to account for whatever property is in his possession that rightfully belongs to the deceased's personal representative after a settlement and adjustment of the partnership affairs. It is also the duty and right, upon the death of the surviving partner, of his administrator or executor to proceed with a settlement of the partnership affairs and to account with the representative of the first deceased partner. Sharp v. Sharp, 180 Pac. 580. See also, Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867.

[4] The allegations, contained in the complaint, that the defendant Lyman is beyond the jurisdiction of the courts of this state, has not now and never has had any of the property of the said partnership, and has refused to take any action looking to an adjustment of the partnership affairs, are, in our opinion, sufficient to authorize the plaintiff, as administrator of the last surviving partner within the jurisdiction of the courts of this state, to institute and maintain an action of this nature, provided the complaint contains the necessary allegations to entitle the administrator to the relief sought.

Appellant contends that its position is supported by the opinion of this court in Mills v. Gray, 50 Utah, 224, 167 Pac. 358. The partnership relation discussed in that opinion, if it were really a partnership, was, as stated by the writer of that opinion, "If we consider the plaintiff and defendant partners in that venture, the partnership was very limited indeed." The plaintiff and defendant in that action were shipping ore taken from certain leased premises and each party received a certain per cent. of the net proceeds. It was their custom, upon each shipment and upon the receipt of the proceeds, to then and there divide the sum between themselves according to their respective interests. There was no general partnership. The arrangement between them related wholly to the mining and shipping of this particular ore and the division of the proceeds between them at the completion of each shipment. The relationship existed only for a few months. Upon receipt of the returns from the last shipment the defendant declined to pay to the plaintiff the amount due him under the agreement, and thereupon suit was instituted. The court rightfully held that he was entitled to recover under the particular facts in that case.

[5] We can see no reason why the plaintiff, under the facts alleged, could not maintain an action against the defendants for a general accounting of the partnership affairs, if it is made to appear that an accounting is necessary, coupled with an additional allegation that the estate of Riter, deceased, has been closed and the personal representative released from further duty in the administration of his estate. Under that state of facts, defendants would be, not only the real parties in interest, but the only

Digitized by Google

parties in interest. Moreover, there does not seem to be any reason, if the defendants Riter have property which they received from the estate of Levi E. Riter, deceased, as heirs at law, which property is part of the assets of the partnership, why an action could not be maintained against them jointly with the administrator, if the administration has not been terminated. In either case they are the interested parties, and as such would become necessary parties.

There are other questions discussed in the briefs of counsel, but as the questions considered must result in an affirmance of the judgment it will be unnecessary to consider anything additional.

The judgment of the lower court is affirmed, with costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

FRANKLIN, Justice of Peace, et al. v. BARIAN. (No. 9847.)

(Supreme Court of Colorado. July 6, 1920.)

1. Justices of the peace ⟸54(1)—Jurisdiction not lost by calling in other justice to attend trial and continue case.

Where justice of the peace was sick at the date set for the trial and called in another justice to attend at the time and place fixed for the trial under Rev. St. 1908, § 3893, and where the only action taken by the latter justice was to attend and continue the cause at the request of the former, and to direct a summons to issue to bring in another defendant, the former justice of peace did not lose jurisdiction to try cause.

2. Justices of the peace ⟸194(1)—Rendition of judgment after calling in other justice to continue cause not reviewable by certiorari.

Action of justice of the peace in rendering judgment after having called in another justice of the peace to attend at the time and place fixed for the trial under Rev. St. 1908, § 3893, and to continue the cause, is not reviewable by certiorari on the ground that former justice of peace had lost jurisdiction in the cause; there being a right of appeal.

3. Certiorari ⟸5(1)—Will not lie where there is a right of appeal.

Certiorari will not lie where there is a right of appeal.

Error to District Court, Montrose County; Thomas J. Black, Judge.

Certiorari by Earl Barian against W. H. Franklin, Justice of the Peace, and anotner, to review a judgment rendered by named defendant. Motion to quash writ overruled, and the judgment set aside, and defendants bring error and apply for a supersedeas. Reversed.

John L. Stivers and Paul L. Littler, both of Montrose, for plaintiffs in error.

Hugo Selig, of Montrose, for defendant in error.

TELLER, J. Defendant in error was defendant in an action before Franklin, a justice of the peace, and, judgment having gone against him, sued out from the district court a writ of certiorari, alleging that said justice of the peace had exceeded his jurisdiction in the matter of the judgment. A motion to quash the writ was overruled, and the judgment against defendant in error was set aside and held for naught. The respondents in that proceeding bring the case here on error.

It appears that the said Franklin, justice of the peace, before whom the cause against defendant in error was pending, was sick on the date of trial; that thereupon one Johnson, the nearest justice of the peace, was, at the request of Franklin, called in to attend at the time and place fixed for trial, as provided by section 3893, R. S. 1908. He so attended and continued the cause. The record shows that Johnson several times, at the request of Franklin, continued the cause. The last continuance made by him was to February 4, 1920, at which date the cause was tried before Franklin; the defendant not appearing.

[1-3] The motion to quash the writ of certiorari was made upon the ground that the petitioner had an adequate remedy by appeal. For defendant in error, it is insisted that the cause was pending before Johnson, and not before Franklin, and that the record shows that the former was called in to try the cause. We do not so read the record. Its recitals are that each time, at the request of Franklin, the cause was continued. It is true that on one occasion, at the request of the plaintiff, Johnson directed summons to issue to bring in another defendant. That is the only action taken by him aside from the continuances. The statute gives him authority to try the cause, but as long as he did not attempt to exercise such authority, and as his record shows that he was at all times acting merely as a substitute for Franklin, there is no ground for the claim that Franklin had lost jurisdiction of the cause. We see no reason why the defendants' rights would not have been fully protected by appeal, and counsel suggests no such reason. There being a right of appeal, certiorari does not lie.

It appears then that it was error to issue the writ, and the judgment is accordingly reversed.

GARRIGUES, C. J., and BURKE, J., concur.

Digitized by Google

MEMORANDUM DECISIONS

UNITED CIGAR STORES CO. OF AMERICA v. PEOPLE. (No. 9681.) (Supreme Court of Colorado. July 6, 1920.) En Banc. Error to District Court, City and County of Denver; Francis E. Bouck, Judge. Proceeding by the People of the State of Colorado against the United Cigar Stores Company of America. Judgment against defendant, and it brings error. Reversed and remanded, with directions to dismiss the complaint. O'Donnell & Graham, of Denver (George W. Musser, of Denver, of counsel), for plaintiff in error. Victor E. Keyes, Atty. Gen., and Forrest C. Northcutt, Asst. Atty. Gen., for the People.

PER CURIAM. This case is one involving the same matter determined in Denver v. Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521, and Denver v. United Cigar Stores Co., announced May 3, 1920, and reported in 189 Pac. 848, as to the validity of so-called trading stamps. These two decisions are controlling on this application for supersedeas, and are decisive of the merits of the case. The judgment is reversed, and the cause remanded to the trial court, with directions to dismiss the complaint. Judgment reversed, and cause remanded, with directions.

DECKER v. DECKER. (No. 4021.) (Supreme Court of Montana. Sept. 9, 1919.) Appeal from District Court, Ravalli County; Asa L. Duncan, Judge. L. O. Johnson and E. M. Tucker, both of Hamilton, for appellant. H. C. Packer and E. C. Kurtz, both of Hamilton, for respondent.

PER CURIAM. Pursuant to stipulation of parties hereto, the appeal herein is this day dismissed.

DUGAN v. APEX MINING CO. et al. (No. 4526.) (Supreme Court of Montana. Dec. 17, 1919.) Appeal from District Court, Silver Bow County. N. A. Rotering, of Butte, for respondent.

PER CURIAM. Upon motion of respondent, the appeal in this cause is hereby dismissed.

JOHNSON v. BURTON. (No. 4527.) (Supreme Court of Montana. Dec. 17, 1919.) Appeal from District Court, Yellowstone County. R. O. Lunke, of Sidney, for respondent.

PER CURIAM. The motion of respondent to dismiss the appeal herein is granted, and the appeal accordingly dismissed.

LADD & TILTON BANK v. LEPPER. (No. 4043.) (Supreme Court of Montana. Nov. 8, 1919.) Appeal from District Court, Fergus County; Roy E. Ayers, Judge. Chas. J. Marshall, of Lewistown, for appellant. E. K. Cheadle, of Lewistown, for respondent.

PER CURIAM. Pursuant to stipulation of the parties hereto, the appeal in the above-entitled cause is this day dismissed.

PEPIN v. BROADWATER. (Nos. 4427, 4428.) (Supreme Court of Montana. Sept. 15, 1919.) Appeals from District Court, Hill County; John A. Matthews, Judge. Wellington D. Rankin, of Helena, for appellant. L. V. Beaulieu and A. F. Lamey, both of Havre, and Norris & Hurd, of Great Falls, for respondent.

PER CURIAM. The appeals in the above-entitled causes are this day, by stipulation of the parties dismissed.

PEPIN v. BROADWATER. (No. 4426.) (Supreme Court of Montana. Oct. 30, 1919.) Appeal from District Court, Hill County; John A. Matthews, Judge. Wellington D. Rankin, of Helena, for appellant. L. V. Beaulieu and A. F. Lamey, both of Havre, and Norris & Hurd, of Great Falls, for respondent.

PER CURIAM. Upon motion of appellant, supported by stipulation of the parties, the appeal in the above-entitled cause is hereby dismissed.

STATE v. TOY DOU et al. (No. 4104.) (Supreme Court of Montana. May 28, 1919.) Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge. Nichols & Wilson, of Billings, and John G. Brown, of Helena, for appellants. S. C. Ford, Atty. Gen., and Frank Woody, Asst. Atty. Gen., for the State.

PER CURIAM. Pursuant to stipulation of the parties herein, the appeal in the above-entitled cause is hereby dismissed.

STATE ex rel. ANDERSON v. OLIVER et al. (No. 4409.) (Supreme Court of Montana. Sept. 9, 1919.) Appeal from District Court, Dawson County; C. C. Hurley, Judge. S. C. Ford, Atty. Gen., for appellant.

PER CURIAM. The stay of proceedings heretofore granted in the above-entitled cause is hereby set aside, and the appeal taken herein is dismissed.

STATE ex rel. CASTEEL v. STATE BOARD OF EXAMINERS et al. (No. 4533.) (Supreme Court of Montana. Dec. 18, 1919.) Original application for injunction. Gunn, Rasch & Hall and Chas. E. Pew, all of Helena, for plaintiff. S. C. Ford, Atty. Gen., for defendants.

PER CURIAM. The court, after consideration, is of the opinion that the act of the legis-

Digitized by Google

lative assembly (chapter 105, Laws of 1919), the validity of which the plaintiff assails on constitutional grounds, is not open to the several objections made to it. It is therefore ordered and adjudged that the demurrer to the complaint herein interposed by the defendants be, and it is hereby, sustained, and the action dismissed.

STATE ex rel. CONLEY v. DISTRICT COURT et al. (No. 4401.) (Supreme Court of Montana. April 19, 1919.) Original Application for Writ of Supervisory Control to the District Court of the Third Judicial District; George B. Winston, Judge. S. C. Ford, Atty. Gen., and Frank Woody, Asst. Atty. Gen., for relator.

PER CURIAM. Application for writ of supervisory control herein was this day, after due consideration by the court, denied.

STATE ex rel. CONTINENTAL OIL CO. v. DISTRICT COURT. (No. 4490.) (Supreme Court of Montana. Oct. 17, 1919.) Original Application for Writ of Supervisory Control Directed to the District Court of Silver Bow County. Nolan & Donovan, of Butte, for relator.

PER CURIAM. Relator's petition for writ of supervisory control herein was this day presented to the court, and after due consideration denied.

STATE ex rel. CUSTER COUNTY v. MULLENDORE et al. (No. 4501.) (Supreme Court of Montana. Nov. 4, 1919.) Appeal from District Court, Custer County; Charles A. Taylor, Judge. P. C. Cornish, of Butte, and Booth & McLemore, of Baker, for appellants. Frank Hunter and George W. Farr, both of Miles City, for respondent.

PER CURIAM. Upon motion of the respondent, the appeal in this cause is hereby dismissed.

STATE ex rel. FORCUM v. BIBEE. (No. 4437.) (Supreme Court of Montana. Sept. 9, 1919.) Appeal from District Court, Flathead County; J. A. Thompson, Judge. Brennen & Kendall and Noffsinger & Walchli, all of Kalispell, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein is this day granted, and the appeal is accordingly dismissed.

STATE ex rel. FORD v. DISTRICT COURT et al. (No. 4508.) (Supreme Court of Montana. Nov. 6, 1919.) Original Application Directed to the District Court of the First Judicial District in and for Lewis and Clark County; W. H. Poorman, Judge. Frank Woody, Asst. Atty. Gen., for relator.

PER CURIAM. Relator's application for a writ of supervisory control herein is, after due consideration, denied.

STATE ex rel. LEE v. HUFFAKER et al. (No. 4506.) (Supreme Court of Montana. Nov. 8, 1919.) Original Application for Writ of Supervisory Control Directed to Geo. W. Huffaker, as Sheriff of Lewis and Clark County, and A. J. Lemkie, Justice of the Peace. Galen & Mettler, of Helena, for relatrix. Frank Woody, Asst. Atty. Gen., and Jos. R. Wine, Asst. Co. Atty., of Helena, for respondents.

PER CURIAM. After considering the evidence introduced by the respective parties upon the issues made by the answer of the respondent Lemkie to the petition for writ of supervisory control, it is ordered and adjudged that the order to show cause be and the same is hereby discharged, and the application dismissed, that the writ of habeas corpus issued out of this court on November 4, 1919, also be discharged, and that relatrix be committed to the custody of respondent sheriff.

STATE ex rel. MAEHLER et al. v. DISTRICT COURT et al. (No. 4467.) (Supreme Court of Montana. Sept. 2, 1919.) Original Application for Writ of Supervisory Control Directed to the District Court of Fergus County; Jack Briscoe, Judge. Blackford & Huntoon, of Lewistown, for relators.

PER CURIAM. Relators' application for a writ of supervisory control herein was, after due consideration by the court, denied.

STATE ex rel. PHILBRICK v. DISTRICT COURT et al. (No. 4493.) (Supreme Court of Montana. Oct. 17, 1919.) Original Application for Writ of Supervisory Control Directed to the District Court of the Eighth Judicial District; H. H. Ewing, Judge. Galen & Mettler, of Helena, for relatrix.

PER CURIAM. Relator's application for writ of supervisory control herein was, after due consideration by the court, denied.

STATE ex rel. WARD v. DISTRICT COURT et al. (No. 4429.) (Supreme Court of Montana. June 18, 1919.) Original Application for Writ of Supervisory Control to the District Court of Silver Bow County; John V. Dwyer, Judge. Leslie B. Sulgrove and W. N. Waugh, both of Butte, for relatrix.

PER CURIAM. After due consideration of the application for writ of supervisory control herein, it is by the court denied.

CRISP v. STATE. (No. A-3777.) (Criminal Court of Appeals of Oklahoma. May 29, 1920.) Appeal from District Court, Grady County; Will Lynn, Judge. Charley Crisp was convicted of grand larceny, and he appeals. Appeal dismissed on motion of plaintiff in error, and cause remanded. E. Hamilton, of Chickasha, for plaintiff in error. W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Charley Crisp, was convicted in the district court of Grady county on a charge that he did take and steal five automobile casings and inner tubes,

Digitized by Google

of the value of $75, the property of the Gilkey-Jarboe Hardware Company, and in accordance with the verdict of the jury he was sentenced to be confined in the penitentiary at Granite for a term of two years. On November 17, 1919, judgment was rendered. On May 13, 1920, an appeal therefrom was perfected by filing in this court a petition in error with case-made. On May 26, 1920, counsel for plaintiff in error filed a motion to dismiss the appeal for the reason "that plaintiff in error no longer desires to prosecute the same and has begun to serve his sentence therein." The motion to dismiss is sustained, and the cause is remanded to the lower court.

HOLDEN v. STATE. (No. A-3455.) (Criminal Court of Appeals of Oklahoma. May 29, 1920.) Appeal from District Court, Cleveland County; F. B. Swank, Judge. Charles Holden was convicted of manslaughter in the first degree, and he appeals. Appeal dismissed, on motion of plaintiff in error, and cause remanded. Pruiett, Sniggs & Patterson, of Oklahoma City, for plaintiff in error. The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Charles Holden, was informed against for the crime of murder, alleged to have been committed on the 24th day of August, 1917, by shooting one Grover Fulkerson with a pistol. Upon his trial he was found guilty of manslaughter in the first degree, and his punishment fixed at imprisonment in the penitentiary for a period of four years. From the judgment rendered on the verdict he appeals. His counsel of record have filed a motion to dismiss his appeal. The motion is sustained, and the cause remanded to the trial court.

END OF CASES IN VOL. 190

Digitized by Google

Digitized by Google

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digests, the Key-Number Series and Prior Reporter Volume Index-Digests

ACCOUNT.

I. RIGHT OF ACTION AND DEFENSES.

⚖1 (Kan.) "Accounting" imports an adjustment of accounts.—Apple v. Smith, 8.

ACCOUNT STATED.

⚖4 (Cal.App.) Execution of note was stating of account.—Bledsoe v. Stuckey, 217.

ACTION.

See Dismissal and Nonsuit.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

⚖59 (Cal.App.) Allegations of complaints in consolidated actions may be taken together to remedy defects.—Tyler v. J. I. Metrovich Bldg. Co., 208.

ADJOINING LANDOWNERS.

⚖10(3) (Cal.App.) Evidence showing erection of high fence was malicious.—Bar Due v. Cox, 1056.

Spite fence statute constitutional.—Id.

ADMINISTRATION.

See Executors and Administrators.

ADOPTION.

⚖3 (Cal.) Statutory requirements must be strictly followed.—In re McGrew, 804.

⚖7 (N.M.) Consent of putative father not required.—Ex parte Wallace, 1020.

⚖10 (Cal.) Only court of county of petitioner's residence has jurisdiction to order adoption.—In re McGrew, 804.

⚖12 (N.M.) Notice to putative father not required.—Ex parte Wallace, 1020.

⚖16 (Cal.) Father who had adopted bastard has sufficient interest to attack adoption by another.—In re McGrew, 804.

ADULTERY.

⚖14 (Utah) May be proved by circumstantial evidence.—State v. Odekirk, 777.

Evidence *held* sufficient to sustain conviction.—Id.

ADVERSE POSSESSION.

I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

⚖13 (Wyo.) Open, notorious, and continued possession under color of title sufficient.—Wallace v. Chicago, B. & Q. R. Co., 999.

(F) Hostile Character of Possession.

⚖64 (Or.) May be established by parol gift.—Miller v. Conley, 301.

⚖85(4) (Or.) Evidence of gift of land by father to daughter sufficient to initiate possession.—Miller v. Conley, 301.

AGENCY.

See Principal and Agent.

ALIENATING AFFECTIONS.

See Husband and Wife, ⚖333.

ANIMALS.

⚖29 (Nev.) Sheep Commission Law not unreasonable, arbitrary, or discriminatory.—Ex parte Goddard, 916.

⚖92 (Or.) Trespass to herd sheep upon unfenced land.—Brown v. McCloud, 578.

⚖100(4) (Or.) Damages by trespassing sheep sufficiently proven.—Brown v. McCloud, 578.

APPEAL AND ERROR.

See Certiorari; Criminal Law, ⚖1022–1186; Exceptions, Bill of.

For review of rulings in particular actions or proceedings, see also the various specific topics.

I. NATURE AND FORM OF REMEDY.

⚖1 (Utah) Right of appeal statutory.—In re Jones' Estate, 783.

⚖4 (Cal.App.) Appeal is remedy where no motion to vacate judgment lies.—Furlow Pressed Brick Co. v. Balboa Land & Water Co., 1061.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

⚖17 (Or.) No appeal from circuit court to circuit court.—Nault v. Palmer, 346.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

⚖77(2) (Utah) No appeal from order appointing special administrator, not being "final judgment."—In re Jones' Estate, 783.

⚖80(3) (Cal.App.) Judgment in action to quiet title not interlocutory to necessitate dismissal of appeal.—Olds v. Thorington, 496.

(E) Nature, Scope, and Effect of Decision.

⚖99 (N.M.) Question on attachment appealable to Supreme Court.—First Nat. Bank v. George, 1026.

⚖110 (Cal.App.) Appeal from order denying motion for new trial dismissed.—Gillons v. Turner Oil Co., 185.

⚖110 (Cal.App.) Order on motion for new trial is not appealable.—McCahan v. McCahan, 460.

⚖110 (Cal.App.) Appeal does not lie from order denying new trial.—Bhumgara v. Gazvini, 854.

Digitized by Google

⇐112 (Or.) Void judgment entry appealable.—School Dist. No. 1 of Clatsop County v. Astoria Const. Co., 969.

⇐115 (Cal.App.) No appeal lies from order vacating satisfaction entered by purchaser of judgment at execution sale.—Judnick v. Judnick, 480.

(F) Mode of Rendition, Form, and Entry of Judgment or Order.

⇐123 (Cal.App.) Judgment *held* essential as basis for appeal.—Universal Film Mfg. Co. v. Kerrigan, 475.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

⇐151(2) (Cal.App.) Principals not aggrieved by judgment entered against sureties on stay bond.—Judnick v. Judnick, 480.

(B) Estoppel, Waiver, or Agreements Affecting Right.

⇐154(4) (Cal.App.) Sureties consenting to judgment against them cannot appeal.—Judnick v. Judnick, 480.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(B) Objections and Motions and Rulings Thereon.

⇐205 (Or.) Trial court must be shown materiality of evidence offered.—Janson v. Pacific Diking Co., 340.

⇐215(1) (Mont.) Objection to instructions necessary.—Sanborn Co. v. Powers, 990.

⇐231(3) (Okl.) General objection "objected to" will be noted where it clearly appears that the admitted evidence was prejudicial.—McDonald v. Strawn, 558.

⇐232(2) (Colo.) Defendant's objections *held* not to show any objection to direct proof of his financial status.—Smillie v. De Mendoza, 533.

⇐237(1) (Okl.) Failure to demur to evidence in a law case does not waive exceptions to instructions or rulings.—McDonald v. Strawn, 558.

⇐237(3) (Okl.) Procedural requisites to obtain review of sufficiency of evidence to go to jury in a law case.—McDonald v. Strawn, 558.

Nature of review on the evidence in an equity case by the Supreme Court stated.—Id.

(C) Exceptions.

⇐265(1) (Wash.) Findings must be excepted to in law case.—Shelton v. Powers, 900.

Findings must be excepted to in equity case.—Id.

(D) Motions for New Trial.

⇐295 (Cal.App.) Excessiveness of damages reviewable only if raised by motion for new trial.—Williams v. A. R. G. Bus Co., 1036.

⇐300 (Okl.) On failure to duly file motion for new trial Supreme Court cannot consider it or review trial errors.—J. R. Watkins Medical Co. v. Lizar, 552.

⇐302(2) (Cal.) Right to complain of error in record not lost by failure to assert in motion for new trial.—Massachusetts Bonding & Insurance Co. v Los Angeles R. Corporation, 161.

⇐302(3) (Kan.) Refusal of offer of testimony *held* not erroneous, where not produced at hearing of motion for new trial.—Wilsey State Bank v. Amend, 739.

⇐302(3) (Kan.) Improper evidence not produced on motion for new trial cannot be considered.—Gigoux v. Henderson, 1092.

VI. PARTIES.

⇐330(1) (N.M.) Appeal will be dismissed where appellant has parted with his interest and taken inconsistent position.—Mardorf v. Norment, 736.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

⇐356 (N.M.) On failure to appeal in time, appeal dismissed.—Simmers v. Boyd, 732.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

⇐361(1) (Okl.) There must be petition in error, setting forth error complained of.—Sterling v. Boucher, 1090.

Petition in error is jurisdictional.—Id.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

⇐371 (Cal.App.) Stenographic reporter cannot refuse to prepare transcript because fees are not prepaid.—Harris v. Burt, 1058.

Appeal will be dismissed where appellant took no steps to compel reporter to prepare transcript.—Id.

⇐395 (N.M.) Circuit court cannot entertain appeal where cost bond is not duly filed.—Roberson v. Citizens' Lumber Co., 353.

⇐395 (N.M.) On failure to file cost bond in time, appeal dismissed.—Simmers v. Boyd, 732.

(D) Writ of Error, Citation, or Notice.

⇐417(1) (Or.) Liberality should be indulged in judging sufficiency of notice of appeal.—McFarland v. Hueners, 584.

⇐419(1) (Or.) Notice of appeal is sufficient if it indicates the judgment appealed from.—McFarland v. Hueners, 584.

⇐419(2) (Or.) Discrepancy in date of judgment not fatal to notice of appeal.—McFarland v. Hueners, 584.

Notice of appeal sufficient, though misstating date of formal entry of judgment.—Id.

⇐422 (Cal.App.) Appeal will not be dismissed for defect in notice.—Patterson v. Patterson, 483.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

⇐460(1) (Cal.App.) Defendant appealing *held* required to deliver possession of personalty on demand, where no stay bond executed.—Mortgage Securities Co. of California v. Pfaffman 641.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

⇐502(7) (Cal.App.) Granting new trial *held* reviewable, in absence of specifications of error.—Furlow Pressed Brick Co. v. Balboa Land & Water Co., 1061.

⇐511(3) (Utah) Orders extending time for bill of exceptions attached to judgment roll not considered.—Ukon Water Co. v. Rooker, 778.

(B) Scope and Contents of Record.

⇐534 (N.M.) Grant of appeal should be shown by the record proper, and not in the bill of exceptions.—Roberson v. Citizens' Lumber Co., 353.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

⇐555 (N.M.) Where assignments follow exceptions stricken, the cause will be affirmed.—State v. Board of Com'rs of Guadalupe County, 353.

⇐555 (Utah) Assignments depending upon exceptions not considered where bill stricken.—Ukon Water Co. v. Rooker, 778.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

⇐568 (Okl.) Notice *held* not to authorize settlement of case-made in absence of defendant in error.—Okmulgee County Business Men's Ass'n v. Bryan, 1086.

Trial judge's absence at time stated in notice

Digitized by Google

for settling a case-made required another notice.—Id.

⇐574(2) (N.M.) Time after which district court judge cannot certify transcript or settle bill of exceptions stated.—Roberson v. Citizens' Lumber Co., 353.

(E) Abstracts of Record.

⇐581(2) (Colo.) Objections and exceptions to evidence must appear in abstract.—Zall Jewelry Co. v. Stoddard, 506.

⇐586(1) (Colo.) Court may decline to consider case which it cannot grasp from abstract.—Zall Jewelry Co. v. Stoddard, 506.

(F) Making, Form, and Requisites of Transcript or Return.

⇐596 (N.M.) Appellant's duty to make transcript comply with statute stated.—Norment v. Mardorf, 733.

⇐607(2) (N.M.) Appellant taking up less than entire record must set forth in præcipe questions desired to be reviewed.—Norment v. Mardorf, 733.

(G) Authentication and Certification.

⇐616(2) (Cal.App.) Affidavits used on motion must be authenticated by judge.—Espinosa v. Gould, 481.

⇐616(2) (Idaho) Certificate as to papers used on hearing of motion must be contained in transcript.—Lyons v. Lambrix, 356.

(H) Transmission, Filing, Printing, and Service of Copies.

⇐627(2) (Or.) Appeal will be dismissed where transcript is not filed within 30 days.—Russell v. Smith, 715.

(I) Defects, Objections, Amendment, and Correction.

⇐635(2) (Wyo.) Where record showed no judgment rendered, writ of error dismissed.—Laramie Grocery Co. v. Bell, 665.

⇐638 (Okl.) Settlement and signing of case-made without notice to opposing party is a nullity.—Okmulgee County Business Men's Ass'n v. Bryan, 1086.

⇐655(2) (Utah) Bill of exception, not shown to have been settled within time as extended, stricken.—Ukon Water Co. v. Rooker, 778.

⇐656(1) (Wyo.) Appellant may amend record to make it conform to statute.—Boatman v. Miles, 1002.

⇐659(3) (Cal.App.) Application could not be made on appeal for order directing preparation of supplementary transcript.—Espinosa v. Gould, 481.

⇐660(2) (N.M.) Appellant taking up less than the entire record cannot suggest diminution or apply for certiorari to supply the same.—Norment v. Mardorf, 733.

(K) Questions Presented for Review.

⇐671(7) (Colo.) Assignment based on document not in abstract will not be considered.—Zall Jewelry Co. v. Stoddard, 506.

⇐673(2) (Cal.App.) Court cannot know terms of bill of lading when not before it.—Pioneer Fruit Co. v. Southern Pac. Co., 50.

⇐679(2) (Colo.) Alleged defective pleading will not be considered where not set out and error not assigned.—Zall Jewelry Co. v. Stoddard, 506.

⇐679(2) (N.M.) Duty of appellant to perfect record stated.—Jamison v. McMillen, 726.

⇐704(2) (N.M.) Appeal presents no question without findings and conclusions in another cause stipulated to be controlling.—Roberson v. Moise Bros. Co., 354.

⇐706(3) (Okl.) Unless evidence on former trial is brought up on appeal, probate change in result cannot be determined; evidence at former trial, considered on motion for new trial, may be so brought to Supreme Court.—Chortney v. Curry, 387.

XI. ASSIGNMENT OF ERRORS.

⇐719(4) (Colo.) Alleged defective pleading will not be considered where not set out and error not assigned.—Zall Jewelry Co. v. Stoddard, 506.

⇐733 (Idaho) Specification that "Court erred in rendering judgment" *held* defective.—Delap v. Lawson, 262.

⇐743(2) (Wash.) Assignments of error to evidence must refer to statement of facts.—Shelton v. Powers, 900.

XII. BRIEFS.

⇐761 (Cal.App.) Assignments of error insufficient.—Bar Due v. Cox, 1056.

⇐762 (Cal.App.) Ground abandoned in closing brief need not be considered.—Patterson v. Patterson, 483.

⇐766 (Cal.App.) Brief not complying with rules may be stricken.—McCahan v. McCahan, 460.

⇐766 (Cal.App.) On appeal under alternative method failure to print portions of record *held* not to warrant dismissal of appeal.—Kinderman v. Shipley, 472.

⇐766 (Wyo.) Failure of brief to point to evidence not ground for dismissal where claim of no evidence is made.—Boatman v. Miles, 1002.

⇐767(1) (Cal.App.) Brief not complying with rules may be stricken.—McCahan v. McCahan, 460.

⇐767(1) (Idaho) Brief distinctly enumerating in argument errors relied on will not be stricken.—Noble v. Harris, 922.

⇐768 (Cal.App.) Failure to deny statement conceded truth on appeal.—Arnold v. La Belle Oil Co., 815.

⇐771 (Cal.App.) Failure of husband to furnish counsel fees and costs no excuse for failing to file brief.—McCahan v. McCahan, 460.

⇐773(2) (Idaho) Failure to file brief within time no ground for dismissal.—Noble v. Harris, 922.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⇐781(7) (Mont.) Dismissed where appellant has complied with order appealed from.—State v. Mayor of City of Butte, 991.

⇐790(3) (Ariz.) Appeal from judgment for defendant in possessory action dismissed as moot.—Dey v. Laurel Cañon Mining Co., 83.

XVI. REVIEW.

(A) Scope and Extent in General.

⇐854(1) (Okl.) General judgment will not be reversed if having a basis in any one of several grounds.—Hines v. Olsen, 266.

⇐856(5) (Cal.App.) Scope of review of order granting new trial limited by form of court's order.—Kinney v. King, 834.

⇐867(5) (Cal.App.) Scope of review of order denying new trial stated.—Furlow Pressed Brick Co. v. Balboa Land & Water Co., 1061.

(C) Parties Entitled to Allege Error.

⇐877(4) (Wash.) Errors against defendant not reviewable on plaintiff's appeal.—Pioneer Mining & Ditch Co. v. Davidson, 242.

⇐877(6) (Cal.App.) Cross-defendants, appealing as group, could not complain of decree affecting respective rights.—De Bairos v. Barlin, 188.

⇐878(1) (Idaho) Entire judgment before appellate court on general appeal without cross appeal.—Rabido v. Furey, 73.

⇐882(21) (Cal.App.) Failure to request reporter's transcript cannot be complained of where respondents failed to give notice of termination of proceedings for new trial.—Stoner v. Security Trust Co., 500.

⇐883 (Or.) Party cannot complain that attorney's fee agreed on as reasonable was included in verdict.—McFarland v. Hueners, 584.

Digitized by Google

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

⇐888(2) **(N.M.)** Defendant litigating material facts omitted from complaint cannot object after judgment, and complaint may be amended on appeal.—Jamison v. McMillen, 726.

(E) Presumptions.

⇐907(2) **(Cal.App.)** Presumption ruling of trial court supported by evidence.—Boland v. Smith, 825.

⇐907(2) **(Cal.App.)** Ruling of lower court assumed to be proper, in absence or evidence on which based.—Espinosa v. Gould, 481.

⇐907(3) **(Colo.)** Evidence not presented by bill of exceptions must be presumed sufficient.—Bollen v. Woodhams, 427.

⇐909(1) **(Cal.App.)** Compliance with statute making water stock appurtenant to land presumed to support judgment.—Woodstone Marble & Tile Co. v. Dunsmore Canyon Water Co., 213.

⇐916(1) **(Cal.)** No presumption as to how pleading was entitled.—In re McGrew, 804.

⇐931(1) **(Colo.)** Presumed that question of fact was resolved by court for prevailing party.—Brown v. Hallett, 429.

⇐931(1) **(Colo.)** Evidence viewed in light most favorable to party prevailing.—Gerard v. Costen, 526.

⇐931(1) **(Idaho)** Findings of fact literally construed.—Fehr v. Haworth, 248.

⇐931(6) **(Kan.)** Improper evidence received on trial before court presumed disregarded.—Dana v. Kansas Natural Gas Co., 610.

⇐931(6) **(Kan.)** Only competent evidence is presumed to have been considered by trial court.—Laverty v. Larned Oil & Gas Co., 596.

⇐931(6) **(Utah)** Court presumed to have based finding on evidence free from objection.—Matson v. Matson, 943.

⇐931(7) **(Cal.App.)** Assumed on appeal in replevin that defendant's possession was within issues, though not pleaded.—Pioneer Truck Co. v. Hawley, 1037.

⇐932(1) **(Cal.App.)** That motion for allowance of counsel fees was made in action for separate maintenance *held* presumed.—Sherman v. Sherman, 464.

(F) Discretion of Lower Court.

⇐960(1) **(Kan.)** Motion to separately state and number is addressed to trial court's discretion.—Small v. Small, 623.

⇐960(2) **(Ariz.)** Order on motion to make pleading more definite and certain will not be revised.—Shill v. Jones, 77.

⇐966(2) **(Kan.)** Continuance on account of illness of juror *held* no ground for reversal.—Schlesener v. Mott, 745.

⇐977(1) **(Okl.)** Motion addressed to discretion of trial court.—Swan v. Duncan, 678.

⇐984(1) **(Nev.)** Whether judgment "more favorable" than that offered, as affecting costs, within discretionary determination of court of jurisdiction.—Herring-Hall-Marvin Safe Co. v. Balliet, 76.

(G) Questions of Fact, Verdicts, and Findings.

⇐987(1) **(Okl.)** In law case matters of fact are not reviewable.—McDonald v. Strawn, 558.

⇐987(2) **(Ariz.)** Constitution makes jury finding against assumption of risk conclusive.—Inspiration Consol. Copper Co. v. Conwell, 88.

⇐987(2) **(Idaho)** Under statute verdict supported by conflicting evidence not disturbed.—Lisenby v. Intermountain State Bank, 355.

⇐991 **(Kan.)** Result of an accounting not disturbed.—Robertson v. Wangler, 788.

⇐992 **(Okl.)** Determination that secondary evidence of lost writing is admissible not disturbed.—Choctaw Lumber Co. v. Waldock, 866.

⇐994(2) **(Wash.)** Determination of credibility of witnesses for jury, and not Supreme Court.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 226.

⇐995 **(Or.)** Opinion evidence as to value of attorney's services not binding.—Tillamook County v. Johnson, 159.

⇐996 **(Cal.App.)** Appellate court cannot set aside findings supported by inferences from facts proved.—Dibble v. San Joaquin Light & Power Corporation, 198.

⇐999(1) **(Okl.)** Verdict on charge properly submitting applicable law is conclusive.—St. Louis-San Francisco Ry. Co. v. Jones, 385.

⇐1001(1) Verdict not disturbed where supported by evidence.

—**(Cal.)** Newman v. E. E. Overholtzer Sons' Co., 175;
(N.M.) First Nat. Bank v. George, 1026;
(Okl.) Thornburgh v. Haun, 1083.

⇐1001(1) **(Okl.)** Verdict supported by some evidence will not be disturbed in the absence of prejudice.—Alamo Nat. Bank of San Antonio v. Dawson Produce Co., 393.

⇐1001(1) **(Okl.)** Judgment on verdict supported by evidence will not be reversed.—Tulsa Fuel & Mfg. Co. v. Gilchrist Drilling Co., 399.

⇐1001(1) **(Okl.)** Verdict supported by evidence not set aside as contrary to evidence.—Katterhenry v. Williamson, 404.

⇐1002 Verdict on conflicting evidence not reviewed.

—**(Cal.)** Young v. Southern Pac. Co., 36;
(Colo.) Smillie v. De Mendoza, 533;
(Mont.) Sanborn Co. v. Powers, 990;
(Or.) McDonald v. Supple, 315.

⇐1002 **(Ariz.)** Finding of proximate cause not disturbed, though evidence warranting inference was contradicted.—Inspiration Consol. Copper Co. v. Conwell, 88.

⇐1002 **(Idaho)** Verdict supported by substantial evidence not disturbed.—Lyons v. Lambrix, 356.

⇐1002 **(Kan.)** Verdict and judgment on controverted evidence conclude the facts.—Currant v. Lenger, 432.

⇐1002 **(Wash.)** Determination of conflict in evidence for jury, and not Supreme Court.—Clark Lloyd Lumber Co. v. Puget Sound C. Ry. Co., 226.

⇐1004(1) **(Cal.App.)** Grounds for setting award aside as excessive stated.—Williams v. A. R. G. Bus Co., 1036.

⇐1005(4) **(Kan.)** Ruling as to evidence not prejudicial, where judgment was based on another theory.—Wilsey State Bank v. Amend, 739.

⇐1008(1) **(Colo.)** Where court, with consent of parties, viewed disputed boundaries, his finding is entitled to additional weight.—Board of Com'rs of Ouray County v. Board of Com'rs of San Juan County, 666.

⇐1008(3) **(Colo.)** Appellate court may draw its own conclusion as to documentary evidence.—Gerard v. Costen, 526.

⇐1009(3) **(Or.)** Opinion of trial court in equity case on disputed question of fact entitled to weight.—James v. Ward, 1105.

⇐1009(4) **(Okl.)** Decree not disturbed unless clearly against evidence.—Swan v. Duncan, 678.

⇐1010(1) **(Okl.)** Trial court's findings of fact, reasonably supported by evidence, will not be disturbed.—Union Sav. Ass'n v. Cummins, 869.

⇐1010(1) **(Okl.)** Verdict supported by any evidence will not be disturbed.—Southwestern Surety Ins. Co. v. Marlow, 672.

⇐1010(2) **(Mont.)** Findings unsupported by evidence.—Tuttle v. Pacific Mut. Life Ins. Co., 993.

⇐1011(1) Finding on conflicting evidence not disturbed.

—**(Cal.)** In re McGrew, 804; (App.) Stern v. McDonald, 221; Wilmot v. Moody, 639; Ramish v. Reichenbach, 824; Barr Lumber Co. v. Joy Const. Co., 844; Bhumgara v. Gazvini, 854; Conrad v. La Plante, 1073;
(Colo.) Greenlees v. Chezik, 667.

Digitized by Google

⇐1011(1) **(Cal.App.)** Conflict in evidence for trial court.—Mortgage Securities Co. of California v. Pfaffman, 641.
⇐1011(1) **(Idaho)** Judgment not disturbed because of conflict in evidence, where sustained by proof.—Clifford v. Lake, 714.
⇐1011(1) **(Okl.)** Judgment sustained by weight of evidence not disturbed.—Peters v. Bledsoe, 407.
⇐1011(1) **(Okl.)** Judgment on conflicting evidence reasonably supported by evidence affirmed.—Choctaw Lumber Co. v. Waldock, 866.
⇐1012(1) **(Mont.)** Supreme Court reverses findings only where evidence clearly against them.—Willis v. Pilot Butte Mining Co., 124.
⇐1012(1) **(Okl.)** Judgment not against weight of evidence not disturbed.—Hines v. Olsen, 266.
⇐1012(1) **(Wash.)** Findings must be confirmed unless evidence preponderates against them.—Di Luck v. Bradner Co., 904.
⇐1015(5) **(Colo.)** Court will defer to trial court's finding as to quotient verdict on motion for new trial.—Smillie v. De Mendoza, 533.
⇐1017 **(Colo.)** Finding of fact of the trial court is conclusive, though part of testimony was heard by referee.—Board of Com'rs of Ouray County v. Board of Com'rs of San Juan County, 666.
⇐1024(3) **(Kan.)** Decision as to good faith of questions asked juror on his voir dire final.—Howard v. Marshall Motor Co., 11.

(H) Harmless Error.

⇐1026 **(Mont.)** Judgment reversed only for error materially affecting the merits.—Montana Live Stock & Loan Co. v. Stewart, 985.
⇐1031(6) **(Ariz.)** Instruction allowing improper measure of damages will be presumed prejudicial.—Gilmore v. Wingate, 571.
⇐1033(1) **(Or.)** Assumption of burden by plaintiff favorable to defendant not error of which latter may complain.—Winn v. Taylor, 342.
⇐1033(3) **(Cal.App.)** Exclusion of evidence favorable to the other party harmless.—Edge v. Bryan, 476.
⇐1033(8) **(Cal.App.)** Error as to damages *held* favorable to appellant.—Humphry v. Farmers' Union & Milling Co., 489.
⇐1033(8) **(Colo.)** Seller *held* not entitled to complain of decree of rescission entered after judgment for purchase money in law action.—Keith v. Schuck, 530.
⇐1039(13) **(Kan.)** Verdict for balance of salary not reversed, because petition did not allege a wrongful discharge.—Manross v. Uncle Sam Oil Co., 619.
⇐1040(16) **(Colo.)** Overruling demurrer for a misjoinder harmless where only one cause of action submitted.—Keith v. Schuck, 530.
⇐1041(2) **(Cal.App.)** Defendant *held* not prejudiced by leave to plaintiffs to amend.—Bhumgara v. Gazvini, 854.
⇐1042(4) **(Mont.)** Refusal to strike an admission from complaint not prejudicial to defendant.—Smith v. Sullivan, 288.
⇐1047(3) **(Idaho)** Admission of evidence as to damages for loss of pasture *held* not prejudicial.—Groefsema v. Mountain Home Co-op. Irr. Co., 356.
⇐1048(6) **(Cal.App.)** Exclusion of cross-examination as to witness' intoxication *held* harmless.—Grover v. Morrison, 1078.
⇐1050(1) **(Kan.)** Admission of evidence in ejectment *held* not prejudicial.—Robertson v. Wangler, 788.
⇐1050(1) **(Mont.)** Testimony as to resale at advance harmless, where advance price was market value.—Montana Live Stock & Loan Co. v. Stewart, 985.
⇐1050(4) **(Utah)** Irregularity in evidence of notice of defect of goods *held* harmless.—Consolidated Wagon & Machine Co. v. Wright, 937.
⇐1052(7) **(Kan.)** Ruling as to evidence not prejudicial, where judgment was based on another theory.—Wilsey State Bank v. Amend, 739.
⇐1053(2) **(Mont.)** Withdrawal of evidence and instruction to disregard *held* sufficient to avoid error.—Sanborn Co. v. Powers, 990.
⇐1053(3) **(Cal.)** Defendant cannot complain of admission of ordinance where instructions construed it as he contended.—Newman v. E. E. Overholtzer Sons' Co., 175.
⇐1064(1) **(Ariz.)** Erroneous instruction not reversible error unless prejudicial.—Mesa City v. Lesueur, 573.
⇐1064(1) **(Colo.)** Instruction for plaintiff if property was held to secure gambling debt, if error, *held* harmless.—Benish v. Jones, 538.
⇐1064(1) **(Kan.)** Verdict for balance of salary not reversed, because instructions were based on unsound theory.—Manross v. Uncle Sam Oil Co., 619.
⇐1064(1) **(Kan.)** Erroneous instruction *held* harmless.—Lenox Hall v. Seelye, 737.
⇐1064(1) **(Kan.)** Instruction that if plaintiff *held* notes merely for collection there could be no recovery *held* not reversible error.—Wilsey State Bank v. Amend, 739.
⇐1064(1) **(Kan.)** In action for destruction of oil well, instructions given on damages *held* not prejudicial.—McArthur et al. v. Independent Torpedo Co., 787.
⇐1064(1) **(Kan.)** Erroneous instructions probably misleading the jury constitute reversible error.—Gigoux v. Henderson, 1092.
⇐1064(1) **(Wash.)** Instruction in action for destruction of log boom site harmless.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 226.
⇐1064(4) **(Utah)** Poorly worded instruction *held* harmless.—Consolidated Wagon & Machine Co. v. Wright, 937.
⇐1067 **(Kan.)** In action for destruction of oil well, instructions refused on damages *held* not prejudicial.—McArthur v. Independent Torpedo Co., 787.
⇐1068(1) **(Kan.)** Ruling on instructions *held* not erroneous in view of verdict.—Robertson v. Wangler, 788.
⇐1068(4) **(Ariz.)** Erroneous instruction as to measure of damages harmless.—Mesa City v. Lesueur, 573.
⇐1068(5) **(Idaho)** Erroneous refusal of instruction was not reversible, where jury's finding negatived its hypothesis.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.
⇐1068(5) **(Kan.)** Refusal of instructions *held* not erroneous in view of verdict.—Robertson v. Wangler, 788.
⇐1071(1) **(Cal.App.)** Error in findings *held* harmless.—Conrad v. La Plante, 1073.
⇐1071(6) **(Cal.App.)** Failure to make finding *held* immaterial.—Mortgage Securities Co. of California v. Pfaffman, 641.
⇐1073(3) **(Cal.App.)** Error in judgment against defendant, not a proper party, prejudicial as to costs.—American Bond & Mortgage Co. v. Lindsay, 192.
⇐1073(3) **(Cal.App.)** Defendant called indifferently by two names may not complain of judgment in one of such names.—George v. Stensland, 1069.
⇐1073(7) **(Or.)** Allowance of excessive attorney's fee on foreclosure of contract of sale *held* not immaterial.—James v. Ward, 1105.

(I) Error Waived in Appellate Court.

⇐1078(1) **(Cal.App.)** Matters not argued deemed waived.—Palvutzian v. Terkanian, 503.
⇐1078(4) **(Cal.App.)** Appellate court will not search record for grounds of alleged errors.—Willits v. Helmer, 645.
⇐1078(4) **(Mont.)** Refusal of instruction not discussed in brief need not be considered.—National Cash Register Co. v. Wall, 135.
⇐1079 **(Cal.App.)** Points not argued in brief not considered.—Gillons v. Turner Oil Co., 185.

Digitized by Google

(K) Subsequent Appeals.

⇐1097(1) (Cal.App.) Decision on former appeal law of case.—Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co., 194.

⇐1097(1) (Kan.) Trial errors settled by former appeal will not be considered.—Kinkel v. Chase, 618.

⇐1097(2) (Cal.App.) Opinion on former appeal law of case.—Hubbard v. Jurian, 1052.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

⇐1122(2) (Cal.App.) Appellate court cannot make findings.—Guy v. Leech, 1067.

(C) Modification.

⇐1151(3) (Kan.) Modification of judgment as to damages directed.—Schlesener v. Mott, 745.

(D) Reversal.

⇐1167 (Cal.) Mere error of pleading or procedure no ground for reversal.—In re McGrew, 804.

⇐1170(1) (Cal.App.) Judgment will not be reversed for nonprejudicial error.—Patterson v. Patterson, 483.

⇐1170(1) (Cal.App.) Lack of service on husband of defendant wife harmless to wife.—George v. Stensland, 1060.

⇐1170(1) (Okl.) No new trial unless for substantial violation of constitutional or statutory right.—Choctaw Lumber Co. v. Waldock, 866.

⇐1170(3) (Cal.App.) Overruling of demurrer to cross-complaint harmless.—Bledsoe v. Stuckey, 217.

⇐1170(6) (Okl.) In absence of substantial error, judgment will be affirmed.—Katterhenry v. Williamson, 404.

⇐1170(7) (Mont.) Erroneous admission of evidence as to market value harmless, where evidence as to value was not attacked.—Church v. Zywert, 291.

⇐1170(7) (Okl.) Exclusion of evidence *held* not prejudicial where not affecting result.—Swan v. Duncan, 678.

Unless prejudicial, error in rulings on evidence no ground for reversal.—Id.

⇐1170(9) (Cal.) Erroneous instructions *held* prejudicial.—Young v. Southern Pac. Co., 36.

⇐1171(1) (Kan.) Mistake in computation of interest *held* not material.—Robertson v. Wangler, 788.

⇐1172(3) (Or.) Judgment not reversed, where good as to one cause of action though verdict single.—Martin v. Gauld Co., 717.

⇐1175(2) (Cal.App.) Appellate court cannot render judgment for amount due plaintiff to save expenses of another trial.—Bayless v. Reed, 211.

⇐1175(2) (Colo.) Suit may be dismissed by appellate court for laches.—Bower v. Pound, 425.

⇐1177(6) (Wash.) On reversal of judgment notwithstanding verdict, appellee is entitled to have trial court dispose of motion for new trial.—Casey v. Williams, 1011.

(F) Mandate and Proceedings in Lower Court.

⇐1207(3) (Ariz.) Including in judgment in possessory action rents accruing after judgment not reversible error.—Genardini v. Kline, 568.

⇐1208(8) (Cal.App.) Delivery of possession of personalty *held* not to deprive defendant of right to judgment for restitution upon retrial after reversal.—Mortgage Securities Co. of California v. Pfaffman, 641.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⇐1231 (Or.) Upon dismissal of appeal judgment will be enforced against the appellant and his sureties.—Russell v. Smith, 715.

ARBITRATION AND AWARD.

I. SUBMISSION.

⇐8 (Cal.App.) Arbitration clause not construed to oust courts of jurisdiction where it can be avoided.—Oakdale Irr. Dist. v. Beard, 224.

ARGUMENT OF COUNSEL.

See Criminal Law, ⇐722½–730; Trial, ⇐108½–127.

ARREST.

I. IN CIVIL ACTIONS.

⇐27 (Cal.App.) Affidavit on information and belief, and not stating facts, *held* insufficient.—Ex parte Gillett, 209.

⇐29 (Cal.App.) Affidavit for arrest, on ground that defendant was guilty of conversion as agent, insufficient.—Ex parte Gillett, 209.

Affidavit should set forth more than mere conclusion of fraud.—Id.

ARREST OF JUDGMENT.

See Criminal Law, ⇐970.

ASSESSMENT.

See Drains, ⇐82; Municipal Corporations, ⇐406–538; Taxation, ⇐386–497.

ASSIGNMENTS.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

⇐22 (Cal.App.) Chose in action arising from violation of property right or from obligation or contract assignable.—Dibble v. San Joaquin Light & Power Corporation, 198.

⇐23 (Wash.) Right of contribution between guarantors assignable.—Pioneer Mining & Ditch Co. v. Davidson, 242.

⇐24(1) (Or.) Tort action cannot be assigned.—Rorvik v. North Pac. Lumber Co., 331.

II. OPERATION AND EFFECT.

⇐76 (Wash.) Assignment of company's personal property passed right to contribution from coguarantors.—Pioneer Mining & Ditch Co. v. Davidson, 242.

⇐79 (Cal.) Transfer of note for indebtedness on open accounts transfers the original debt.—Ellison v. Henion, 793.

IV. ACTIONS.

⇐119 (Kan.) Assignee of account for wages may sue thereon.—Currant v. Lenger, 432.

⇐121 (Wash.) Obligor or debtor to be sued by assignee need not be named in assignment.—Pioneer Mining & Ditch Co. v. Davidson, 242.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

II. CONSTRUCTION AND OPERATION IN GENERAL.

⇐191 (Mont.) Does not affect creditors' right to sue assignor.—Acme Harvesting Mach. Co. v. Benedict, 287.

IV. ADMINISTRATION OF ASSIGNED ESTATE.

⇐215 (Mont.) Assignee stands in place of assignor.—Acme Harvesting Mach. Co. v. Benedict, 287.

V. RIGHTS AND REMEDIES OF CREDITORS.

(B) Presentation, Proof, and Payment of Claims.

⇐326 (Mont.) Creditor's release *held* insufficient to release unpaid portion of debt.—Acme Harvesting Mach. Co. v. Benedict, 287.

Digitized by Google

VI. RIGHTS AND REMEDIES OF ASSIGNOR.

⇐362 (Mont.) Assented to by creditor, does not discharge his debt.—Acme Harvesting Mach. Co. v. Benedict, 287.

ASSOCIATIONS.

See Building and Loan Associations; Insurance, ⇐695–812.

ASSUMPSIT, ACTION OF.

See Work and Labor.

ASSUMPTION OF RISK.

See Master and Servant, ⇐213–217.

ATTACHMENT.

See Garnishment.

I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

⇐13 (Cal.App.) Not authorized in suit upon judgment secured in another state; "contract of record."—Erickson v. Erickson, 464.

⇐19 (Kan.) Defendant filing cross-petition against his codefendant is entitled to have an attachment issued against his property.—Johnson v. Hay, 613.

II. PROPERTY SUBJECT TO ATTACHMENT.

⇐63 (Utah) Contents of safety deposit box are subject to writ.—West Cache Sugar Co. v. Hendrickson, 946.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

⇐184 (N.M.) General judgment and execution does not waive attachment.—First Nat. Bank v. George, 1026.

VIII. CLAIMS BY THIRD PERSONS.

⇐296 (Cal.App.) Sheriff not liable for detention of automobile until atfer notice of third party claim.—Mutch v. Long Beach Imp. Co., 638.

ATTORNEY AND CLIENT.

See Trial, ⇐108½–127.

I. THE OFFICE OF ATTORNEY.

(C) Suspension and Disbarment.

⇐46 (Cal.App.) Attorney may be disbarred for defrauding his partner.—In re Cruickshank, 1038.

⇐48 (Or.) Order requiring attorney sought to be disbarred to appear and answer charges did not require seal of court.—State v. Hall, 304.

Copy of order to appear and answer disbarment charges need not be authenticated by clerk.—Id.

⇐52 (Or.) Accusation in disbarment proceedings *held* not required to set forth entire complaint by defrauded party.—State v. Hall, 304.

Verification of accusation in disbarment proceedings by chairman of grievance committee of bar association complied with statute.—Id.

⇐53(2) (Cal.App.) Code provision as to proof of false pretenses not applicable in disbarment proceedings.—In re Cruickshank, 1038.

⇐53(2) (Nev.) Evidence of subornation of perjury *held* insufficient to warrant disbarment.—Washoe County Bar Ass'n v. Scoular, 899.

⇐54 (Nev.) Disbarment proceeding not a civil action, and findings unnecessary.—Washoe County Bar v. Scoular, 899.

⇐55 (Cal.App.) Refusal of new trial not error where affidavits showed omissions to get evidence in.—In re Cruickshank, 1038.

⇐57 (Cal.App.) Appellate court in disbarment proceedings concluded by finding on conflicting evidence.—In re Cruickshank, 1038.

Reasons for disbarment no part of record on appeal.—Id.

⇐58 (Nev.) Misrepresentation of immaterial matter to procure order is misconduct warranting suspension.—Washoe County Bar Ass'n v. Scoular, 899.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

⇐109 (Cal.App.) Attorney of executrix not liable for permitting statute to run against note of estate taken by her in informal division.—Wilmot v. Moody, 639.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

⇐147 (N.M.) Contract by attorney to assist in prosecution of criminal case for contingent fee *held* contrary to public policy.—Baca v. Padilla, 730.

⇐147 (Or.) Provision fixing compensation attached to appropriation to pay claim supersedes express contract for compensation.—Herrick v. Barzee, 141.

⇐166(2) (Kan.) Evidence in action for attorney's fee *held* to sustain a judgment for plaintiffs.—Dana v. Kansas Natural Gas Co., 610.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

⇐49 (Okl.Cr.App.) On evidence not creating a reasonable doubt of guilt of a capital offense bail will be denied.—In re Bean, 1091.

Evidence not creating such a reasonable doubt of guilt of capital offense as to entitle to bail.—Id.

⇐96 (Cal.App.) Cash bail to answer felony charged forfeited by recorder belongs to county.—Tulare County v. Fenn, 855.

BAILMENT.

See Pledges.

⇐2 (Kan.) "Mandate" defined.—Maddock v. Riggs, 12.

⇐12 (Kan.) Liability for gross negligence only.—Maddock v. Riggs, 12.

Bailee may be liable though exercising same care as with his own goods.—Id.

Mandatory must exercise same care as he should in his own affairs.—Id.

"Reasonable care" required of gratuitous bailee, defined.—Id.

⇐33 (Kan.) Liability for gross negligence only; gross negligence question for jury.—Maddock v. Riggs, 12.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

III. ASSIGNMENT, ADMINISTRATION AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(E) Actions by or Against Trustee.

⇐303(1) (Mont.) Facts which must be proved in suit to set aside preference stated.—Worden v. Morigeau, 122.

⇐303(3) (Mont.) Evidence *held* to sustain bona fides of transfer attacked as preference.—Worden v. Morigeau, 122.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(C) Stockholders.

⇐43 (Kan.) Uncollectible note charged by state bank to profit and loss account *held* to

Digitized by Google

belong to it, and not to its former stockholders.—Johnson v. Hay, 613.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

⇐119 (Okl.) Agreement as to deposit will be enforced so long as third persons are not prejudiced.—Southwestern Surety Ins. Co. v. Marlow, 672.

⇐148(2) (Cal.App.) Bank liable for money paid out on forged indorsement.—Bennett v. First Nat. Bank, 831.

Bank not entitled to credit on money paid on forged indorsement by reason of money paid by forger to drawer.—Id.

⇐154(6) (Okl.) Burden of proving that bank which paid out funds on orders of guardian was guilty of misappropriations *held* upon surety company.—Southwestern Surety Ins. Co. v. Marlow, 672.

BASTARDS.

I. ILLEGITIMACY IN GENERAL.

⇐13 (Cal.) Father of illegitimate child may adopt.—In re McGrew, 804.

II. CUSTODY, SUPPORT, AND PROTECTION.

⇐15 (N.M.) Putative father not entitled to custody against adopting parents.—Ex parte Wallace, 1020.

Statute permitting illegitimate children to inherit does not change rights as to their custody.—Id.

⇐16 (N.M.) Statute permitting illegitimate children to inherit does not change rights as to their support.—Ex parte Wallace, 1020.

IV. PROPERTY.

⇐95 (N.M.) At common law a bastard could not inherit.—Ex parte Wallace, 1020.

⇐104 (N.M.) At common law a bastard had no heirs, except of his own body.—Ex parte Wallace, 1020.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations; Insurance, ⇐695–812.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

⇐30 (Cal.App.) Note to cover impairment of assets binding though not joint and several as directed.—Stern v. McDonald, 221.

(C) Execution and Delivery.

⇐65 (Colo.) Delivery of a note to enable the payee to use proceeds gives power to negotiate.—Greenlees v. Chezik, 667.

(E) Consideration.

⇐92(1) (Cal.App.) Transaction *held* sale of bonds which amounted to consideration for note.—Stern v. McDonald, 221.

Note executed by directors to make good impairment of bank's assets supported by consideration.—Id.

(F) Validity.

⇐103(1) (Or.) Misrepresentation that change in contract did not increase obligations of maker not a defense.—McFarland v. Hueners, 584.

III. MODIFICATION, RENEWAL, AND RESCISSION.

⇐140 (Cal.App.) Though renewal notes were given, action may be on original obligation.—Seaboard Nat. Bank v. Belden, 1045.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

⇐167 (Cal.App.) Note and mortgage with default and option clause *held* not negotiable.—Stoner v. Security Trust Co., 500.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

⇐296 (Cal.App.) Indorser for value after maturity cannot set up defenses.—Seaboard Nat. Bank v. Belden, 1045.

(D) Bona Fide Purchasers.

⇐337 (Kan.) Bad faith necessary to charge holder with notice.—Gigoux v. Henderson, 1092.

⇐351 (Colo.) Transferee after maturity bound by payment.—Greenlees v. Chezik, 667.

⇐356 (Okl.) Bank giving drawer of bill of exchange credit on his deposit is not holder for value, unless deposit is checked out.—Alamo Nat. Bank of San Antonio v. Dawson Produce Co., 393.

Bank merely crediting proceeds of bill of exchange not a purchaser for value.—Id.

VII. PAYMENT AND DISCHARGE.

⇐432 (Cal.App.) Transfer of leasehold interest in consideration of release from note precluded recovery thereon.—Hill v. Moore, 651.

VIII. ACTIONS.

⇐443(3) (Or.) Assignment as collateral supports recovery by assignee.—McFarland v. Hueners, 584.

⇐452(1) (Cal.App.) Directors' note to take up depreciated bonds binding, though sale not authorized by resolution.—Stern v. McDonald, 221.

⇐471 (Utah) Plaintiff suing on note providing for attorney's fees should plead and prove what is reasonable fee.—Staheli v. Adams, 781.

⇐474 (Colo.) Payment and plea thereof is recognition of execution, delivery, and consideration.—Greenlees v. Chezik, 667.

⇐475 (Colo.) Plea of payment admits the original liability.—Greenlees v. Chezik, 667.

⇐477 (Cal.App.) Answer setting up misrepresentation insufficient, without stating reliance on fraud.—Stern v. McDonald, 221.

⇐493(3) (N.M.) Burden of showing want of consideration rests upon defendant until he offers evidence shifting burden.—Citizens' Nat. Bank of Roswell v. Bean, 1018.

⇐516 (Cal.App.) Evidence in action on notes *held* to sustain finding for plaintiff.—Conrad v. La Plante, 1073.

⇐538(2) (Okl.) Question of ownership of bill of exchange rather than agency for collection *held* for jury.—Alamo Nat. Bank of San Antonio v. Dawson Produce Co., 393.

⇐539 (Utah) On awarding attorney's fee in action on note, court should find what constitutes reasonable fee.—Staheli v. Adams, 781.

BREACH OF MARRIAGE PROMISE.

⇐21 (Colo.) Letters between parties admissible.—Smillie v. De Mendoza, 533.

⇐22 (Colo.) Acts of parties are admissible.—Smillie v. De Mendoza, 533.

Where defendant attacked plaintiff's character, evidence of her reputation was admissible.—Id.

Digitized by Google

⇐27 (Colo.) Defendant's financial condition may be shown by direct evidence.—Smillie v. De Mendoza, 533.

Jury warranted in considering financial condition of defendant.—Id.

⇐28 (Colo.) Jury might consider attack on plaintiff's character in assessing damages.—Smillie v. De Mendoza, 533.

⇐31 (Colo.) Amount of damages rests peculiarly with jury.—Smillie v. De Mendoza, 533.

BRIEFS.

See Appeal and Error, ⇐761–773.

BROKERS.

See Factors.

II. EMPLOYMENT AND AUTHORITY.

⇐10 (Kan.) Listing of property for sale does not give an exclusive or irrevocable agency.—Haggart v. King, 763.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

⇐31 (Cal.) Must inform principal of interest on the side of the proposed purchaser.—Newell-Murdoch Realty Co. v. Wickham, 359.

Must inform principal that they are stockholders in proposed purchaser.—Id.

⇐34 (Kan.) Agents to sell, who by misrepresentation obtain a profit over their commission, forfeit their right to it, and become liable in damages.—Schlesener v. Mott, 745.

⇐38(4) (Kan.) Brokers' misrepresentations and fraud *held* sustained by evidence.—Schlesener v. Mott, 745.

IV. COMPENSATION AND LIEN.

⇐43(2) (Cal.App.) Statute as to appointment of broker does not require formal written contract.—Arnold v. La Belle Oil Co., 815.

Statute as to appointment of broker by writing *held* not to apply to executive corporate officer.—Id.

⇐43(3) (Cal.App.) Letter employing broker to sell land sufficient.—Arnold v. La Belle Oil Co., 815.

⇐43(3) (Wash.) Description of property in broker's employment contract *held* insufficient.—Big Four Land Co. v. Daracunas, 229.

⇐46 (Kan.) Broker not notifying owner of sale of land listed until after owner's sale is not entitled to commission.—Haggart v. King, 763.

⇐55(3) (Kan.) Listing of property for sale does not give an exclusive or irrevocable agency.—Haggart v. King, 763.

⇐57(2) (Cal.App.) Entitled to agreed compensation on sale to purchaser for less than contemplated.—Arnold v. La Belle Oil Co., 815.

Subsequent modification of sale contract cannot defeat broker's compensation.—Id.

⇐63(1) (Okl.) When real estate broker has earned his commission stated.—Thornburgh v. Haun, 1083.

⇐65(1) (Cal.) Principal not deceived by representations disregarded by him.—Gillons v. Turner Oil Co., 183.

⇐65(1) (Cal.App.) Representations of broker as to quality of oil to be produced mere statement of opinion.—Gillons v. Turner Oil Co., 183.

⇐65(1) (Cal.App.) Principal having independent knowledge could not rely on false representation.—Gillons v. Turner Oil Co., 185.

⇐65(2) (Kan.) Agents to sell, who by misrepresentation obtain a profit over their commission, forfeit their right to it, and become liable in damages.—Schlesener v. Mott, 745.

⇐66 (Kan.) Agent to sell who purchases property at a profit to himself, *held* liable on agreement to divide commissions with another agent.—Stainbrook v. Wilson, 606.

⇐75 (Cal.App.) Entitled to compensation as price was paid.—Arnold v. La Belle Oil Co., 815.

Not entitled to percentage out of due, but unpaid, installments.—Id.

V. ACTIONS FOR COMPENSATION.

⇐82(2) (Kan.) In action for commission answer *held* not subject to demurrer.—Haggart v. King, 763.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

⇐94 (Cal.) Sale may be avoided for failure of agent to disclose his interest in purchaser.—Newell-Murdoch Realty Co. v. Wickham, 359.

BUILDING AND LOAN ASSOCIATIONS.

⇐1 (Okl.) Nature and status.—Holt v. Ætna Building & Loan Ass'n, 872.

⇐6(2) (Okl.) Law in force required mutuality in transactions, and did not discriminate against borrowing members.—Holt v. Ætna Building & Loan Ass'n, 872.

⇐23(4) (Okl.) Finding that loan solicitor was agent of association *held* justified.—Union Sav. Ass'n v. Cummins, 869.

⇐31(3) (Okl.) Prior law required association to fix premiums for loan by competitive bidding.—Union Sav. Ass'n v. Cummins, 869.

⇐33(13) (Okl.) Finding that loan was made without competitive bidding *held* correct.—Union Sav. Ass'n v. Cummins, 869.

Failure to fix premium by competitive bidding prevents charge of more than legal interest.—Id.

⇐46(3) (Okl.) Foreign corporation cannot do business in state unless it complies with state laws.—Holt v. Ætna Building & Loan Ass'n, 872.

⇐46(9) (Okl.) Contract *held* not a building and loan contract.—Holt v. Ætna Building & Loan Ass'n, 872.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

⇐42(3) (Cal.App.) Evidence *held* to sustain conviction.—People v. Majors, 636.

⇐46(1) (Cal.App.) Instruction as to first degree burglary *held* correct.—People v. Cota, 473.

CANCELLATION OF INSTRUMENTS.

I. RIGHT OF ACTION AND DEFENSES.

⇐1 (Cal.App.) Suit for "rescission" *held* synonymous with suit for "annulment."—Vaughn v. Fey, 1041.

II. PROCEEDINGS AND RELIEF.

⇐35(1) (Okl.) Person whose status will be changed necessary party.—Simon v. Hine, 264.

⇐38 (Okl.) Defendant in action to reform deed may file cross-bill to cancel it.—Smith v. Williams, 555.

⇐47 (Cal.App.) Evidence in suit to cancel assignment *held* to support finding that note and mortgage assigned were worth their face value.—Stoner v. Security Trust Co., 500.

CARRIERS.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

⇐4 (Cal.App.) Forwarding company when a carrier.—Heath v. Judson Freight Forwarding Co., 839.

⇐18(5) (Okl.) Finding of corporation commission that pipe line is common carrier not disturbed when supported by evidence.—Pierce Oil Corporation v. Phœnix Refining Co., 857.

Digitized by Google

(B) Interstate and International Transportation.

⇐30 (Okl.) No relief from unreasonable freight charge where rate charged was fixed by Interstate Commerce Commission.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

II. CARRIAGE OF GOODS.

(C) Custody and Control of Goods.

⇐70 (Kan.) Shipment consigned to seller, "notify Bennett," with customer's attached draft drawn by seller on Bennett, did not pass title to him.—Bennett v. Dickinson, 757.

⇐72 (Cal.App.) Telegram sufficient notice to withhold shipment.—Heath v. Judson Freight Forwarding Co., 839.

Forwarding agent must withhold goods from shipment on owners' orders.—Id.

A forwarding company must unload goods on order to withhold.—Id.

⇐76 (Kan.) Drawee of draft, not having title to corn when damaged, had no action against carrier because not the real party in interest.—Bennett v. Dickinson, 757.

Carrier liable to consignee under "open" bill of lading.—Id.

Consignee may maintain action for damages in transit.—Id.

One having special interest has action against carrier for damages.—Id.

Consignor may sue for loss in transit where consignee releases claim to goods.—Id.

(H) Limitation of Liability.

⇐157 (Cal.App.) Limitation for filing claim with forwarder inapplicable to claims arising from forwarder's own dereliction.—Heath v. Judson Freight Forwarding Co., 839.

(I) Connecting Carriers.

⇐180(2) (Ariz.) Initial carrier contracting for through transportation may limit liability to own line.—Southern Pac. Co. v. Larrimore, 564.

(J) Charges and Liens.

⇐188 (Cal.App.) Entitled to reasonable charge for unloading on order to withhold shipment.—Heath v. Judson Freight Forwarding Co., 839.

(K) Discrimination and Overcharge.

⇐200 (Okl.) At common law action could be maintained to recover excess over reasonable freight charge.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

CERTIORARI.

I. NATURE AND GROUNDS.

⇐5(1) (Colo.) Will not lie where there is a right of appeal.—Franklin v. Barian, 1116.

⇐28(1) (Mont.) Lies only for excess of jurisdiction.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 295.

⇐28(2) (Mont.) Lies to annul order granting change of venue by disqualified judge.—State v. District Court of Fourth Judicial Dist., Ravalli County, 133.

II. PROCEEDINGS AND DETERMINATION.

⇐58 (Cal.App.) Affidavits contrary to record cannot be considered.—Dolan v. Superior Court of California in and for City and County of San Francisco, 469.

⇐64(2) (Nev.) Inquiry limited to jurisdiction of lower court.—Dixon v. Second Judicial Dist. Court of Nevada in and for Washoe County, 352.

CHAMPERTY AND MAINTENANCE.

⇐7(3) (Okl.) Second conveyance after removal of restriction not champertous.—Sells v. Mooney, 861, 863; Sells v. Butts, 863.

CHANCERY.

See Equity.

CHARITIES.

I. CREATION, EXISTENCE, AND VALIDITY.

⇐11 (Kan.) Trust fund to buy food and fuel for needy inhabitants of trustee city is a "public, charitable use."—Treadwell v. Beebe, 768.

Trust fund to aid those suffering from cancer in obtaining treatment is for a public, charitable use.—Id.

⇐20(5) (Kan.) City may accept bequest of trust fund for public charitable use.—Treadwell v. Beebe, 768.

⇐22(3) (Kan.) Disposition of residue in trust for charitable public uses *held* not ambiguous.—Treadwell v. Beebe, 768.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

⇐48(1) (Or.) Funds accumulated during controversy as to beneficiary will be treated as capital.—Hartman v. City of Pendleton, 339.

CHATTEL MORTGAGES.

II. FILING, RECORDING, AND REGISTRATION.

(A) Original.

⇐84 (Mont.) Valid between parties, though not filed.—Chester State Bank v. Great Northern Ry. Co., 136.

Valid as against all save creditors, though not filed.—Id.

⇐87 (Mont.) Sufficiency of filing not affected by change of statute.—Chester State Bank v. Great Northern Ry. Co., 136.

Validity of recordation is not affected by subsequent changes in boundaries of recording district.—Id.

(B) Renewal.

⇐98 (Mont.) Where boundaries of recording district changed after mortgage filed, subsequent mortgagee cannot defeat renewal in district of original filing.—Chester State Bank v. Great Northern Ry. Co., 136.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

⇐139 (Mont.) Subsequent incumbrancer in good faith must take without knowledge of prior mortgage.—Chester State Bank v. Great Northern Ry. Co., 136.

⇐150(1) (Mont.) Notice imparted from filing.—Chester State Bank v. Great Northern Ry. Co., 136.

⇐154 (Mont.) Rights of parties fixed by filing, irrespective of failure to file extension affidavit.—Chester State Bank v. Great Northern Ry. Co., 136.

Where mortgage antedating plaintiff's was on file and extended, plaintiff is not a subsequent incumbrancer in good faith.—Id.

CHILDREN.

See Infants; Parent and Child.

CITIES.

See Municipal Corporations.

CIVIL RIGHTS.

See Constitutional Law, ⇐83.

⇐2 (Colo.) Statute for equal enjoyment of places of public accommodation strictly construed.—Darius v. Apostolos, 510.

Statute providing for equal enjoyment of public places constitutional.—Id.

Digitized by Google

⇐8 (Colo.) Bootblacking stand "a place of public accommodation" under statute providing for equal enjoyment.—Darius v. Apostolos, 510.

No distinction between barber shops and bootblacking stands by reason of statutory regulation of latter.—Id.

Bootblacking establishment is "place of public accommodation" notwithstanding later statute.—Id.

COMMERCE.

I. POWER TO REGULATE IN GENERAL.

⇐8(12) (Nev.) Sheep Commission Law not interference with interstate commerce.—Ex parte Goddard, 916.

III. MEANS AND METHODS OF REGULATION.

⇐69 (Colo.) City may impose occupation tax on local business of concern engaged in interstate commerce.—Interstate Business Exch. Corporation v. City and County of Denver, 508.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONERS.

See Public Service Commissions.

COMMON LAW.

⇐12 (N.M.) Poor laws of England not adopted as part of common law.—Ex parte Wallace, 1020.

COMMUNITY PROPERTY.

See Husband and Wife, ⇐248–274.

CONDEMNATION.

See Eminent Domain.

CONFUSION OF GOODS.

I. NATURE AND EFFECT.

⇐5½ (N.M.) Party negligently causing confusion does not forfeit his interest in the goods.—Page v. Jones, 541.

II. RIGHTS AND REMEDIES OF PERSONS INTERESTED.

⇐11 (N.M.) Failure to record partido contract does not make it void as to subsequent purchasers without notice.—Page v. Jones, 541.

⇐12 (N.M.) Replevin lies for number or quantity owned by plaintiff to be taken out of a mass.—Page v. Jones, 541.

CONSTITUTIONAL LAW.

See Statutes, ⇐47–114.

For validity of statutes relating to particular subjects, see also the various specific topics.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

⇐26 (Mont.) Legislature possesses sovereign lawmaking power subject to constitutional limitation.—State v. Stewart, 129.

⇐26 (Or.) Amendment limiting indebtedness does not preclude smaller limit by Legislature.—Hawley v. Anderson, 1097.

⇐33 (Or.) Amendment authorizing increase of indebtedness for road purposes not self-executing.—Hawley v. Anderson, 1097.

Amendment increasing debt limit does not change statute fixing old limit.—Id.

⇐42 (Nev.) Only persons affected can attack constitutionality.—Ex parte Goddard, 916.

⇐42 (Okl.) Pipe line company *held* not entitled to contend that statute making it a common carrier is unconstitutional.—Pierce Oil Corporation v. Phœnix Refining Co., 857.

⇐48 (Cal.App.) Statute not declared unconstitutional, except for most cogent reasons.—Lawson v. Turlock Union High School Dist., 1055.

⇐48 (Mont.) Constitutionality of statute will be sustained unless it appears beyond a reasonable doubt to be unconstitutional.—State v. Stewart, 129.

⇐48 (Nev.) Every presumption in favor of validity.—Ex parte Goddard, 916.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

⇐70(1) (Mont.) Courts will not determine whether legislative provision for tax levy is sufficient for purpose contemplated.—State v. Stewart, 129.

⇐70(1) (Okl.) Rate-making power is legislative and not judicial.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

⇐75 (Kan.) Judicial powers and duties cannot be delegated.—Golden v. Mitchell, 785.

V. PERSONAL CIVIL AND POLITICAL RIGHTS.

⇐83(3) (Cal.App.) Imprisonment for practicing law without license not "imprisonment for debt."—Ex parte Johnson, 852.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

⇐121(2) (Cal.App.) Street assessment is a contract and statutes in force at time thereof as to its enforcement are part thereof.—Oakland Street Improvement Bond Co. v. Fitzmaurice, 499.

⇐121(2) (Or.) Remonstrance to improvements *held* not to create contractual obligations.—Brown v. City of Silverton, 971.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

⇐207(6) (Nev.) Sheep Commission Law not discriminatory against citizens of other states.—Ex parte Goddard, 916.

XI. DUE PROCESS OF LAW.

⇐251 (Idaho) Classification of holder of licenses must be based on substantial differences to afford due process of law.—State v. Crosson, 922.

⇐278(1) (Cal.) Compelling public utility to operate at loss is "taking of property without compensation."—Lyon & Hoag v. Railroad Commission, 795.

⇐283 (Idaho) Classification for taxation of holder of licenses must be based on substantial differences to afford due process of law.—State v. Crosson, 922.

⇐290(5) (Or.) Remonstrance *held* not to preclude reassessment as denying due process.—Brown v. City of Silverton, 971.

⇐297 (Idaho) Classification of carriers, holder of licenses must be based on substantial differences to afford due process of law.—State v. Crosson, 922.

⇐306 (Ariz.) Statute permitting judgment for rent accruing after judgment and before surrendering possession in a possessory action does not deny due process.—Genardini v. Kline, 568.

CONTEMPT.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

⇐10 (Utah) Rights of attorneys to advise noncompliance with court order stated.—In re Thomas, 952.

Advising client, garnished to disobey order

Digitized by Google

requiring safety deposit box to be opened, *held* not contempt.—Id.

Characterizing court order as "foolish" or "damned foolish" *held* not contempt.—Id.

⊂⊃21 (Cal.App.) Judgment against corporation not open to attack in a proceeding against officer for contempt.—Drew v. Superior Court of California in and for Mendocino County, 374.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

⊂⊃54(1) (Utah) Statement of deputy sheriff to court not in form of affidavit *held* sufficient basis for contempt proceedings.—In re Thomas, 952.

⊂⊃66(7) (Utah) Questions to be considered by reviewing court in contempt proceedings stated.—In re Thomas, 952.

CONTINUANCE.

See Criminal Law, ⊂⊃594, 595.

⊂⊃20(1) (Utah) Plaintiff's counsel and court justified in relying on notice given defendant's counsel prior to withdrawal by counsel in accordance with statutory method.—Staheli v. Adams, 781.

⊂⊃46(5) (Colo.) Affidavit as to expected testimony of absent witness setting up mere conclusions and showing no diligence insufficient.—Durham v. Wilson, 525.

⊂⊃54 (Kan.) Voluntary dismissal and a second action for same relief waived error in denying continuance.—Anderson v. Piper, 597.

CONTRACTS.

See Assignments; Bills and Notes; Breach of Marriage Promise; Champerty and Maintenance; Covenants; Frauds, Statute of; Guaranty; Indemnity; Release; Sales; Specific Performance; Stipulations; Vendor and Purchaser.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

⊂⊃4 (Okl.) "Implied contract" defined.—Tulsa Fuel & Mfg. Co. v. Gilchrist Drilling Co., 399.

⊂⊃10(4) (Cal.App.) Contract of sale of future crops *held* not void for lack of mutuality.—Hogue-Kellogg Co. v. Baker, 493.

(F) Legality of Object and of Consideration.

⊂⊃101(2) (Okl.) Courts will not enforce foreign contracts repugnant to its public policy; comity does not require that foreign associations be given greater privileges than domestic corporations.—Union Sav. Ass'n v. Cummins, 869.

⊂⊃102 (Nev.) Contracts operating to public detriment void.—King v. Randall, 979.

⊂⊃111 (Cal.App.) Agreement of husband to pay fees and costs of divorce action contra bonos mores.—McCahan v. McCahan, 458.

⊂⊃111 (Cal.App.) Entered into to facilitate divorce void.—McCahan v. McCahan, 460.

Agreement to pay attorney fee to wife in anticipated divorce action void.—Id.

⊂⊃126 (Or.) Attorney may appear before legislative body to procure appropriation.—Herrick v. Barzee, 141.

Advice of attorney to petition legislators did not render contract to procure passage of law unlawful.—Id.

Services of attorney under contract to procure legislation legalized by provision.—Id.

⊂⊃137(3) (Cal.App.) Provision for payment of attorney fee to wife in event of divorce did not render entire separation agreement void.—McCahan v. McCahan, 460.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⊂⊃169 (Or.) Surrounding circumstances admissible as aid in construction.—McDonald v. Supple, 315.

⊂⊃175(3) (Cal.App.) Evidence *held* to show unconditional contract with architect.—Borgmeyer v. Solomon, 1043.

III. MODIFICATION AND MERGER.

⊂⊃238(1) (Okl.) Contract in writing may be altered by contract in writing.—Choctaw Lumber Co. v. Waldock, 866.

⊂⊃241 (Or.) May be modified by waiver of a term and acquiescence therein.—James v. Ward, 1105.

IV. RESCISSION AND ABANDONMENT.

⊂⊃260 (Cal.App.) Entire contract may be rescinded for partial failure of consideration.—Vaughn v. Fey, 1041.

⊂⊃266(1) (Cal.App.) Plaintiff *held* entitled to rescission only upon return of value received.—Vaughn v. Fey, 1041.

Personal receipt of consideration not essential to duty to return on rescission.—Id.

⊂⊃270(1) (Cal.) Knowledge of right to rescind is imputed at time person is charged with discovery of facts.—Bancroft v. Woodward, 445.

V. PERFORMANCE OR BREACH.

⊂⊃305(3) (Or.) Acceptance of partial payment *held* not to preclude recovery of additional compensation.—McDonald v. Supple, 315.

⊂⊃318 (Cal.) Forfeiture should be restrained to technical limits.—Downing v. Cutting Packing Co., 455.

⊂⊃322(5) (Cal.App.) Evidence *held* insufficient to sustain verdict for balance due under lease of newspaper route.—Straus v. Eaton, 1033.

⊂⊃322(5) (Okl.) Evidence supporting verdict for partial recovery for drilling oil and gas well.—Tulsa Fuel & Mfg. Co. v. Gilchrist Drilling Co., 399.

VI. ACTIONS FOR BREACH.

⊂⊃324(1) (Mont.) In action on quantum meruit, express contract may be proved.—Wilcox v. Newman, 138.

⊂⊃332(2) (Or.) Complaint *held* to state cause of action upon contract.—Janson v. Pacific Diking Co., 340.

⊂⊃346(3) (Mont.) In action on quantum meruit, express contract may be proved.—Wilcox v. Newman, 138.

⊂⊃346(5) (Okl.) Waiver of breach must be pleaded and proved.—Wagner v. Keechi Oil & Gas Co., 864.

⊂⊃354 (Okl.) Refusal to determine whether time was impliedly of the essence *held* not error.—Peters v. Bledsoe, 407.

CONVERSION.

See Trover and Conversion.

⊂⊃4 (Cal.App.) Money awarded for land taken for public use deemed the land for purpose of discharging liens.—Los Angeles Trust & Savings Bank v. Bortenstein, 850.

⊂⊃15(1) (Cal.) Land, directed to be converted into money, deemed personal property from testator's death.—In re Phelps' Estate, 17.

CORPORATIONS.

See Banks and Banking; Building and Loan Associations; Carriers; Electricity; Municipal Corporations; Public Service Commissions; Railroads; Street Railroads; Telegraphs and Telephones.

Digitized by Google

I. INCORPORATION AND ORGANIZATION.

⇐28(1) (Kan.) Trust, though unincorporated, *held* a "corporation," which may sell stock only by conforming to regulations.—Home Lumber Co. v. Hopkins, 601.

⇐30(2) (Cal.) False representation that option holders were subscribers on same basis warrants rescission.—Munson v. Fishburn, 808.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

⇐80(6) (Cal.) False statement that defendants had purchased stock on same basis *held* actionable.—Munson v. Fishburn, 808.

⇐80(10) (Cal.) Four months' delay no defense to action by stock subscriber for damages.—Munson v. Fishburn, 808.

Delay of a stock subscriber in bringing action for rescission *held* not laches.—Id.

Payment of assessments to preserve stock for tender to seller does not prevent rescission.—Id.

⇐80(12) (Cal.) Return of stock *held* to put sellers in statu quo.—Munson v. Fishburn, 808.

Damages sufficiently alleged for rescission of purchase of stock.—Id.

Rescission of purchase of stock induced by fraud not limited to rescission against corporation.—Id.

(C) Issue of Certificates.

⇐101 (Colo.) Corporation defrauded in issuing stock for an assignment of a worthless process may sue the assignor.—Kunkle v. Soule, 536.

⇐110 (Cal.App.) Defendant, to whom stock was issued, but who transferred it, proper party to company's suit to cancel.—American Bond & Mortgage Co. v. Lindsay, 192.

(D) Transfer of Shares.

⇐122 (Cal.App.) Buyer at execution sale of stock of mutual water corporation does not necessarily acquire title.—Woodstone Marble & Tile Co. v. Dunsmore Canyon Water Co., 213.

V. MEMBERS AND STOCKHOLDERS.

(B) Meetings.

⇐193 (Cal.) Attendance at and participation in meeting by all stockholders waives objections as to place.—Guaranty Loan Co. v. Fontanel, 177.

⇐194 (Cal.) Attendance at and participation in meeting by all stockholders waives objections as to call.—Guaranty Loan Co. v. Fontanel, 177.

(C) Suing or Defending on Behalf of Corporation.

⇐204 (Colo.) Stockholders cannot repudiate transaction which corporation could not repudiate.—Kunkle v. Soule, 536.

⇐206(1) (Colo.) Sale to corporation under false representations may be set aside by corporation or stockholder if it refuses to sue.—Kunkle v. Soule, 536.

⇐212 (Colo.) Evidence as to issue of stock for assignment of process for extracting minerals *held* to show consideration.—Kunkle v. Soule, 536.

(D) Liability for Corporate Debts and Acts.

⇐215 (Cal.App.) Stockholder's liability is primary and unaffected by guaranty of the debt.—Seaboard Nat. Bank v. Belden, 1045.

⇐264 (Cal.App.) Stockholder's liability on obligation created by law barred in three years; "time when liability was created."—Pidgeon v. San Diego Consol. Brewing Co., 1048.

Corporation's contract of sale created contingent liability when made and before order placed thereunder.—Id.

VI. OFFICERS AND AGENTS.

(A) Election or Appointment, Qualification, and Tenure.

⇐283(1) (Cal.) Statutes governing corporations in regard to notice of meetings construed.—Guaranty Loan Co. v. Fontanel, 177.

Notice of meeting for election of directors may be dispensed with by by-law.—Id.

⇐283(4) (Cal.) Secretary who wrongfully refused to transfer stock cannot claim stockholders ineligible as directors.—Guaranty Loan Co. v. Fontanel, 177.

⇐289 (Cal.) Authority of directors de facto could not be questioned collaterally.—Guaranty Loan Co. v. Fontanel, 177.

⇐290 (Cal.) Secretary who wrongfully refused to transfer stock cannot claim meeting invalid for absence of stockholders.—Guaranty Loan Co. v. Fontanel, 177.

(D) Liability for Corporate Debts and Acts.

⇐339 (Colo.) Statement of indebtedness on January 1st in report filed February 28th *held* insufficient.—Perini v. Continental Oil Co., 532.

⇐341 (Colo.) Suit against directors because of default in making annual report maintainable by creditor's assignee.—Perini v. Continental Oil Co., 532.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

⇐382½ [New, vol. 16 Key-No. Series] (Cal.) Theory on which a state exercises control over public utilities stated.—Lyon & Hoag v. Railroad Commission, 795.

(B) Representation of Corporation by Officers and Agents.

⇐407(3) (Cal.App.) Corporation may appoint acting secretary to execute written appointment of broker to sell land.—Arnold v. La Belle Oil Co., 815.

⇐426(6) (Cal.App.) Corporation by resolution of directors could ratify writing appointing broker to sell land.—Arnold v. La Belle Oil Co., 815.

⇐426(7) (Cal.) Payment on note a ratification of its unauthorized execution.—California Nat. Supply Co. v. Flack, 634.

⇐428(6) (Cal.) Charged with knowledge of its managing officers making sale to it as agents of vendor.—Newell-Murdoch Realty Co. v. Wickham, 359.

⇐432(4) (Cal.App.) Contract purporting to be signed by officers prima facie proof of execution by officers so as to shift burden of proof.—Arnold v. La Belle Oil Co., 815.

⇐432(12) (Cal.App.) Finding that pledge holder corporation and officer were estopped to claim prior lien proper under evidence.—Mayr v. Reynolds, 383.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

⇐592 (Cal.) Proclamation unnecessary to dissolution for nonpayment of license and franchise tax.—California Nat. Supply Co. v. Flack, 634.

⇐617(2) (Or.) When stockholders become owners of assets on dissolution stated.—Smyth v. Kenwood Land Co., 962.

Default under land sale contract *held* not to create debt preventing property passing to stockholders on dissolution.—Id.

Removal by vendor of defaulting corporation's goods before time for re-entering *held* to create liability enforceable by stockholder after dissolution.—Id.

⇐630(4) (Or.) Complaint *held* to allege ownership by stockholder of property of dissolved corporation.—Smyth v. Kenwood Land Co., 962.

Digitized by Google

⇐630(5) (Or.) Evidence in action by stockholder after dissolution *held* to sustain finding defendant authorized removal of personal property.—Smyth v. Kenwood Land Co., 962.
⇐630(6) (Cal.) Judgment against defunct corporation void.—California Nat. Supply Co. v. Flack, 634.

XII. FOREIGN CORPORATIONS.

⇐639 (Okl.) Foreign corporation cannot exercise rights not conferred on domestic corporations.—Union Sav. Ass'n v. Cummins, 869.
Courts will not enforce foreign contracts repugnant to its public policy; comity does not require that foreign associations be given greater privileges than domestic corporations.—Id.
⇐639 (Okl.) Foreign corporation cannot exercise other rights than those conferred on similar domestic corporations.—Holt v. Ætna Building & Loan Ass'n, 872.
⇐642(2) (Kan.) Sale of stock in foreign corporation or trust is not a "doing of business."—Home Lumber Co. v. Hopkins, 601.
⇐642(6) (Kan.) "Doing of business" by foreign corporation defined.—Home Lumber Co. v. Hopkins, 601.
⇐648 (Kan.) Application of foreign corporation *held* to require state charter board to pass on its right to sell stock in state.—Home Lumber Co. v. Hopkins, 601.
⇐657(2) (Okl.) Comity does not require that foreign corporations enforce contracts conflicting with state law.—Holt v. Ætna Building & Loan Ass'n, 872.

COSTS.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⇐3 (Nev.) Not allowable in absence of statutory authority.—Dixon v. Second Judicial Dist. Court of Nevada in and for Washoe County, 352.
⇐42(2) (Nev.) Offer of judgment as to undisputed part of claim makes cost dependent upon result of disputed part.—Herring-Hall-Marvin Safe Co. v. Balliet, 76.
Offer of judgment need not include costs.—Id.
⇐42(4) (Nev.) Offer of judgment does not affect costs accruing prior to offer.—Herring-Hall-Marvin Safe Co. v. Balliet, 76.

V. AMOUNT, RATE, AND ITEMS.

⇐172 (Nev.) Attorney's fees not allowable in action for services appealed from justice court.—Dixon v. Second Judicial Dist. Court of Nevada in and for Washoe County, 352.
⇐184(1) (Or.) Double mileage and per diem fees to witness allowed without showing actual payment.—Brown v. McCloud, 578.

VI. TAXATION.

⇐203 (Cal.App.) Defendants not "adverse parties," so as to require service of cost bill.—Hubbard v. Jurian, 1052.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⇐238(1) (Wash.) Respondents not appearing not allowed costs.—Ames v. Duff & Youk, 230.
⇐260(4) (Cal.) Buyer's appeal on ground that delivery was not alleged *held* frivolous.—Jones v. California Growers & Shippers, 172.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

⇐178 (Or.) Election for excessive bond issue does not authorize issue up to limit.—Hawley v. Anderson, 1097.

COURTS.

See Contempt; Criminal Law, ⇐90–98; Judges; Justices of the Peace; Prohibition.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

⇐90(1) (Ariz.) Rule of decision ought not to be disturbed.—Inspiration Consol. Copper Co. v. Conwell, 88.
⇐93(1) (Okl.) Rule of property cannot be applied to valid conveyances violating governmental policy.—Sells v. Mooney, 861, 863; Sells v. Butts, 863.
⇐97(1) (Ur.) Federal decisions followed in determining validity of contract affecting federal legislation.—Herrick v. Barzee, 141.
⇐101 (Colo.) Majority of members of Supreme Court constitute "court en banc," and majority may decide; "quorum."—Mountain States Telephone & Telegraph Co. v. People, 513.
⇐102(1) (Colo.) Concurrence of three judges of Supreme Court necessary for department decision.—Mountain States Telephone & Telegraph Co. v. People 513.
⇐107 (Cal.App.) Decisions limited to matters before court.—Palvutzian v. Terkanian, 503.
⇐114 (Cal.App.) Can correct record by entry of order nunc pro tunc.—Dolan v. Superior Court of California in and for City and County of San Francisco, 469.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

⇐163 (Utah) Action for price *held* not to involve "title or possession of real property" ousting city court of jurisdiction.—Manning v. Day, 779.

VII. UNITED STATES COURTS.

(G) Supreme Court.

⇐391(3) (Idaho) Jurisdiction of United States Supreme Court to review proceedings of state courts is limited to denials of federal rights.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.
Error involving no federal question is not reviewable by Supreme Court of the United States.—Id.
⇐400 (Idaho) State court should dispose of errors left undecided by decision of the United States Supreme Court.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) State Courts and United States Courts.

⇐489(9) (Okl.) State courts have jurisdiction in action for difference between legal and illegal freight charges.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

COVENANTS.

I. REQUISITES AND VALIDITY.

(B) Implied Covenants.

⇐14 (Idaho) "Grant, bargain, sell, convey, and confirm" do not imply covenant of seizin.

Digitized by Google

—Bliss Town-Site Co. v. Morris-Roberts Co., 1028.

Covenant of seizin is not implied from the word "grant."—Id.

III. PERFORMANCE OR BREACH.

⇐88 (Idaho) Failure to make warrantor a party in action against warrantee does not release warrantor.—Bliss Town-Site Co. v. Morris-Roberts Co., 1028.

⇐96(3) (Or.) Outstanding lease is an "incumbrance."—Winn v. Taylor, 342.

⇐102(1) (Idaho) No breach of covenant of warranty until eviction by paramount title.—Bliss Town-Site Co. v. Morris-Roberts Co., 1028.

⇐102(2) (Idaho) Eviction breaching covenant of warranty need not be from the entire premises.—Bliss Town-Site Co. v. Morris-Roberts Co., 1028.

IV. ACTIONS FOR BREACH.

⇐118 (Or.) Defendant grantor, admitting receipt of rental from third person and execution of warranty deed, had burden of proving right to retain rent.—Winn v. Taylor, 342.

⇐127(6) (Or.) Measure of damages for breach of covenant against incumbrances.—Winn v. Taylor, 342.

⇐131 (Or.) Interest allowed grantee in action against grantor collecting rents.—Winn v. Taylor, 342.

CRIMINAL LAW.

See Adultery; Bail, ⇐49–96; Burglary; False Pretenses; Fines; Forgery; Homicide; Indictment and Information; Larceny; Mayhem; Perjury; Rape, ⇐3.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

⇐21 (Mont.) Criminal intent not necessary to violation of police statute.—State v. Smith, 107; Same v. Dunn, 121.

IV. JURISDICTION.

⇐90(3) (Cal.App.) Police court of Sacramento *held* not to have jurisdiction of prosecution for violation of state Medical Practice Act.—People v. T. Wah Hing, 662.

⇐93 (Okl.Cr.App.) Amended information for unlawfully conveying intoxicating liquors *held* to give superior court jurisdiction.—Ripley v. State, 710.

⇐98 (Okl.Cr.App.) Defendant's presence and plea of not guilty gives superior court jurisdiction of person.—Ripley v. State, 710.

VII. FORMER JEOPARDY.

⇐177 (Idaho) Allowance of demurrer to information may be a final judgment barring a future prosecution.—State v. Bilboa, 248.

⇐193½ (Okl.Cr.App.) Conviction of lesser offense bars prosecution for greater.—Johnson v. State, 897.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

⇐230 (Idaho) Function of committing magistrate stated.—State v. Bilboa, 248.

⇐238 (Cal.App.) Sufficient cause to believe accused guilty authorizes magistrate to hold him.—Ex parte James, 466.

Probable cause *held* to exist for holding one accused of obtaining sheep by falsely pretending to have bank deposit.—Id.

⇐251 (Cal.) Constitutional rights of accused must be preserved in police courts.—Ex parte Williams, 163.

⇐252(1) (Cal.) Complaint essential to jurisdiction of police court.—Ex parte Williams, 163.

⇐258(4) (Cal.App.) Cannot change judgment to defendant's prejudice after commencement of execution of sentence.—Ex parte Gottschalk, 649.

IX. ARRAIGNMENT AND PLEAS AND NOLLE PROSEQUI OR DISCONTINUANCE.

⇐261(2) (Okl.Cr.App.) Second arraignment and plea unnecessary after first trial.—Thomas v. State, 711.

⇐295 (Idaho) No bar without proof that offense thereafter charged is the same.—State v. Bilboa, 248.

⇐300 (Idaho) Plea of not guilty puts in issue every material allegation.—State v. McBride, 247.

⇐300 (Mont.) Issues raised by plea of not guilty.—State v. Smith, 107; Same v. Dunn, 121.

⇐300 (Mont.) Plea of not guilty puts in issue all allegations of information.—State v. Diedtman, 117.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

⇐318 (Cal.) No presumption of change in locks of decedent's hair between time of discovery at scene of murder and trial.—People v. Wolff, 22.

⇐330 (Cal.App.) Burden on state to prove guilt beyond reasonable doubt.—People v. Bickerstaff, 656.

⇐335 (Mont.) Proof that offense occurred in county of prosecution necessary.—State v. Smith, 107; Same v. Dunn, 121.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

⇐351(10) (Or.) That defendant authorized, taking of his children out of jurisdiction admissible.—State v. Zullig, 580.

⇐364(4) (Or.) Statements by defendant as to inability of his children to give information as to the crime not res gestæ.—State v. Zullig, 580.

(C) Other Offenses, and Character of Accused.

⇐369(1) (Mont.) Admission as to other seditious statements *held* improperly admitted and prejudicial.—State v. Smith, 107; Same v. Dunn, 121.

⇐369(13) (Okl.Cr.App.) Conviction reversed for error in admission of evidence.—Ewing v. State, 274.

⇐371(12) (Cal.App.) Evidence of assault on another subsequent to killing *held* admissible to show motive.—People v. Gilman, 205.

(E) Best and Secondary and Demonstrative Evidence.

⇐404(3) (Okl.Cr.App.) Knife not identified as the one claimed to have been in the hands of person assaulted inadmissible.—Pruitt v. State, 894.

⇐404(4) (Cal.) Locks of hair found in automobile driven by murdered man properly admitted.—People v. Wolff, 22.

Admission of locks of decedent's hair not erroneous, as tending to arouse passion.—Id.

⇐404(4) (Okl.Cr.App.) Decedent's clothing *held* admissible to show relative position of decedent and defendant and location of wounds.—Jones v. State, 887.

Witness may point out how holes in clothes worn by decedent correspond with wounds.—Id.

(F) Admissions, Declarations, and Hearsay.

⇐412(3) (Cal.App.) Statements of prisoners in cell admissible.—People v. White, 821.

⇐413(1) (Okl.Cr.App.) Defendant's self-serving declaration, forming no part of res gestæ inadmissible.—Smart v. State, 269.

Digitized by Google

⊂⊃418(1) (Cal.App.) Testimony as to conversation in defendant's presence *held* admissible.—People v. Majors, 636.
⊂⊃419, 420(1) (Mont.) That State Department had passed favorably on record of prosecuting witness inadmissible.—State v. Diedtman, 117.
⊂⊃419, 420(6) (Cal.) Statements by decedent while on a train after the attack incompetent as hearsay.—People v. Wolff, 22.

(I) Opinion Evidence.

⊂⊃452(2) (Cal.) Witnesses acquainted with defendant competent to testify as to sanity.—People v. Niino, 626.

(K) Confessions.

⊂⊃535(2) (Cal.App.) Evidence aside from confession *held* to show entry in nighttime.—People v. Cota, 473.

(M) Weight and Sufficiency.

⊂⊃552(3) (Mont.) Circumstantial evidence must be consistent, and inconsistent with any other rational hypothesis.—State v. Gomez, 982.
⊂⊃561(1) (Cal.App.) Burden on state to prove guilt beyond reasonable doubt.—People v. Bickerstaff, 656.

XI. TIME OF TRIAL AND CONTINUANCE.

⊂⊃594(1) (Okl.Cr.App.) Denial of continuance proper where no probability of different result.—Williams v. State, 892.
⊂⊃595(4) (Okl.Cr.App.) Denial of continuance for absence of witness *held* reversible error.—Little v. State, 706.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

⊂⊃640 (N.M.) State may employ private counsel on order of court with consent of district attorney or Attorney General.—Baca v. Padilla, 730.
⊂⊃643 (Okl.Cr.App.) On timely request argument should be ordered taken in shorthand.—Ewing v. State, 274.
⊂⊃655(4) (Mont.) Announcement by court that he would sustain a challenge to juror *held* prejudicial.—State v. Diedtman, 117.
⊂⊃656(2) (Cal.) Remark of court not prejudicial.—People v. Niino, 626.

(E) Arguments and Conduct of Counsel.

⊂⊃722½ (Okl.Cr.App.) Conviction reversed for error in argument prejudicial to defendant.—Ewing v. State, 274.
⊂⊃730(13) (Okl.Cr.App.) Failure to instruct jury to disregard improper argument of county attorney prejudicial.—Ewing v. State, 274.

(F) Province of Court and Jury in General.

⊂⊃741(6) (Or.) Question of weight of circumstantial evidence peculiarly for jury.—State v. Zullig, 580.
⊂⊃753(2) (Mont.) Directed verdict proper, where contrary verdict would require new trial.—State v. Gomez, 982.
Acquittal properly directed where evidence insufficient to convict.—Id.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⊂⊃782(1) (Cal.App.) Defendant entitled to instructions as to conditions of evidence requiring acquittal.—People v. Bickerstaff, 656.
⊂⊃785(2) (Mont.) Where witness testified from written memorandum, it was improper to deny a cautionary instruction.—State v. Diedtman, 117.
⊂⊃789(1) (Okl.Cr.App.) Practice of attempting to define reasonable doubt disapproved.—Mayfield v. State, 276.
⊂⊃789(2). (Cal.) Courts should adhere to precedents in framing instructions on reasonable doubt.—People v. Bickerstaff, 656.
⊂⊃789(2) (Okl.Cr.App.) Instruction defining "reasonable doubt" not erroneous.—Mayfield v. State, 276.
⊂⊃789(3) (Cal.App.) Instruction as to reasonable doubt of alcoholic content erroneously refused.—People v. Bickerstaff, 656.
⊂⊃789(9) (Cal.) Instruction on reasonable doubt not erroneous.—People v. Bickerstaff, 656.
⊂⊃789(17) (Cal.App.) Instruction on reasonable doubt *held* not erroneous.—People v. T. Wah Hing, 662.
⊂⊃792(3) (Idaho) Instruction as to who are principals *held* to substantially conform to statute.—State v. Sheehan, 71.
⊂⊃798(½) (Wash.) Instruction that charge was addressed to jurors individually *held* properly refused.—State v. Chittenden, 232.
⊂⊃806(3) (Cal.) Court should not repeat instructions.—People v. Bickerstaff, 656.
⊂⊃814(3) (Mont.) Instruction not based on evidence is erroneous.—State v. Smith, 107; Same v. Dunn, 121.
⊂⊃814(5) (Mont.) Instruction allowing jury to consider other seditious publications *held* erroneous.—State v. Smith, 107; Same v. Dunn, 121.
Instruction that defendant could be convicted for either writing, publishing, or uttering seditious article *held* erroneous.—Id.
⊂⊃814(21) (Mont.) Instructions should be explicit and closely connected with the facts.—State v. Smith, 107; Same v. Dunn, 121.
⊂⊃822(1) (Cal.) Instructions construed as whole.—People v. Wolff, 22.
⊂⊃822(1) (Mont.) In determining correctness of instructions, they should be examined in their entirety.—State v. Smith, 107; Same v. Dunn, 121.
⊂⊃822(4) (Cal.) Instructions in homicide case as to duty of jury not objectionable when construed as a whole.—People v. Wolff, 22.

(H) Requests for Instructions.

⊂⊃829(1) (Cal.App.) Refusal of request covered not error.—People v. Nunes, 486.
⊂⊃829(1) (Okl.Cr.App.) Requested instructions properly refused, when covered by those given.—Jones v. State, 887.
⊂⊃829(3) (Cal.App.) Requested instruction on mayhem *held* not error being covered by charge as given.—People v. Nunes, 486.
⊂⊃834(5) (Cal.App.) Requested instruction as to embodying rule as to reasonable doubt should have been given without modification.—People v. Bickerstaff, 656.
Requested instruction embodying rule as to reasonable doubt should have been given without modification.—Id.

(K) Verdict.

⊂⊃883 (Okl.Cr.App.) Verdict sufficiently definite and in effect a verdict of guilty of assault with intent to do bodily harm.—Pruitt v. State, 894.
⊂⊃894 (Okl.Cr.App.) Informal verdict should be objected to when returned.—Pruitt v. State, 894.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⊂⊃970(6) (Idaho) Motion in arrest granted after conviction on information charging more than one offense.—State v. Hall, 251.
⊂⊃970(7) (Cal.App.) Objection to information not waived by failure to demur and properly present by motion in arrest.—People v. Bliss, 1046.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

⊂⊃984 (Idaho) Grant of motion in arrest as to all but one offense, after conviction of sev-

Digitized by Google

eral offenses charged in same information, *held* error.—State v. Hall, 251.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

⇐1022 **(Utah)** No appeal from conviction in district court on appeal from city court, where constitutionality or validity of statute is not involved.—State v. Roberts, 351.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⇐1031(5) **(Cal.)** Objection that copy of complaint was not attached to magistrate's certificate of defendant's age, not properly raised, will not be considered on appeal.—People v. Wolff, 22.

⇐1032(1) **(Cal.App.)** Objection to change in information waived by failure to object.—People v. White, 821.

⇐1035(3) **(Cal.)** Remark of court not objected to not error.—People v. Niino, 626.

⇐1054(1) **(Or.)** Objection to inquiry of district attorney as to story of defendant's children not reviewable, where no exception taken.—State v. Zullig, 580.

⇐1064(4) **(Or.)** Objection to inquiry of district attorney as to story of defendant's children not reviewable, where matter not made ground for new trial.—State v. Zullig, 580.

(D) Record and Proceedings Not in Record.

⇐1086(13) **(Okl.Cr.App.)** Where transcript of record or case-made contains no copy of judgment below the appeal will be dismissed.—Mitchell v. State, 268.

⇐1086(13) **(Okl.Cr.App.)** Where transcript contains no copy of judgment appeal dismissed.—Sherwood v. State, 270.

⇐1090(1) **(Wash.)** Failure to file bill of exceptions or statement of facts leaves for review questions on record.—State v. Terrien, 1017.

⇐1092(4) **(Wash.)** Bill of exceptions within time jurisdictional—State v. Terrien, 1017.

⇐1099(6) **(Wash.)** Filing of statement of facts within time jurisdictional.—State v. Terrien, 1017.

⇐1104(4) **(Cal.)** Objection that copy of complaint was not attached to magistrate's certificate of defendant's age *held* not shown by record.—People v. Wolff, 22.

⇐1106(3) **(Wash.)** Appellant for cause shown may be allowed to file transcript and serve and file briefs after time fixed.—State v. Terrien, 1017.

(E) Assignment of Errors and Briefs.

⇐1130(2) **(Okl.)** On failure to file briefs, appeal will be dismissed.—Johnson v. State, 263.

⇐1130(4) **(Cal.App.)** Appeal ordered submitted on record where no brief filed in time.—People v. Riccomini, 1045.

⇐1130(4) **(Wash.)** Appellant for cause shown may be allowed to file transcript and serve and file briefs after time fixed.—State v. Terrien, 1017.

(G) Review.

⇐1141(1) **(Cal.App.)** Presumptions in favor of regularity of proceedings below.—People v. White, 821.

⇐1141(1) **(Okl.Cr.App.)** Presumptions on appeal in favor of regularity of proceedings below.—Thomas v. State, 711.

⇐1144(½) **(Okl.Cr.App.)** Presumption of regularity of proceedings below.—Williams v. State, 892.

⇐1144(8) **(Or.)** Jury being in part selected by defendant, presumption is that they will be impartial.—State v. Zullig, 580.

⇐1144(17) **(Okl.Cr.App.)** Presumption as to judgment and session of court.—Williams v. State, 892.

⇐1151 **(Okl.Cr.App.)** Application for continuance in discretion of trial court.—Williams v. State, 892.

⇐1153(2) **(Cal.)** Competency of intimate acquaintance to testify as to sanity matter within discretion of trial court.—People v. Niino, 626.

⇐1153(3) **(Okl.Cr.App.)** Opening of case for rebuttal evidence discretionary.—Felice v. State, 898.

⇐1159(2) **(Cal.)** Judgment not reversed if supported by evidence.—People v. Niino, 626.

⇐1159(2) **(Okl.Cr.App.)** Conviction not reversed if supported by competent evidence.—Johnson v. State, 897.

⇐1159(2) **(Okl.Cr.App.)** Conviction supported by some testimony will not be reversed.—Armstrong v. State, 898.

⇐1163(1) **(Okl.Cr.App.)** That error presumes injury not the rule and unless resulting in a miscarriage of justice error in opening argument is not reversible.—Mayfield v. State, 276.

⇐1167(1) **(Okl.Cr.App.)** Defendant cannot complain that prosecutor elected to try him for lesser offense.—Johnson v. State, 897.

⇐1168(4) **(Idaho)** Refusal to strike erroneous testimony and to instruct to disregard it *held* harmless.—State v. Sheehan, 71.

⇐1169(1) **(Cal.App.)** Admission of testimony *held* harmless, in view of sufficiency of evidence.—People v. Majors, 636.

⇐1169(1) **(Cal.App.)** Admission of evidence harmless.—People v. White, 821.

⇐1169(1) **(Mont.)** Testimony that State Department acted favorably on record of prosecuting witness *held* prejudicial.—State v. Diedtman, 117.

⇐1169(7) **(Okl.Cr.App.)** Error in admission of evidence where guilt otherwise established harmless.—Everidge v. State, 701.

⇐1169(11) **(Mont.)** Admission as to other seditious statements *held* improperly admitted and prejudicial.—State v. Smith, 107; Same v. Dunn, 121.

⇐1170½(5) **(Cal.App.)** Exclusion of cross-examination *held* harmless, in view of sufficiency of evidence.—People v. Majors, 636.

⇐1171(2) **(Okl.Cr.App.)** County attorney's opening argument *held* without injury.—Mayfield v. State, 276.

⇐1172(2) **(Idaho)** Instruction as to weight to be given erroneous testimony *held* not prejudicial error.—State v. Sheehan, 71.

⇐1172(6) **(Cal.App.)** Instruction allowing conviction of burglary on proof of intent not charged in indictment *held* not prejudicial.—People v. Cota, 473.

⇐1173(2) **(Idaho)** Refusal to strike erroneous testimony and to instruct to disregard it *held* harmless.—State v. Sheehan, 71.

⇐1173(2) **(Mont.)** Refusal of cautionary instruction as to testimony based on written memorandum prejudicial.—State v. Diedtman, 117.

⇐1180 **(Okl.Cr.App.)** Decision as to sufficiency of identical evidence, conclusive on second appeal.—Thomas v. State, 711.

Presumptions as to arraignment and plea below stated.—Id.

(H) Determination and Disposition of Cause.

⇐1182 **(Cal.App.)** Conviction affirmed on conclusive evidence and fair trial.—People v. Won Lee Wing, 643.

⇐1182 **(Okl.Cr.App.)** Without brief appearance or reversible error, conviction affirmed.—Martin v. State, 268.

⇐1182 **(Okl.Cr.App.)** Where record discloses no error and evidence sustains the verdict,

Digitized by Google

judgment will be affirmed.—Thompson v. State, 275.

⇐1182 (Okl.Cr.App.) On failure to file brief or appear for argument judgment affirmed under rule.—Pollykoff v. State, 420.

⇐1186(1) (Okl.) Conviction reversed for error in admission of evidence and argument prejudicial to defendant.—Ewing v. State, 274.

⇐1186(4) (Cal.) Erroneous admission of evidence not prejudicial, where no miscarriage of justice.—People v. Wolff, 22.

⇐1186(4) (Cal.App.) Erroneous change in information not reversible error.—People v. White, 821.

⇐1186(4) (Idaho) Errors not prejudicing defendant's substantial right will not justify reversal of a conviction.—State v. McBride, 247.

⇐1186(4) (Mont.) Judgment not reversed for technical errors not affecting substantial rights.—State v. Diedtman, 117.

⇐1186(4) (Okl.Cr.App.) Unless resulting in a miscarriage of justice error in opening argument is not reversible.—Mayfield v. State, 276.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

⇐1216(6) (Okl.Cr.App.) Sentence of imprisonment not satisfied by mere expiration of time.—Ex parte Smith, 1092.

⇐1217 (Okl.Cr.App.) Defendant who has not served his sentence may be taken as on escape.—Ex parte Smith, 1092.

CROPS.

⇐3 (Cal.App.) Contract for sale of crops to be grown in future valid, where seller has land.—Hogue-Kellogg Co. v. Baker, 493.

Contract for sale of future crops *held* valid.—Id.

Invalidity of provision as to title on sale of future crops has no effect on main contractual obligation.—Id.

CURTESY.

⇐9(1) (Or.) Exists in equitable estate notwithstanding statute; "fee."—Chance v. Weston, 155.

Depends on character of wife's title.—Id.

⇐11(3) (Or.) Husband not barred by conveyance in trust for wife.—Chance v. Weston, 155.

⇐11(6) (Or.) Contracts between husband and wife are void.—Chance v. Weston, 155.

CUSTOMS AND USAGES.

⇐19(2) (Cal.) Subsequent acts not competent to prove uniform custom.—Wilson v. Travelers' Ins. Co., 366.

DAMAGES.

I. NATURE AND GROUNDS IN GENERAL.

⇐6 (Or.) Certainty not essential to recovery.—Brown v. McCloud, 578.

Need not be exactly calculated.—Id.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⇐30 (Idaho) Elements jury may consider in assessing damages under federal Employers' Liability Act stated.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

⇐113 (Ariz.) Measure for injuries to personal property difference in value immediately before and after.—Mesa City v. Lesueur, 573.

(C) Breach of Contract.

⇐124(4) (Wash.) Measure for cancellation of contract difference between price and what performance would have cost.—Di Luck v. Bradner Co., 904.

Contractor constructing floors not entitled beside regular damages to allowance for personal services.—Id.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⇐131(4) (Cal.App.) $1,500 not excessive for shock and injuries from automobile accident.—Williams v. A. R. G. Bus Co., 1036.

⇐134(1) (Idaho) $35,000 for injury seriously disabling an employé 29 years of age *held* excessive.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.

⇐138 (Wash.) $5,750 for destruction of lumber company's boom site not excessive.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 226.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(E) Damages, Forfeiture, or Fine.

⇐95(2) (Or.) Measure of damages for husband's death defined.—Rorvik v. North Pac. Lumber Co., 331.

⇐99(4) (Ariz.) $17,000 for death of husband, a mine motorman, *held* not excessive.—Inspiration Consol. Copper Co. v. Conwell, 88.

⇐101 (Wash.) Division of damages between surviving wife and child *held* proper.—Schultz v. Western Farm Tractor Co., 1007.

(F) Trial, Judgment, and Review.

⇐103(3) (Cal.) Where deceased was contributorily negligent as matter of law case is not for jury.—Young v. Southern Pac. Co., 36.

DEEDS.

See Mortgages; Taxation, ⇐750.

I. REQUISITES AND VALIDITY.

(E) Validity.

⇐69 (Idaho) Mistake set up by parties seeking affirmative or defensive relief must be mutual.—Udelavitz v. Ketchen, 1029.

⇐70(6) (Cal.App.) Overreaching wife by husband through violation of the confidential relation is fraudulent.—Patterson v. Patterson, 483.

⇐72(3) (Colo.) Not set aside for undue influence merely because of confidential relation between parties.—Gerard v. Costen, 526.

⇐75 (Cal.App.) Failure of wife to specify property in divorce action not ratification of conveyance.—Patterson v. Patterson, 483.

Wife's quitclaim deed of property not ratification of former conveyance induced by husband's fraud.—Id.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇐90 (Cal.App.) All parts must be considered together.—Hughes v. Scott, 643.

⇐93 (Cal.App.) Intention of parties to be ascertained.—Hughes v. Scott, 643.

⇐93 (Mont.) Object of construction to ascertain intention.—R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co. of Montana, 988.

⇐95 (Mont.) Qualifying words applied to words immediately preceding.—R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co. of Montana, 988.

(C) Estates and Interests Created.

⇐133(1) (Cal.App.) Present interest in property conveyed.—Hughes v. Scott, 643.

Digitized by Google

(D) Exceptions and Reservations.

⇐140 (Idaho) Exception of railroad right of way *held* not to refer to land adjacent thereto. —Bliss Town-Site Co. v. Morris-Roberts Co., 1028.

IV. PLEADING AND EVIDENCE.

⇐196(1½) (Idaho) Burden of proof is on party alleging mistake.—Udelavitz v. Ketchen, 1029.

⇐210 (Cal.App.) Evidence *held* to prove grantee's compliance with condition of deed requiring her to support grantor.—Smyth v. Fitch, 1049.

⇐211(1) (Cal.App.) Evidence *held* to show mental competency of grantor.—Smyth v. Fitch, 1049.

⇐211(2) (Idaho) Evidence of mutual mistake must leave no reasonable doubt thereof. —Udelavitz v. Ketchen, 1029.

DEPOSITARIES.

⇐4 (Cal.App.) Depositary bound to return a "special deposit."—Ennis-Brown Co. v. Richvale Land Co., 1064.

DEPOSITIONS.

⇐81 (Kan.) May be withdrawn by leave of court for proper certification.—Stone v. Jarbalo State Bank of Jarbalo, 1094.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

⇐91(1) (Cal.App.) Heirs *held* entitled to sue to cancel assignment of mortgage by decedent and for amounts collected.—Stoner v. Security Trust Co., 500.

DISMISSAL AND NONSUIT.

See Appeal and Error, ⇐781–790; Trial, ⇐159–165.

II. INVOLUNTARY.

⇐60(1) (Cal.) Courts have inherent power to dismiss cross-complaint for lack of diligence in prosecution.—Seaman v. Superior Court of Marin County, 441.

⇐60(6) (Cal.) Court properly refused to dismiss cross-complaint for failure to return summons.—Seaman v. Superior Court of Marin County, 441.

DIVORCE.

II. GROUNDS.

⇐27(1) (Cal.App.) Mental suffering may be "extreme cruelty."—McCahan v. McCahan, 460.

⇐29 (Or.) Evidence *held* to show personal indignities entitling plaintiff to divorce.—Steele v. Steele, 716.

Personal violence unnecessary to "personal indignities."—Id.

⇐31 (Utah) Wife entitled for husband's willful refusal to support.—Stevenson v. Stevenson, 776.

Court may not arbitrarily refuse decree on statutory ground of nonsupport.—Id.

⇐37(6) (Cal.App.) Decree cannot be based on cross-complaint for cause of action not accrued.—Zartarian v. Zartarian, 196.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(C) Pleading.

⇐93(3) (Cal.App.) Complaint or cross-complaint must allege effects of cruelty.—Zartarian v. Zartarian, 196.

⇐93(3) (Cal.App.) Not necessary to allege mental suffering was wrongfully inflicted.—McCahan v. McCahan, 460.

(D) Evidence.

⇐124 (Cal.) Evidence *held* to show plaintiff wife at fault in associating with men.—Knapp v. Knapp, 362.

(G) Appeal.

⇐182 (Cal.App.) Court may compel husband to pay wife money to prosecute appeal.—McCahan v. McCahan, 458.

⇐182 (Or.) Supreme Court cannot grant suit or maintenance money pending appeal.—White v. White, 969.

⇐183 (Or.) Rule requiring printed briefs relaxed on account of poverty.—White v. White, 969.

⇐184(10) (Cal.App.) What constitutes grievous mental suffering a question of fact not ordinarily reviewable.—McCahan v. McCahan, 460.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

⇐214(4) (Cal.App.) Good faith and merit of appeal by wife determined from showing in lower court on application for suit money.—McCahan v. McCahan, 458.

Agreements as to counsel fees to be subjected to examination of trial court.—Id.

⇐249(2) (Cal.App.) Separation agreement considered in regard to disposition of community property.—McCahan v. McCahan, 460.

Trial court *held* to have ratified agreement as to division of community property.—Id.

⇐255 (Cal.) Final decree by default on complaint raising no issue as to property not conclusive of property rights.—Lang v. Lang, 181.

VI. CUSTODY AND SUPPORT OF CHILDREN.

⇐308 (Or.) Defendant ordered to pay $15 per month for support of daughter.—Steele v. Steele, 716.

⇐311 (Cal.) Child cannot satisfy judgment against father for support furnished by mother. —Saunders v. Simms, 806.

DOWER.

II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

⇐49(2) (Or.) Contracts between husband and wife are void.—Chance v. Weston, 155.

DRAINS.

I. ESTABLISHMENT AND MAINTENANCE.

⇐34 (Kan.) Sustaining of demurrer to a protest against application to establish ditch is not a judicial function.—Coffman v. Hall, 761.

Order of administrative board or officer does not preclude a subsequent order.—Id.

⇐36(2) (Kan.) No appeal to district court from order overruling demurrer to protest against application to establish ditch.—Coffman v. Hall, 761.

II. ASSESSMENTS AND SPECIAL TAXES.

⇐82(3) (Idaho) Assessment not disturbed on appeal, because of conflict of evidence, where supported by evidence.—Burt v. Stuart, 713.

DRAMSHOPS.

See Intoxicating Liquors.

DUE PROCESS OF LAW.

See Constitutional Law, ⇐251–306.

Digitized by Google

EJECTMENT.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⇐111(4) (Kan.) Findings *held* not demonstrably wrong.—Robertson v. Wangler, 788.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

⇐125 (Ariz.) Statute contemplates that rental value determined in possessory action may be basis of motion for rent after judgment.—Genardini v. Kline, 568.

Motion for judgment for rent accruing after judgment in possessory action may be informal.—Id.

Statute permitting judgment for rent accruing after judgment and before surrendering possession in a possessory action does not deny due process.—Id.

⇐136 (Ariz.) Rule for estimating damages for withholding farm land stated.—Genardini v. Kline, 568.

ELECTION OF REMEDIES.

⇐1 (Okl.) Definition.—Vose v. Penny, 97.

⇐3(1) (Cal.) Rescission *held* not barred.—Bancroft v. Woodward, 445.

⇐3(2) (Cal.App.) Lien claimants cannot enforce bond against sureties, and set up invalidity to enable them to go against owner.—Tyler v. J. I. Metrovich Bldg. Co., 208.

⇐7(1) (Okl.) Guardian, electing to avoid deed to premises incumbered by mortgage, *held* precluded from questioning validity of mortgage.—Vose v. Penny, 97.

⇐14 (Okl.) Effect of election stated.—Vose v. Penny, 97.

ELECTRICITY.

⇐14(1) (Cal.App.) Degree of care required in supplying current defined.—Stott v. Southern Sierras Power Co., 478.

⇐19(5) (Cal.App.) Evidence *held* not to show negligence in maintaining wires causing fire.—Stott v. Southern Sierras Power Co., 478.

⇐19(6) (Cal.App.) Negligence question for court where facts are settled.—Stott v. Southern Sierras Power Co., 478.

EMINENT DOMAIN.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

⇐2(1) (Cal.) Compelling public utility to operate at loss is "taking of property without compensation."—Lyon & Hoag v. Railroad Commission, 795.

⇐13 (Or.) Lot owners have interest in streets giving access which cannot be taken for private use.—Bostwick v. Hosier, 299.

⇐56 (Wash.) Company which can float out timber on river not entitled to condemn right of way.—State v. Superior Court, 234.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

⇐84 (Or.) Logging company's interference with stream a "taking of property" within guaranty of compensation.—Logan v. Chas. K. Spaulding Logging Co., 349.

⇐95 (Ariz.) Taking land for tracks by mining company governed by principles applied to common carriers acting in private capacity.—Arizona Hercules Copper Co. v. Protestant Episcopal Church Corporation of Arizona, 85.

⇐103 (Or.) Owner entitled to damages for constructing and maintaining fences made necessary.—Tillamook County v. Johnson, 159.

⇐104 (Ariz.) Mine constructing private tracks on highway liable for damages by reason of noise, smoke, etc.—Arizona Hercules Copper Co. v. Protestant Episcopal Church Corporation of Arizona, 85.

(D) Persons Entitled and Payment.

⇐154 (Cal.App.) Damages for destruction of mortgaged property an equitable fund for satisfaction of mortgage.—Los Angeles Trust & Savings Bank v. Bortenstein, 850.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

⇐194 (Ariz.) Amendment allowed after verdict.—Arizona Hercules Copper Co. v. Protestant Episcopal Church Corporation of Arizona, 85.

⇐195 (Or.) In condemnation proceeding defendant must specify the damages which he seeks to prove.—Tillamook County v. Johnson, 159.

⇐196 (Wash.) Evidence *held* not to show necessity for right of way for lumber company.—State v. Superior Court, 234.

⇐198(1) (Wash.) Contract to carry produce of lands affected need appear only in final record.—State v. Superior Court, 234.

Selection of right of way by logging company makes prima facie case of necessity.—Id.

Necessity for right of way question of fact.—Id.

⇐262(5) (Ariz.) Failure to rule on motion to amend answer after verdict and allowing judgment for more than prayed, not reversible error.—Arizona Hercules Copper Co. v. Protestant Episcopal Church Corporation of Arizona, 85.

⇐262(5) (Or.) Instruction limiting damages to that specified in the answer *held* harmless.—Tillamook County v. Johnson, 159.

⇐264 (Wash.) Error not called to attention of trial court cannot be considered on certiorari.—State v. Superior Court, 234.

IV. REMEDIES OF OWNERS OF PROPERTY.

⇐280 (Wyo.) Landowner cannot recover land taken with his knowledge after construction of road.—Wallace v. Chicago, B. & Q. R. Co., 999.

Landowner not objecting to taking of land by railroad could not recover possession.—Id.

⇐297 (Wyo.) Owner not objecting to construction of road not entitled to value of company's improvements.—Wallace v. Chicago, B. & Q. R. Co., 999.

⇐308 (Wyo.) Award of damages for land proper in owner's action for possession.—Wallace v. Chicago, B. & Q. R. Co., 999.

EQUITY.

See Cancellation of Instruments; Conversion; Injunction; Partition; Quieting Title; Reformation of Instruments; Specific Performance; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

⇐36 (Kan.) Court in partnership accounting may make orders affecting real estate in another state.—Apple v. Smith, 8.

(C) Principles and Maxims of Equity.

⇐66 (Cal.App.) Requirement that plaintiff do equity *held* not to require defrauded wife to adjust monetary arrangements between husband and paramour.—Patterson v. Patterson, 483.

ERROR, WRIT OF.

See Appeal and Error.

Digitized by Google

ESCROWS.

⇐6 (Okl.) Active drilling *held* condition precedent to enforcement of assignment of lease in escrow.—Wagner v. Keechi Oil & Gas Co., 864.

⇐14(1) (Kan.) Bank violating instructions as to deed placed in escrow *held* liable for damages.—Stone v. Jarbalo State Bank of Jarbalo, 1094.

Evidence sustaining finding that bank received instructions relative to delivery of deed.—Id.

Bank liable for damages for violating instructions as to delivery of deed.—Id.

ESTATES.

See Curtesy; Descent and Distribution; Dower; Executors and Administrators; Perpetuities; Wills.

⇐5 (Or.) "Estate in fee" defined.—Chance v. Weston, 155.

ESTOPPEL.

II. BY DEED.

(A) Creation and Operation in General.

⇐22(3) (Cal.App.) Recitals of second bond evidence that contractor had not performed.—Oakdale Irr. Dist. v. Beard, 224.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

⇐63 (Mont.) Purchaser estopped to claim that description in deed was not to convey land as shown on map prepared by purchaser.—R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co. of Montana, 988.

⇐68(2) (Cal.App.) Intervention of superintendent of banks to protect bonds deposited as collateral did not estop him from asserting that bank directors had purchased bonds.—Stern v. McDonald, 221.

⇐71 (Mont.) Where one interested in cattle recovers full damages, another disclaiming at trial could not recover from defendant.—Church v. Zywert, 291.

⇐72 (Colo.) Where agent of maker was guilty of fraud in negotiating note, loss should fall on maker.—Greenlees v. Chezik, 667.

⇐75 (Cal.App.) One clothing another with apparent ownership cannot assert title against transferee.—Stoner v. Security Trust Co., 500.

⇐78(3) (Cal.App.) Contract regarding rights in irrigation ditch estopped landowner from denying existence of easement.—Palvutzian v. Terkanian, 503.

⇐83(3) (Cal.App.) Seller of lumber *held* estopped as against building mortgagee to set up he did not accept trust deed in place of lien.—Guy v. Leech, 1067.

⇐95 (Cal.App.) Where party failed to perform obligation to disclose facts, there can be no estoppel.—Stern v. Sunset Road Oil Co., 651.

Silence will not estop where there is no duty to speak.—Id.

(E) Pleading, Evidence, Trial; and Review.

⇐107 (Cal.App.) Not necessary to plead estoppel in technical words if facts appear on face of complaint.—Palvutzian v. Terkanian, 503.

⇐110 (Cal.App.) Facts constituting estoppel must be pleaded.—Stoner v. Security Trust Co., 500.

⇐110 (Cal.App. Building mortgagee not required to plead as against materialman asserting lien.—Guy v. Leech, 1067.

⇐116 (Cal.App.) Purchaser relying on negligence of true owner has burden of proof.—Stoner v. Security Trust Co., 500.

EVIDENCE.

See Criminal Law, ⇐318–561; Depositions; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Trial, ⇐36–83.

I. JUDICIAL NOTICE.

⇐10(1) (Nev.) Court will take judicial notice of removal of county seat by Legislature.—King v. Randall, 979.

⇐11 (Okl.) Court will take judicial notice of contemporaneous history.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

⇐20(2) (Colo.) Courts take judicial notice of federal control of railroads.—Chicago, B. & Q. R. Co. v. Public Utilities Commission, 539.

⇐21 (Utah) Courts will take judicial notice as to the use of safety deposit boxes.—West Cache Sugar Co. v. Hendrickson, 946.

⇐22(2) (Cal.) Court knows that regular meeting of stockholders is that at which directors are elected.—Guaranty Loan Co. v. Fontanel, 177.

⇐28 (Okl.) Court will take judicial notice of laws, and abuse to be remedied by act in question.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

⇐46 (Cal.App.) Judicial notice not taken of order of Industrial Accident Commission.—Schmidt v. Pursell, 846.

⇐48 (Utah) Judicial notice taken of acts of Auditor and State Land Board.—State Board of Land Com'rs v. Ririe, 59.

II. PRESUMPTIONS.

⇐80(1) (Cal.App.) Foreign laws presumed same as those of forum.—Uplinger v. Yonkin, 822.

⇐83(2) (Or.) Presumption executive board and civil service commission acted in good faith in removing policeman.—Cole v. City of Portland, 720.

⇐84 (Cal.App.) Presumptive evidence of value.—Humphry v. Farmers' Union & Milling Co., 489.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) Res Gestæ.

⇐121(8) (Or.) Memorandum competent as res gestæ.—Janson v. Pacific Diking Co., 340.

⇐127(3) (Cal.App.) Complaints of pain admissible.—Williams v. A. R. G. Bus Co., 1036.

(E) Competency.

⇐150 (Or.) Admitting evidence of experiments rests largely in court's discretion.—Horn v. Elgin Warehouse Co., 151.

⇐155(1) (Or.) Excluding plaintiff's evidence of unsuccessful planting *held* proper, though defendant showed successful planting.—Horn v. Elgin Warehouse Co., 151.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

⇐215(4) (Idaho) Notice published by irrigation company *held* admissible as bearing on quantity of water stored for a season.—Groefsema v. Mountain Home Co-op. Irr. Co., 356.

(C) By Grantors, Former Owners, or Privies.

⇐230(1) (Kan.) Grantor's declarations as to title *held* not admissible because of possession of land.—Robertson v. Wangler, 738.

Digitized by Google

(D) By Agents or Other Representatives.

⊂=243(4) (Cal.App.) Declaration of agent as to past event not part of res gestæ inadmissible against principal.—Brush v. Southern Pac. Co., 216.

VIII. DECLARATIONS.

(E) Proof and Effect.

⊂=313 (Cal.App.) Declarations *held* to show donor's intention to make an unconditional gift.—Hynes v. White, 836.

X. DOCUMENTARY EVIDENCE.

(B) Exemplifications, Transcripts, and Certified Copies.

⊂=347 (Cal.App.) Foreign judgment may be proved by authenticated copy.—Uplinger v. Yonkin, 822.

(C) Private Writings and Publications.

⊂=354(13) (Cal.App.) Ledger account made up from memoranda admissible to prove items of charge.—Sugar Loaf Orange Growers' Ass'n v. Skewes, 1076.

(D) Production, Authentication, and Effect.

⊂=368(5) (Kan.) Notice to produce, describing document, *held* sufficient.—Stone v. Jarbalo State Bank of Jarbalo, 1094.

⊂=376(1) (Mont.) Ledger *held* admissible without production of mechanics who turned in time cards.—Smith v. Sullivan, 288.

⊂=376(12) (Utah) Book entries authenticated by party *held* to show land was held in trust.—Matson v. Matson, 943.

Partnership book entries authenticated by party admissible.—Id.

⊂=383(3) (Or.) Dissolution proclamation *held* prima facie evidence of filing report of delinquency.—Smyth v. Kenwood Land Co., 962.

⊂=383(5) (Cal.App.) Certificate attached to judgment established general jurisdiction of foreign court.—Uplinger v. Yonkin, 822.

⊂=383(8) (Cal.) Book account, not kept in usual course of business, and not showing all the dealings, of no probative value.—Tipps v. Landers, 173.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

⊂=390(5) (Or.) Owner of water right conveying his interest in the ditch could not, by parol, claim right to its use.—O'Neil v. Twohy Bros. Co., 306.

⊂=402 (Mont.) Cross-examination as to statements concerning check given in payment incompetent, immaterial, or attempt to vary writing.—Montana Live Stock & Loan Co. v. Stewart, 985.

⊂=419(2) (Or.) Oral agreement pleaded as part of consideration for deed inadmissible to change its terms.—O'Neil v. Twohy Bros. Co., 306.

⊂=419(4) (Kan.) Parol evidence admissible to prove grantee assumed mortgage.—Woodburn v. Harvey, 620.

(B) Invalidating Written Instrument.

⊂=433(4) (Idaho) Parol evidence is admissible to show that deed because of mutual mistake did not express the real intent.—Udelavitz v. Ketchen, 1029.

(C) Separate or Subsequent Oral Agreement.

⊂=441(9) (Ariz.) Parol warranty cannot be grafted on written contract of sale.—Gilmore v. Wingate, 571.

⊂=441(11) (Or.) Parol agreement limiting liability of maker of note cannot be shown.—McFarland v. Hueners, 584.

⊂=442(1) (Or.) Parol evidence admissible to supply omitted terms.—McDonald v. Supple, 315.

⊂=442(5) (Or.) Time of delivery of steel admissible on issue of additional compensation, though not specified in contract.—McDonald v. Supple, 315.

⊂=442(6) (Ariz.) Written contract *held* not to purport to contain all terms so as to exclude parol warranty.—Gilmore v. Wingate, 571.

⊂=442(6) (Cal.App.) As to time of delivery of automobile sold not inadmissible as varying contract.—Boland v. Smith, 825.

(D) Construction or Application of Language of Written Instrument.

⊂=457 (Mont.) Contract for sale of cash register with "special" keys may be orally explained.—National Cash Register Co. v. Wall, 135.

⊂=457 (Okl.) Parol evidence is competent to explain technical terms in deed.—Hines v. Olsen, 266.

⊂=457 (Or.) Evidence admissible to show technical meaning of terms used.—McDonald v. Supple, 315.

That steel was not painted and numbers wore off, and meaning of terms, *held* admissible.—Id.

⊂=460(6) (Okl.) Parol evidence is competent to explain uncertain boundaries.—Hines v. Olsen, 266.

(E) Showing Discharge or Performance of Obligation.

⊂=466 (Colo.) Parol evidence admissible to show surrender of lease.—Brown v. Hallett, 429.

⊂=469 (Cal.App.) Payments on note prior to execution inadmissible as varying writing.—Bledsoe v. Stuckey, 217.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

⊂=471(13) (Cal.App.) Testimony as to actions and conduct of injured person admissible.—Williamson v. Hardy, 646.

(B) Subjects of Expert Testimony.

⊂=506 (Kan.) Expert testimony *held* not to invade province of jury.—McArthur v. Independent Torpedo Co., 787.

(F) Effect of Opinion Evidence.

⊂=574 (Cal.) Conclusions and probabilities not substantial contradiction of positive testimony.—Newell-Murdoch Realty Co. v. Wickham, 359.

XIV. WEIGHT AND SUFFICIENCY.

⊂=588 (Cal.) Credibility of witness for jury.—Young v. Southern Pac. Co., 36.

⊂=588 (Cal.App.) Court may not disregard unimpeached evidence.—Hynes v. White, 836.

⊂=589 (Cal.App.) Court properly disregarded defendants' testimony where surrounded with elements of uncertainty and suspicion.—Willits v. Helmer, 645.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⊂=555.

II. SETTLEMENT, SIGNING, AND FILING.

⊂=39(1) (N.M.) Time after which district court judge cannot certify transcript or settle bill of exceptions stated.—Roberson v. Citizens' Lumber Co., 353.

EXECUTION.

II. PROPERTY SUBJECT TO EXECUTION.

⊂=49 (Cal.App.) Judgment cannot be sold.—Judnick v. Judnick, 480.

Digitized by Google

VII. SALE.

(B) Title and Rights of Purchaser.

⊂⊃283 (Cal.App.) After year purchaser may quiet title, although no deed has been issued.—Leaver v. Smith, 1050.

X. SUPPLEMENTARY PROCEEDINGS.

⊂⊃388 (Cal.App.) Order of examination misnaming party to action *held* sufficient notice.—Drew v. Superior Court of California in and for Mendocino County, 374.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⊂⊃35(15) (Wash.) Evidence of fraud and neglect warranted removal of administratrix.—In re Fick's Estate, 1008.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

⊂⊃199 (Wash.) Facts warranting setting aside of order awarding property for fraud of administratrix.—In re Fick's Estate, 1008.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

⊂⊃202(1) (Cal.) Enforcement of revived judgment not limited to execution.—Saunders v. Simms, 806.

VII. DISTRIBUTION OF ESTATE.

⊂⊃315(1) (Cal.) Probate court in distributing estate can declare lien in favor of third person.—Title Insurance & Trust Co. v. Miller & Lux, 433.

Lien imposed by distribution decree not void for uncertainty.—Id.

⊂⊃315(5) (Cal.) Decree of distribution established lien on land.—Title Insurance & Trust Co. v. Miller & Lux, 433.

X. ACTIONS.

⊂⊃421 (Cal.) Suit to enforce payment of judgment not action for new judgment.—Saunders v. Simms, 806.

⊂⊃451(2) (Colo.) Where evidence as to ownership conflicting, directed verdict properly denied.—Benish v. Jones, 538.

XI. ACCOUNTING AND SETTLEMENT.

(E) Stating, Settling, Opening, and Review.

⊂⊃513(9) (Cal.) Order of settlement conclusive on executrix and persons beneficially interested.—In re Simonton's Estate, 442.

Settlement of executrix conclusive as between her successors and persons interested in estate.—Id.

⊂⊃513(15) (Cal.) Settlement of widow's account as executrix determined property not inventoried or accounted for was hers.—In re Simonton's Estate, 442.

EXEMPTIONS.

See Homestead.

I. NATURE AND EXTENT.

(C) Property and Rights Exempt.

⊂⊃50(1) (Cal.) Insurance money of deceased leaving no spouse or minor children not exempt.—In re Starr's Estate, 625.

EXPLOSIVES.

⊂⊃10 (Kan.) Demurrer to evidence as to negligence in destroying oil well *held* properly overruled.—McArthur v. Independent Torpedo Co., 787.

FACTORS.

See Brokers.

⊂⊃52 (Cal.App.) Pledge of goods by broker valid though bill of lading not negotiable.—Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co., 194.

FALSE PRETENSES.

⊂⊃9 (Cal.App.) Pretenses must be a material element in inducing parting with money.—People v. Bliss, 1046.

⊂⊃26 (Cal.App.) Information *held* defective.—People v. Bliss, 1046.

⊂⊃26 (Okl.Cr.App.) Information *held* sufficient.—State v. Underwood, 281.

FELLOW SERVANTS.

See Master and Servant, ⊂⊃180.

FERRIES.

II. REGULATION AND OPERATION.

⊂⊃29 (Wash.) Statute regulating same *held* a special and not general law.—State v. Public Service Commission, 1012.

Public Service Commission cannot regulate service and rates.—Id.

FINES.

⊂⊃20 (Cal.App.) State Poison Act conclusive as to disposition of fines, notwithstanding inconsistent provision of charter; "municipal affairs."—People v. City of San Bernardino, 482.

⊂⊃20 (Utah) In city court for violation of fish and game laws belong to commissioner.—Siddoway v. Utah County, 941.

FOREIGN CORPORATIONS.

See Corporations, ⊂⊃639–657.

FORGERY.

⊂⊃5 (Cal.App.) Implies evil intent.—Ex parte Sanders, 647.

⊂⊃47 (Wash.) Evidence *held* sufficient for submission to jury in prosecution for uttering forged check.—State v. Chittenden, 232.

FORMER JEOPARDY.

See Criminal Law, ⊂⊃177–193.

FRAUD.

See Frauds, Statute of; Fraudulent Conveyances.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

⊂⊃11(1) (Cal.App.) Vendor's representation as to improvements *held* one of fact.—Edge v. Bryan, 476.

Vendor's representation land was virgin soil one of fact.—Id.

Seller knowing buyer relies on representation cannot assert it was opinion.—Id.

⊂⊃20 (Cal.App.) Reliance on representations and damage thereby essential.—Edge v. Bryan, 476.

⊂⊃25 (Cal.App.) Reliance on representations and damages thereby essential.—Edge v. Bryan, 476.

⊂⊃27 (Cal.) False representation that defendants have subscribed for stock on same terms *held* actionable.—Munson v. Fishburn, 808.

⊂⊃29 (Colo.) Defrauded stockholders may sue person inducing purchase.—Kunkle v. Soule, 536.

Digitized by Google

II. ACTIONS.

(A) Rights of Action and Defenses.

⚖31 (Cal.) Right to rescind contract or perform and recover damages.—Thompson v. Modern School of Business and Correspondence, 451.

(B) Parties and Pleading.

⚖47 (Cal.) Plaintiff must allege and prove a definite amount and measure of damage in action for fraudulent representations inducing purchase of stock.—Munson v. Fishburn, 808.
⚖49 (Cal.App.) Evidence *held* properly excluded as not within issues.—Edge v. Bryan, 476.

(C) Evidence.

⚖50 (Cal.App.) Must be proved.—Tyler v. J. I. Metrovich Bldg. Co., 208.
⚖54 (Cal.) Evidence *held* admissible to show scienter.—Thompson v. Modern School of Business and Correspondence, 451.
⚖58(1) (Cal.) Evidence *held* to show fraudulent scheme of correspondence school.—Thompson v. Modern School of Business and Correspondence, 451.
⚖58(1) (Idaho) Allegation of fraud must be sustained by reasonably convincing evidence.—Fehr v. Haworth, 248.

(D) Damages.

⚖59(1) (Cal.) Damages measured by amount paid for stock with 7 per cent. interest less value of stock upon discovering fraud.—Munson v. Fishburn, 808.
⚖61 (Cal.) Exemplary damages recoverable.—Thompson v. Modern School of Business and Correspondence, 451.

FRAUDS, STATUTE OF.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

⚖71 (Cal.App.) Oral promise to deed land void, in absence of fraudulent conduct.—Schwarz v. Bohle, 819.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

⚖115(3) (Cal.App.) Paper route lease signed only by lessor's wife *held* binding on lessee as the party to be charged.—Straus v. Eaton, 1033.

IX. OPERATION AND EFFECT OF STATUTE.

⚖129(2) (Kan.) Actual acceptance of a pupil into school *held* to satisfy statute.—Lenox Hall v. Seelye, 737.

FRAUDULENT CONVEYANCES.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

⚖225 (Ariz.) Creditor accepting payments from trustee for creditors could not garnishee.—Allaire v. Laurel Canyon Mining Co., 79.

(I) Trial.

⚖308(9) (Cal.App.) Whether possession of chattels changed to satisfy statute a jury question.—Tennant v. Cline, 1065.

GAMING.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

⚖20 (Colo.) Security for gambling debt not owned by holder.—Benish v. Jones, 538.

(B) Rights and Remedies of Parties.

⚖33 (Colo.) Pledgee of property delivered as security for gaming debt not entitled to possession.—Benish v. Jones, 538.

GARNISHMENT.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

⚖54 (Utah) Contents of safety deposit box are subject to writ.—West Cache Sugar Co. v. Hendrickson, 946.
⚖56 (Ariz.) When bank deposit for distribution among creditors subject to garnishment stated.—Allaire v. Laurel Canyon Mining Co., 79.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

⚖167 (Utah) Court may require garnishee bank to open safety deposit box to reach contents.—West Cache Sugar Co. v. Hendrickson, 946.

That opening of safety deposit box by garnishee incurs expense no excuse for disobedience.—Id.

Neither garnishee nor debtor entitled to notice before order to open safety deposit box.—Id.

Responsibility of garnishee bank upon opening safety deposit box under court order stated.—Id.

Order requiring garnishee to open safety deposit box should allow garnishee to make inventory.—Id.

Notice necessary upon opening safety deposit box for inspection stated.—Id.

Order requiring garnishee bank to open safety deposit box *held* too broad.—Id.

Garnishee bank's liability upon opening safety deposit box in its possession stated.—Id.

GIFTS.

I. INTER VIVOS.

⚖4 (Cal.App.) Intention, delivery, and acceptance are essential.—Hynes v. White, 836.
⚖28(2) (Cal.App.) Donor's retention of key to deposit box *held* not inconsistent with gift.—Hynes v. White, 836.
⚖32(1) (Cal.App.) No gift where drawer gave check to payee, but payee did not cash it before drawer's death.—Edwards v. Guaranty Trust & Savings Bank, 57.
⚖34 (Cal.App.) Donor's arrangement to repossess if donee died first *held* not inconsistent with gift.—Hynes v. White, 836.
⚖41 (Cal.App.) Mere possession by donor after completed gift does not revest title.—Hynes v. White, 836.
⚖49(6) (Cal.App.) Evidence *held* to establish gift of bonds.—Hynes v. White, 836.

GUARANTY.

See Indemnity.

I. REQUISITES AND VALIDITY.

⚖1 (Cal.App.) An independent contract.—Kelley v. Goldschmidt, 55.

II. CONSTRUCTION AND OPERATION.

⚖27 (Or.) Liability of guarantors without compensation strictly construed.—W. T. Rawleigh Co. v. McCoy, 311.
⚖36(5) (Or.) Transaction *held* not a "purchase" of goods within guaranty of payment; "transfer."—W. T. Rawleigh Co. v. McCoy, 311.

III. DISCHARGE OF GUARANTOR.

⚖53(2) (Cal.) Creditor could not recover against guarantor after transfer of note.—Ellison v. Henion, 793.

IV. REMEDIES OF CREDITORS.

⚖75 (Cal.App.) Creditor may resort either to guarantor or security furnished by principal.—Kelley v. Goldschmidt, 55.

Digitized by Google

V. RIGHTS AND REMEDIES OF GUARANTOR.

⇐105 (Wash.) Obligation of contribution arises between guarantors, when payment is made to creditor.—Pioneer Mining & Ditch Co. v. Davidson, 242.

Company which assumed obligation of guarantor and paid debt entitled to contribution. —Id.

GUARDIAN AND WARD.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

⇐108 (Okl.) As to bona fide mortgagee, lien of mortgage on realty sold by guardian not defeated, because sale not for cash.—Vose v. Penny, 97.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

⇐22(1) (Kan.) Defendant is not entitled to a release so long as any part of his jail term has not been fully served.—Ex parte Jackson, 608.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⇐85(1) (Cal.) Parol evidence *held* not to show lack of complaint in police court.—Ex parte Williams, 163.

Evidence *held* to show trial.—Id.

Burden is on prisoner to show lack of trial. —Id.

⇐85(1) (Okl.Cr.App.) Petitioner must show facts entitling him to bail.—In re Bean, 1091.

⇐92(1) (Cal.App.) Difficulty of proving of offense charged cannot be considered.—Ex parte De Martini, 468.

⇐92(1) (Cal.App.) Statement of case on appeal from justice can be considered on habeas corpus after new trial was denied.—Ex parte Gottschalk, 649.

⇐92(1) (Nev.) Correctness of statement of facts in Governor's proclamation under Sheep Commission Law not reviewable.—Ex parte Goddard, 916.

⇐99(1) (N.M.) Custody of child may be given without consent of or notice to parents.— Ex parte Wallace, 1020.

⇐99(3) (Okl.) Judgment of sister state not conclusive as to custody of children, their welfare being paramount consideration.—Aufder Heide v. Kiskaddon, 859.

HARMLESS ERROR.

See Appeal and Error, ⇐1026–1073; Criminal Law, ⇐1163–1173.

HIGHWAYS.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

⇐177 (Cal.) Violation of speed law does not prevent recovery unless contributing to accident.—Robinson v. Clemons, 203.

⇐177 (Cal.App.) Automobilist about to cross intersection may assume car will not approach at excessive speed.—Robinson v. Clemons, 203.

⇐184(2) (Cal.App.) Evidence *held* to show that defendant's vehicle approaching intersection was not under control.—Robinson v. Clemons, 203.

Evidence *held* to show ordinary care by plaintiff automobilist at intersection.—Id.

HOMESTEAD.

I. NATURE, ACQUISITION, AND EXTENT.

(A) Nature, Creation, and Duration of Estate or Right in General.

⇐1 (Okl.) Nature and incidents of homestead interest stated.—Pettis v. Johnston, 681.

(C) Acquisition and Establishment.

⇐43 (Cal.App.) Declaration not stating declarant resided on premises claimed *held* ineffective.—Olds v. Thorington, 496.

Right of claimant must appear on face of declaration.—Id.

⇐47 (Cal.App.) Wife's declaration of homestead *held* sufficient, irrespective of her motive or absence of husband.—Michels v. Burkhard, 370.

⇐57(1) (Cal.App.) Claimant has burden of proof.—Michels v. Burkhard, 370.

⇐57(3) (Cal.App.) Facts *held* to show residence on property by person making and recording homestead declaration.—Michels v. Burkhard, 370.

II. TRANSFER OR INCUMBRANCE.

⇐110 (Okl.) Unmarried owner may deed or mortgage without consent of family.—Roberson v. Hurst, 402.

⇐115(3) (Okl.) Husband or wife necessary party to mortgage foreclosure sale affecting homestead interest.—Pettis v. Johnston, 681.

Wife owning homestead in fee may attack a judgment foreclosing a mortgage because husband was not a party.—Id.

Foreclosure judgment is void where husband was not a party to foreclosure suit.—Id.

⇐117 (Cal.App.) Mortgage before declaration of homestead cannot afterwards be extended by husband alone.—Corey v. Matot, 378.

⇐117 (Kan.) Husband's extensions of oil lease on homestead without wife's consent not valid.—Laverty v. Larned Oil & Gas Co., 596.

⇐121 (Okl.) Sale of homestead under foreclosure without making husband a party void.— Pettis v. Johnston, 681.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

⇐142(2) (Cal.) Next of kin of widow entitled to proceeds of homestead set aside to her.—In re Simonton's Estate, 442.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

⇐158 (Cal.) Homestead community property subject to partition after divorce making no disposition of it.—Lang v. Lang, 181.

HOMICIDE.

III. MANSLAUGHTER.

⇐55 (Cal.App.) Resistance of illegal arrest reduces killing to manslaughter.—People v. Gilman, 205.

For murder to be reduced to manslaughter on ground of resistance of illegal arrest actual resistance must appear.—Id.

Resistance to illegal arrest not shown by facts.—Id.

VII. EVIDENCE.

(B) Admissibility in General.

⇐173 (Okl.Cr.App.) Evidence as to subsequent finding of weapons near place of assault admissible.—Pruitt v. State, 894.

⇐174(8) (Or.) Evidence that defendant said that he did not question his children concerning death of wife *held* admissible.—State v. Zullig, 580.

Digitized by Google

(E) Weight and Sufficiency.

⇐250 (Okl.) Evidence *held* to sustain conviction.—Everidge v. State, 701.
⇐250 (Okl.Cr.App.) Evidence *held* to sustain conviction for murder and imprisonment for life.—Whitmore v. State, 278.
⇐250 (Or.) Where there is doubt as to grade of offense, jury should find manslaughter. —State v. Zullig, 580.
⇐255(3) (Okl.Cr.App.) Evidence sustaining conviction for manslaughter in the first degree. —Jones v. State, 887.

VIII. TRIAL.

(B) Questions for Jury.

⇐268 (Or.) In prosecution for uxoricide, evidence *held* sufficient to go to jury.—State v. Zullig, 580.
⇐270 (Cal.) Sanity of defendant for jury.—People v. Niino, 626.
⇐272 (Cal.App.) Question of resistance of illegal arrest *held* for jury.—People v. Gilman, 205.

X. APPEAL AND ERROR.

⇐336 (Okl.Cr.App.) Order for view will not be reviewed, unless prejudicing defendant's substantial rights.—Jones v. State, 887.
⇐343 (Okl.Cr.App.) Plaintiff in error cannot complain that the jury were too lenient in fixing punishment.—Crabtree v. State, 271.
⇐348 (Cal.App.) Failure to give instruction not reversible error, where absence of such instruction probably not prejudicial.—People v. Gilman, 205.

XI. SENTENCE AND PUNISHMENT.

⇐354 (Okl.Cr.App.) Evidence *held* to sustain conviction for murder and imprisonment for life.—Whitmore v. State, 278.

HUSBAND AND WIFE.

See Curtesy; Divorce; Dower; Marriage.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

⇐4 (Utah) Separation did not absolve husband from duty to support.—Stevenson v. Stevenson, 776.
⇐19(18) (Cal.App.) Legal services not "articles necessary for wife's support," to render husband liable; "necessaries."—Sumner v. Mohn, 368.
Code gives wife remedy for means to prosecute action for separate maintenance.—Id.
⇐23 (Cal.App.) Parol authorization to wife to assign claim under lease of newspaper route *held* valid.—Straus v. Eaton, 1033.
⇐23¾ (Cal.App.) Evidence *held* insufficient to justify finding wife authorized by husband to employ attorney.—Sumner v. Mohn, 368.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

⇐131(1) (Idaho) Proof that separate property retains character after changes must be clear.—Clifford v. Lake, 714.

(B) Rights and Liabilities of Husband.

⇐138(1) (Cal.App.) Previous signing of notes by wife did not make husband agent.—McConnell v. Gaut's Estate, 843.
⇐138(9) (Cal.App.) Wife signing undelivered mortgage on husband's property and note not ratifying his previous acts as agent.—McConnell v. Gaut's Estate, 843.

VII. COMMUNITY PROPERTY.

⇐248 (Wash.) Property acquired during bigamous marriage is separate property.—Beyerle v. Bartsch, 239.
⇐254 (Wash.) Where husband and wife unite in note and mortgage for purchase money, property is community.—Rawlings v. Heal, 237.
⇐255 (Wash.) Community character of property depends on source of purchase price. —Rawlings v. Heal, 237.
Property purchased *held* community except to extent of separate funds used.—Id.
⇐259 (Cal.App.) Wife's earnings *held* community property.—Bayless v. Reed, 211.
⇐262(1) (Idaho) Property acquired during coverture presumed community.—Clifford v. Lake, 714.
⇐262(1) (Wash.) Presumption of community character of property rebuttable.—Rawlings v. Heal, 237.
Presumption as to community property not overcome.—Id.
⇐262(2) (Idaho) Burden of showing property so acquired to be separate property stated.—Clifford v. Lake, 714.
⇐274(1) (Cal.) Code provision as to inheritance by persons not relatives of decedent, but relatives of decedent's spouse, construed.—In re Simonton's Estate, 442.
Property received by widow as allowance and fees properly distributed to her next of kin. —Id.
Property acquired by widow *held* not husband's descendants' as presumably community property.—Id.
⇐274(4) (Cal.) Burden on heir whose right depends on fact of relationship, and fact property was formerly community property.—In re Simonton's Estate, 442.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

⇐278(1) (Cal.App.) May agree to immediate separation and provide for support of either. —McCahan v. McCahan, 460.
Trial court may not interfere with valid separation contract dividing community property. —Id.
⇐299(1) (Cal.App.) Community cannot be divided in suit for separate maintenance, where the complaint did not seek such relief.—Sherman v. Sherman, 464.

X. ENTICING AND ALIENATING.

⇐333(4) (Cal.App.) Defendant's letters to wife intercepted by husband admissible to rebut the claim that wife tempted defendant.—Pratt v. Harrold, 372.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPROVEMENTS.

See Municipal Corporations, ⇐297–538.

INDEMNITY.

See Guaranty.

⇐3 (Nev.) Contract creating situation preventing removing of county seat *held* contrary to public policy.—King v. Randall, 979.

INDIANS.

⇐13 (Okl.) Enrollment records admissible to show quantum of Indian blood and patent records competent to show whether allotments are restricted.—Smith v. Williams, 555.
⇐15(1) (Okl.) Restrictions on alienation of allotted lands depend solely upon acts of Congress.—Smith v. Williams, 555.
Title cannot be acquired from allottee except according to acts of Congress.—Id.
⇐27(2) (Okl.) District courts on July 6, 1909, might partition inherited lands of mixed-blood Indians.—Tiger v. Nolen, 263.
⇐39 (Okl.) United States sovereign in Indian Territory.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

Digitized by Google

INDICTMENT AND INFORMATION.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⇐60 (Okl.Cr.App.) Information informing one of common understanding what is intended is sufficient.—State v. Underwood, 281.
⇐71 (Okl.Cr.App.) Need not be certain to a certain intent in every particular.—State v. Underwood, 281.
⇐110(2) (Okl. Cr. App.) Words conveying same meaning as those used in statutes are sufficient.—State v. Underwood, 281.
⇐122(2) (Idaho) Information may be filed charging offense for which accused is *held* although complaint charged two offenses.—State v. Bilboa, 248.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

⇐125(2) (Idaho) Several offenses may not be joined except in prosecution for sales of intoxicating liquor.—State v. Bilboa, 248.
⇐125(2) (Mont.) Information can charge but one offense, which must be proved.—State v. Smith, 107; Same v. Dunn, 121.
⇐130 (Idaho) Transporting and possession of liquors may not be joined in different courts.—State v. Hall, 251.
⇐132(7) (Idaho) Motion to require election where information charges more than one offense should be granted.—State v. Bilboa, 248.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

⇐140(2) (Okl.Cr.App.) Information amended by interlineation and reverified not open to motion to quash.—French v. State, 707.
⇐147 (Idaho) Information charging more than one offense is demurrable for duplicity.—State v. Bilboa, 248.
⇐154 (Cal.App.) Objection to information not waived by failure to demur and properly presented by motion in arrest.—People v. Bliss, 1046.

VIII. AMENDMENT.

⇐161(2) (Okl.Cr.App.) Information, amended merely by interlineation, need not be marked "refiled."—French v. State, 707.
Substantive amendment to information requires reverification.—Id.
⇐161(3) (Okl.Cr.App.) When information may be amended as to form only stated.—French v. State, 707.
⇐161(6) (Cal.App.) Court could correct name of prosecutrix after jury was drawn.—People v. White, 821.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT.

⇐193 (Idaho) Duplicity is an irregularity which may be waived.—State v. Bilboa, 190 P. 248.

INFANTS.

See Guardian and Ward; Parent and Child.

II. CUSTODY AND PROTECTION.

⇐16 (Cal.) Attachment by magistrate of copy of complaint, etc., to certificate defendant is under 18 directory.—People v. Wolff, 22.
⇐16 (Cal.App.) Custody of infants cannot be taken from parent under Juvenile Court Law because others might better provide for and train them.—People v. Gutierrez, 200.
⇐19 (Cal.App.) Evidence *held* insufficient to show that infants had no parent or guardian.—People v. Gutierrez, 200.
To justify taking infants from custody of parent, facts specified in statute therefor must be averred and found.—Id.
⇐19 (Utah) Judgment committing minor to Industrial School, on erroneous finding that mother was unfit to have custody, reversed.—Bedford v. Anderson, 775.

VI. CRIMES.

⇐68 (Cal.) Defendant under 18 may be prosecuted under general laws for offense, as murder.—People v. Wolff, 22.

INJUNCTION.

II. SUBJECTS OF PROTECTION AND RELIEF.

(E) Public Officers and Boards and Municipalities.

⇐78 (Okl.) Quo warranto *held* proper to test validity of organization of consolidated school district; injunction inapplicable.—Fowler v. Park, 668.
⇐80 (Kan.) Lies at suit of state to prevent holding an unauthorized election.—State v. Board of Com'rs of McPherson County, 594.

(H) Criminal Acts, Conspiracies, and Prosecutions.

⇐105(2) (Or.) Public officers undertaking to enforce void statute by criminal prosecution may be restrained.—Nault v. Palmer, 346.

INSANE PERSONS.

II. INQUISITIONS.

⇐29 (Cal.App.) Order restoring grantor to competency sufficient to show capacity.—Smyth v. Fitch, 1049.
⇐29 (Wash.) Facts *held* to show person incompetent to manage estate, so that guardian would not be discharged.—In re Bayer's Estate, 323.

III. GUARDIANSHIP.

⇐33(1) (Or.) Petition for guardian of incompetent need only follow statute.—In re McIlroy, 309.
Evidence *held* to show father incapable of conducting own affairs.—Id.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy.

INSTRUCTIONS.

See Criminal Law, ⇐782–834; Trial, ⇐191–296.

INSURANCE.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

⇐78 (Kan.) License to a local agent does not change the general law as to his authority.—Eikelberger v. Insurance Co. of North America, 611.

IV. INSURABLE INTEREST.

⇐123 (Wash.) Wife's interest in husband's life does not expire on divorce.—Teed v. Brotherhood of American Yeomen, 1005.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

⇐129 (Cal.) General agent without authority to issue policy to cover known loss.—Western Indemnity Co. v. Industrial Accident Commission, 27.
⇐130(7) (Cal.) Counter offer of general agent upon receipt of application called for acceptance or rejection.—Western Indemnity Co. v. Industrial Accident Commission, 27.
Acceptance of terms granted by company completes contract before local agent communicates same to principal.—Id.

Digitized by Google

(B) Construction and Operation.

⇐146(3) (Cal.) Ambiguities in accident policies construed against insurer.—Wilson v. Travelers' Ins. Co., 366.
⇐146(3) (Cal.App.) Policy construed in favor of insured.—Greer-Robbins Co. v. Insurance Co. of State of Pennsylvania, 187.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

⇐241 (Kan.) Offer to surrender note on surrender of policy does not violate antidiscrimination law.—Eikelberger v. Insurance Co. of North America, 611.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

⇐327 (Cal.App.) Removal of goods from one compartment of a building to another *held* not to violate fire policy.—Greer-Robbins Co. v. Insurance Co. of State of Pennsylvania, 187.
Ambiguities in policy as to removal cleared by proofs.—Id.

(E) Nonpayment of Premiums or Assessments.

⇐349(2) (Mont.) Failure to pay a life insurance premium works forfeiture.—Nelson v. Mutual Life Ins. Co. of New York, 927.
⇐365(2) (Mont.) Life policy not reinstated by payment without furnishing satisfactory health certificate.—Nelson v. Mutual Life Ins. Co. of New York, 927.

XII. RISKS AND CAUSES OF LOSS.

(E) Accident and Health Insurance.

⇐451(1) (Cal.) Clause in accident policy that it should not cover injury resulting from explosives did not apply only to voluntary exposure.—Wilson v. Travelers' Ins. Co., 366.
⇐452 (Cal.) Injury occasioned by "wreckage" of passenger car and not explosion causing wreckage.—Wilson v. Travelers' Ins. Co., 366.
⇐455 (Mont.) To recover on accident policy, death must be shown to result from accidental means; "accident."—Tuttle v. Pacific Mut. Life Ins. Co., 993.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(C) Guaranty and Indemnity Insurance.

⇐514 (Kan.) Exception of risk under casualty policy until after insured's payment of adjudged loss is valid condition.—Kansas Free Fair Ass'n v. Georgia Casualty Co., 592.
Insured's payment of notes *held* to comply with conditions of casualty policy.—Id.

(E) Accident and Health Insurance.

⇐530 (Cal.) Recovery could be had only on one daily ticket accident policy.—Wilson v. Travelers' Ins. Co., 366.
Issuance of several accident tickets *held* not to estop insurer from limiting liabilities to one ticket; custom not influencing action does not estop.—Id.

XIV. NOTICE AND PROOF OF LOSS.

⇐535 (Mont.) Accident policy *held* to require notice of accident, though mode of death unknown.—Tuttle v. Pacific Mut. Life Ins. Co., 993.
⇐538 (Mont.) Oral notice to agent not immediate written notice to insurer at home office.—Tuttle v. Pacific Mut. Life Ins. Co., 993.
⇐539(6) (Mont.) Where insured disappeared while hunting notice of the accident necessary, though mode of death not known.—Tuttle v. Pacific Mut. Life Ins. Co., 993.
⇐556(1) (Mont.) Provision as to waiver is information that there could be no waiver by agent.—Tuttle v. Pacific Mut. Life Ins. Co., 993.
⇐559(2) (Mont.) Letters from home office of insurer not waiver of provisions as to notice.—Tuttle v. Pacific Mut. Life Ins. Co., 993.

XVIII. ACTIONS ON POLICIES.

⇐622(2) (Kan.) Provision requiring suit on casualty policy within 90 days after date of judgment for loss is invalid.—Kansas Free Fair Ass'n v. Georgia Casualty Co., 592.
⇐646(5) (Mont.) Plaintiff pleading reinstatement of insured must prove waiver of forfeiture.—Nelson v. Mutual Life Ins. Co. of New York, 927.
⇐646(6) (Mont.) Claimant under accident policy has burden of showing accidental death.—Tuttle v. Pacific Mut. Life Ins. Co., 993.
Presumption against suicide does not create presumption of accidental death.—Id.
⇐665(8) (Mont.) Evidence *held* to show policy forfeited, default not waived and policy not reinstated.—Nelson v. Mutual Life Ins. Co. of New York, 927.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

⇐695 (Kan.) One failing in his undertaking to remit dues was liable to beneficiary for resulting injury.—Maddock v. Riggs, 12.
Beneficiary of insured may sue for resulting injury from defendant's failure to remit dues.—Id.
Evidence *held* to sustain verdict for beneficiary for neglecting to remit dues.—Id.

(E) Beneficiaries and Benefits.

⇐770 (Wash.) Wife's status as one entitled to be named as beneficiary remained with her.—Teed v. Brotherhood of American Yeomen, 1005.
Statute confining death benefit to wife not retrospective.—Id.
Benefit society estopped to raise question whether wife entitled to receive benefit.—Id.

(F) Actions for Benefits.

⇐812 (Wash.) Limitation of time for action without application where death not known.—Teed v. Brotherhood of American Yeomen, 1005.

INTEREST.

See Usury.

I. RIGHTS AND LIABILITIES IN GENERAL.

⇐20 (Cal.) Deposit of fund in court in interpleader action stopped running.—Conner v. Bank of Bakersfield, 801.

II. RATE.

⇐31 (Okl.) Where rate contracted for is set aside, legal interest is allowable.—Holt v. Ætna Building & Loan Ass'n, 872.

III. TIME AND COMPUTATION.

⇐46(1) (Kan.) Interest is allowable from demand for payment of wages and money expended for defendant.—Currant v. Lenger, 432.
⇐47(1) (Cal.App.) Maker of note cross-complaining for overpayments not entitled to interest before filing cross-complaint.—Bledsoe v. Stuckey, 217.

IV. RECOVERY.

⇐61 (Cal.) No action for interest as damages after payment in absence of agreement.—Conner v. Bank of Bakersfield, 801.
⇐62 (Cal.) Bank which severed claim to interest as damages from obligation on certified

Digitized by Google

check cannot complain of subsequent action for such damages.—Conner v. Bank of Bakersfield, 801.

INTERPLEADER.

I. RIGHT TO INTERPLEADER.

⇐10 (Cal.) Plaintiff must be disinterested stakeholder.—Conner v. Bank of Bakersfield, 801.

Bank could not have interpleaded adverse claimants of proceeds of interest-bearing check.—Id.

Interest of plaintiff to defeat suit must be in subject-matter.—Id.

⇐11 (Cal.) Bank entitled to interplead conflicting claimants of fund.—Conner v. Bank of Bakersfield, 801.

II. PROCEEDINGS AND RELIEF.

⇐26 (Cal.) Defendant can put in issue plaintiff's right to compel interpleader.—Conner v. Bank of Bakersfield, 801.

⇐32 (Cal.) Right to compel interpleader only question which can be litigated.—Conner v. Bank of Bakersfield, 801.

Bank interpleading drawer and holder of certified check could not be compelled to litigate other liability.—Id.

INTOXICATING LIQUORS.

VI. OFFENSES.

⇐131 (Cal.App.) Lack of knowledge of volume of alcohol in beer no defense under Wyllie Act.—People v. Bickerstaff, 656.

⇐132 (Idaho) Pari materia rule is especially applicable to statutes passed at same session.—State v. McBride, 247.

⇐134 (Cal.App.) Sale of beer containing less than 1 per cent. alcohol no crime.—People v. Bickerstaff, 656.

⇐137 (Ariz.) One attempting to manufacture intoxicating liquors guilty of crime.—State v. Crawford, 422.

⇐167 (Idaho) One aiding or abetting in transporting liquor into Idaho is guilty of transporting.—State v. Sheehan, 71.

VIII. CRIMINAL PROSECUTIONS.

⇐209 (Ariz.) Allegation of unlawful manufacture need not set out instruments or processes used.—State v. Crawford, 422.

Allegation of "attempt" to manufacture need not allege process used.—Id.

⇐223(4) (Okl.Cr.App.) Proof as to points between which liquor was conveyed *held* not at variance with allegations.—Smart v. State, 269.

⇐236(9) (Okl.Cr.App.) Insufficiency of evidence to sustain conviction for maintaining public nuisance.—Patterson v. State, 271.

⇐236(20) (Okl.Cr.App.) Evidence *held* to sustain conviction for unlawful transportation.—Wood v. State, 280.

IRRIGATION.

See Waters and Water Courses, ⇐216–263.

JEOPARDY.

See Criminal Law, ⇐177–193.

JOINT ADVENTURES.

⇐4(1) (Cal.) Duty of parties defined.—Munson v. Fishburn, 808.

⇐5(1) (Wash.) No cause of action for accounting *held* to lie between the parties.—Nudd v. Rowe, 902.

JUDGES.

See Justices of the Peace.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

⇐25(2) (Kan.) Powers of judge pro tempore substituting for retiring judge terminated on qualification of his successor.—Golden v. Mitchell, 785.

Verbal request by district judge that one continue to serve as judge pro tempore conferred no judicial powers.—Id.

IV. DISQUALIFICATION TO ACT.

⇐40 (Mont.) Laws covering disqualification of judge and change of venue to be construed together.—State v. District Court of Fourth Judicial Dist., Ravalli County, 133.

⇐51(1) (Wash.) Accused having secured change of judge, his attorney cannot also obtain a change.—State v. Reynolds, 321.

⇐51(2) (Wash.) Application for change of judge must be timely and seasonable.—State v. Reynolds, 321.

JUDGMENT.

See Execution.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

⇐17(2) (Okl.) Defects in publication notice *held* not fatal to judgment on collateral attack.—Pettis v. Johnston, 681.

Publication of notice stating in general terms the nature of the judgment sought, supports judgment when collaterally attacked.—Id.

Jurisdiction to foreclose a mortgage includes power to pass on sufficiency of steps to invoke jurisdiction.—Id.

⇐17(3) (Okl.) Valid personal judgment cannot be rendered against nonresident on publication.—Pettis v. Johnston, 681.

⇐18(3) (Cal.) Defect in entitling pleading not invalidating judgment.—In re McGrew, 804.

IV. BY DEFAULT.

(A) Requisites and Validity.

⇐113 (Cal.App.) Notice of trial to defaulting defendant not necessary.—Uplinger v. Yonkin, 822.

(B) Opening or Setting Aside Default.

⇐136(Nev.) Statute authorizing relief from default for mistake, etc., *held* inapplicable to judgment void for lack of jurisdiction.—State v. Justice's Court of Elko Tp., 977.

⇐145(2) (Mont.) Motion to set aside default insufficient without affidavit of merits or copy of answer.—State v. District Court of Musselshell County, 982.

⇐145(2) (Nev.) Right to relief from void default judgment is absolute.—State v. Justice's Court of Elko Tp., 977.

⇐145(2) (Okl.) On motion to vacate for want of service meritorious defense need not be shown.—Pettis v. Johnston, 681.

⇐153(1) (Okl.) Motion to vacate judgment for want of service of process must be presented within three years.—Pettis v. Johnston, 681.

Decisions that judgment valid on its face, rendered without service or appearance, may be vacated at any time on motion not adhered to.—Id.

⇐155 (Cal.App.) Notice of motion to set aside default sufficient where date was correctly given, though day was improperly named.—Dunton v. Tanigoshi, 467.

Notice that motion to vacate default would be made at 10 o'clock sufficient, though the same was not heard until 11.—Id.

Digitized by Google

⇐155 (Mont.) Plaintiff entitled to notice of defendants' motion to set aside default.—State v. District Court of Musselshell County, 982.
⇐162(3) (Okl.) Relief based on extrinsic evidence may be had against a judgment rendered without service of process.—Pettis v. Johnston, 681.
Extrinsic evidence is admissible to contradict return of service and recital thereof in the judgment.—Id.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

⇐222 (Or.) Order void where blank as to amount of recovery.—School Dist. No. 1 of Clatsop County v. Astoria Const. Co., 969.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⇐248 (Okl.) Judgment outside the issues is erroneous.—Crawford v. Cassity, 412.
⇐251(1) (Cal.App.) Contributory negligence put in issue by cross-complaint.—Grover v. Morrison, 1078.

VII. ENTRY, RECORD, AND DOCKETING.

⇐278 (Okl.) Record preserved on order of court to make record *held* equivalent to the "judgment roll" at common law.—Pettis v. Johnston, 681.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

⇐298 (Okl.) During the term at which decrees and orders are made they may be modified.—J. R. Watkins Medical Co. v. Lizar, 552.
⇐329 (Or.) Entry of judgment order blank as to amount may be corrected by entry of new order.—School Dist. No. 1 of Clatsop County v. Astoria Const. Co., 969.

IX. OPENING OR VACATING.

⇐337 (Cal.App.) Motion to vacate for inadvertence must be filed under Code Civ. Proc. § 473.—Dolan v. Superior Court of California in and for City and County of San Francisco, 469.
⇐340 (Cal.App.) Void order can be set aside whenever it comes before court.—Dolan v. Superior Court of California in and for City and County of San Francisco, 469.
⇐341 (Okl.) During the term at which decrees and orders are made they may be set aside.—J. R. Watkins Medical Co. v. Lizar, 552.
⇐379(1) (Okl.) Meritorious defense is not necessary on motion to vacate a judgment void on its face, and vacation must be unconditional.—Pettis v. Johnston, 681.
⇐386(3) (Okl.) Judgment void on its face may be vacated by court rendering it on motion within or after three years.—Pettis v. Johnston, 681.
Is void on its face when its invalidity is shown by judgment roll; "judgment void on face."—Id.
⇐396 (Okl.) Meritorious defense is not necessary on motion to vacate a judgment void on its face, and vacation must be unconditional.—Pettis v. Johnston, 681.
⇐397 (Cal.App.) Cannot without notice set aside for inadvertence order of vacation previously entered.—Dolan v. Superior Court of California in and for City and County of San Francisco, 469.
Vacating because conclusions are not supported by findings without new judgment is void.—Id.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⇐407(2) (Okl.) Motion for vacation of judgment rendered without service of process is exclusive of relief in equity.—Pettis v. Johnston, 681.
⇐407(6) (Okl.) Party without notice of default judgment in time to file a motion to vacate it may have its enforcement restrained.—Pettis v. Johnston, 681.
⇐423 (Cal.App.) Equity may correct mutual mistake in description of property in pleadings and judgment.—Dunning Bros. Co. v. Johnson, 829.
⇐447(1) (Okl.) Plaintiff suing in equity to show invalidity of judgment for want of jurisdiction must show a meritorious defense.—Pettis v. Johnston, 681.

(B) Jurisdiction and Proceedings.

⇐465 (Okl.) Court may impose conditions on granting relief against a judgment not void on its face.—Pettis v. Johnston, 681.
⇐469 (Okl.) Bona fide purchaser will not be prejudiced by judgment not void on its face.—Pettis v. Johnston, 681.

XI. COLLATERAL ATTACK.

(B) Grounds.

⇐486(1) (Okl.) Successful collateral attack merely avoids or evades a judgment.—Pettis v. Johnston, 681.
⇐495(2) (Okl.) Every intendment will be indulged to support a judgment collaterally attacked.—Pettis v. Johnston, 681.
⇐497(2) (Okl.) Recital of service of process in a judgment is not conclusive.—Pettis v. Johnston, 681.
Where judgment roll shows service of process in a particular way no different service will be presumed.—Id.
⇐497(3) (Okl.) Judgment in mortgage foreclosure, on publication notice adjudged sufficient, will not be *held* invalid in a collateral proceeding, if calling for "construction"; "jurisdiction."—Pettis v. Johnston, 681.
⇐499 (Okl.) Officer's sworn return and judgment's recital of service cannot be set aside except on the most convincing evidence.—Pettis v. Johnston, 681.
⇐504(1) (Cal.App.) Based on trial without notice erroneous, but not void.—Uplinger v. Yonkin, 822.

(C) Proceedings.

⇐518 (Okl.) "Collateral attack" defined.—Pettis v. Johnston, 681.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

⇐585(2) (Cal.App.) Previous judgment against plaintiff bar to second action.—Leaver v. Smith, 1050.
⇐590(4) (Cal.) Defendant did not waive claim to damages by failing to set it up as bar to suit for interpleader.—Conner v. Bank of Bakersfield, 801.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) Persons Concluded.

⇐688 (Cal.App.) In action to quiet title against administrator *held* res judicata as to heirs.—Schwarz v. Bohle, 819.
⇐710 (Or.) Decree as to water rights binding only on parties to litigation.—Nault v. Palmer, 346.

(C) Matters Concluded.

⇐713(2) (Cal.) Conclusive on matters in issue or which might have been decided.—Conner v. Bank of Bakersfield, 801.
Estoppel in subsequent action to claim greater obligation than admitted in interpleader suit.—Id.
⇐714(1) (Cal.App.) Judgment conclusive in subsequent action between same parties involving same question.—Kinderman v. Shipley, 472.

Digitized by Google

⚖714(3) (Cal.App.) Judgment for landlord in action defended on ground of breach of lease *held* conclusive.—Kinderman v. Shipley, 472.
⚖735 (Cal.) Former judgment not adjudication of question not in issue.—Thompson v. Modern School of Business and Correspondence, 451.

XVII. FOREIGN JUDGMENTS.

⚖815 (Or.) Where no remittitur filed judgment appealed from is not entitled to faith and credit.—Rorvik v. North Pac. Lumber Co., 331.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

⚖855 (Cal.) Statute for relief of judgment gives courts discretion to remove limitations.—Saunders v. Simms, 806.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⚖948(1) (Cal.) Plaintiff did not waive benefit of estoppel by failure to plead former judgment.—Kipp v. Reed, 363.
⚖948(1) (Colo.) Res judicata must be pleaded.—People v. County Court of City and County of Denver, 425.
That court's attention was called to point of res judicata insufficient, in absence of pleading.—Id.
⚖949(2) (Colo.) Answer of former adjudication *held* sufficient in suit on injunction bond.—Bollen v. Woodhams, 427.
⚖950(1) (Cal.) In former case between same parties admissible as muniment of title.—Kipp v. Reed, 363.

JUDICIAL POWER.

See Constitutional Law, ⚖70–75.

JUDICIAL SALES.

⚖16 (Okl.) Selling officer can sell only on terms provided for by decree and the law in force.—Pettis v. Johnston, 681.
⚖53 (Okl.) One is not a bona fide purchaser under a judgment for him based on a false return.—Pettis v. Johnston, 681.
⚖54 (Okl.) Bona fide purchaser will not be prejudiced by decree in equity restraining the further enforcement of a judgment not void on its face.—Pettis v. Johnston, 681.

JURISDICTION.

See Criminal Law, ⚖90–98.

JURY.

II. RIGHT TO TRIAL BY JURY.

⚖13(14) (Okl.) In action on secured notes involving amount due defendant is entitled to a jury trial.—Choctaw Lumber Co. v. Waldock, 866.
⚖14(4) (Okl.) Where, in foreclosure, personal judgment is sought, defendant entitled to jury.—Collins v. Industrial Sav. Soc., 670.
⚖14(6) (Okl.) In action to reform a deed with cross-bill for cancellation parties are not entitled to a jury.—Smith v. Williams, 555.
⚖31(6) (Kan.) Failure of part of defendants to file pleadings *held* not to result in denial of jury trial as to other defendants.—Robertson v. Wangler, 788.
⚖34(2) (Mont.) Assumption by trial court that fact is proven is erroneous.—State v. Smith, 107; Same v. Dunn, 121.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

⚖103(14) (Cal.) Juror's opinion from newspaper reports, which will yield to evidence, does not disqualify.—People v. Wolff, 22.
⚖109 (Mont.) Trial court's remark that challenge to jury would be sustained erroneous.—State v. Diedtman, 117.
Defendant entitled to insist that the jury be selected by legal method.—Id.
⚖110(1) (Mont.) Challenge for cause may be waived.—State v. Diedtman, 117.
⚖131(1) (Mont.) Purpose of voir dire examination stated.—State v. Smith, 107; Same v. Dunn, 121.
⚖131(8) (Mont.) Defendant should be allowed on voir dire to ascertain whether juror would give benefit of doubt.—State v. Smith, 107; Same v. Dunn, 121.
⚖131(15) (Cal.) Question by district attorney as to whether a juror would follow instructions not objectionable.—People v. Wolff, 22.

JUSTICES OF THE PEACE.

III. CIVIL JURISDICTION AND AUTHORITY.

⚖54(1) (Colo.) Jurisdiction not lost by calling in other justice to attend trial and continue case.—Franklin v. Barian, 1116.

IV. PROCEDURE IN CIVIL CASES.

⚖81(5) (Nev.) Statute *held* to require justice to make certificate for service of summons by publication.—State v. Justice's Court of Elko Tp., 977.
⚖83(1) (Nev.) Statutes prescribing mode of service to be strictly pursued.—State v. Justice's Court of Elko Tp., 977.
⚖84(6) (Nev.) General appearance by demurrer after default not waiver of defects in service.—State v. Justice's Court of Elko Tp., 977.
⚖122(2) (Nev.) Where copy of complaint not certified, justice acquires no jurisdiction.—State v. Justice's Court of Elko Tp., 977.

V. REVIEW OF PROCEEDINGS.

(B) Certiorari.

⚖194(1) (Colo.) Rendition of judgment after calling in other justice to continue cause not reviewable by certiorari.—Franklin v. Barian, 1116.
⚖198 (Nev.) That judgment, sought to be annulled, has been satisfied, no bar.—State v. Justice's Court of Elko Tp., 977.

LANDLORD AND TENANT.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

⚖31 (Cal.) Lessee *held* to have lost his right to rescind for fraud by dealing with property as if contract in effect.—Bancroft v. Woodward, 445.
⚖34(1) (Cal.) Lessee's rights to rescission lost by transfer of rentals and subleases to his wife.—Bancroft v. Woodward, 445.
⚖34(2) (Cal.) Lessee cannot rescind because false representations as to previous lease prevented building.—Bancroft v. Woodward, 445.
⚖34(4) (Cal.) Lessee must rescind promptly after discovering facts putting him on inquiry as to his rights.—Bancroft v. Woodward, 445.
Failure of lessee to learn of legal right to rescind *held* due to want of diligence.—Id.

IV. TERMS FOR YEARS.

(D) Termination.

⚖94(1) (Cal.) Notice to quit *held* not to terminate tenancy for years, and guarantor may still be held liable.—Downing v. Cutting Packing Co., 455.

Digitized by Google

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(E) Injuries from Dangerous or Defective Condition.

⇐162 (Idaho) Landlord *held* liable for death of subtenant, falling down elevator shaft.—McKenna v. Grunbaum, 919.

If lessor improves property, he may be liable for damages from negligence.—Id.

⇐164(5) (Idaho) Lessor may be liable for damages to subtenant for faulty construction of elevator gate.—McKenna v. Grunbaum, 919.

⇐169(6) (Wash.) Evidence *held* to show landlord had actual knowledge of defect.—Casey v. Williams, 1011.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

⇐194(2) (Colo.) Assignment of lease not surrender, and does not relieve lessee from liability.—Brown v. Hallett, 429.

(B) Actions.

⇐231(8) (Colo.) Finding of surrender of lease and acceptance of new tenant sustained by evidence.—Brown v. Hallett, 429.

X. RENTING ON SHARES.

⇐331(2) (Kan.) Verdict for landlord's conversion of tenant's share of crop *held* excessive.—Dunlavy v. Moffett, 741.

LARCENY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⇐3(3) (Cal.App.) Taking property to enforce lien not "grand larceny" though wrongful.—Ex parte Bayles, 1034.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

⇐55 (Okl.Cr.App.) Evidence *held* to support conviction for grand larceny.—Mayfield v. State, 276.

LEASE.

See Landlord and Tenant.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

⇐7(16) (Mont.) Charge that woman was common and tough *held* not slanderous per se.—Daniel v. Moncure, 983.

⇐19 (Mont.) Words to be construed with reference to conversation as a whole.—Daniel v. Moncure, 983.

Words to be given their ordinary meaning.—Id.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

⇐81 (Mont.) Complaint must state surrounding circumstances in making words slander.—Daniel v. Moncure, 983.

⇐86(1) (Mont.) Innuendo cannot make words slanderous per se.—Daniel v. Moncure, 983.

⇐89(1) (Mont.) Complaint not stating special damages is good only if words are slanderous per se.—Daniel v. Moncure, 983.

⇐94(1) (Mont.) Answer *held* not to admit words were slanderous per se.—Daniel v. Moncure, 983.

(C) Evidence.

⇐112(2) (Cal.App.) Malice may be proved indirectly.—Wright v. Baldwin, 377.

(D) Damages.

⇐120(2) (Cal.App.) Malice essential to recovery of punitive damages.—Wright v. Baldwin, 377.

(E) Trial, Judgment, and Review.

⇐123(2) (Mont.) Jury question whether words were used with defamatory meaning.—Daniel v. Moncure, 983.

⇐123(6) (Cal.App.) Inference of malice from unprivileged slander is for the jury.—Wright v. Baldwin, 377.

LICENSES.

I. FOR OCCUPATIONS AND PRIVILEGES.

⇐5½ (Colo.) City of Denver may impose occupation tax.—Interstate Business Exch. Corporation v. City and County of Denver, 508.

⇐6(3) (Cal.App.) Ordinance imposing license tax on attorneys *held* a revenue measure.—Ex parte Johnson, 852.

Municipality has power to impose a license fee.—Id.

LIENS.

See Mechanics' Liens.

LIMITATION OF ACTIONS.

See Adverse Possession.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

⇐27 (Cal.App.) Action for breach of contract of shipment not action on oral contract; "bill of lading"; "written contract."—Pioneer Fruit Co. v. Southern Pac. Co., 50.

⇐28(2) (Wash.) Guarantor's action for contribution is on "implied contract arising out of written instrument," within six-year statute.—Pioneer Mining & Ditch Co. v. Davidson, 242.

⇐34(2) (Cal.App.) State's action against city for fines collected in police court is an action upon a liability created by statute.—People v. City of San Bernardino, 482.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

⇐48(7) (Cal.App.) Junior mortgage not prior where senior mortgagee in possession though mortgage barred by limitations.—Craig v. Gomes, 1060.

⇐54(2) (Cal.App.) "Mutual, open, and current account" defined.—Sugar Loaf Orange Growers' Ass'n v. Skewes, 1076.

⇐55(7) (Cal.App.) Only on storm waters being backed by faulty construction of bridge does statute run.—Brush v. Southern Pac. Co., 216.

⇐58(4) (Colo.) Failure to file annual report of financial condition did not bar suit on directors' liability for similar subsequent default.—Perini v. Continental Oil Co., 532.

(B) Performance of Condition, Demand, and Notice.

⇐66(8) (Cal.App.) Action against bailee for property accrues on demand.—Credit Guide Co. v. Fidelity Storage & Moving Co., 827.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

⇐100(8) (Cal.App.) Cause of action on fraudulent statement barred.—Wilmot v. Moody, 639.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

⇐148(3) (Kan.) Letter of purchaser assuming a mortgage debt *held* not an acknowledgment.—Miles v. Hamilton, 430.

Digitized by Google

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⇐199(1) (Kan.) Question for the court.—Johnson v. Hay, 613.

LIQUOR SELLING.

See Intoxicating Liquors.

LOST INSTRUMENTS.

⇐2 (Cal.) Duplicate bond pursuant to decree does not impose liability, where original bond is capable of enforcement.—Brown v. Anderson Cottonwood Irr. Dist., 797.

⇐3 (Cal.) Equity can give relief, notwithstanding special statutory proceeding.—Brown v. Anderson-Cottonwood Irr. Dist., 797.

Demand for duplicate bond not a condition precedent.—Id.

⇐7 (Cal.) Complaint for reissuance of lost bond *held* insufficient.—Brown v. Anderson-Cottonwood Irr. Dist., 797.

Complaint *held* sufficient to give equity jurisdiction.—Id.

⇐10 (Cal.) Decree canceling original bond in suit for reissuance of lost bond improper.—Brown v. Anderson-Cottonwood Irr. Dist. 797.

LUNATICS.

See Insane Persons.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

⇐21(1) (Cal.App.) Full disclosure to attorney on whose advice prosecutor acted in defense.—Wright v. Baldwin, 377.

V. ACTIONS.

⇐59(2) (Wash.) Statement of facts in prior civil suit *held* properly excluded.—Inglis v. Morton, 908.

⇐64(2) (Wash.) Evidence of disclosure to counsel *held* sufficient.—Inglis v. Morton, 908.

⇐71(2) (Wash.) Probable cause *held* question for court.—Inglis v. Morton, 908.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

⇐1 (Nev.) Writ will not be granted in anticipation of supposed omission of duty.—State v. Public Service Commission of Nevada, 284.

Duty to continue street car service not considered, in advance of actual discontinuance.—Id.

⇐3(2) (Okl.) Writ does not lie where there is a plain and adequate remedy at law.—Champlin v. Carter, 679.

⇐3(8) (Kan.) Public policy requires that controversy within jurisdiction of court of industrial relations on its public utilities side shall be adjusted there.—Clay County Co-Op. Telephone Ass'n v. Southwestern Bell Telephone Co., 747.

Telephone company seeking physical connection with another company has adequate remedy in court of industrial relations.—Id.

⇐3(12) (Cal.App.) Lies to compel reinstatement and payment of police pension though certiorari would also lie.—Sheehan v. Board of Police Com'rs, 51, 55.

⇐10 (Okl.) Writ does not lie where the duty or right sought to be enforced by such writ is not clear and indisputable.—Champlin v. Carter, 679.

⇐14(1) (Cal.App.) Presentation of claim for police pension to auditor and treasurer not conditions precedent.—Sheehan v. Board of Police Com'rs, 51, 55.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

⇐31 (Kan.) Writ will compel district judge to exercise jurisdiction on a motion for a new trial.—Golden v. Mitchell, 785.

⇐44 (Cal.App.) Writ will issue to compel clerk to transfer papers as required.—Searcy v. Kay, 49.

⇐57(1) (Cal.App.) Stenographic reporter may be compelled to prepare transcript.—Harris v. Burt, 1058.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

⇐71 (Okl.) Lies to compel ministerial duties.—Champlin v. Carter, 679.

⇐72 (Okl.) Does not lie to control discretion.—Champlin v. Carter, 679.

⇐81 (Nev.) Will not lie to compel Public Service Commission to annul order discontinuing street car service.—State v. Public Service Commission of Nevada, 284.

⇐87 (Kan.) Application of foreign corporation *held* to require state charter board to pass on its right to sell stock in state.—Home Lumber Co. v. Hopkins, 601.

⇐102(1) (Nev.) State board of examiners cannot be compelled to approve payment out of certain fund where another fund is available.—State v. Boyle, 914.

⇐107 (Cal.App.) Lies to compel retention of policeman on retired list on pension.—Sheehan v. Board of Police Com'rs, 51, 55.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

⇐154(1) (Nev.) Writ will not lie to compel traction company to continue service not discontinued.—State v. Public Service Commission of Nevada, 284.

⇐154(4) (Cal.App.) Complaint must show fund will not be exhausted for various purposes for which raised before application to one particular purpose may be ordered.—Buschman v. Turlock Irr. Dist. 491.

Complaint for writ of mandate to compel construction of irrigation ditches defective.—Id.

⇐168(2) (Utah) Presumption indulged that Land Board has satisfied itself as to desirability of investment.—State Board of Land Com'rs v. Ririe, 59.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

See Breach of Marriage Promise; Divorce; Husband and Wife.

⇐11 (Wash.) Bigamous marriages are void, and not merely voidable.—Beyerle v. Bartsch, 239.

⇐62 (Mont.) Power to award temporary alimony, etc., in annulment suit limited.—McMurray v. McMurray, 924.

⇐63 (Okl.) Court decreeing annulment may make equitable division of property jointly accumulated.—Krauter v. Krauter, 1088.

MASTER AND SERVANT.

I. THE RELATION.

(A) Creation and Existence.

⇐6 (Cal.App.) Performance of work for another prima facie evidence of employment.—Dibble v. San Joaquin Light & Power Corporation, 198.

(B) Statutory Regulation.

⇐16½. Owing to the great increase of matter heretofore classified to this section, we have

Digitized by Google

made a new subdivision, consisting of ⊂ number sections 346–420, at the end of this topic, where the matter in this and future index digests will be found.

(C) Termination and Discharge.

⊂37 (Or.) Resignation defeats recovery for wrongful discharge.—Martin v. Gauld Co., 717.
⊂39(2) (Or.) Evidence in avoidance of written resignation inadmissible, in absence of plea.—Martin v. Gauld Co., 717.
Variance as to salary claimed *held* not fatal.—Id.
⊂43 (Or.) Construction of term "profits" *held* question for court.—Martin v. Gauld Co., 717.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

⊂87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⊂ number sections 346–420, at the end of this topic, where the matter in this and future index digests will be found.

(B) Tools, Machinery, Appliances, and Places for Work.

⊂118(2) (Okl.) Mining regulations applicable to lead and zinc mines.—Quapaw Mining Co. v. Cogburn, 416.
Mine owner's violation of statute is negligence.—Id.
Mine owner's liability for injury by falling rock defined.—Id.
⊂124(2) (Okl.) Mining regulations concerning inspection applicable to lead and zinc mines.—Quapaw Mining Co. v. Cogburn, 416.

(C) Methods of Work, Rules, and Orders.

⊂137(3) (Idaho) Coupling work train to dozer *held* negligence.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.
⊂137(4) (Kan.) Carrier sued under federal act *held* not negligent in failing to warn section man.—Waymire v. Atchison, T. & S. F. Ry. Co., 588.

(E) Fellow Servants.

⊂180(1) (Idaho) Fellow servant doctrine abolished by federal act.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.

(F) Risks Assumed by Servant.

⊂213(5) (Idaho) Risk of coupling negligently attempted at excessive speed *held* not assumed.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.
⊂217(21) (Idaho) Employé without notice of omission of safety appliances does not assume risk.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.

(H) Actions.

⊂250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⊂ number sections 346–420, at the end of this topic, where the matter in this and future index digests will be found.
⊂258(15) (Okl.) Evidence of negligence *held* sufficient.—Quapaw Mining Co. v. Cogburn, 416.
⊂273 (Mont.) Compensation *held* allowable for death of employé killed after altercation.—Willis v. Pilot Butte Mining Co., 124.
⊂276(2) (Ariz.) Evidence *held* to show deceased motorman was thrown from ore car by derailing.—Inspiration Consol. Copper Co. v. Conwell, 88.
⊂276(3) (Ariz.) Evidence *held* to show derailing of ore cars was proximately caused by defective track.—Inspiration Consol. Copper Co. v. Conwell, 88.
⊂278(8) (Kan.) Verdict *held* supported by evidence.—Brackville v. Southwestern Bell Telephone Co., 773.
⊂285(13) (Okl.) Railroad's negligence under federal act *held* question for jury.—Ferris v. Holiman, 409.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

⊂302(1) (Kan.) Chauffeur's negligence *held* imputable to employer.—Howard v. Marshall Motor Co., 11.
⊂302(1) (Kan.) Scope of employment defined.—Dale v. Armstrong, 598.
⊂302(3) (Cal.) Assault, though malicious and willful, actionable.—Johnson v. Monson, 635.
Assault *held* within statutory phrase "including wrongful acts."—Id.
⊂305 (Cal.) Assault, though made in violation of orders, actionable.—Johnson v. Monson, 635.

(C) Actions.

⊂330(2) (Kan.) Testimony as to scope of employment *held* immaterial.—Dale v. Armstrong, 598.
⊂330(3) (Cal.App.) Evidence *held* to show relationship of principal and agent between defendants and workmen who set fire.—Dibble v. San Joaquin Light & Power Corporation, 198.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

⊂351 (Ariz.) Compensation Act does not preclude recovery in action for death of servant caused by negligence.—Inspiration Consol. Copper Co. v. Conwell, 88.
⊂352 (Cal.App.) Noncompliance with safety order not "gross negligence" within Compensation Act.—Schmidt v. Pursell, 846.
Safety order of Industrial Accident Commission not conclusively presumed reasonable in action for damages.—Id.
General safety orders of Industrial Accident Commission must be served upon employer under Compensation and Safety Act.—Id.
Essentials for recovery for gross negligence under Compensation Act stated; "willfully disregard."—Id.
⊂369 (Or.) Subrogation under foreign compensation act *held* unenforceable because contrary to law of forum.—Rorvik v. North Pac. Lumber Co., 331.
Resident wrongdoer suable for death of employé domiciled in sister state allowing limited compensation with subrogation.—Id.
⊂371 (Cal.App.) Accident "arising out of employment" within Compensation Act defined.—Continental Casualty Co. v. Industrial Acc. Commission, 849.
Accident during vacation *held* not one "arising out of employment" within Compensation Act.—Id.
⊂373 (Okl.) Injury by "horseplay" of coemployé *held* to "arise out of and in course of employment" within Compensation Act.—Willis v. State Industrial Commission, 92.
⊂375(1) (Utah) Employé struck by lightning while seeking shelter from storm was injured in "course of employment."—State Road Commission v. Industrial Commission of Utah, 544.

(B) Compensation.

⊂385(1) (Utah) "Average weekly wage" within compensation act defined.—State Road Commission v. Industrial Commission of Utah, 544.
⊂389 (Cal.) Insurer paying compensation to employé's widow *held* subrogated to rights of sons also.—Massachusetts Bonding & Insurance Co. v. Los Angeles R. Corporation, 161.

Digitized by Google

(C) Proceedings.

⇐405(1) (Cal.) Evidence insufficient to show contract of insurance prior to accident.—Western Indemnity Co. v. Industrial Accident Commission, 27.

Finding of authority of agent to bind indemnity company by parol *held* not sustained by evidence.—Id.

Finding of custom that assured was covered from date of application not sustained by evidence.—Id.

⇐405(4) (Utah) Compensation claimant's evidence *held* to show employé killed by lightning was seeking shelter.—State Road Commission v. Industrial Commission of Utah, 544.

⇐405(5) (Utah) Evidence *held* to show dependency within Compensation Law.—Geo. A. Lowe Co. v. Industrial Commission of Utah, 934.

⇐410 (Cal.) Charge allowing subrogated compensation insurer to recover damages to sons of deceased employé *held* erroneous as not supported by pleading and evidence.—Massachusetts Bonding & Insurance Co. v. Los Angeles R. Corporation, 101.

Admission by counsel *held* not to justify charge authorizing subrogated insurance carrier to recover damages not pleaded.—Id.

⇐416 (Utah) Compensation award not invalidated by failure to find daily wage.—Geo. A. Lowe Co. v. Industrial Commission of Utah, 934.

⇐417(1) (Mont.) Compensation Act provision that trial in district court should be de novo constitutional.—Willis v. Pilot Butte Mining Co., 124.

⇐417(7) (Cal.) Finding of facts in compensation case conclusive.—Western Indemnity Co. v. Industrial Accident Commission, 27.

⇐417(7) (Utah) Finding of dependency within Compensation Law conclusive.—Geo. A. Lowe Co. v. Industrial Commission of Utah, 934.

Amount of compensation awarded not reviewable.—Id.

⇐418(1) (Mont.) Compensation Act unconstitutional in attempting to confer on Supreme Court jurisdiction to try cause anew.—Willis v. Pilot Butte Mining Co., 124.

⇐420 (Cal.App.) Compensation act authorizes commission to fix fees of claimant's attorneys.—Schilling v. Industrial Acc. Commission of California, 373.

Compensation act merely authorizes determination of reasonableness of attorney's fee.—Id.

Compensation commission bound to give attorney fair hearing on question of reasonableness of fee.—Id.

MAYHEM.

⇐1 (Cal.App.) One who unlawfully strikes another, destroying a member, etc., is guilty of mayhem.—People v. Nunes, 486.

Mere disfigurement of eye not offense unless eye is rendered useless; "puts out an eye."—Id.

⇐5 (Cal.App.) Proof of premeditation not necessary.—People v. Nunes, 486.

Evidence *held* to show that defendant put out his victim's eye.—Id.

MECHANICS' LIENS.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

⇐75(4) (Cal.App.) "Constructive notice" of work sufficient to bind owner.—Raisch v. Helfrich, 848.

⇐78 (Cal.App.) Statute relating to estoppel against owner applies to street work.—Raisch v. Helfrich, 848.

(E) Subcontractors and Contractors' Workmen and Materialmen.

⇐113(2) (Cal.App.) Lien of stop notice subordinate to other liens.—Hubbard v. Jurian, 1052.

III. PROCEEDINGS TO PERFECT.

⇐132(8) (Cal.App.) Work done by architect immaterial on question when work on building ceased.—Hubbard v. Jurian, 1052.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(B) Bond or Deposit to Prevent or Discharge Lien.

⇐223 (Cal.App.) Bond need not be filed personally by owner or contractor.—Tyler v. J. I. Metrovich Bldg. Co., 208.

⇐226 (Cal.App.) Where bond filed court must restrict recovery from owner to amount due contractor.—Tyler v. J. I. Metrovich Bldg. Co., 208.

⇐229 (Cal.App.) Claimant entitled to judgment of foreclosure, irrespective of amount due contractor from owner, who did not file bond.—Tyler v. J. I. Metrovich Bldg. Co., 208.

(C) Extinguishment, Release, or Payment.

⇐239 (Ariz.) No implied notice to materialman of source of money credited to contractor's account other than intended by owner.—Stolaroff v. Bassett Lumber Co., 81.

Notice of source of money paid on account of contractor too late to affect liability of owner, where payment was not applied as owner intended.—Id.

Materialman applying payment from contractor to certain account, must have notice of equity in landowner.—Id.

VII. ENFORCEMENT.

⇐271(1) (Cal.App.) Claimant must allege that statute relative to owner's bond has not been met.—Tyler v. J. I. Metrovich Bldg. Co., 208.

MINES AND MINERALS.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

⇐73 (Okl.) Lessee is entitled to possession to extent necessary to perform his obligations.—Rennie v. Red Star Oil Co., 391.

⇐77 (Okl.) Cessation of operations does not of itself show an abandonment.—Rennie v. Red Star Oil Co., 391.

⇐78(1) (Kan.) Oil and gas lease construed to require completion of well within 60 days, except for unavoidable delay.—Waters v. Hatfield, 599.

⇐78(7) (Kan.) Findings supported by evidence *held* to entitle lessor to cancel the lease.—Waters v. Hatfield, 599.

⇐78(7) (Kan.) Lessees *held* under evidence entitled to forfeit rights of drilling contractor.—Matthews v. Johnson, 609.

⇐78(7) (Okl.) Injunction against lessor's interference with lessee's removal of improvements *held* warranted.—Rennie v. Red Star Oil Co., 391.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(B) Mining Partnerships and Companies.

⇐97 (Kan.) Joint enterprise under oil lease *held* not to constitute partnership.—Matthews v. Johnson, 609.

MINORS.

See Infants.

Digitized by Google

MORTGAGES.

See Chattel Mortgages.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

⇐38(1) (Wash.) Evidence *held* to show deed was not a mortgage.—Boost v. Capen, 240.

⇐38(2) (Wash.) Clear proof that absolute deed a mortgage required.—Boost v. Capen, 240.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

⇐118 (Cal.App.) Subsequently given mortgage must express intent to secure performance of contract of guaranty.—Kelley v. Goldschmidt, 55.

Subsequently given trust deed *held* not intended to secure performance of contract of guaranty.—Id.

(C) Property Mortgaged, and Estates of Parties Therein.

⇐144 (Okl.) Mortgagor's payment of taxes cannot defeat lien.—Union Sav. Ass'n v. Cummins, 869.

(D) Lien and Priority.

⇐157 (Okl.) As to bona fide mortgagee, lien of mortgage on realty sold by guardian not defeated, because sale not for cash.—Vose v. Penny, 97.

⇐186(5) (Okl.) Evidence *held* insufficient to charge mortgagees with notice of fraud in guardian's sale.—Vose v. Penny, 97.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

⇐280(5) (Kan.) Evidence *held* to show verbal agreement by a grantee to assume and pay mortgage.—Woodburn v. Harvey, 620.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

⇐309(1) (Cal.) Foreclosure and sale as to only part of property covered *held* to have released part omitted.—Citizens' Savings Bank of San Diego v. Bennett, 44.

X. FORECLOSURE BY ACTION.

(A) Nature and Form of Remedy.

⇐383 (Okl.) Action to foreclose real estate mortgage is a "proceeding in rem."—Pettis v. Johnston, 681.

(E) Parties and Process.

⇐427(1) (Cal.) Successor in interest of mortgagor could have been made defendant without joining mortgagor.—Hutchison v. Barr, 799.

Mortgagor necessary party, if mortgagee insists on deficiency judgment.—Id.

Dismissal of mortgagor did not affect right to judgment of foreclosure against successor.—Id.

⇐440 (Okl.) Petition against nonresident mortgagor to foreclose may supply defects in affidavit for publication and in notice.—Pettis v. Johnston, 681.

Omission to describe land in affidavit for publication in foreclosure action against nonresident is not fatal on collateral attack.—Id.

(F) Pleading and Evidence.

⇐459(3) (Kan.) Pleadings *held* to raise issue whether grantee verbally assumed mortgage.—Woodburn v. Harvey, 620.

(J) Sale.

⇐507 (Okl.) Sale by sheriff on advertised date after his removal *held* not void.—Bradley v. Smith, 1087.

⇐538 (Cal.) Reopening foreclosure decree only remedy where part of property omitted from decree by mistake.—Citizens' Savings Bank of San Diego v. Bennett, 44.

MOTIONS.

⇐1 (Ariz.) Nature of proceeding.—Genardini v. Kline, 568.

"Motion" defined.—Id.

⇐14 (Ariz.) May be oral.—Genardini v. Kline, 568.

⇐26 (Ariz.) Must be supported by affidavit.—Genardini v. Kline, 568.

MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts; Street Railroads.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(C) Amendment, Repeal or Forfeiture of Charter, and Dissolution.

⇐46 (Or.) Charter amendments *held* not to supersede existing charter.—Brown v. City of Silverton, 971.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

⇐56 (Or.) Statute conferring power must provide for jurisdictional requirements.—Brown v. City of Silverton, 971.

Jurisdictional requirements must be complied with.—Id.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

⇐111(4) (Cal.App.) Failure to pay license fee being misdemeanor under general statute, validity of ordinance immaterial; "law."—Ex parte Johnson, 852.

⇐112(1) (Cal.App.) Title is not an indispensable part of the ordinance.—Ex parte Johnson, 852.

⇐120 (Cal.App.) Title of ordinance not conclusive.—Ex parte Johnson, 852.

V. OFFICERS, AGENTS, AND EMPLOYÉS.

(B) Municipal Departments and Officers Thereof.

⇐185(4) (Mont.) Though statute requires dismissal for cause and after hearing, council can retire policemen to eligible list.—State v. Mayor of City of Butte, 991.

Council may not remove assistant city jailer and appoint another without charges and hearing.—Id.

⇐185(8) (Or.) Trial of policeman before executive board or civil service commission does not require arraignment or plea.—Cole v. City of Portland, 720.

⇐185(13) (Mont.) If discharge of policeman is not supported by complaint and proof certiorari lies though charges sufficient.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 295.

Affidavit for certiorari to review discharge of policeman must state facts, not conclusions.—Id.

Certiorari not proper remedy for discharged policeman, where only complaint is insufficiency of evidence; "transcript of record of proceedings;" "courts of record;" "suit."—Id.

⇐185(13) (Or.) Reviewing court cannot pass on facts where any evidence sustains findings for dismissal of a policeman.—Cole v. City of Portland, 720.

⇐187 (Cal.App.) Policeman retired on pension has vested right to pension during dis-

Digitized by Google

ability.—Sheehan v. Board of Police Com'rs, 51, 55.

Police board's determination that disabilities had ended and dismissal of policeman for failure to report *held* void.—Id.

⇐187 (Cal.App.) Police pension computed on basis of salary at time of disability.—Rumetsch v. Davie, 1075.

(C) Agents and Employés.

⇐217(5) (Wash.) Rule of civil service commission relative to transfers of employés effective.—State v. City of Seattle, 906.

New civil service positions may be filled from eligible lists or by transfer.—Id.

Transfer of accountant from one department to another not violative of civil service commission rule.—Id.

IX. PUBLIC IMPROVEMENTS.

(B) Preliminary Proceedings and Ordinances or Resolutions.

⇐297(1) (Or.) Right to file remonstrance against improvements statutory.—Brown v. City of Silverton, 971.

Mistake as to sufficiency of remonstrance *held* not to oust council of jurisdiction.—Id.

⇐298 (Or.) Owners have constitutional right to be heard.—Brown v. City of Silverton, 971.

⇐323(1) (Okl.) Courts cannot prevent intended sewer improvement unless ordinance void for unreasonableness.—Crawford v. Cassity, 412.

⇐323(3) (Okl.) Petition alleging unreasonableness of improvement ordinance construed to state a cause of action.—Crawford v. Cassity, 412.

⇐325 (Okl.) City council's finding of necessity of sewer improvement final in absence of fraud.—Crawford v. Cassity, 412.

(C) Contracts.

⇐373(3) (Cal.App.) Wetting curb *held* done under contract so as to extend time for lien notices.—Barr Lumber Co. v. Joy Const. Co., 844.

Verification of lien claim of corporation for materials furnished contractor *held* sufficient.—Id.

Statement of nonpayment in claims *held* sufficient.—Id.

Unnecessary statement in claim *held* not to defeat lien for material furnished contractor.—Id.

(E) Assessments for Benefits, and Special Taxes.

⇐406(1) (Or.) Special assessment based on power of taxation.—Brown v. City of Silverton, 971.

⇐408(2) (Or.) Charter amendments providing for reassessment *held* to operate retroactively.—Brown v. City of Silverton, 971.

⇐443 (Or.) Jurisdictional requirements must be complied with.—Brown v. City of Silverton, 971.

⇐484(1) (Okl.) Proceedings for improvements and in making assessments presumed regular.—Crawford v. Cassity, 412.

⇐484(2) (Okl.) Finding of benefits by improvement to the amount of the assessment conclusive.—Crawford v. Cassity, 412.

⇐488, 489(5) (Cal.App.) Validity of bonds cannot be questioned by property owner who did not appeal.—Cohn v. Thompson, 381.

⇐514(1) (Or.) Reassessment permissible only in manner prescribed by charter.—Brown v. City of Portland, 722; Cook v. Same, 726.

⇐514(2) (Or.) Power to reassess not dependent on former assessment being declared void.—Brown v. City of Portland, 722; Cook v. Same, 726.

⇐514(2) (Or.) Legislature may reassess and cure defect.—Brown v. City of Silverton, 971.

⇐514(9) (Or.) Proceeding *held* to provide for reassessment, and therefore to be barred by limitations; "institute."—Brown v. City of Portland, 722; Cook v. Same, 726.

⇐515(1) (Cal.App.) Defect in street improvement proceedings relating to bonds relieved by curative provision.—Conn v. Thompson, 381.

(F) Enforcement of Assessments and Special Taxes.

⇐538 (Okl.) Judgment enjoining collection of sewer assessments *held* clearly against the evidence.—Crawford v. Cassity, 412.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent and Exercise of Power.

⇐592(1) (Colo.) May impose tax upon occupation licensed by state.—Interstate Business Exch. Corporation v. City and County of Denver, 508.

⇐611 (Colo.) Employment agency furnishing technically trained persons not subject to police regulations.—Interstate Business Exch. Corporation v. City and County of Denver, 508.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

⇐657(4) (Or.) Lot owners in adjoining blocks can prevent partial vacation of streets.—Bostwick v. Hosier, 299.

⇐705(3) (Utah) Care required of automobilist on street; "ordinary care."—Herald v. Smith, 932.

Blowing horn by automobilist did not relieve of charge of negligence as to child.—Id.

⇐705(10) (Cal.App.) Automobilist, colliding with one having right of way, *held* guilty of contributory negligence.—Kinney v. King, 834.

⇐705(11) (Cal.App.) Negligence of plaintiff which did not contribute to the accident no ground for denying recovery.—Wilkinson v. Rohrer, 650.

⇐706(4) (Cal.) Ordinance prescribing duties of drivers on approach of ambulance admissible.—Newman v. E. E. Overholtzer Sons' Co., 175.

⇐706(5) (Cal.) Evidence *held* to show that defendant was operating its ambulance at a negligent speed.—Newman v. E. E. Overholtzer Sons' Co., 175.

⇐706(6) (Utah) Negligence of automobilist running over child for jury.—Herald v. Smith, 932.

⇐706(7) (Utah) Child not guilty of contributory negligence as matter of law when run over by automobile.—Herald v. Smith, 932.

XII. TORTS.

(D) Defects or Obstructions in Sewers, Drains, and Water Courses.

⇐840 (Ariz.) City liable for negligence concurring with act of animal.—Mesa City v. Lesueur, 573.

Defect in sewer not remote cause of injury, though flood precipitated by burrowing gophers.—Id.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(C) Bonds and Other Securities, and Sinking Funds.

⇐920 (Wash.) Specific authority in officers to determine whether conditions precedent to issuance of bonds performed not necessary.—Cuddy v. Sturtevant, 909.

⇐921(1) (Wash.) Sale at discount requiring more than statutory interest a mere irregularity.—Cuddy v. Sturtevant, 909.

⇐943(1) (Wash.) City estopped by recitals of waterworks bonds.—Cuddy v. Sturtevant, 909.

Digitized by Google

⇐944 (Wash.) Purchasers not required to examine records to determine whether bonds originally sold at discount.—Cuddy v. Sturtevant, 909.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ⇐695–812.

NAVIGABLE WATERS.

See Ferries.

I. RIGHTS OF PUBLIC.

⇐1(5) (Or.) Stream practicable for floating timber products navigable to such extent; "navigable stream."—Logan v. Chas. K. Spaulding Logging Co., 349.

III. RIPARIAN AND LITTORAL RIGHTS.

⇐43(1) (Or.) Use of splash dams proper in so far as not injuring riparian owners.—Logan v. Chas. K. Spaulding Logging Co., 349.

NEGLIGENCE.

See Master and Servant, ⇐118–330; Municipal Corporations, ⇐840; Railroads, ⇐328–372; Street Railroads, ⇐103.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

⇐1 (Okl.) "Actionable negligence" defined.—St. Louis San Francisco Ry. Co. v. Jones, 385.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

⇐18 (Or.) Captain of vessel injured by negligence of shipper's employés *held* within protection of Employers' Liability Act.—Rorvik v. North Pac. Lumber Co., 331.

⇐21 (Cal.App.) Employés of power companies negligent in not extinguishing fire on right of way.—Dibble v. San Joaquin Light & Power Corporation, 198.

II. PROXIMATE CAUSE OF INJURY.

⇐56(1) (Ariz.) "Proximate cause" defined.—Inspiration Consol. Copper Co. v. Conwell, 88.

⇐59 (Ariz.) Proximate cause of injury defined as to anticipation of damages.—Mesa City v. Lesueur, 573.

⇐61(1) (Ariz.) "Proximate cause" of injury defined.—Mesa City v. Lesueur, 573.

Defect in sewer not remote cause of injury, though flood precipitated by burrowing gophers.—Id.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

⇐83 (Cal.) Contributory negligence no bar to recovery under last clear chance doctrine.—Young v. Southern Pac. Co., 36.

(B) Children and Others Under Disability.

⇐85(2) (Utah) Degree of care required of child graduated to age.—Herald v. Smith, 932.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

⇐106 (Cal.App.) Insurer of grain destroyed by fire not necessary party to owner's action against parties at fault.—Dibble v. San Joaquin Light & Power Corporation, 198.

(B) Evidence.

⇐121(2) (Cal.App.) Presumption *held* overcome.—Stott v. Southern Sierras Power Co., 478.

⇐121(5) (Ariz.) Plaintiff must show proximate cause of injury.—Mesa City v. Lesueur, 573.

⇐122(2) (Cal.) Contributory negligence must be proved by defendants unless shown by plaintiff's evidence.—Young v. Southern Pac. Co., 36.

⇐134(1) (Cal.App.) Evidence *held* to make prima facie case for owner of grain destroyed by fire.—Dibble v. San Joaquin Light & Power Corporation, 198.

⇐134(10) (Cal.App.) Evidence *held* to show that fire was communicated from power companies' right of way.—Dibble v. San Joaquin Light & Power Corporation, 198.

(C) Trial, Judgment, and Review.

⇐136(9) (Okl.) Jury case defined.—St. Louis San Francisco Ry. Co. v. Jones, 385.

⇐136(15) (Cal.App.) Care as to meat market customer slipping on floor *held* for jury.—Williamson v. Hardy, 646.

⇐136(18) (Or.) Hazardous occupation on premises of another employer *held* question for jury.—Rorvik v. North Pac. Lumber Co., 331.

⇐136(25) (Ariz.) Proximate cause question for jury.—Inspiration Consol. Copper Co. v. Conwell, 88.

⇐136(25) (Ariz.) Proximate cause question of fact.—Mesa City v. Lesueur, 573.

⇐136(26) (Idaho) Contributory negligence a question of fact.—McKenna v. Grunbaum, 919.

⇐136(26) (Okl.) Contributory negligence question for jury, under Constitution.—St. Louis San Francisco Ry. Co. v. Jones, 385.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

I. NATURE AND SCOPE OF REMEDY.

⇐6 (Okl.) Motion addressed to discretion of trial court.—Swan v. Duncan, 678.

II. GROUNDS.

(F) Verdict or Findings Contrary to Law or Evidence.

⇐65 (Okl.) Motion calls for court's re-examination of issues of fact.—Choctaw Lumber Co. v. Waldock, 866.

⇐79 (Cal.App.) Granting of new trial on ground that action was barred by limitations error.—Furlow Pressed Brick Co. v. Balboa Land & Water Co., 1061.

May be granted for errors in excluding or admitting evidence.—Id.

(G) Surprise, Accident, Inadvertence, or Mistake.

⇐97 (Okl.) Party cannot speculate on verdict and thereafter allege surprise.—Rock v. Craig & Osborn, 388.

(H) Newly Discovered Evidence.

⇐99 (Kan.) Newly discovered evidence *held* not to require new trial.—Robertson v. Wangler, 788.

⇐99 (Okl.) Burden on party alleging newly discovered evidence stated; newly discovered impeaching or cumulative evidence is no ground.—Chortney v. Curry, 387.

⇐102(1) (Okl.) Plaintiff controlling testimony to meet defense cannot allege unoffered evidence as newly discovered evidence.—Rock v. Craig & Osborn, 388.

⇐102(7) (Colo.) Not granted on account of public records of which party was charged with knowledge.—Greenlees v. Chezik, 667.

⇐104(1) (Colo.) Cumulative evidence is insufficient to justify.—Greenlees v. Chezik, 667.

⇐104(1) (Okl.) Newly discovered cumulative evidence is no ground.—Chortney v. Curry, 387.

⇐105 (Okl.) Newly discovered impeaching evidence is no ground.—Chortney v. Curry, 387.

Digitized by Google

⚖108(1) (Okl.) Newly discovered evidence which would not change result not ground for.—Swan v. Duncan, 678.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

⚖117(3) (Okl.) Court on affidavits for new trial filed the first day of the succeeding term cannot set aside verdict rendered at previous term.—J. R. Watkins Medical Co. v. Lizar, 552.
⚖119 (Okl.) On failure to duly file motion for new trial Supreme Court cannot consider it or review trial errors.—J. R. Watkins Medical Co. v. Lizar, 552.
⚖124(1) (Okl.) Motion on ground of newly discovered evidence must set forth witness' name and residence and testimony.—Rock v. Craig & Osborn, 388.
⚖150(1) (Okl.) Motion on ground of newly discovered evidence filed more than three days after verdict must be accompanied by affidavit.—Rock v. Craig & Osborn, 388.
⚖155 (Cal.App.) Order *held* to show granting on date of entry which was too late, and not date nunc pro tunc, which was in time.—Dolan v. Superior Court of California in and for City and County of San Francisco, 469.
⚖163(2) (Cal.App.) Grant of new trial as to damages vacates judgment.—Universal Film Mfg. Co. v. Kerrigan, 475.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NUISANCE.

I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

⚖3(3) (Ariz.) Construction of ore bins close to church not actionable.—Arizona Hercules Copper Co. v. Protestant Episcopal Church Corporation of Arizona, 85.

OBLIGATION OF CONTRACTS.

See Constitutional Law, ⚖121.

OFFICERS.

See Judges; Justices of the Peace; Public Service Commissions.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(D) De Facto Officers.

⚖39 (Kan.) One assuming to exercise official powers does not become an "officer de facto" if authority is promptly challenged.—Golden v. Mitchell, 785.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

⚖100(1) (Wash.) When an officer's compensation may be increased during term of office.—State v. Clausen, 324.

PARENT AND CHILD.

See Adoption; Guardian and Ward; Infants.

⚖3(1) (Wash.) Parent must support defective child after majority.—Schultz v. Western Farm Tractor Co., 1007.

PARTIES.

For parties to particular proceedings or instruments, see also the various specific topics.
For parties on appeal and review of rulings as to parties, see Appeal and Error.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚖75(6) (Mont.) Where not appearing in complaint, objection to defect of parties taken by answer.—Church v. Zywert, 291.
⚖75(7) (Mont.) Objection to parties must be taken by demurrer if defect appears on complaint.—Church v. Zywert, 291.
⚖80(2½) (Mont.) Objections to defect of parties, when not raised by demurrer or answer, are waived.—Church v. Zywert, 291.

PARTITION.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

⚖12(3) (Cal.) Homestead community property subject to partition after divorce making no disposition of it.—Lang v. Lang, 181.
⚖12(3) (Okl.) Homestead interest cannot be partitioned.—Pettis v. Johnston, 681.
⚖21 (Kan.) Part of children *held* not entitled to maintain action without another's consent.—Brookens v. Brookens, 754.

(B) Proceedings and Relief.

⚖116(2) (Cal.) Effect of partition decree changing boundaries of mortgaged lands stated.—Citizens' Savings Bank of San Diego v. Bennett, 44.

PARTNERSHIP.

I. THE RELATION.

(A) Creation and Requisites.

⚖3 (Kan.) Agreement *held* to create a "trust" and not a "partnership."—Home Lumber Co. v. Hopkins, 601.

(C) Evidence.

⚖55 (Mont.) Evidence *held* sufficient to establish.—Sanborn Co. v. Powers, 990.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

⚖64 (Okl.) Statute construed not to apply to one person adopting a business or trade name.—Katterhenry v. Williamson, 404.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

(C) Actions Between Partners.

⚖108 (Utah) Balance struck and interest of each partner in firm's assets found.—Bankers' Trust Co. v. Riter, 1113.

VI. DEATH OF PARTNER, AND SURVIVING PARTNERS.

⚖246 (Utah) Title to realty in partner descends to heirs, subject to equity of surviving partner.—Bankers' Trust Co. v. Riter, 1113.
⚖251 (Utah)) Surviving partner must account to representative of deceased partner.—Bankers' Trust Co. v. Riter, 1113.
⚖258(2) (Utah) Administrator of deceased partner may sue heirs of other partner for proceeds of realty.—Bankers' Trust Co. v. Riter, 1113.
⚖258(7) (Utah) Complaint of administrator of deceased partner against heirs of other partner *held* insufficient.—Bankers' Trust Co. v. Riter, 1113.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(D) Actions for Dissolution and Accounting.

⚖319 (Kan.) Where party fails to convey land in other state as decreed, court may order accounting.—Apple v. Smith, 8.
⚖325(1) (Kan.) In winding up partnership, court may direct conveyance of land in another state without receiver.—Apple v. Smith, 8.

Digitized by Google

⇐330 (Kan.) Personal judgment at end of accounting may be rendered, though further accounting necessary.—Apple v. Smith, 8.

PAYMENT.

I. REQUISITES AND SUFFICIENCY.

⇐16(1) (Cal.) Note taken for open account does not discharge original debt.—Ellison v. Henion, 793.

⇐21 (Cal.App.) Receipt of check, though not payment, presumptively so where check not returned.—Bledsoe v. Stuckey, 217.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⇐67(1) (Cal.) Check presumed payment of debt and not loan.—Tipps v. Landers, 173.

⇐67(1) (Cal.App.) Receipt of check, though not payment, presumptively so where check not returned.—Bledsoe v. Stuckey, 217.

PERJURY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⇐6 (Cal.App.) False statements by juror on voir dire are perjury.—Ex parte De Martini, 468.

PERPETUITIES.

⇐6(1) (Cal.) Question as to separate trusts in certain fund to be considered with reference to each share separately.—In re Phelps' Estate, 17.

⇐6(10) (Cal.) Devise creating trust for payment of specific and residuary legacies *held* not to suspend power of alienation.—In re Phelps' Estate, 17.

⇐6(11) (Cal.) Devise to trustees with directions to sell *held* not unlawfully to suspend power of alienation.—In re Phelps' Estate, 17.

⇐9(1) (Cal.) Will creating trust in fund to be accumulated *held* not to suspend power of alienation.—In re Phelps' Estate, 17.

⇐9(7) (Cal.) Invalidity of one trust created by will *held* not to affect validity of another trust.—In re Phelps' Estate, 17.

PHYSICIANS AND SURGEONS.

⇐2 (Or.) Act requiring license to practice before conducting dental office constitutional.—State v. State Board of Dental Examiners, 338.

⇐6(2) (Or.) One licensed to conduct dental parlor cannot practice dentistry unless licensed.—State v. State Board of Dental Examiners, 338.

⇐6(9) (Cal.App.) Information charging practice of medicine without a certificate *held* sufficient.—People v. T. Wah Hing, 662.

⇐6(10) (Cal.App.) Evidence *held* to sustain conviction for practicing without a certificate.—People v. T. Wah Hing, 662.

Burden of proving possession of certificate entitling him to practice medicine is on defendant.—Id.

PLEADING.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

⇐11 (Cal.App.) Reassignment by insurer of rights under subrogation to owner of standing grain destroyed did not need to be pleaded.—Dibble v. San Joaquin Light & Power Corporation, 198.

⇐11 (Kan.) Rule that evidence should not be pleaded does not state the whole law of pleading.—Small v. Small, 623.

⇐24 (Colo.) "Sham pleading," one good in form, but false in fact.—Bollen v. Woodhams, 427.

⇐34(2) (Ariz.) Specific charge after general averment *held* not to show unreasonable delay on line of initial carrier.—Southern Pac. Co. v. Larrimore, 564.

⇐36(3) (Colo.) Admission of plea of payment cannot be contradicted by party making it.—Greenlees v. Chezik, 667.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

⇐67 (N.M.) Plaintiff need not anticipate defenses.—Jamison v. McMillen, 726.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

⇐93(1) (Mont.) Defendant may interpose inconsistent defenses.—Daniel v. Moncure, 983.

(B) Dilatory Pleas and Matter in Abatement.

⇐104(1) (Colo.) Affirmative plea necessary to raise issue of want of jurisdiction depending on question of fact.—People v. County Court of City and County of Denver, 425.

(C) Traverses or Denials and Admissions.

⇐129(2) (Cal.App.) Failure to deny in answer an admission of truth.—Drew v. Superior Court of California in and for Mendocino County, 374.

(E) Set-Off, Counterclaim, and Cross-Complaint.

⇐148 (Cal.App.) Cross-complaint for overpayments insufficient without averment of demand or failure to repay.—Bledsoe v. Stuckey, 217.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

⇐165 (Mont.) Reply unnecessary when matter in answer could be proved under special denial.—Wilcox v. Newman, 138.

Answer stating contract different from that sued on does not require reply.—Id.

V. DEMURRER OR EXCEPTION.

⇐214(2) (Colo.) Demurrer admits facts material and well pleaded.—Mountain States Telephone & Telegraph Co. v. People, 513.

⇐214(3) (Cal.) Demurrer admits allegation that property belonged to community.—Lang v. Lang, 181.

⇐216(2) (Okl.) On general demurrer allegations must be construed with attached exhibits.—Pettis v. Johnston, 681.

⇐218(3) (Cal.App.) On demurrer plaintiff should have been required to specify number of articles furnished for which claim was made.—Straus v. Eaton, 1033.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⇐236(3) (Cal.) Amendments during trial within discretion of court.—Title Insurance & Trust Co. v. Miller & Lux, 433.

⇐236(7) (Or.) Amendment relying on implied contract *held* to be within court's discretion.—McDonald v. Supple, 315.

⇐236(7) (Or.) Allowance of amendment to answer to present new defense within discretion of court.—McFarland v. Hueners, 584.

Refusal to permit defendant to amend answer to present new defense not abuse of discretion.—Id.

⇐261 (Or.) Refusal to permit amendment to answer changing defense *held* proper.—Lind v. Boulin, 1103.

⇐279(4) (Cal.) Installment of price due after action brought may be set up by supple-

Digitized by Google

mental complaint.—Jones v. California Growers & Shippers, 172.

VII. SIGNATURE AND VERIFICATION.

⊂=290(3) (Cal.App.) Filing of unverified answer to admission of averments of verified complaint.—Patterson v. Patterson, 483.

VIII. PROFERT, OYER, AND EXHIBITS.

⊂=312 (Or.) Deed set out as exhibit prevails over pleader's statement of legal effect.—O'Neil v. Twohy Bros. Co., 306.

XI. MOTIONS.

⊂=341 (Colo.) Motion to strike is not to test sufficiency of pleading.—Bollen v. Woodhams, 427.

⊂=345(1) (Cal.App.) Court erred in rendering judgment for plaintiff on the pleadings in action on note where answer alleged payment.—Hill v. Moore, 651.

⊂=350(3) (Cal.App.) Affirmative allegations of answer deemed true on motion for judgment on pleadings.—Hill v. Moore, 651.

⊂=359 (Colo.) Sham replication is properly stricken.—Bollen v. Woodhams, 427.

⊂=360(2) (Colo.) Motion to strike parts of answer should have preceded demurrer.—Bollen v. Woodhams, 427.

⊂=360(4) (Colo.) Motion to strike as sham proper, where trial by record.—Bollen v. Woodhams, 427.

⊂=364(5) (Kan.) Striking from petition allegation of facts showing fiduciary relation and oral trust agreement *held* error.—Small v. Small, 623.

⊂=367(1) (Ariz.) Motion to make complaint more definite and certain cannot take place of demurrers.—Shill v. Jones, 77.

⊂=367(2) (Ariz.) Motion to make complaint more definite and certain addressed to indefinite statement of cause of action.—Shill v. Jones, 77.

⊂=367(4) (Ariz.) Complaint being indefinite as to damages, plaintiff should have complied with order to make more definite.—Shill v. Jones, 77.

⊂=367(6) (Ariz.) Motion to make more definite and certain addressed to discretion.—Shill v. Jones, 77.

⊂=368 (Kan.) Motion to separately state and number is addressed to trial court's discretion.—Small v. Small, 623.

Petition to establish trust in lands and other property and for an accounting stated a single cause of action.—Id.

⊂=368 (Mont.) Motion to require plaintiff to separately state and number causes of action *held* proper.—McLean v. Dickson, 924.

Complaint alleging conspiracy *held* subject to motion to separately state and number.—Id.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

⊂=403(2) (Or.) Complaint sufficiently broad enough to support and sustain judgment after verdict.—Winn v. Taylor, 342.

⊂=403(2) (Cal.App.) Omission from complaint may be aided by answer despite erroneous overruling of demurrer.—Bledsoe v. Stuckey, 217.

⊂=403(5) (Cal.) Answer in foreclosure suit cured defect in complaint.—Hutchison v. Barr, 799.

⊂=406(5) (Cal.App.) Complaint *held* sufficient on appeal though subject to special demurrer if made.—McCahan v. McCahan, 460.

⊂=408 (N.M.) Objection that complaint fails to state cause of action may be raised at any time.—Jamison v. McMillen, 726.

⊂=433(8) (Or.) Absence of allegation that work of decedent involved risk *held* not available after verdict.—Rorvik v. North Pac. Lumber Co., 331.

PLEDGES.

⊂=16(3) (Cal.App.) Evidence *held* to sustain finding that assignment of mortgage was for security.—Stoner v. Security Trust Co., 500.

⊂=40 (Cal.App.) Pledgee cannot transfer greater interest in pledge than that he himself has.—Stoner v. Security Trust Co., 500.

⊂=55 (Cal.App.) Possession of pledge does not preclude judgment in first instance against debtor.—Stern v. McDonald, 221.

POLICE POWER.

See Municipal Corporations, ⊂=592–611.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Factors.

I. THE RELATION.

(A) Creation and Existence.

⊂=19 (Okl.) Burden of proving agency is on the party alleging it.—McDonald v. Strawn, 558.

⊂=20(1) (Okl.) Authority of agent cannot be proven by showing general repute.—McDonald v. Strawn, 558.

⊂=22(1) (Okl.) Agent's declarations or admissions or claim of assumed powers will not establish agency.—McDonald v. Strawn, 558.

⊂=23(5) (Cal.App.) Evidence *held* not to show undisclosed principal.—Hutchison v. Holland, 1072.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(A) Execution of Agency.

⊂=54 (Okl.) Agent has no implied authority to delegate powers.—Vose v. Penny, 97.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

⊂=99 (Okl.) Principal is bound by the apparent authority of his agent.—Southwestern Surety Ins. Co. v. Marlow, 672.

⊂=109(4) (Kan.) Principal could not compel bank to pay it the amount of a check indorsed in its name and collected by its agent.—Chamberlin Metal Weatherstrip Co. v. Bank of Pleasanton, 742.

⊂=119(1) (Okl.) Burden of proving nature and extent of agency is on the party alleging it.—McDonald v. Strawn, 558.

⊂=122(1) (Okl.) Agent's declarations or admissions or claim of assumed powers will not establish his authority.—McDonald v. Strawn, 558.

⊂=123(7) (Okl.) General repute as to agency *held* not evidence of authority to sell property.—McDonald v. Strawn, 558.

⊂=136(2) (Wash.) Agent not liable for owners' breach of contract made through him.—Di Luck v. Bradner Co., 904.

(B) Undisclosed Agency.

⊂=145(2) (Cal.App.) Recovery against undisclosed principal may be had only on nonnegotiable notes.—Hutchison v. Holland, 1072.

(C) Unauthorized and Wrongful Acts.

⊂=147(2) (Okl.) One dealing with agent must discover whether agency is general or special.—McDonald v. Strawn, 558.

Digitized by Google

PRINCIPAL AND SURETY.

See Guaranty; Indemnity.

I. CREATION AND EXISTENCE OF RELATION.

(B) Surety Companies.

⇐55 (Okl.) Provision in power of attorney authorizing agent to execute bonds *held* not a restriction.—Southwestern Surety Ins. Co. v. Marlow, 672.

IV. REMEDIES OF CREDITORS.

⇐138 (Cal.App.) Compliance with arbitration clause of the contract not condition precedent to action on bond.—Oakdale Irr. Dist. v. Beard, 224.

PRISONS.

⇐15 (Cal.App.) Credits for good conduct forfeited for crime while upon parole.—Ex parte Sanders, 647.

Credits which might be earned in future may be forfeited.—Id.

PROCESS.

II. SERVICE.

(C) Publication or Other Notice.

⇐96(4) (Okl.) Affidavit for service by publication alleging defendant's nonresidence and inability to serve is sufficient.—Pettis v. Johnston, 681.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

⇐150 (Cal.) Jurisdiction of cross-complaint not lost on failure to return summons within three years.—Seaman v. Superior Court of Marin County, 441.

PROHIBITION.

I. NATURE AND GROUNDS.

⇐3(5) (Mont.) Remedy by appeal must be adequate.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 295.

⇐15 (Mont.) Officers *held* "beneficially interested" in prohibition to stay proceedings against them.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 295.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⇐17 (Mont.) Application to lower court to quash writ of certiorari sufficient as basis for prohibition.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 295.

⇐21 (Mont.) Affidavit must show beneficial interest by facts stated, and not by conclusion.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 295.

⇐28 (Mont.) Sufficiency of affidavit reviewable on prohibition.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 295.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

⇐7 (Okl.Cr.App.) Ownership of chattel denotes possession and control.—State v. Underwood, 281.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, ⇐297–538.

PUBLIC SERVICE COMMISSIONS.

⇐30 (Kan.) Orders of the court of industrial relations are to be reviewed according to the Public Utilities Act.—Clay County Co-op. Telephone Ass'n v. Southwestern Bell Telephone Co., 747.

Industrial relations court act *held* to provide for method of review as to industrial relations only.—Id.

No direct appeal from court of industrial relations by notice of appeal.—Id.

⇐35 (Cal.) Question not raised before Railroad Commission not considered by court on certiorari.—Lyon & Hoag v. Railroad Commission, 795.

⇐35 (Colo.) Order presumptively reasonable.—Chicago, B. & Q. R. Co. v. Public Utilities Commission, 539.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Electricity; Railroads; Street Railroads; Telegraphs and Telephones.

QUANTUM MERUIT.

See Work and Labor.

QUIETING TITLE.

I. RIGHT OF ACTION AND DEFENSES.

⇐19 (Cal.App.) Suit to cancel assignments of mortgage and for recovery of money collected will lie as one to determine adverse claim.—Stoner v. Security Trust Co., 500.

II. PROCEEDINGS AND RELIEF.

⇐30(3) (Cal.App.) Former owner of land *held* not necessary party.—Darter v. Schuyler, 827.

⇐30(3) (Okl.) Person whose status will be changed necessary party.—Simon v. Hine, 264.

⇐44(2) (Okl.) That one claiming as innocent purchaser knew title was in litigation admissible.—Simon v. Hine, 264.

QUO WARRANTO.

I. NATURE AND GROUNDS.

⇐8 (Okl.) Quo warranto *held* proper to test validity of organization of consolidated school district; injunction inapplicable.—Fowler v. Park, 668.

RAILROADS.

See Street Railroads.

I. CONTROL AND REGULATION IN GENERAL.

⇐5½ [New, vol. 6A Key-No. Series] (Colo.) Federal control *held* not to deprive Railroad Commission of jurisdiction to order new station.—Chicago, B. & Q. R. Co. v. Public Utilities Commission, 539.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

⇐59 (Colo.) Order requiring stations void, if unreasonable.—Chicago, B. & Q. R. Co. v. Public Utilities Commission, 539.

Findings requiring station *held* supported by evidence.—Id.

Order requiring station *held* reasonable.—Id.

X. OPERATION.

(A) Duty to Operate.

⇐216 (Wash.) Expense of building spur tracks governed by contract.—Skagit Mill Co. v. Great Northern Ry., 901.

Digitized by Google

(F) Accidents at Crossings.

⊂328(1) (Cal.) Motorcyclist *held* contributorily negligent as matter of law.—Young v. Southern Pac. Co., 36.
⊂328(10) (Cal.) Motorcyclist approaching obstructed crossing required to stop, look, and listen.—Young v. Southern Pac. Co., 36.
⊂338 (Cal.) Last clear chance doctrine defined.—Young v. Southern Pac. Co., 36.
⊂348(9) (Cal.) Evidence *held* to show contributory negligence of motorcyclist crossing track.—Young v. Southern Pac. Co., 36.
⊂351(17) (Cal.) Instruction as to duty of traveler to look after passing obstruction to view *held* error.—Young v. Southern Pac. Co., 36.
Instruction as to duty to look after passing obstruction created by defendant *held* error.—Id.

(G) Injuries to Persons on or near Tracks.

⊂370 (Okl.) Duty as to lookout and signals at places used by pedestrians defined.—St. Louis San Francisco Ry. Co. v. Jones, 385.
⊂372(5) (Okl.) Duty to moderate speed at places used by pedestrians.—St. Louis San Francisco Ry. Co. v. Jones, 385.

RAPE.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⊂3 (Okl.Cr.App.) Proof of defendant's age a matter of defense.—Williams v. State, 892.

REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

RECORDS.

See Appeal and Error, ⊂502–706; Criminal Law, ⊂1086–1106.

REFERENCE.

See Arbitration and Award.

REFORMATION OF INSTRUMENTS.

I. RIGHT OF ACTION AND DEFENSES.

⊂19(1) (Idaho) Mistake set up by parties seeking affirmative or defensive relief must be mutual.—Udelavitz v. Ketchen, 1029.

II. PROCEEDINGS AND RELIEF.

⊂33 (Okl.) Deed will not be reformed without making grantors parties.—Simon v. Hine, 264.
⊂43 (Idaho) Burden of proof is on party alleging mistake.—Udelavitz v. Ketchen, 1029.
⊂45(4) (Idaho) Evidence of mutual mistake must leave no reasonable doubt thereof.—Udelavitz v. Ketchen, 1029.

RELEASE.

I. REQUISITES AND VALIDITY.

⊂17(2) (Okl.) False statements by defendant's agent as to a physician's opinion of the injury is fraud justifying rescission.—Quapaw Milling Co. v. Cogburn, 416.
Release of damages for injury induced by knowingly false statements of defendant's physician is not binding.—Id.
⊂24(1) (Okl.) Prior rescission or cancellation of release for a grossly inadequate consideration is not a prerequisite to action for injury.—Quapaw Mining Co. v. Cogburn, 416.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⊂57(2) (Okl.) Evidence supporting finding avoiding release of damages for personal injury.—Quapaw Mining Co. v. Cogburn, 416.

REPLEVIN.

I. RIGHT OF ACTION AND DEFENSES.

⊂11(2) (Or.) Demand unnecessary where defendant claims title.—Lind v. Boulin, 1103.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

⊂50 (Colo.) Intervener's allegation of ownership mere evidence tending to show ownership.—Benish v. Jones, 538.
⊂52 (Colo.) Evidence that property was held by claimant as pledgee, and not as buyer, *held* within issues.—Benish v. Jones, 538.
Claimant pleading ownership not entitled to rely on lien or pledge.—Id.
Intervener claiming ownership has burden of proof.—Id.
Plaintiff under general denial *held* entitled to show intervener's want of ownership.—Id.

V. DAMAGES.

⊂82 (Cal.App.) Damages allowed to person deprived of use of automobile *held* excessive.—Mutch v. Long Beach Imp. Co., 638.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⊂100(1) (Or.) Decree giving defendant the right to acquire ownership on completing payments *held* proper.—Lind v. Boulin, 1103.
⊂103(1) (Colo.) No damages can be awarded in favor of defendant where not claimed in the answer.—Durham v. Wilson, 525.
⊂103(2) (Colo.) Judgment for return erroneous where no taking was shown.—Durham v. Wilson, 525.
⊂103(4) (Cal.App.) Judgment for defendant for affirmative relief not sustained by answer.—Imperial Valley Auto Co. v. Toney, 1043.

RETROSPECTIVE LAWS.

See Statutes, ⊂263.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Certiorari.

RIPARIAN RIGHTS.

See Navigable Waters, ⊂43; Waters and Water Courses, ⊂39, 40.

RISKS.

See Master and Servant, ⊂213–217.

ROADS.

See Highways.

SALES.

See Judicial Sales; Taxation, ⊂660; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

⊂12 (Cal.) Growing crops subject to absolute sale.—Jones v. California Growers & Shippers, 172.
⊂22(3) (Cal.App.) Withdrawal of offer after telegram of acceptance was filed is too late.—Humphry v. Farmers' Union & Milling Co., 489.
⊂22(4) (Cal.App.) Acceptance subject to inspection was not a variation of offer.—Humphry v. Farmers' Union & Milling Co., 489.
⊂52(3) (Or.) Evidence that defendant's foreman purchased wheat for another *held* admissible to show alleged agency.—Horn v. Elgin Warehouse Co., 151.

Digitized by Google

⊂=52(7) (Cal.) Finding that purchaser did not obtain possession by means of worthless check *held* warranted.—South San Francisco Packing & Provision Co. v. Jacobsen, 628.

II. CONSTRUCTION OF CONTRACT.

⊂=62 (Cal.App.) Divisibility of contract dependent not only on number and separability of items, but upon object and intention.—Stern v. Sunset Road Oil Co., 651.

⊂=80 (Cal.App.) Contract *held* to require payment at place of delivery.—Humphry v. Farmers' Union & Milling Co., 489.

⊂=81(1) (Cal.App.) Contract for sale of automobile called for delivery in reasonable time.—Boland v. Smith, 825.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

⊂=89 (Cal.App.) Evidence *held* to support finding that agreement sued on had not been modified.—Stone v. Porter-Burnham Co., 830.

(C) Rescission by Buyer.

⊂=124 (Colo.) Returned goods upon rescission *held* sufficient.—Keith v. Schuck, 530.

On rescission buyer could make good his tender of goods, refused by seller by delivering release of mortgage thereon.—Id.

⊂=130(2) (Cal.) Exact damage need not be shown in action for rescission.—Munson v. Fishburn, 808.

⊂=130(3) (Cal.App.) Evidence *held* to justify conclusion delay in delivery unreasonable.—Boland v. Smith, 825.

IV. PERFORMANCE OF CONTRACT.

(D) Payment of Price.

⊂=191 (Mont.) Check accepted in place of cash was payment until dishonored.—Montana Live Stock & Loan Co. v. Stewart, 985.

Refusal to guarantee check in payment of price not dishonor thereof.—Id.

Seller who took check could not rescind for nonpayment without presenting it.—Id.

⊂=196 (Utah) Waiver of initial payment on price by delivery without it.—Consolidated Wagon & Machine Co. v. Wright, 937.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

⊂=199 (Cal.) Whether title passes at delivery depends on intention as shown by circumstances.—South San Francisco Packing & Provision Co. v. Jacobsen, 628.

⊂=202(2, 3) (Cal.) Title to hogs *held* not to pass where check for price was dishonored.—South San Francisco Packing & Provision Co. v. Jacobsen, 628.

(B) Rights and Liabilities of Seller as to Third Persons.

⊂=222 (Cal.) An attaching creditor has no greater rights in personal property than his debtor.—South San Francisco Packing & Provision Co. v. Jacobsen, 628.

VI. WARRANTIES.

⊂=270 (Or.) Warranty of variety of wheat seed *held* not implied where buyer inspected it.—Horn v. Elgin Warehouse Co., 151.

⊂=285(4) (Utah) Waiver of notice of breach of warranty by taking charge of setting up warranted machine.—Consolidated Wagon & Machine Co. v. Wright, 937.

⊂=287(1) (Mont.) Contract *held* not to require return of defective cash register.—National Cash Register Co. v. Wall, 135.

⊂=287(6) (Utah) Seller waived return of unsatisfactory machine by refusal to accept it.—Consolidated Wagon & Machine Co. v. Wright, 937.

⊂=288(2) (Utah) Purchaser *held* not bound by card signed showing goods were satisfactory.—Consolidated Wagon & Machine Co. v. Wright, 937.

Buyer's keeping machine more than contract five days' trial limit *held* to be by seller's consent.—Id.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

⊂=340 (Kan.) Action to recover part of price paid *held* not maintainable; seller in possession by sale of goods for which buyer had given note elected his remedy.—Central Trust Co. v. Adams, 755.

⊂=353(6) (Cal.) Seller of growing crop, suing for price, need not allege delivery.—Jones v. California Growers & Shippers, 172.

⊂=353(8) (Utah) Complaint in seller's action on buyer's note *held* defective in not stating amount due thereon.—Staheli v. Adams, 781.

(F) Actions for Damages.

⊂=384(2) (Mont.) Damages for buyer's breach is difference between market and contract price.—Church v. Zywert, 291.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

⊂=411 (Cal.App.) Buyer, suing seller for refusal to deliver, not required to plead particulars as to general damages.—Hogue-Kellogg Co. v. Baker, 493.

Allegation as to price for which goods could have been bought not equivalent to allegation as to value thereof to buyer.—Id.

Complaint *held* to state cause of action for failure to deliver.—Id.

⊂=417 (Cal.App.) Evidence of value at place of shipment *held* to sustain judgment for damages.—Humphry v. Farmers' Union & Milling Co., 489.

⊂=418(2) (Mont.) Damages for breach is difference between contract and market price.—Montana Live Stock & Loan Co. v. Stewart, 985.

(D) Actions and Counterclaims for Breach of Warranty.

⊂=440(4) (Or.) Evidence that variety of seed sold would have produced crop next year admissible in mitigation.—Horn v. Elgin Warehouse Co., 151.

⊂=441(2) (Or.) Evidence *held* not to show express warranty of variety of seed wheat.—Horn v. Elgin Warehouse Co., 151.

⊂=442(8) (Ariz.) Though seller warranted cattle free from contagious disease, buyer cannot recover for mere exposure of his own herd to infection.—Gilmore v. Wingate, 571.

⊂=447 (Or.) General verdict for defendant sustained, notwithstanding finding of undisclosed agency.—Horn v. Elgin Warehouse Co., 151.

SCHOOLS AND SCHOOL DISTRICTS.

I. PRIVATE SCHOOLS AND ACADEMIES.

⊂=8 (Kan.) Demurrer to evidence showing that extras were furnished to pupil *held* properly sustained.—Lenox Hall v. Seelye, 737.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

⊂=25 (Wash.) Town being organized did not, ipso facto, become school district.—Tukwila School Dist. v. Burrows, 1010.

Town did not become separate school district upon organization.—Id.

⊂=42(2) (Kan.) Canvass of election to establish rural high school cannot be challenged in the state's action to enjoin an election to dis-

Digitized by Google

organize it.—State v. Board of Com'rs of McPherson County, 594.

Rural high school established after the statute cannot hold election to disorganize.—Id.

(D) District Property, Contracts, and Liabilities.

⊂⊃69 (Cal.App.) School district trustees may change location of high school in a city.—Lawson v. Turlock Union High School Dist., 1055.

SENTENCE.

See Criminal Law, ⊂⊃984.

SEPARATE PROPERTY.

See Husband and Wife, ⊂⊃131–138.

SEPARATION.

See Husband and Wife, ⊂⊃278–299.

SET-OFF AND COUNTERCLAIM.

I. NATURE AND GROUNDS OF REMEDY.

⊂⊃21 (Cal.App.) Party to contract *held* not estopped to assert recoupment against assignee.—Stern v. Sunset Road Oil Co., 651.

II. SUBJECT-MATTER.

⊂⊃29(1) (Cal.App.) Overpayment *held* proper matter for counterclaim.—Bledsoe v. Stuckey, 217.

⊂⊃44(1) (Kan.) In action against several for assault, a claim for alienating affections of wife of one defendant may be set off.—Ruby v. Baker, 6.

⊂⊃49(1) (Cal.App.) Recoupment proper where cause of action on assigned demands, and defendant's right against assignor originated in same indivisible contract.—Stern v. Sunset Road Oil Co., 651.

⊂⊃50 (Cal.App.) Assignee *held* to take subject to debtor's right of recoupment.—Stern v. Sunset Road Oil Co., 651.

"Set-off" distinguished from "recoupment" as respects assignor's breach of contract after assignment.—Id.

SEWERS.

See Drains.

SLANDER.

See Libel and Slander.

SPECIAL LAWS.

See Statutes, ⊂⊃93.

SPECIFIC PERFORMANCE.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

⊂⊃12 (Cal.) Avoidance of contract by agent not disclosing interest available as defense without revocation.—Newell-Murdock Realty Co. v. Wickham, 359.

II. CONTRACTS ENFORCEABLE.

⊂⊃41 (Colo.) Provision that statute of frauds shall not abridge power to compel specific performance in case of part performance not to be enlarged.—Knoff v. Grace, 526.

⊂⊃42 (Colo.) Part performance must be of something required by contract.—Knoff v. Grace, 526.

Part performance, taking parol lease out of the statute, must be consistent with no other theory.—Id.

⊂⊃43 (Colo.) Payment of rent and taking possession under a parol lease is not sufficient part performance.—Knoff v. Grace, 526.

Installation of trade fixtures, coupled with taking of possession and payment of rent, not part performance.—Id.

IV. PROCEEDINGS AND RELIEF.

⊂⊃105(3) (Colo.) Cross-complainant barred by laches, though seasonably filed.—Bower v. Pound, 425.

STATES.

II. GOVERNMENT AND OFFICERS.

⊂⊃63 (Wash.) State labor commissioner not entitled to increased compensation for new duties.—State v. Clausen, 324.

⊂⊃63 (Wash.) State mining inspector not entitled to increase in compensation during term of office.—State v. Clausen, 329.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

⊂⊃114 (Mont.) May engage in business of operating grain elevator.—State v. Stewart, 129.

Constitutional authorization *held* to include operation of grain elevator by state.—Id.

⊂⊃116 (Cal.) Act providing for bond issue *held* unconstitutional for failure to make proper provision for payment of principal.—Hatfield v. Jordan, 1030.

⊂⊃116 (Mont.) Statute creating state debt without providing for payment is unconstitutional.—State v. Stewart, 129.

Statute *held* sufficient to provide for taxes to purchase and maintain state-owned grain elevator.—Id.

⊂⊃124 (Utah) Funds of State Land Board may be invested in town bonds; "city."—State Board of Land Com'rs v. Ririe, 59.

⊂⊃137 (Utah) Auditor may object to use of money for purposes for which not appropriated.—State Board of Land Com'rs v. Ririe, 59.

Auditor cannot inquire into desirability of investment by Land Board.—Id.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

⊂⊃47 (Mont.) Statute making "agricultural lands" liable for taxation for support of state-owned grain elevator *held* not uncertain; "agriculture"; "agricultural in character."—State v. Stewart, 129.

⊂⊃64(1) (Nev.) Partial invalidity does not invalidate independent portions.—Ex parte Goddard, 916.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

⊂⊃93(6) (Cal.App.) Statute permitting trustees to change location of high school in city not invalid.—Lawson v. Turlock Union High School Dist., 1055.

III. SUBJECTS AND TITLES OF ACTS.

⊂⊃114(1) (Cal.App.) Title of state Poison Act *held* sufficient.—People v. City of San Bernardino, 482.

⊂⊃114(4) (Cal.App.) Title of state Medical Practice Act *held* sufficiently comprehensive to include punishment for practicing without a certificate.—People v. T. Wah Hing, 662.

IV. AMENDMENT, REVISION, AND CODIFICATION.

⊂⊃141(2) (Or.) Constitutional provision as to amending a statute inapplicable where new

Digitized by Google

sections are added.—Brown v. City of Silverton, 971.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

⇐162 (Wash.) Special law, when repealed by implication.—State v. Public Service Commission, 1012.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇐181(1) (Mont.) In construing statutes, the legislative intent must be sought.—State v. Smith, 107; Same v. Dunn, 121.

⇐188 (Colo.) Words and phrases presumed to be used in usual sense.—Darius v. Apostolos, 510.

⇐190 (Cal.App.) Construed to avoid ambiguities.—Rumetsch v. Davie, 1075.

⇐194 (Colo.) Ejusdem generis not applicable where specific words signify subjects greatly different.—Darius v. Apostolos, 510.

⇐196 (Mont.) Qualifying words applied to words immediately preceding.—R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co. of Montana, 988.

⇐205 (Utah) Construed as whole.—Roberts v. Lynch, 930.

⇐206 (Utah) Effect must be given to every word if possible.—State Road Commission v. Industrial Commission of Utah, 544.

⇐208 (Utah) Words considered in relationship to context and general purpose.—State Board of Land Com'rs v. Ririe, 59.

⇐212 (Utah) Legislature presumed to know construction by state officers.—State Board of Land Com'rs v. Ririe, 59.

⇐217 (Okl.) History of time of enactment may be resorted to.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.

History of time of enactment tends to disclose reasons for act.—Id.

⇐219 (Utah) Executive construction, though not binding, entitled to consideration.—State Board of Land Com'rs v. Ririe, 59.

⇐225¼ (Idaho) Statutes construed together.—State v. McBride, 247.

⇐225¾ (Utah) Legislature having re-enacted statute will be presumed to have been satisfied with court construction prior to re-enactment.—State v. Roberts, 351.

⇐226 (Or.) Difference from state irrigation district act of another state *held* to preclude adoption of construction.—Board of Directors of Medford Irr. Dist. v. Hill, 957.

(D) Retroactive Operation.

⇐263 (Or.) Not construed to be retrospective unless clearly made so.—Brown v. City of Silverton, 971.

⇐263 (Wash.) No retrospective construction, unless intent plainly expressed.—Teed v. Brotherhood of American Yeomen, 1005.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. 14.....568, 795
Art. 1, § 8..... 916
Art. 4, §§ 1, 2..... 916

INTERSTATE COMMERCE ACT.

Act 1887, Feb. 4, ch. 104, 24 Stat. 379.

Ch. 104..... 878

JUDICIAL CODE.

Act 1911, March 3, ch. 231, 36 Stat. 1087.

§ 237. Amended 1914, Dec. 23, ch. 2, 38 Stat. 790 255

STATUTES AT LARGE.

1887, Feb. 4, ch. 104, 24 Stat. 379. See Interstate Commerce Act.
1888, Feb. 18, ch. 13, 25 Stat. 35..... 878
1890, May 2, ch. 182, 26 Stat. 81..... 878
1893, March 2, ch. 196, § 4, 27 Stat. 531..... 409
1908, April 22, ch. 149, 35 Stat. 65.....255, 588
1908, April 22, ch. 149, § 2, 35 Stat. 65..... 409
1911, March 3, ch. 231, 36 Stat. 1087. See Judicial Code.
1912, Feb. 19, ch. 46, 37 Stat. 67. Amended 1912, Aug. 24, ch. 388, § 18, 37 Stat. 530..... 396
1912, Aug. 24, ch. 388, § 18, 37 Stat. 530..... 396
1914, Dec. 23, ch. 2, 38 Stat. 790..... 255
1917, Oct. 6, ch. 106, 40 Stat. 411..... 239
1918, March 21, ch. 25, 40 Stat. 451..... 539
1918, March 21, ch. 25, § 15, 40 Stat. 458..... 539

COMPILED STATUTES 1916 or 1918.

§ 1214..... 255
§ 8608..... 409
§§ 8657–8665.....255, 588
§ 8658..... 409

COMPILED STATUTES 1918.

§§ 3115½a–3115½j..... 239
§ 3115¾a et seq..... 539

COMPILED STATUTES ANNOTATED SUPPLEMENT 1919.

§§ 3115½a–3115½j..... 239
§ 3115¾a et seq..... 539

ARIZONA.

CONSTITUTION.

Art. 2, § 17..... 85
Art. 6, § 21..... 85
Art. 18, § 5..... 88
Art. 23 422

REVISED STATUTES 1913.

CIVIL CODE.

Par. 422..... 85
Pars. 468, 474..... 77
Par. 1427 et seq..... 79
Pars. 1627–1647..... 568
Par. 3087..... 85
Pars. 3163–3179, 3372.... 88

PENAL CODE.

§ 736..... 422

LAWS.

1917, ch. 63..... 422

CALIFORNIA.

CONSTITUTION.

Art. 1 852
Art. 4, § 24..... 662
Art. 4, § 25, subsec. 28...1055
Art. 6, § 4..... 211
Art. 6, § 4½.....22, 36, 172, 205, 211, 217, 483, 804, 1069
Art. 11, § 6, 8..... 482
Art. 16 1030

CIVIL CODE.

§ 94.....196, 460
§ 107..... 196
§ 137.....368, 458, 464
§ 137. Amended by Laws, 1917, p. 35..... 464
§§ 146, 147..... 460
§ 158.....458, 460
§ 159..... 460
§ 174..... 368
§§ 226, 230..... 804
§§ 301–303..... 177
§ 303, subsec. 4..... 177
§ 324..... 213
§ 329..... 797
§ 694.....17, 46
§§ 695, 715, 716, 749..... 17
§ 781..... 46
§ 954.....198, 1033
§§ 1039, 1044..... 17
§ 1141..... 493
§ 1241, subsec. 4..... 378
§ 1261.....*181
§ 1263.....370, 496
§ 1276..... 168
§ 1276, subsec. 4..... 168
§§ 1317, 1326..... 17
§ 1330..... 46
§ 1338..... 17
§§ 1357–1359..... 364
§ 1386, subsec. 8..... 442
§ 1573..... 188
§§ 1582, 1583..... 489
§ 1624.....815, 819
§ 1624, subsec. 6..... 815

Digitized by Google

§§ 1636, 1641..... 643
§ 1689..... 1041
§ 1690..... 188
§ 1691..... 445, 1041
§ 1709..... 451
§§ 1771, 1785..... 489
§§ 1814, 1835..... 1064
§ 1856..... 839
§ 2126..... 50
§ 2144..... 839
§§ 2217, 2219..... 483
§§ 2309, 2310..... 815
§§ 2338, 2339..... 635
§§ 2787, 2788, 2850..... 55
§ 2991..... 194
§ 3051..... 641
§ 3116..... 1045
§ 3290..... 801
§ 3294..... 377, 451
§ 3308..... 493
§ 3336..... 1034
§ 3354..... 489
§§ 3379, 3380..... 1034
§ 3440..... 1065

CODE OF CIVIL PROCEDURE.

§ 336..... 806
§ 337, subsec. 2..... 1061, 1076
§ 338..... 482
§ 338, subsec. 3..... 827
§ 339..... 482
§ 339, subsec. 1..... 50, 1061
§ 359..... 1048
§ 368..... 651
§ 386..... 801
§ 390..... 49, 202
§ 438, subsec. 2..... 217
§ 442. Amended by Laws 1909, p. 966..... 441
§ 473..... 469, 804
§ 479, subsecs. 2, 4..... 209
§ 481..... 209
§§ 509–512..... 1034
§ 537..... 464
§ 581a..... 441
§ 594..... 822
§ 627..... 1043
§§ 648, 656, 657..... 1061
§ 660..... 469, 500
§ 663..... 469, 1061
§ 663a..... 469
§ 667..... 1034, 1043
§ 685..... 806
§ 689..... 638
§ 690, subsec. 18..... 625
§§ 700, 702, 703, 706..... 1050
§ 726..... 799
§ 803..... 177
§ 870..... 1034
§ 949..... 202
§ 953a..... 500, 1058
§ 953a. Amended by Laws 1919, p. 261..... 472
§ 953b..... 1058
§ 953c..... 460
§ 963..... 185, 460, 854
§ 1033..... 1052
§ 1046..... 804
§ 1050..... 500
§ 1085..... 1058
§ 1161, subsec. 2..... 455
§ 1183..... 208
§§ 1191, 1192..... 848
§ 1193..... 1052
§ 1465..... 625
§§ 1498, 1504, 1505..... 806
§§ 1516, 1562, 1563..... 364
§ 1870, subsec. 10..... 626
§ 1880, subsec. 3..... 173, 211
§ 1881..... 372
§ 1960..... 442
§ 1962, subsec. 3..... 383
§ 1963, subsec. 7..... 173
§ 1963, subsec. 18..... 1050
§ 3359..... 638

PENAL CODE.

§ 118..... 468
§§ 187, 189..... 22
§ 203..... 486
§ 435..... 852
§ 459..... 473
§ 484..... 1034
§ 808..... 855
§§ 836, 837..... 205
§ 872..... 466
§ 1004..... 1046
§ 1008..... 821
§ 1012..... 1046
§ 1073, subsec. 2..... 22
§ 1076..... 22
§ 1110..... 1038
§ 1185..... 1046
§ 1246..... 22
§§ 1268, 1295, 1307..... 855
§ 1425..... 662
§§ 1457, 1570..... 855
§ 1588..... 647

POLITICAL CODE.

§ 1742. Amended by Laws 1919, p. 1086..... 1055

GENERAL LAWS.

Page 1132, §§ 882, 883... 855
Act 1770a, §§ 1, 3, 4c, 4d, 6, 13..... 22
Act 2724..... 482

CITY CHARTERS.

Oakland, §§ 91, 95..... 1075
Sacramento, § 164, subsec. 1, Laws 1911 (Ex. Sess.) p. 355..... 662
San Francisco, ch. 4, art. 3, § 1..... 51
San Francisco, ch. 10, art. 8, §§ 3, 9..... 51

LAWS.

1887, p. 29..... 491
1893, p. 34, § 4. Amended by Laws 1911, p. 1201, § 2..... 381
1909, p. 966..... 441
1911, p. 599..... 656
1911, p. 713, § 1, subsec. 3 46
1911, p. 730, § 68. Amended by Laws 1919, p. 554 499
1911, p. 1201, § 2..... 381
1911 (Ex. Sess.) p. 355, § 164, subsec. 1..... 662
1913, p. 7, § 24..... 634
1913, p. 279. Amended by Laws 1915, pp. 913, 1079, 1302..... 331
1913, p. 283, § 12b. Amended by Laws 1915, p. 1081, § 2..... 846
1913, p. 342..... 1056
1913, p. 639..... 203
1913, p. 715..... 192
1913, p. 734, § 17..... 662
1913, p. 1049..... 630
1913, p. 1050, § 3..... 630
1915, pp. 425, 426, §§ 7, 10, 12..... 634
1915, pp. 913, 1079..... 331
1915, p. 1081, § 2..... 846
1915, p. 1225..... 200
1915, p. 1233, § 9b..... 200
1915, p. 1302..... 331
1917, p. 35..... 464
1917, p. 831..... 373
1917, p. 852, §§ 24b(1), 24d..... 373
1917, p. 860, § 30e, subsec. 2..... 27
1919, p. 191..... 650
1919, p. 261..... 472
1919, p. 554..... 499
1919, p. 1086..... 1055
1919, p. 1182..... 1030

COLORADO.

CONSTITUTION.

Art. 6, §§ 5, 8..... 513

GENERAL LAWS 1877.

§ 385..... 666

REVISED STATUTES 1908.

§ 194..... 525
§§ 609, 610..... 510
§ 1412..... 513
§ 2664..... 526
§ 3893..... 1116

CITY CHARTERS.

Denver, § 137..... 508

LAWS.

1895, p. 139..... 510
1909, p. 294..... 510
1917, p. 164, § 3..... 510

IDAHO.

CONSTITUTION.

Art. 1, § 13..... 922

COMPILED STATUTES 1919.

§ 2642..... 248, 251
§ 5384..... 1028
§§ 5556, 5558, 5560–5562, 5569..... 73
§ 6861..... 356
§ 7170..... 355
§ 8003..... 71
§§ 8829, 8878, 9019..... 248
§§ 9084, 9191..... 247

LAWS.

1915, ch. 11..... 247
1915, ch. 28, §§ 1–3..... 247

KANSAS.

CONSTITUTION.

Art. 12, § 6..... 601

CODE OF CIVIL PROCEDURE.

§§ 25, 26..... 432
§§ 88, 100..... 6
§ 321..... 616
§ 366..... 1094
§ 410..... 6
§ 564..... 761

GENERAL STATUTES 1915.

§§ 3874–3889..... 761
§§ 6915, 6916..... 432
§§ 6979, 6992..... 6
§ 7223..... 616
§ 7270..... 1094
§ 7314..... 6
§ 7468..... 761
§§ 8327–8372a..... 747
§§ 11674, 11681..... 1

LAWS.

1911, ch. 238..... 747
1920 (Sp. Sess.) ch. 29... 747
1920 (Sp. Sess.) ch. 29, § 12..... 747

MONTANA.

CONSTITUTION.

Art. 3, § 6..... 107
Art. 10, § 1..... 129
Art. 13, § 2..... 129

Digitized by Google

REVISED CODES.

§ 3306 991
§ 3308.....295, 991
§ 3603..... 983
§ 5036..... 135
§ 5047..... 993
§§ 5466, 5467..... 990
§§ 5672, 5761..... 136
§§ 5761, 5763. Repealed by Laws 1913, ch. 86, §§ 4, 6..... 136
§ 6059..... 294
§ 6081..... 291
§§ 6136–6161..... 287
§§ 6238, 6239..... 295
§ 6315. Amended by Laws 1909, ch. 114..... 133
§§ 6506, 6507..... 133
§ 6533..... 924
§§ 6534, 6535, 6538, 6539.. 291
§ 6585..... 138
§ 6589..... 982
§ 6746..... 990
§ 7228..... 295
§§ 7862, 7951..... 288
§§ 7961, 7962..... 107
§ 8020..... 117
§§ 8112, 8113, 8907, 9261.. 107
§ 9297..... 982
§ 9415..... 291

LAWS.

1909, ch. 114 133
1911, ch. 112 136
1913, ch. 86, §§ 4, 5, 6... 136
1915, ch. 96, §§ 20n, 22b, 22d 124
1917, ch. 150 129
1917, ch. 150, § 4..... 129
1918 (Ex. Sess.) ch. 11... 107
1919, ch. 204 129

NEVADA.

CUTTING'S COMPILED LAWS.

§ 3470..... 76

REVISED LAWS.

§ 5022. Amended by Laws 1913, ch. 87, § 2..... 977
§ 5376..... 352
§ 5732. Amended by Laws 1913, ch. 235, § 3..... 977
§ 5742..... 977
§ 5794..... 352

LAWS.

1913, ch. 87, § 2..... 977
1913, ch. 235, § 3..... 977
1919, ch. 81, §§ 23, 24... 914
1919, ch. 82 916
1919, ch. 109, § 46..... 914

NEW MEXICO.

CODE 1915.

§ 17.....1020
§§ 41, 42..... 541
§ 618.....1018
§ 1850. Amended by Laws 1915, ch. 69.....1020
§ 1860..... 730
§ 2175.....1018
§ 4114..... 726
§ 4336.....1026

LAWS.

1899, ch. 22, § 15..... 728
1913, ch. 84, § 36..... 728
1915, ch. 69 1020
1917, ch. 43, § 15....353, 732
1917, ch. 43, §§ 23, 32, 34 733

OKLAHOMA.

CONSTITUTION.

Art. 2, § 4..... 568
Art. 9, § 44.....869, 872
Art. 14, § 3..... 869
Art. 23, § 6..... 385

COMPILED LAWS 1909.

§§ 1487–1532..... 872

REVISED LAWS 1910.

§ 468..... 412
§ 945 et seq..... 407
§ 988..... 866
§ 1702.....1087
§ 2260..... 861
§ 2336, subsec. 1..... 894
§ 2344..... 894
§ 2415..... 892
§ 2694..... 281
§ 2700..... 404
§§ 3983, 3984, 3988..... 416
§§ 4304–4318..... 857
§§ 4469, 4471..... 404
§ 4671..... 681
§ 4690..... 264
§ 4722..... 681
§ 4868..... 391
§ 4993..... 670
§ 5035.....388, 552
§ 5037..... 387
§ 5070..... 558
§§ 5144–5146..... 681
§ 5238. Amended by Laws 1917, ch. 219, § 1.....1090
§§ 5267, 5272, 5274..... 681
§ 5695..... 284
§ 5738, subsec. 2..... 281
§§ 5744, 5746, 5791, 5799.. 281
§ 5897..... 887
§ 5939..... 281
§ 6005.....276, 404, 678, 866

LAWS.

1910 (Ex. Sess.) ch. 73, § 2 869
1910–11, ch. 70, § 13..... 271
1913, ch. 200 869
1915, ch. 107, art. 1, § 2.. 396
1917, ch. 219, § 1.....1090

OREGON.

CONSTITUTION.

Art. 2, § 2..... 971
Art. 4, §§ 1a, 22..... 971
Art. 11, § 4..... 349
Art. 11, § 10.....1097

LORD'S OREGON LAWS.

§ 97..... 717
§ 102.....1103
§ 155..... 151
§ 201..... 584
§ 204..... 969
§ 390. Amended by Laws 1917, p. 126.....1103, 1105
§ 507..... 716
§ 550..... 584
§ 554. Amended by Laws 1913, p. 618..... 715
§ 713.....306, 315
§§ 717, 718..... 315
§ 727..... 580
§ 768..... 962
§ 804..... 155
§ 818..... 578
§§ 1096, 1097..... 304
§ 1319..... 309
§ 1528..... 580
§ 3551. Amended by Laws 1907, p. 485, § 1.....1109
§ 3553. Amended by Laws 1907, p. 486, § 3.....1109
§ 6028..... 342
§§ 6617, 6618..... 346
§§ 6716–6718..... 962
§ 7315. Amended by Laws 1917, p. 687..... 155
§ 7398..... 155

CITY CHARTERS.

Portland, § 400..... 722
Silverton, §§ 71, 135–138.. 971

SPECIAL LAWS.

1920, p. 5 1097

LAWS.

1907, pp. 485, 486, §§ 1, 3 1109
1911, p. 16 331
1911, p. 378 957
1913, pp. 170, 175, §§ 4, 19 1097
1913, p. 618 715
1913, p. 670, § 8..... 962
1917, p. 126 .....1103, 1105
1917, p. 687 155
1917, p. 721, § 3..... 319
1917, p. 754, § 19..... 957
1917, p. 773, § 41, subsecs. a, d..... 957
1919, p. 177 338

UTAH.

CONSTITUTION.

Art. 1, § 11..... 952
Art. 8, § 9..... 783

COMPILED LAWS 1917.

§ 328..... 781
§ 1711..... 779
§ 1717..... 351
§ 1726. Amended by Laws 1919, ch. 34, § 1..... 941
§ 1813..... 946
§§ 3112, 3113. Amended by Laws 1919, ch. 63..... 544
§ 3132..... 544
§ 3140, subsec. 3. Amended by Laws 1919, ch. 63 934
§ 5607..... 59
§ 5715, subsec. 16..... 59
§ 5848..... 59
§§ 5865, 5877..... 930
§ 6969..... 778
§ 6990..... 783
§ 7060..... 952
§ 7076..... 59
§ 7424.....1113
§ 7606..... 783

LAWS.

1917, ch. 100. Amended by Laws 1919, ch. 63... 934
1919, ch. 34 351
1919, ch. 34, § 1..... 941
1919, ch. 47, § 37..... 941
1919, ch. 63 .....544, 934

WASHINGTON.

CONSTITUTION.

Art. 2, § 25..... 324
Art. 3, § 25..... 324
Art. 4, § 13..... 324
Art. 11, § 8..... 324

REMINGTON & BALLINGER'S CODE.

§ 3394..... 909
§ 7162..... 239
§ 8008..... 909

Digitized by Google

REMINGTON'S CODE 1915.

§ 171..... 239
§ 191..... 242
§§ 209—1, 209—2..... 321
§ 367..... 900
§ 983..... 239
§§ 4998-5011.....1012
§§ 5482-5491..... 324
§ 6059—211.....1005
§§ 6250-6256..... 909
§§ 6550 to 6604—32..... 324
§ 7151..... 239
§ 8008..... 909
§§ 8213-8240..... 324
§§ 8626—13, 8626—62..... 901

LAWS.

1854, p. 354 1012
1889-90, p. 379, § 64.....1010
1909, p. 230 1010
1913, p. 412 234
1913, p. 412, § 3..... 234
1917, pp. 116-120, §§ 7, 8, 10 329
1917, p. 495 1007
1919, p. 309 329
1919, pp. 310, 311, §§ 4, 6 324
1919, p. 312, §§ 7, 8..324, 329
1919, pp. 313, 315, 319, 320, §§ 9, 10, 18, 28, 32 329
1919, pp. 321, 322, §§ 34, 39 324
1919, p. 327, § 49..... 329
1919, p. 328, § 50..... 324

STIPULATIONS.

⇐14(7) (Mont.) Construed as to burden on defendant in quieting title action to show land claimed under deed.—R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co. of Montana, 988.

STREET RAILROADS.

II. REGULATION AND OPERATION.

⇐103(3) (Kan.) Discovered peril doctrine defined.—Atherton v. Topeka Ry. Co., 430.

SUPPLEMENTARY PROCEEDINGS.

See Execution, ⇐388.

SURETYSHIP.

See Principal and Surety.

TAXATION.

I. NATURE AND EXTENT OF POWER IN GENERAL.

⇐2 (Or.) Attribute of sovereignty.—Brown v. City of Silverton, 971.
⇐20 (Or.) Power limited to persons, property and business within territorial jurisdiction.—Endicott, Johnson & Co. v. Multnomah County, 1109.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

⇐40(6) (Mont.) Tax levy on agricultural lands for support of state-owned grain elevator *held* not to violate constitutional uniformity.—State v. Stewart, 129.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

⇐74 (Or.) Taxable "personal property" includes tangibles and intangibles.—Endicott, Johnson & Co. v. Multnomah County, 1109.
⇐79 (Wash.) Contract with government *held* not to make Emergency Fleet Corporation owner, so as to exempt materials from taxation.—Sloan Shipyards Corporation v. Thurston County, 1015.
Apparent owner of personalty subject to taxation.—Id.
⇐93(1) (Or.) Statutes *held* not to tax notes and accounts of nonresident; "personal property."—Endicott, Johnson & Co. v. Multnomah County, 1109.
Tangible personalty of nonresident taxable where located.—Id.
⇐98 (Or.) Rule that personalty follows owner is subject to exception to prevent injustice.—Endicott, Johnson & Co. v. Multnomah County, 1109.
Notes at owner's domicile in another state not taxable.—Id.
Notes and accounts due nonresidents may be taxed if owner has "business situs" within state.—Id.
Nonresident manufacturer, represented in state only by salesman, has no business situs.—Id.
Residence of owner is prima facie situs of personalty for taxation.—Id.

(C) Public Property and Institutions.

⇐181 (Okl.) Purchaser of surface of segregated Indian land *held* properly assessable in the following year.—Rose v. Stalcup, 396.

V. LEVY AND ASSESSMENT.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

⇐386(1) (Utah) Bank deposits assessable as solvent credits, and taxpayer entitled to deduct debts.—Roberts v. Lynch, 930.

(G) Review, Correction, or Setting Aside of Assessment.

⇐453 (Okl.) Taxpayer complaining of state auditor's correction of assessment has an appeal.—Champlin v. Carter, 679.
⇐497 (Okl.) Correction of income tax cannot be compelled by mandamus.—Champlin v. Carter, 679.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

⇐660 (N.M.) Publication for tax sale *held* sufficient.—De Graftenreid v. Casaus, 728.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

⇐734(9) (Okl.) Tax deed without due notice to owner did not convey title.—Union Sav. Ass'n v. Cummins, 869.
⇐742 (N.M.) Sale of tax certificate acquired under former laws authorized.—De Graftenreid v. Casaus, 728.

(B) Tax Deeds.

⇐750 (Okl.) Notice of application for deed essential.—Union Sav. Ass'n v. Cummins, 869.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

⇐861 (Cal.) Liability to inheritance tax determined by law at time of vesting of interest.—In re Murphy's Estate, 46.
⇐867(1) (Cal.) Transfer to be subject to inheritance tax must transfer property within state.—In re Murphy's Estate, 46.
⇐878(1) (Cal.) Transfer prior to death *held* without consideration, subjecting it to inheritance tax.—In re Murphy's Estate, 46.
⇐878(2) (Cal.) Remainder *held* subject to inheritance tax; "vested remainder."—In re Murphy's Estate, 46.

TELEGRAPHS AND TELEPHONES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⇐10(16) (Colo.) Ouster suit *held* premature.—Mountain States Telephone & Telegraph Co. v. People, 513.
⇐12 (Kan.) Connection contract between systems *held* to give stranger no common-law right to connect its system.—Clay County Co.-Op. Telephone Ass'n v. Southwestern Bell Telephone Co., 747.

Digitized by Google

II. REGULATION AND OPERATION.

⊂=26¾ [New, vol. 7A Key-No. Series]
(Kan.) Federal control *held* not to invalidate service of summons.—Brackville v. Southwestern Bell Telephone Co., 773.

TERRITORIES.

⊂=13 (Okl.) Oklahoma Territory carved from Indian Territory became a separate and distinct territory.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.
⊂=15 (Okl.) Right of Way Act providing for rates for transportation was abrogated by Organic Act as to shipments from Indian Territory into Oklahoma Territory.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.
⊂=18 (Okl.) Commerce between Indian Territory and territory of Oklahoma was within jurisdiction of Interstate Commerce Commission.—Chicago, R. I. & P. Ry. Co. v. Gist, 878.
Interstate Commerce Act covered transportation from a territory to a territory.—Id.

TORTS.

See Fraud, ⊂=11–61; Libel and Slander, ⊂=7–123; Malicious Prosecution, ⊂=21–71; Municipal Corporations, ⊂=840; Negligence, ⊂=1–136; Nuisance, ⊂=3; Trover and Conversion.

TRIAL.

See Continuance; Costs; Criminal Law, ⊂=640–894; Jury; New Trial; Venue.
For trial of particular actions or proceedings, see also the various specific topics.
For review of rulings at trial, see Appeal and Error.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

⊂=3 (Or.) Case proceeded with as in equity on filing of answer setting out facts for equitable relief.—James v. Ward, 1105.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

⊂=25(7) (Okl.) Admissions by defendant *held* to entitle him to open and close.—Choctaw Lumber Co. v. Waldock, 866.
⊂=29(2) (Cal.App.) Trial judge's inadvertent statement as to evidence which had been given not error.—Grover v. Morrison, 1078.
⊂=29(3) (Cal.App.) Court's question whether witness was "guessing" at distance testified to not error.—Grover v. Morrison, 1078.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

⊂=36 (Cal.) Neither proof nor finding of admitted fact necessary.—Hutchison v. Barr, 799.

(B) Order of Proof, Rebuttal, and Reopening Case.

⊂=66 (Idaho) Reopening of case rests in trial court's discretion.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.
Reopening of case *held* not abuse of trial court's discretion.—Id.
⊂=72 (Wash.) Refusal to reopen case generally for admission of defendant's evidence not abuse of discretion.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 226.

(C) Objections, Motions to Strike Out, and Exceptions.

⊂=83(1) (Okl.) Requisites of valid objection stated.—McDonald v. Strawn, 558.
If admissibility of offered evidence clearly appears on its face, no reason for its exclusion is necessary.—Id.
⊂=83(2) (Okl.) General rule is that objection that evidence is "incompetent, irrelevant, and immaterial" is no objection.—McDonald v. Strawn, 558.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

⊂=108½ (Cal.App.) Asking jurors as a body whether interested in company indemnifying defendant not error.—Williamson v. Hardy, 646.
⊂=127 (Cal.App.) Statement of plaintiff's counsel concerning surety for defendant in negligence case not error.—Williamson v. Hardy, 646.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⊂=140(1) (Okl.) Credibility of witnesses is for jury.—Quapaw Milling Co. v. Cogburn, 416.
⊂=143 (Idaho) Conflicting evidence on an issue of fact is for the jury.—Kinzell v. Chicago, M. & St. P. Ry. Co., 255.
⊂=143 (Okl.) Conflicting evidence as to issue makes a question for jury.—Katterhenry v. Williamson, 404.
⊂=143 (Or.) Differences in inferences from evidence for jury.—Herrick v. Barzee, 141.

(B) Demurrer to Evidence.

⊂=156(3) (Okl.) Defendant's demurrer to plaintiff's evidence admits its truth.—Rennie v. Red Star Oil Co., 391.

(C) Dismissal or Nonsuit.

⊂=159 (Mont.) Direction of nonsuit on counterclaim on the ground of variance between the pleadings and proof *held* warranted.—Wipf v. Kelleher, 294.
⊂=165 (Idaho) Motion for nonsuit admits truth of plaintiff's evidence, with inferences.—McKenna v. Grunbaum, 919.
⊂=165 (Mont.) Mere claim of prejudice by variance does not authorize nonsuit.—Wilcox v. Newman, 188.
⊂=165 (Or.) Motion for nonsuit admits truth of evidence; "demurrer to evidence."—Herrick v. Barzee, 141.

(D) Direction of Verdict.

⊂=178 (Okl.) Question presented on motion for directed verdict stated; on motion to direct verdict only the evidence favorable to the opposing party should be considered.—Ferris v. Holiman, 409.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⊂=191(11) (Or.) Charge on damages not erroneous as suggesting that exemplary damages might have been allowed if prayed for.—Brown v. McCloud, 578.
⊂=193(3) (Cal.) Instruction as to burden of proving contributory negligence *held* erroneous as indicating court's opinion as to evidence.—Young v. Southern Pac. Co., 36.
⊂=194(15) (Kan.) Instruction *held* not to invade province of jury.—McArthur v. Independent Torpedo Co., 787.
⊂=194(20) (Kan.) Recovery for wrongful discharge a matter of computation for trial court.—Manross v. Uncle Sam Oil Co., 619.

(B) Necessity and Subject-Matter.

⊂=219 (Cal.) Instruction requiring "proper warning," without specifying any standard, improper.—Young v. Southern Pac. Co., 36.

(C) Form, Requisites, and Sufficiency.

⊂=232(3) (Cal.App.) Instruction as to recovery not being justified because of instruction as to damages *held* not error.—Grover v. Morrison, 1078.
⊂=244(3) (Colo.) Instruction that jury, in determining whether marriage promise had

Digitized by Google

been made, might consider letters between parties, was not objectionable as emphasizing the letters.—Smillie v. De Mendoza, 533.

(D) Applicability to Pleadings and Evidence.

⊂=251(8) (Cal.) Instruction as to negligence not pleaded improper.—Young v. Southern Pac. Co., 36.

⊂=252(9) (Cal.) Instruction on last clear chance doctrine *held* improper as without support in evidence.—Young v. Southern Pac. Co., 36.

(E) Requests or Prayers.

⊂=261 (N.M.) Incorrect instructions as to defendant's residence, etc., properly refused.—First Nat. Bank v. George, 1026.

(G) Construction and Operation.

⊂=295(1) (Cal.App.) Instructions to be considered as a whole.—Williamson v. Hardy, 646.

⊂=295(1) (Idaho) Instructions must be considered together.—Lyons v. Lambrix, 356.

⊂=296(2) (Kan.) Instruction omitting defensive pleading *held* not error in view of other instructions.—Wilsey State Bank v. Amend, 739.

⊂=296(3) (Or.) Instruction on duty to employés of others for Employers' Liability Act approved in view of explanation.—Rorvik v. North Pac. Lumber Co., 331.

⊂=296(7) (Kan.) Error in instruction on burden of proof as to contributory negligence *held* cured.—Brackville v. Southwestern Bell Telephone Co., 773.

IX. VERDICT.

(A) General Verdict.

⊂=333 (Cal.App.) Ungrammatical verdict not error.—Grover v. Morrison, 1078.

⊂=340(5) (Kan.) No reversal for court's addition of interest expressly excluded by verdict.—Manross v. Uncle Sam Oil Co., 619.

⊂=340(5) (Kan.) Trial court may correct manifest error in verdit as to amount of damages.—Schlesener v. Mott, 745.

⊂=343 (Kan.) General verdict *held* to signify that contract was not performed.—Lenox Hall v. Seelye, 737.

(B) Special Interrogatories and Findings.

⊂=349(2) (Or.) Submission of special issues is discretionary.—Horn v. Elgin Warehouse Co., 151.

Submission of special issues *held* not abuse of discretion.—Id.

⊂=359(1) (Idaho) Statute providing that inconsistent special finding controls general verdict *held* not applicable.—Groefsema v. Mountain Home Co-op. Irr. Co., 356.

⊂=359(1) (Or.) General verdict controls unless special finding is inconsistent.—Horn v. Elgin Warehouse Co., 151.

⊂=362 (Idaho) Case properly sent back to permit jury to show verdict which they found and intended to return.—Groefsema v. Mountain Home Co-op. Irr. Co., 356.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

⊂=391 (Cal.) Neither proof nor finding of admitted fact necessary.—Hutchison v. Barr, 799.

⊂=391 (Idaho) Findings by court should set out ultimate facts.—Fehr v. Haworth, 248.

⊂=393(1) (Cal.App.) Findings need not be in any particular form.—Stoner v. Security Trust Co., 500.

⊂=396(4) (Utah) Finding as to value of property in absence of any allegation or evidence as to value *held* reversible error.—Staheli v. Adams, 781.

⊂=397(1) (Cal.App.) Specific findings not necessary as to affirmative evidentiary matters alleged in answer.—Borgmeyer v. Solomon, 1043.

⊂=397(5) (Cal.App.) Finding on ultimate fact makes other findings unnecessary.—Gillons v. Turner Oil Co., 185.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

⊂=419 (Idaho) Motion for nonsuit is not reviewable when evidence for defense afterwards introduced.—Groefsema v. Mountain Home Co-op. Irr. Co., 356.

TROVER AND CONVERSION.

II. ACTIONS.

(C) Evidence.

⊂=40(1) (Cal.App.) Circumstantial evidence of receipt and conversion admissible.—Bhumgara v. Gazvini, 854.

TRUST DEEDS.

See Mortgages.

TRUSTS.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

⊂=17, 18(5) (Kan.) Parol agreement by mother to reconvey to son *held* insufficient to create trust under statute.—Silvers v. Howard, 1.

⊂=17, 18(5) (Or.) Oral agreement to hold land subject to conveyance when directed *held* void.—Chance v. Weston, 155.

⊂=30½(1) (Kan.) Agreement *held* to create a "trust" and not a "partnership."—Home Lumber Co. v. Hopkins, 601.

⊂=43(2) (Kan.) Grantor may not show parol agreement, in absence of fraud, etc., except in cases involving purchase money.—Silvers v. Howard, 1.

⊂=44(1) (Utah) Evidence *held* to show land was held in trust.—Matson v. Matson, 943.

⊂=61(2) (Or.) When testamentary in character, could not be executed after death of donor.—Chance v. Weston, 155.

(C) Constructive Trusts.

⊂=96 (Kan.) Mere repudiation of trust under oral agreement does not constitute fraud.—Silvers v. Howard, 1.

⊂=102(1) (Kan.) Breach of confidence may amount to constructive fraud giving rise to a trust by implication.—Silvers v. Howard, 1.

⊂=109 (Kan.) Oral agreement between fiduciaries insufficient, standing alone, to raise implication of trust.—Silvers v. Howard, 1.

⊂=110 (Kan.) Oral agreement between fiduciaries insufficient, standing alone, to raise implication of trust.—Silvers v. Howard, 1.

Evidence *held* to sustain trust arising by implication on conveyance by a son to mother.—Id.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

⊂=210 (Kan.) Bondholders are not individually liable for obligations of trust.—Home Lumber Co. v. Hopkins, 601.

UNITED STATES.

See Territories.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

⊂=12 (Okl.) Whether usury was charged by collateral instruments or devices *held* a question of intent.—Holt v. Ætna Building & Loan Ass'n, 872.

⊂=78 (Okl.) Where usury is reserved by contract, but not paid, the only penalty is the for-

Digitized by Google

feiture of entire interest.—Union Sav. Ass'n v. Cummins, 869.

(B) Rights and Remedies of Parties.

⇐95 (Wash.) Party seeking to be relieved must return what he has received.—Cuddy v. Sturtevant, 909.

II. PENALTIES AND FORFEITURES.

⇐134 (Wash.) Waterworks bonds of city not subject to penalty provisions.—Cuddy v. Sturtevant, 909.

VENDOR AND PURCHASER.

See Sales.

I. REQUISITES AND VALIDITY OF CONTRACT.

⇐3(4) (Utah) Contract *held* a sale and not an option.—Manning v. Day, 779.

⇐13 (Cal.App.) Disclaimer by party not having interest no consideration for oral promise to deed land.—Schwarz v. Bohle, 819.

⇐34 (Cal. App.) Vendor, misrepresenting frontage of lot without fraudulent intent, guilty of constructive fraud.—De Bairos v. Barlin, 188.

⇐37(4) (Colo.) Representations as to water supply *held* not ground for rescission, where purchaser personally investigated.—Madsen v. Carpenter, 528.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

⇐79 (Utah) Condition on which price became payable *held* performed.—Manning v. Day, 779.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

⇐85 (Or.) No agreement for rescission of contract shown.—James v. Ward, 1105.

Taking of possession by vendor on abandonment by purchaser not mutual rescission.—Id.

(B) Rescission by Vendor.

⇐95(2) (Cal.) Acceptance of overdue installments does not eliminate provision that time is of essence.—De Bairos v. Barlin, 188.

⇐97 (Idaho) Vendor *held* not entitled to forfeit purchaser's interest or sue for price without tendering deed and abstract.—Walsh v. Coghlan, 252.

⇐101 (Cal.) Where acquiescence by vendor is sufficient to justify an inference of waiver of condition regarding forfeiture as matter of fact, it is revived by notice to vendee.—De Bairos v. Barlin, 188.

(C) Rescission by Purchaser.

⇐107 (Cal.App.) Motive of vendee in rescinding not inquired into.—De Bairos v. Barlin, 188.

⇐113 (Cal.App.) Variance between actual and represented description of land *held* to warrant rescission.—De Bairos v. Barlin, 188.

⇐114 (Or.) Right to rescind for fraud waived by treating contract in force.—James v. Ward, 1105.

⇐118 (Cal.) Vendee in default may rescind contract for fraud or mistake.—De Bairos v. Barlin, 188.

IV. PERFORMANCE OF CONTRACT.

(D) Payment of Purchase Money.

⇐172 (Colo.) Installment contract construed to call for interest on "unpaid part of purchase price," not on whole of initial balance.—San Luis Valley Building & Loan Ass'n v. Holbert, 428.

⇐185 (Cal.App.) Inexcusable failure to make payment under contract terminates it.—Darter v. Schuyler, 827.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

⇐244 (Cal.App.) Husband's paramour, to whom he conveyed property, *held* to have knowledge of his fraud.—Patterson v. Patterson, 483.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

⇐273 (Idaho) Vendor may sue to foreclose purchaser's interest without tendering deed and abstract, but is not entitled to attorney's fee.—Wash v. Coghlan, 252.

⇐285(5) (Idaho) Vendor may sue to foreclose purchaser's interest without tendering deed and abstract, but is not entitled to attorney's fee.—Wash v. Coghlan, 252.

⇐294 (Or.) Attorney's fees decreed in suit to foreclose contract of sale should be estimated only on the amount due.—James v. Ward, 1105.

⇐296 (Cal.App.) Purchaser in default cannot maintain equitable defense against seller's ejectment.—Hincksman v. Delacour, 832.

Purchasers must either perform or rescind.—Id.

(B) Actions for Purchase Money.

⇐303 (Idaho) Vendor *held* not entitled to forfeit purchaser's interest or sue for price without tendering deed and abstract.—Wash v. Coghlan, 252.

⇐303 (Kan.) That vendor refused to permit reasonable examination of abstract was a defense to suit for price.—Wilsey State Bank v. Amend, 739.

VENUE.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

⇐49(1) (Mont.) Disqualified judge without power to grant change of venue unless judge called in fails to appear.—State v. District Court of Fourth Judicial Dist., Ravalli County, 133.

⇐75 (Mont.) Disqualified judge granting change of venue must make an order showing reason.—State v. District Court of Fourth Judicial Dist., Ravalli County, 133.

⇐78 (Cal.App.) Order transferring cause to other county deprived court of all jurisdiction.—Searcy v. Superior Court of Humboldt County, 202.

⇐79 (Cal.App.) On order changing place of trial, clerk is required to transmit pleadings and papers despite appeal or subsequent motion.—Searcy v. Kay, 40.

VERDICT.

See Trial, ⇐333–362.

WAR.

⇐4 (Mont.) Intent in publishing language calculated to cause resistance to authorities immaterial.—State v. Smith, 107; Same v. Dunn, 121.

Instruction on intent given in sedition case too broad, including intent to publish.—Id.

Defendant, charged with publishing article likely to cause resistance to authorities, should be allowed to show intent.—Id.

Officer of corporation publishing seditious article liable, if he could have prevented it.—Id.

Legislature may define limits of freedom of speech and press.—Id.

All publications of inflammatory language not necessarily seditious.—Id.

Whether language was calculated to inflame resistance to authority is for jury.—Id.

Publication of inflammatory article to member of state council of defense not seditious.—Id.

Digitized by Google

⇐4 (Mont.) Seditious remark not necessarily offense, unless calculated to bring government into contempt.—State v. Diedtman, 117.

Whether defendant's remarks were calculated to bring government into contempt is for jury. —Id.

In a prosecution for sedition, the particular charge should be submitted, and mere general instructions insufficient.—Id.

⇐11 (Wash.) Void marriage to alien enemy does not toll limitation statute.—Beyerle v. Bartsch, 239.

WATERS AND WATER COURSES.

See Drains; Navigable Waters.

II. NATURAL WATER COURSES.

(A) Riparian Rights in General.

⇐39 (Cal.) Only tracts acquired by single conveyance from state and abutting on stream entitled to riparian rights.—Title Insurance & Trust Co. v. Miller & Lux, 433.

⇐40 (Cal.) Right of riparian proprietor as against appropriators extends to entire stream. —Title Insurance & Trust Co. v. Miller & Lux, 433.

VI. APPROPRIATION AND PRESCRIPTION.

⇐133 (Idaho) Hostile diversion of water from another's ditch cannot initiate a water right. —Rabido v. Furey, 73.

⇐137 (Or.) Diversion of water not continued for 10 years did not give vested right to diverter.—Miller v. Conley, 301.

⇐140 (Idaho) Priority of appropriation depends on application to a beneficial use.—Rabido v. Furey, 73.

⇐142 (Idaho) Rights under a water license are confined to waters described in application. —Rabido v. Furey, 73.

⇐144 (Or.) One having use of water cannot benefit junior tract to injury of intermediate user.—Nault v. Palmer, 346.

⇐152(5) (Cal.) Defendant's claim of lien *held* proper for amendment in action to quiet title to water right.—Title Insurance & Trust Co. v. Miller & Lux, 433.

⇐152(5) (Or.) Answer insufficient to confer on defendant in suit to quiet title any right to water claimed.—Miller v. Conley, 301.

⇐152(8) (Cal.) Evidence *held* to sustain conclusion plaintiff entitled to per cent. of waters allotted under settlement agreement.—Title Insurance & Trust Co. v. Miller & Lux, 433.

⇐152(11) (Or.) Court determining priorities could not establish rule of evidence or prescribe penalties in advance.—Nault v. Palmer, 346.

⇐152(12) (Or.) Supreme Court cannot affect water master in his absence as party.—Nault v. Palmer, 346.

VII. CONVEYANCES AND CONTRACTS.

⇐154(1) (Cal.App.) Water right *held* appurtenant to land, though represented by stock in mutual company.—Woodstone Marble & Tile Co. v. Dunsmore Canyon Water Co., 213.

⇐156(1) (Or.) One may retain his water right and alienate the ditch by means of which he enjoys it.—O'Neil v. Twohy Bros. Co., 306.

⇐156(2) (Or.) Owner who conveyed his rights in water ditch could not recover damages for its destruction—O'Neil v. Twohy Bros. Co., 306.

⇐156(4) (Cal.App.) Obvious easement impliedly retained by grantor of portion of land. —Palvutzian v. Terkanian, 503.

⇐158(1) (Cal.) Agreement not describing land too uncertain to establish riparian rights. —Title Insurance & Trust Co. v. Miller & Lux, 433.

⇐158(2) (Cal.) Right to use water confined by agreement to land owned by party within certain townships.—Title Insurance & Trust Co. v. Miller & Lux, 433.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

⇐183½ (Or.) Irregularities in ballot title and numbers *held* not to invalidate election of officers of water district.—State v. Parkey, 319.

⇐188(3) (Cal.) Railroad Commission could not compel operation of waterworks at a loss after abandonment thereof.—Lyon & Hoag v. Railroad Commission, 795.

(B) Irrigation and Other Agricultural Purposes.

⇐216 (Cal.) Act providing for water districts and for inclusion of lands without notice not unconstitutional.—People v. Lake County Water Dist., 630.

⇐217 (Or.) Water master must preserve priorities and quantities consistently with duty of water.—Nault v. Palmer, 346.

⇐225 (Or.) In confirmation proceedings to organize irrigation district, court should examine all questions, whether discussed or not.—Board of Directors of Medford Irr. Dist. v. Hill, 957.

Court may confirm irrigation district as to nonappearing parties without notice.—Id.

Court without statutory notice may confirm irrigation district as against party appearing. —Id.

⇐226 (Cal.) Act for organization of water district precludes inclusion of land not within boundaries shown in petition.—People v. Lake County Water Dist., 630.

Act for incorporation of water districts permits supervisors to exclude within purposed district lands to extent stated.—Id.

Water district to which lands other than shown in petition were added not properly organized.—Id.

⇐226 (Or.) Lands can be eliminated from district only by strictly following statutory proceedings.—Board of Directors of Medford Irr. Dist. v. Hill, 957.

⇐227 (Cal.App.) New construction under Wright Irrigation Act rests on adoption of plans by owners.—Buschman v. Turlock Irr. Dist., 491.

⇐228½ [New, vol. 10A Key-No. Series] (Cal.App.) Evidence *held* to sustain finding of damages in amount of bond to irrigation district from improper work.—Oakdale Irr. Dist. v. Beard, 224.

Defects in irrigation district contract not defense to contractor and surety sued on bond. —Id.

Recitals of second bond evidence that contractor had not performed.—Id.

⇐230(1) (Or.) Order for irrigation district bond election must state general purpose.—Board of Directors of Medford Irr. Dist. v. Hill, 957.

Change in irrigation district law *held* not to authorize bond election without stating purpose.—Id.

Purpose of district bonds need be stated only generally.—Id.

Bonds issued on insufficient resolution calling election *held* invalid.—Id.

⇐263 (Idaho) Evidence of date for delivery of water for irrigation was admissible.—Groefsema v. Mountain Home Co-op. Irr. Co., 356.

In action for damages evidence of failure to deliver water between certain dates *held* admissible.—Id.

Evidence *held* competent to show breach of obligation in water deed.—Id.

Evidence sustaining judgment for damages for failure to furnish water called for by deeds. —Id.

Digitized by Google

WILLS.

See Descent and Distribution; Executors and Administrators.

II. TESTAMENTARY CAPACITY.

⇐55(1) (Wash.) Testamentary incompetency not shown by evidence.—White v. White, 1003.

IV. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

⇐106 (Kan.) Description in devise stating ownership and location sufficient.—Brookens v. Brookens, 754.

(C) Execution.

⇐121 (Cal.) Attestation on separate sheet after blank space does not invalidate.—In re Moro's Estate, 168.

Attestation clause must follow testator's signature so as to occur at "end of the will."—Id.

⇐123(3) (Cal.) Substantial compliance with statutory requirements as to execution essential.—In re Moro's Estate, 168.

(F) Mistake, Undue Influence, and Fraud.

⇐166(1) (Wash.) Undue influence not shown.—White v. White, 1003.

VI. CONSTRUCTION.

(A) General Rules.

⇐440 (Cal.) Construed according to testator's intent as found in language.—In re Phelps' Estate, 17.

⇐447 (Cal.) Construction causing gifts to vest favored.—In re Phelps' Estate, 17.

⇐448 (Cal.) To be given an interpretation which makes it operative.—In re Phelps' Estate, 17.

(E) Nature of Estates and Interests Created.

⇐616(7) (Okl.) Construed to give fee to wife with power to mortgage realty, and contingent remainder over to her minor children.—Roberson v. Hurst, 402.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(G) Debts of Testator and Incumbrances on Property.

⇐832 (Cal.) Property not disposed of by will must first be resorted to for payment of claims.—In re Hall's Estate, 364.

Charges against estate *held* properly deducted from lapsed legacies.—Id.

WITNESSES.

See Depositions; Evidence.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

⇐14 (Or.) Witness may, but is not required to, demand double fees in advance.—Brown v. McCloud, 578.

⇐21 (Kan.) Court granting a divorce could not require officer of society having custody of child to disclose its whereabouts.—In re Hosford, 765.

⇐24 (Or.) Witness may, but is not required to, demand double fees in advance.—Brown v. McCloud, 578.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

⇐53(1) (Cal.App.) Wife's testimony in husband's behalf admissible to show alienation of affection.—Pratt v. Harrold, 372.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

⇐138 (Cal.App.) Statute excluding testimony in action against decedent's estate applies only to parties and assignors.—Bayless v. Reed, 211.

⇐140(9) (Cal.App) Wife not incompetent because of interest in husband's action against decedent's estate to recover for her services.—Bayless v. Reed, 211.

⇐143(5) (Cal.App.) Wife not incompetent as assignor of husband in his action against decedent's estate to recover for wife's services.—Bayless v. Reed, 211.

⇐160(2) (Kan.) Witness *held* not so connected with transaction between decedent and another as to exclude his testimony.—Robertson v. Wangler, 788.

⇐167 (Cal.) Plaintiff cannot testify as to correctness of book account against decedent.—Tipps v. Landers, 173.

⇐178(3) (Kan.) Incompetency to testify to transactions with decedent *held* waived by cross-examination.—Robertson v. Wangler, 788.

⇐183½ [New, vol. 9 Key-No. Series] (N.M.) Rule precluding verdict against administrator on oposing party's evidence unless corroborated *held* not to apply where deceased maker's signature is admitted.—Citizens' Nat. Bank of Roswell v. Bean, 1018.

(D) Confidential Relations and Privileged Communications.

⇐217 (Kan.) Grantee of deceased incompetent *held* not entitled to object to testimony of grantor's physician as to capacity.—Flack v. Brewster, 616.

⇐219(4) (Kan.) Testimony of physician as to deceased patient's mental capacity may be admitted where heirs waive statutory privilege.—Flack v. Brewster, 616.

III. EXAMINATION.

(A) Taking Testimony in General.

⇐255(3) (Cal.App.) Use of memorandum by witness to refresh memory as to dates and other details not error.—People v. Majors, 636.

⇐255(7) (Utah) Partnership book entries authenticated by party may be used to refresh recollection.—Matson v. Matson, 943.

⇐255(10) (Utah) Partnership book entries authenticated by party admissible and may be used to refresh recollection.—Matson v. Matson, 943.

⇐258 (Mont.) Where witness testified from written memorandum, it was improper to deny a cautionary instruction.—State v. Diedtman, 117.

⇐259 (Mont.) Where proper foundation laid, stenographer may testify from transcript.—State v. Smith, 107; Same v. Dunn, 121.

Where stenographer attempts to testify from transcript preliminary examination should be allowed.—Id.

(B) Cross-Examination and Re-examination.

⇐270(2) (Mont.) Cross-examination as to statements concerning check given in payment incompetent, immaterial, or attempt to vary writing.—Montana Live Stock & Loan Co. v. Stewart, 985.

⇐271(1) (Mont.) Where stenographer attempts to testify from transcript preliminary examination should be allowed.—State v. Smith, 107; Same v. Dunn, 121.

⇐274(2) (Okl.Cr.App.) Character witness may be cross-examined as to reports of acts inconsistent with good character previous to crime charged.—Jones v. State, 887.

⇐275(2) (Or.) In action for breach of warranty of seed wheat, plaintiff can be asked on cross-examination how much he paid.—Horn v. Elgin Warehouse Co., 151.

Digitized by Google

⇐286(4) **(Cal.)** Redirect examination of witness, who saw deceased after he had been assaulted and before death, *held* warranted.—People v. Wolff, 22.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

⇐330(1) **(Mont.)** Broad cross-examination allowed, where only means of ascertaining credibility.—State v. Diedtman, 117.

(B) Character and Conduct of Witness.

⇐350 **(Mont.)** Credibility may be attacked by cross-examination showing conviction.—State v. Smith, 107; Same v. Dunn, 121.

⇐358 **(Cal.App.)** Cross-examination of impeaching witness as to drunkenness *held* proper.—Grover v. Morrison, 1078.

(E) Contradiction and Corroboration of Witness.

⇐405(1) **(Mont.)** Collateral answer on cross-examination as to character is binding.—State v. Diedtman, 117.

Collateral nature of question depends on whether it could be proved by opposite party in chief.—Id.

WORDS AND PHRASES.

"Accident."—Tuttle v. Pacific Mut. Life Ins. Co. (Mont.) 993.
"Accounting."—Apple v. Smith (Kan.) 8.
"Actionable negligence."—St. Louis San Francisco Ry. Co. v. Jones (Okl.) 385; Quapaw Mining Co. v. Cogburn (Okl.) 416.
"Adverse party."—Hubbard v. Jurian (Cal. App.) 1052.
"Agricultural in character."—State v. Stewart (Mont.) 129.
"Agricultural lands."—State v. Stewart (Mont.) 129.
"Agriculture."—State v. Stewart (Mont.) 129.
"Annulment."—Vaughn v. Fey (Cal. App.) 1041.
"Arlsing out of and in course of employment."—Willis v. State Industrial Commission (Okl.) 92.
"Arising out of employment."—Continental Casualty Co. v. Industrial Acc. Commission (Cal. App.) 849.
"Articles necessary for wife's support."—Sumner v. Mohn (Cal. App.) 368.
"Attempt."—State v. Crawford (Ariz.) 422.
"Average weekly wage."—State Road Commission v. Industrial Commission of Utah (Utah) 544.
"Beneficially interested."—State v. District Court of Second Judicial Dist. in and for Silver Bow County (Mont.) 295.
"Bill of lading."—Pioneer Fruit Co. v. Southern Pac. Co. (Cal. App.) 50.
"Building and loan association."—Holt v. Ætna Building & Loan Ass'n (Okl.) 872.
"Business situs."—Endicott, Johnson & Co. v. Multnomah County (Or.) 1109.
"City."—State Board of Land Com'rs v. Ririe (Utah) 59.
"Collateral attack."—Pettis v. Johnston (Okl.) 681.
"Common."—Daniel v. Moncure (Mont.) 983.
"Common carrier."—State v. Crosson (Idaho) 922.
"Community property."—Clifford v. Lake (Idaho) 714.
"Construction."—Pettis v. Johnston (Okl.) 681.
"Constructive notice."—Raisch v. Helfrich (Cal. App.) 848.
"Contract of record."—Erickson v. Erickson (Cal. App.) 464.
"Corporation."—Home Lumber Co. v. Hopkins (Kan.) 601.
"Course of employment."—State Road Commission v. Industrial Commission of Utah (Utah) 544.
"Court en banc."—Mountain States Telephone & Telegraph Co. v. People (Colo.) 513.
"Courts of record."—State v. District Court of Second Judicial Dist. in and for Silver Bow County (Mont.) 295.
"Demurrer to evidence."—Herrick v. Barzee (Or.) 141.
"Doing of business."—Home Lumber Co. v. Hopkins (Kan.) 601.
"Election of remedies."—Vose v. Penny (Okl.) 97.
"End of the will."—In re Moro's Estate (Cal.) 168.
"Estate in fee."—Chance v. Weston (Or.) 155.
"Exchange."—State v. Underwood (Okl. Cr. App.) 281.
"Extreme cruelty."—McCahan v. McCahan (Cal. App.) 460.
"Fee."—Chance v. Weston (Or.) 155.
"Final judgment."—In re Jones' Estate (Utah) 783.
"Gift."—Hynes v. White (Cal. App.) 836.
"Grand larceny."—Ex parte Bayles (Cal. App.) 1034.
"Gross negligence."—Schmidt v. Pursell (Cal. App.) 846.
"Guaranty."—Kelley v. Goldschmidt (Cal. App.) 55.
"Implied contract."—Tulsa Fuel & Mfg. Co. v. Gilchrist Drilling Co. (Okl.) 399.
"Implied contract arising out of written instrument."—Pioneer Mining & Ditch Co. v. Davidson (Wash.) 242.
"Imprisonment for debt."—Ex parte Johnson (Cal. App.) 852.
"Including wrongful acts."—Johnsen v. Monson (Cal.) 635.
"Incumbrance."—Winn v. Taylor (Or.) 342.
"Institute."—Brown v. City of Portland (Or.) 722.
"Judgment roll."—Pettis v. Johnston (Okl.) 681.
"Judgment void on face."—Pettis v. Johnston (Okl.) 681.
"Jurisdiction."—Pettis v. Johnston (Okl.) 681.
"Law."—Ex parte Johnson (Cal. App.) 852.
"Look after."—McDonald v. Strawn (Okl.) 558.
"Mandate."—Maddock v. Riggs (Kan.) 12.
"Mayhem."—People v. Nunes (Cal. App.) 486.
"Misfeasance."—Maddock v. Riggs (Kan.) 12.
"Moral turpitude."—In re Cruickshank (Cal. App.) 1038.
"Motion."—Genardini v. Kline (Ariz.) 568.
"Motion in arrest of judgment."—State v. Underwood (Okl. Cr. App.) 281.
"Municipal affairs."—People v. City of San Bernardino (Cal. App.) 482.
"Mutual, open and current account."—Sugar Loaf Orange Growers' Ass'n v. Skewes (Cal. App.) 1076.
"Natural channel."—Rabido v. Furey (Idaho) 73.
"Navigable stream."—Logan v. Chas. K. Spaulding Logging Co. (Or.) 349.
"Necessaries."—Sumner v. Mohn (Cal. App.) 368.
"Nonfeasance."—Maddock v. Riggs (Kan.) 12.
"Ordinary care."—Herald v. Smith (Utah) 932.
"Partnership."—Home Lumber Co. v. Hopkins (Kan.) 601.
"Personal indignities."—Steele v. Steele (Or.) 716.
"Personal property."—Endicott, Johnson & Co. v. Multnomah County (Or.) 1109.
"Place of public accommodation."—Darius v. Apostolos (Colo.) 510.
"Proceedings in rem."—Pettis v. Johnston (Okl.) 681.
"Proximate cause."—Inspiration Consol. Copper Co. v. Conwell (Ariz.) 88; Mesa City v. Lesueur (Ariz.) 573.
"Public, charitable use."—Treadwell v. Beebe (Kan.) 768.

Digitized by Google

"Purchase."—W. T. Rawleigh Co. v. McCoy (Or.) 311; Treadwell v. Beebe (Kan.) 768.
"Puts out an eye."—People v. Nunes (Cal. App.) 486.
"Quorum."—Mountain States Telephone & Telegraph Co. v. People (Colo.) 513.
"Reasonable care."—Maddock v. Riggs (Kan.) 12.
"Recoupment."—Ruby v. Baker (Kan.) 6; Stern v. Sunset Road Oil Co. (Cal. App.) 651.
"Rescission."—Vaughn v. Fey (Cal. App.) 1041.
"Set-off."—Ruby v. Baker (Kan.) 6; Stern v. Sunset Road Oil Co. (Cal. App.) 651.
"Sham pleading."—Bollen v. Woodhams (Colo.) 427.
"Special."—National Cash Register Co. v. Wall (Mont.) 135.
"Special deposit."—Ennis-Brown Co. v. Richvale Land Co. (Cal. App.) 1064.
"Substantial justice."—Gigoux v. Henderson (Kan.) 1092.
"Suit."—State v. District Court of Second Judicial Dist. in and for Silver Bow County (Mont.) 295.
"Taking of property."—Logan v. Chas. K. Spaulding Logging Co. (Or.) 349.
"Taking property without compensation."—Lyon & Hoag v. Railroad Commission (Cal.) 795.
"Time when liability was created."—Pidgeon v. San Diego Consol. Brewing Co. (Cal. App.) 1048.
"Title or possession of real property."—Manning v. Day (Utah) 779.
"Transcript of record of proceedings."—State v. District Court of Second Judicial Dist. in and for Silver Bow County (Mont.) 295.
"Transfer."—W. T. Rawleigh Co. v. McCoy (Or.) 311.
"Trial."—State v. Bilboa (Idaho) 248.
"Trust."—Home Lumber Co. v. Hopkins (Kan.) 601.
"Unpaid part of purchase price."—San Luis Valley Building & Loan Ass'n v. Holbert (Colo.) 428.
"Usurious contract."—Holt v. Ætna Building & Loan Ass'n (Okl.) 872.
"Vested remainder."—In re Murphy's Estate (Cal.) 46.
"Willfully disregard."—Schmidt v. Pursell (Cal. App.) 846.
"Wreckage."—Wilson v. Travelers' Ins. Co., 366.
"Written contract."—Pioneer Fruit Co. v. Southern Pac. Co. (Cal. App.) 50.

WORK AND LABOR.

⇐10 **(N.M.)** Contract to assist in criminal prosecution for contingent fee may be basis for quantum meruit.—Baca v. Padilla, 730.

When recovery on quantum meruit allowable stated.—Id.

⇐13 **(Or.)** Contract to pay additional sum for work and labor *held* implied.—McDonald v. Supple, 315.

Right to recover on quantum meruit for extra work.—Id.

Party may be entitled to additional compensation, though deviations were not numerous.—Id.

⇐22 **(Or.)** Complaint stated cause of action for reasonable value of services.—Janson v. Pacific Diking Co., 340.

WORKMEN'S COMPENSATION ACTS.

See Master and Servant, ⇐351–420.

WRIT OF ERROR.

See Appeal and Error.

WRITS.

See Attachment; Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Process; Prohibition; Quo Warranto; Replevin.

Digitized by Google

TABLES OF PACIFIC CASES

IN

STATE REPORTS

VOL. 56, MONTANA REPORTS

Mont. Rep.	Pac. Rep.		Mont. Rep.	Pac. Rep.		Mont. Rep.	Pac. Rep.		Mont. Rep.	Pac. Rep.		Mont. Rep.	Pac. Rep.		Mont. Rep.	Pac. Rep.		Mont. Rep.	Pac. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	179	828	134	182	115	230	182	270	330	185	153	476	185	161	556	185	771	614	190	1118
10	180	574	140	181	739	237	181	981	338	185	169	478	185	458	561	186	332	615	190	1117
13	180	574	144	181	983	241	184	219	348	185	155	480	185	562	563	186	327	616	190	1117
27	180	729	146	182	477	244	184	218	355	185	147	485	186	329	568	187	1013	616	190	1118
37	180	908	179	182	122	247	184	217	363	185	152	493	185	556	571	185	769	617	190	1118
43	180	971	195	182	126	250	184	630	371	185	315	500	185	559	578	185	1112	618	190	1117
63	181	326	196	182	126	266	185	150	387	185	456	511	186	337	583	185	1118	618	190	1118
82	181	332	197	182	128	277	184	478	393	185	165	522	185	707	587	185	1114	619	190	1117
54	182	110	204	182	129	284	184	836	400	185	322	526	185	706	592	186	335	619	190	1118
108	182	107	211	181	984	292	184	987	413	185	708	530	186	332	600	186	1	620	190	1117
122	182	117	215	182	119	299	184	842	413	186	697	537	186	340	613	190	1117	620	190	1118
130	180	569	226	182	126	321	184	838	464	185	157	550	185	1116	613	190	1118	621	190	1117

VOL. 56, MONTANA REPORTS

	Page
Anaconda Copper Min. Co. v. Ravalli County (186 P. 332)	530
Asbury v. Robbins (182 P. 126)	195
Barrick v. Porter (184 P. 217)	247
Berry v. City of Helena (182 P. 117)	122
Crawford v. Pierse (185 P. 315)	371
Crosby v. Robbins (182 P. 122)	179
Dalgarno v. Holloway (186 P. 332)	561
Daniels v. Granite Bi-Metallic Consol. Min. Co. (184 P. 836)	284
D'Autremont v. McDonald (185 P. 707)	522
Davis v. Davis' Estate (185 P. 559)	500
Decker v. Decker (185 P. 168)	338
Decker v. Decker (190 P. 1117)	615
Dugan v. Apex Min. Co. (190 P. 1117)	620
Fifty Associates Co. of Great Falls v. Quigley (185 P. 155)	348
First State Bank of Shelby v. Bottineau County Bank (185 P. 162)	363
Green v. Wiederhold (181 P. 981)	237
Gullickson, In re (181 P. 983)	144
Hall v. Northern Pac. R. Co. (186 P. 340)	537
Hansen v. Goodrich (181 P. 739)	140
Hanson v. Robbins (182 P. 126)	196
Hilger v. Moore (182 P. 477)	146
Johnson v. Burton (190 P. 1117)	621
Johnson v. Erickson (185 P. 1116)	550
Juby v. Craddock (185 P. 771)	556
Kansier v. City of Billings (184 P. 630)	250
Kelley v. John R. Daily Co. (181 P. 326)	63
Kirk v. Montana Transfer Co. (184 P. 987)	292
Knapp v. Andrus (180 P. 908)	37
Koerner v. Northern Pac. R. Co. (186 P. 337)	511
Ladd & Tilton Bank v. Lepper (190 P. 1117)	619
Lindsay v. Hogan (185 P. 1118)	583
Lunke, In re (182 P. 126)	226
McDermott v. American Bonding Co. of Baltimore (179 P. 828)	1
McIntyre v. Northern Pac. R. Co. (180 P. 971)	43
McKim v. Beiseker (185 P. 153)	330
Montana Amusement Securities Co. v. Goldwyn Distributing Corporation (182 P. 119)	215
Murphy v. Johns (182 P. 115)	134
Myrick v. Peet (180 P. 574)	13
Pepin v. Broadwater (190 P. 1117)	616
Pepin v. Broadwater (190 P. 1117)	618
Pure Oil Co. v. Chicago, M. & St. P. R. Co. (185 P. 150)	266
Rate v. American Smelting & Refining Co. (184 P. 478)	277
Rogers-Templeton Lumber Co. v. Welch (184 P. 838)	321
Rose v. Sullivan (185 P. 562)	480
St. John v. Taintor (182 P. 129)	204
St. John v. United States Fidelity & Guaranty Co. (182 P. 128)	197
Shinors v. Joslin (180 P. 574)	10
Smith v. Hoffman (184 P. 842)	299
Soliri v. Fasso (185 P. 322)	400
Stair v. Lunke (180 P. 569)	130
State v. Bratton (186 P. 327)	563
State v. Griffith (184 P. 219)	241
State v. Guie (186 P. 329)	485
State v. Kahn (182 P. 107)	108
State v. Moran (182 P. 110)	94
State v. Popa (185 P. 1114)	587
State v. Riggs (185 P. 165)	393
State v. Slothower (182 P. 270)	230

Digitized by Google

56 MONT.—Continued. Page

State v. State Board of Equalization (185 P. 708; 186 P. 697) 413
State v. Toy Dou (190 P. 1117) 613
State v. Wolf (185 P. 556) 493
State v. Wyman (186 P. 1) 600
State ex rel. Anderson v. District Court (184 P. 218) 244
State ex rel. Anderson v. Oliver (190 P. 1117) 615
State ex rel. Bishop v. Keating (185 P. 706) 526
State ex rel. Casteel v. State Board of Examiners (190 P. 1117) 621
State ex rel. Conley v. District Court (190 P. 1118) 613
State ex rel. Continental Oil Co. v. District Court (190 P. 1118) 617
State ex rel. Custer County v. Mullendore (190 P. 1118) 618
State ex rel. Cutts v. Hart (185 P. 769) .. 571
State ex rel. Esgar v. District Court (185 P. 157) 464
State ex rel. Forcum v. Bibee (190 P. 1118) 616
State ex rel. Ford v. District Court (190 P. 1118) 619
State ex rel. Galles v. Board of County Com'rs (185 P. 456) 387

Page

State ex rel. Koefod v. Board of Com'rs of Hill County (185 P. 147) 355
State ex rel. Lee v. Huffaker (190 P. 1118) 620
State ex rel. Loundagin v. Tattan (181 P. 984) 211
State ex rel. Maehler v. District Court (190 P. 1118) 614
State ex rel. O'Rourke v. District Court (185 P. 161) 476
State ex rel. Philbrick v. District Court (190 P. 1118) 617
State ex rel. Robison v. District Court (186 P. 335) 592
State ex rel. Ward v. District Court (190 P. 1118) 614
State ex rel. Williams v. District Court (185 P. 458) 478
State ex rel. Zosel v. District Court (185 P. 1112) 578
Steinbrenner v. Minot Auto Co. (180 P. 729) 27
Sullivan v. Marshall (187 P. 1013) 568

Union Bank & Trust Co. v. Himmelbauer (181 P. 332) 82

Digitized by Google

VOL. 43, NEVADA REPORTS

Nev. Rep.	Pac. Rep.	Nev. Rep.	Pac. Rep.	Nev. Rep.	Pac. Rep.	Nev. Rep.	Pac. Rep.	Nev. Rep.	Pac. Rep.	Nev. Rep.	Pac. Rep.	Nev. Rep.	Pac. Rep.
Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.
1	176 784	78	181 960	150	182 927	227	184 206	290	185 459	348	186 674	407	187 1004
1	181 309	78	183 314	159	183 312	227	186 678	298	185 801	359	187 510	413	187 308
12	177 409	95	181 586	165	183 310	243	184 209	298	185 1119	368	187 311	422	187 509
12	185 565	98	181 963	172	183 387	253	184 212	320	184 1023	375	187 723	428	186 1110
50	180 122	102	182 92	182	183 391	253	185 563	323	185 1070	388	187 1002	441	187 721
50	187 929	114	184 305	191	183 386	266	184 814	323	187 1006	396	187 1006	448	187 723
61	181 133	128	183 317	196	183 642	274	183 984	332	185 1067	403	182 925	448	189 676
61	184 921	140	182 745	208	183 523	280	184 926	342	186 673				

VOL. 43, NEVADA REPORTS

	Page
Adams v. Wagoner (184 P. 814)	266
Barber Creek, Douglas County, In re (182 P. 925)	403
Barber Creek, Douglas County, In re (Scossa v. Church, 187 P. 1004)	407
Brennen, Ex parte (183 P. 310)	165
Campbell v. Vanetti (181 P. 963)	98
Cassinelli v. Humphrey Supply Co. (183 P. 523)	208
Clarke v. Johnson (187 P. 510)	359
Clover Valley Land & Stock Co., v. Lamb (187 P. 723)	375
Cole v. Nickel (177 P. 409; 185 P. 565)	12
Connolly v. Kawich Cattle Co. (183 P. 391)	182
Connolly v. Salsberry (183 P. 391)	182
Dixon, Ex parte (183 P. 642)	196
Dixon v. City of Reno (187 P. 308)	413
Dixon v. Miller (184 P. 926)	280
Dixon v. Second Judicial Dist. Court in and for Washoe County (183 P. 312)	159
Escalle v. Mark (183 P. 387)	172
Forney's Estate, In re (184 P. 206; 186 P. 678)	227
Garson v. Steamboat Canal Co. (185 P. 801, 1119)	298
Gill v. Goldfield Consol. Mines Co. (176 P. 784; 184 P. 309)	1
Hilton v. Second Judicial Dist. Court in and for Washoe County (183 P. 317)	128
Keyworth v. Nevada Packard Mines Co. (186 P. 1110)	428
Kingsbury v. Copren (187 P. 728; 189 P. 676)	448
Love v. Mt. Oddie United Mines Co. (181 P. 133; 184 P. 921)	61
McKay's Estate, In re (184 P. 305)	114
Miller's Estate, In re (Cole v. Nickel, 177 P. 409; Nickel v. State, 185 P. 565)	12
Mooney v. Newton (187 P. 721)	441
Nehls v. William Stock Farming Co. (184 P. 212; 185 P. 563)	253
Nevada Lincoln Mining Co. v. Eighth Judicial Dist. Court (187 P. 1006)	396
Nickel v. State (177 P. 409; 185 P. 565)	12
Nielsen v. Rebard (183 P. 984)	274
Oden v. Peterson (181 P. 960; 183 P. 314)	78
Page v. Walser (187 P. 509)	422
Pershing County v. Sixth Judicial Dist. Court in and for Humboldt County (181 P. 960; 183 P. 314)	78
Phillips, Ex parte (187 P. 311)	368
Pierotti, Ex parte (184 P. 209)	243
Reinhart v. Echave (185 P. 1070; 187 P. 1006)	323
Reno Electrical Works v. United States Fidelity & Guaranty Co. (183 P. 386)	191
Roberts v. Second Judicial Dist. Court in and for Washoe County (185 P. 1067)	332
Robertson v. Robertson (180 P. 122; 187 P. 929)	50
Scossa v. Church (182 P. 925)	403
Scossa v. Church (187 P. 1004)	407
Smith v. Lucas (186 P. 674)	348
Southern Pac. Co. v. Haug (182 P. 92)	102
State v. Board of Com'rs of Churchill County (185 P. 459)	290
State v. Bonner (181 P. 586)	95
State v. Ebert (181 P. 960; 183 P. 314)	78
State v. McFadden (182 P. 745)	140
State v. Moran (182 P. 927)	150
State v. Sixth Judicial Dist. Court in and for Humboldt County (184 P. 1023)	320
State v. State Bank & Trust Co. (187 P. 1002)	388
State v. Williams (185 P. 459)	290
Waters of Barber Creek, Douglas County, In re (182 P. 925)	403
Waters of Barber Creek, Douglas County, In re (Scossa v. Church, 187 P. 1004)	407
Wildes v. State (187 P. 1002)	388
Williams, Ex parte (186 P. 673)	342

Digitized by Google

VOL. 77, OKLAHOMA REPORTS

Okl. Rep.		Pac. Rep.	Okl. Rep.		Pac. Rep.	Okl. Rep.		Pac. Rep.	Okl. Rep.		Pac. Rep.	Okl. Rep.		Pac. Rep.	Okl. Rep.		Pac. Rep.	Okl. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	184	1016	46	186	477	87	186	1080	123	186	224	193	187	465	234	188	327	285	186	205
3	185	520	48	186	478	88	186	474	130	187	806	193	187	794	236	188	337	285	188	99
4	185	1089	48	187	217	90	186	481	137	187	467	196	187	801	238	188	323	287	187	1096
6	185	526	50	186	240	92	186	940	140	187	233	197	187	470	240	188	335	288	188	104
10	185	1092	51	186	218	93	186	1086	142	187	212	199	187	797	242	187	920	290	188	331
12	185	1081	54	185	1088	95	186	944	143	187	479	201	187	466	243	188	342	291	188	115
13	185	828	55	185	828	97	186	957	148	187	232	202	187	484	244	187	235	295	188	106
14	185	1082	57	185	1084	100	186	483	149	187	205	203	186	941	257	187	248	297	188	670
16	185	1095	58	185	1097	101	186	946	151	187	474	204	186	472	257	188	93	301	188	662
18	185	1093	62	186	235	104	186	931	155	187	221	204	187	223	260	188	95	302	188	676
20	185	1085	63	186	234	105	186	960	156	187	491	206	186	723	260	188	96	306	188	659
23	185	1080	64	186	230	108	186	936	162	187	222	213	187	488	260	188	109	308	188	661
24	186	220	65	186	461	110	186	1081	163	187	199	216	186	934	265	188	343	308	188	682
28	186	454	68	186	242	112	186	939	165	171	870	218	187	800	270	188	99	310	188	681
31	186	464	69	186	457	112	186	941	165	186	215	219	187	799	273	188	663	311	188	660
34	186	942	74	186	232	113	186	940	170	187	472	221	187	917	276	188	332	312	188	666
36	186	463	76	186	239	114	186	1083	173	186	932	224	187	921	277	188	96	314	188	669
38	186	470	77	186	236	114	187	212	174	186	949	229	188	102	277	188	113	315	188	879
40	186	240	80	186	729	116	187	207	183	187	486	230	187	1094	279	188	322	316	188	658
41	186	466	81	186	484	119	187	213	185	187	465	231	187	1096	280	188	334	317	188	674
43	186	210	81	186	463	119	187	219	186	187	477	233	188	108	282	188	655	320	188	667
44	186	216	83	186	212	122	186	1085	188	187	802	233	188	333						

VOL. 77, OKLAHOMA REPORTS

	Page
Armstrong Music Co. v. Boysen (185 P. 828)	55
Baker v. Cole (188 P. 662)	301
Baker v. Deichman (187 P. 212)	142
Barrick v. Smith (187 P. 199)	163
Beck v. Finley (187 P. 488)	213
Biendorf v. Thorpe (188 P. 102)	229
Billings Hotel Co. v. City of Enid (186 P. 1085)	122
Board of Com'rs of Comanche County v. Compton (187 P. 801)	196
Board of Com'rs of Creek County v. Bartlett (188 P. 655)	282
Board of Equalization of Oklahoma County v. First State Bank of Oklahoma City (188 P. 115)	291
Boles v. State (188 P. 681)	310
Bonner v. Chicago, R. I. & P. R. Co. (185 P. 1093)	18
Bowen v. Garber (185 P. 1095)	16
Bratcher v. Gernert (185 P. 1081)	12
Bristow Cotton Oil Co. v. State Industrial Commission (188 P. 658)	316
Bulgin v. American Law Book Co. (186 P. 941)	112
Burnett v. Burnett (188 P. 342)	243
Buss v. Chicago, R. I. & P. R. Co. (186 P. 729)	80
Byrd v. Woods (188 P. 337)	236
Carter v. State ex rel. Taylor (186 P. 464)	31
Chastain v. Smith (187 P. 802)	188
Chicago, R. I. & G. R. Co. v. Jones (187 P. 233)	140
Chicago, R. I. & P. R. Co. v. Montague (186 P. 216)	44
Chicago, R. I. & P. R. Co. v. Smith (188 P. 670)	297
Chicago, R. I. & P. R. Co. v. State (186 P. 234)	63
Christner v. McKay (187 P. 207)	116
Citizens' State Bank of Vici v. Gettig (187 P. 217)	48
City of Kingfisher v. Zalabak (186 P. 936)	108
City of Muskogee v. Burford (186 P. 949)	174
City of Muskogee v. Samuel (188 P. 669)	314
Clinton v. Miller (186 P. 932)	173
Close Bros. & Co. v. Oklahoma City (186 P. 931)	104
Coachman's Estate, In re (187 P. 465)	185
Cobb v. Killingsworth (187 P. 477)	186
Craven v. Smith (188 P. 96)	260
Cull v. Cavanaugh (185 P. 828)	13
Cushing v. Choate (186 P. 481)	90
Custer v. Fortuna Oil Co. (187 P. 248)	257
Dickinson v. Elliott (188 P. 660)	311
Durant v. Stanfield (186 P. 939)	112
Equitable Surety Co. v. Sapp (187 P. 917)	221
Etenburn v. Neary (186 P. 457)	69
Federal Refining Co. v. Fortuna Oil Co. (185 P. 1080)	23
Finerty v. Kirkendall (187 P. 219)	119
First Nat. Bank Bldg. Co. v. Riddle (187 P. 479)	143
First Nat. Bank of Cushing v. Atchison, T. & S. F. R. Co. (186 P. 1086)	93
First Nat. Bank of Haskell v. Lent (186 P. 1081)	110
First State Bank of Ringling v. Hunt (185 P. 1089)	4
Foster v. West Pub. Co. (186 P. 1083)	114
Franklin v. Parks (188 P. 334)	280
Fulp v. Squires (187 P. 921)	224
Garland v. Hunter (187 P. 466)	201
General Accident, Fire & Life Assur. Corporation v. Hymes (185 P. 1085)	20
Gill v. Fixico (187 P. 474)	151
Grayson v. Thompson (186 P. 236)	77
Guynes v. Fooshee (188 P. 659)	306
Hardwicke-Etter Co. v. City of Durant (187 P. 484)	202
Harkins v. McPhail (187 P. 222)	162
Harn v. Boyd (185 P. 1092)	10
Harn v. Interstate Building & Loan Co. (188 P. 343)	265
Harriss v. Parks (187 P. 470)	197
Hart-Parr Co. v. Brockreide (188 P. 113)	277
Hill v. Turnverein Germania of Oklahoma City (187 P. 920)	242
Hivick v. Turben (187 P. 1094)	230
Hopkins v. Farmers' Nat. Bank of Norman (188 P. 667)	320
Hulley v. Stidham (188 P. 879)	315
Hunter v. Hughes (186 P. 468)	81
Johnson v. Brown (186 P. 210)	43
Jones v. Johnson (185 P. 1082)	14
Jumper v. Lyles (185 P. 1084)	57

Digitized by Google

77 OKL.—Continued.

	Page
Kansas City Southern R. Co. v. Sheffield (188 P. 682)	308
Kennedy v. Van Horn (186 P. 483)	100
Ketcham v. Cunliff (187 P. 1095)	287
King v. Gant (186 P. 960)	105
Kingfisher, City of, v. Zalabak (186 P. 936)	108
Koller v. American Surety Co. of New York (187 P. 205)	149
Ledegar v. Bockoven (185 P. 1097)	58
Lee v. Pesterfield (188 P. 674)	317
Lohr & Trapnell v. H. W. Johns-Manville Co. (185 P. 526)	6
Long v. Anderson (186 P. 944)	95
Ludeman v. Smith (188 P. 661)	308
Lusk v. Durant Nursery Co. (188 P. 104)	288
McAlester v. Williams (186 P. 461)	65
McCartney v. Shores (188 P. 663)	273
McDonald v. Miller (186 P. 957)	97
McGowen v. Ring (187 P. 465)	193
McKee v. Interstate Oil & Gas Co. (188 P. 109)	260
McKone v. McConkey (185 P. 520)	3
MacThwaite Oil & Gas Co. v. Bolen (187 P. 221)	155
M. B. Armstrong Music Co. v. Boysen (185 P. 828)	55
Merritt v. Park Nat. Bank of Sulphur (187 P. 232)	148
Midland Valley R. Co. v. Goble (186 P. 723)	206
Midland Valley R. Co. v. Graney (185 P. 1088)	54
Miller v. Drumm Commission Co. (187 P. 213)	119
Missouri, K. & T. R. Co. v. Watkins (188 P. 99)	270
Mobley v. Rhoades (186 P. 230)	64
Molone v. Wamsley (187 P. 465)	185
Montgomery v. Krouch (186 P. 218)	51
Moore v. Stanton (186 P. 466)	41
Mulligan v. Johnson (186 P. 242)	68
Muskogee, City of, v. Burford (186 P. 949)	174
Muskogee, City of, v. Samuel (188 P. 669)	314
Muskogee Electric Traction Co. v. Fore (188 P. 327)	234
Muskogee Electric Traction Co. v. Latty (187 P. 491)	156
Myers v. Smith (188 P. 95)	260
National Lumber & Mfg. Co. v. Elred (186 P. 470)	38
Negin v. Picher Lumber Co. (186 P. 205)	285
Nettles v. Carson (187 P. 799)	219
Nowka v. West (186 P. 220)	24
Oil Fields & S. F. R. Co. v. Smaltz (187 P. 794)	193
Oklahoma Gas & Electric Co. v. Oklahoma R. Co. (188 P. 331)	290
Oklahoma Portland Cement Co. v. Winters (186 P. 468)	36
One Buick Car v. State (188 P. 108)	233
One Hudson Super-Six Automobile Model J. No. 4197, Engine No. 39527, v. State (187 P. 806)	130
Perry v. Werline (186 P. 940)	92
Phillips v. State (188 P. 332)	276
Pioneer Telephone & Telegraph Co. v. Hendricks (186 P. 934)	216
Pioneer Telephone & Telegraph Co. v. State (186 P. 934)	216
Prowant v. Sealy (187 P. 235)	244
Prowant v. Smith (188 P. 93)	257
Purdy v. State ex rel. Hall (187 P. 800)	218
Randerson v. McKay (188 P. 323)	238
Rogers v. Bomer (188 P. 99)	285
St. Louis & S. F. R. Co. v. Stacy (171 P. 870)	165
Seiffert v. Jones (186 P. 472; 187 P. 223)	204
Seward v. Anderson (186 P. 215)	165
Seward v. Johnson (186 P. 212)	83
Sigle v. Rippetoe (187 P. 1096)	231
Simmon v. Young (186 P. 941)	203
Smith v. Interstate Oil & Gas Co. (188 P. 109)	260
Southwestern Surety Ins. Co. v. Board of Com'rs of Coal County (187 P. 467)	137
Southwestern Surety Ins. Co. v. Walser (188 P. 335)	240
Star Mill & Elevator Co. v. Bruce (186 P. 940)	113
State ex rel. Davis v. Beatty (186 P. 240)	50
State ex rel. De Atley v. Alexander (186 P. 1080)	87
State ex rel. Freeling v. Smith (188 P. 96)	277
State ex rel. Owen v. Carter (186 P. 454)	28
Stein v. Lawrence (187 P. 472)	170
Stem v. Kemp (186 P. 946)	101
Tayiah v. Bunnell (186 P. 240)	40
Taylor v. Enid Nat. Bank (186 P. 232)	74
Terrell Co. v. Davis (188 P. 676)	302
Tidal Oil Co. v. Roelfs (187 P. 486)	183
Unity Drilling Co. v. Bentley (186 P. 239)	76
Van Arsdale-Osborne Brokerage Co. v. School Dist. No. 16, Comanche County (188 P. 333)	233
Van Winkle v. Henkle (186 P. 942)	34
Wade v. Hope & Killingsworth (186 P. 235)	62
Wah-hrah-lum-pah v. To-wah-e-he (188 P. 106)	295
Watson v. Shaffner (184 P. 1016)	1
Watts v. State ex rel. Scott (187 P. 797)	199
Wells v. McArthur (188 P. 322)	279
White v. Harrigan (186 P. 224)	123
White v. Kroeger (186 P. 477)	46
White v. Kroeger (186 P. 478)	48
Wichita Falls & N. W. R. Co. v. Overstreet & Dockter (187 P. 212)	114
Wilkin v. Board of Com'rs of Oklahoma County (186 P. 474)	88
Wilson Lumber Co. v. Wilson (188 P. 666)	312
Wolf v. Blackwell Oil & Gas Co. (186 P. 484)	81

Digitized by Google

VOL. 78, OKLAHOMA REPORTS

Okl. Rep.	Pac. Rep.	Okl. Rep.	Pac. Rep.	Okl. Rep.	Pac. Rep.	Okl. Rep.	Pac. Rep.	Okl. Rep.	Pac. Rep.	Okl. Rep.	Pac. Rep.	Okl. Rep.	Pac. Rep.
Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.
1	188 347	47	186 485	81	188 1063	127	188 1040	167	189 753	204	190 385	251	190 897
5	188 338	50	186 1092	84	188 1053	127	188 1076	174	189 359	206	190 387	254	190 388
8	187 214	57	188 1052	85	188 1079	140	189 193	176	189 353	208	190 391	256	190 407
12	186 206	58	188 885	87	189 175	141	189 355	177	189 531	210	189 747	259	190 266
13	188 329	58	188 1053	89	189 168	143	189 361	178	189 532	213	189 885	261	190 412
15	188 325	59	189 177	91	189 514	145	189 192	179	189 535	214	189 867	265	190 869
16	184 781	62	188 879	103	188 1074	146	189 188	182	189 537	216	190 92	268	190 396
16	186 1089	62	188 1081	105	188 1087	146	189 190	184	189 353	221	190 404	271	190 558
25	187 201	65	188 1066	109	189 180	147	189 191	185	189 533	224	190 264	277	190 681
28	188 97	66	188 878	112	187 916	149	189 189	187	189 357	227	190 416	297	190 555
31	188 1060	67	188 1055	114	189 171	149	189 194	189	187 223	232	190 886	300	190 679
34	188 878	69	188 1057	118	188 1077	150	189 194	198	189 188	235	190 393	302	190 552
34	188 1083	70	188 886	119	188 1067	150	189 363	199	189 752	238	190 97	305	190 678
38	188 107	72	188 884	120	188 1067	154	189 527	200	189 741	249	189 743	307	190 872
38	188 661	73	189 170	121	189 184	158	189 540	200	189 743	250	190 263	313	190 672
39	188 1069	74	189 737	125	188 1078	164	189 193	202	189 744	251	190 409	319	190 670
44	186 479	78	188 1058	126	188 1075	164	189 511	203	189 745				

VOL. 78, OKLAHOMA REPORTS

	Page
Ætna Building & Loan Ass'n v. McCarty (189 P. 357)	187
Alamo Nat. Bank of San Antonio, Tex., v. Dawson Produce Co. (190 P. 393)	235
American Surety Co. of New York v. Stinnett (188 P. 1060)	31
Andrews v. Carlisle (189 P. 175)	87
Atchison, T. & S. F. R. Co. v. Wooley (189 P. 180)	109
Bahr v. Chicago, R. I. & P. R. Co. (188 P. 1057)	69
Barnett v. Barnett (189 P. 743)	249
Batchelder v. Minks (189 P. 194)	149
Bear v. Jones (188 P. 879)	62
Bland v. Bland (184 P. 781; 186 P. 1089)	16
Brink v. Canfield (187 P. 223)	189
Brown v. Hennessey State Bank (189 P. 355)	141
Brown v. W. H. Savage & Sons (189 P. 168)	89
Bruno v. Medlinger (188 P. 878)	34
Burkett v. Bayes (187 P. 214)	8
Canfield v. Jack (188 P. 1040)	127
Carson v. Mills (189 P. 867)	214
Champlin v. Carter (190 P. 679)	300
Cherokee Grain Co. v. Elk City Flour Mills Co. (188 P. 1067)	120
Chicago, R. I. & P. R. Co. v. Bahr (188 P. 1058)	78
Chicago, R. I. & P. R. Co. v. Owens (186 P. 1092)	50
Chicago, R. I. & P. R. Co. v. Owens (189 P. 171)	114
Chilton v. Carpenter (189 P. 747)	210
Choctaw Lumber Co. v. Waldock (190 P. 866)	232
Chortney v. Curry (190 P. 387)	206
Collins v. Industrial Sav. Society (190 P. 670)	319
Crawford v. Cassity (190 P. 412)	261
Denton v. City of Sapulpa (189 P. 532)	178
Dickinson v. Elliott (188 P. 1052)	57
Dotterer v. Chicago, R. I. & P. R. Co. (188 P. 1055)	67
Dufek v. Klufa (188 P. 329)	13
Evans v. Bracken (187 P. 916)	112
Farmers' Bank & Trust Co. v. Sheffler (186 P. 479)	44
Ferris v. Holiman (190 P. 409)	251
Ferris v. Jones (189 P. 527)	154
Foley, In re (188 P. 885)	58
Foley v. Wilson (188 P. 885)	58
Folsom v. Billy (189 P. 188)	146
Foreman v. Needles (188 P. 1087)	105
Fowler v. Swank (189 P. 194)	150
Franklin v. Jackson (188 P. 325)	15
Garfield Oil Co. v. Champlin (189 P. 514)	91
Gibson v. Board of Com'rs of Okfuskee County (189 P. 745)	203
Gonzales v. Cowerd (188 P. 1053)	84
Gorman-Head Auto Co. v. Barrett (188 P. 1083)	34
Gypsy Oil Co. v. Cover (189 P. 540)	158
Gypsy Oil Co. v. Rambo (189 P. 193)	140
Harris v. Allen (188 P. 878)	66
Harrison v. Corry Pharmacy (188 P. 1076)	127
Hibdon's Estate, In re (188 P. 97)	28
Hines v. Olsen (190 P. 266)	259
Hogan v. Grimes (189 P. 353)	184
Holt v. Ætna Building & Loan Ass'n (190 P. 872)	307
Hopkins v. Harris (189 P. 192)	145
Interstate Mortgage Trust Co. v. Cunningham (188 P. 1081)	62
Investors' Mortgage Security Co. v. Bilby (189 P. 190)	146
Jacobs v. Hill (188 P. 661)	38
Johnson v. State (190 P. 897)	251
J. R. Watkins Medical Co. v. Lizar (190 P. 552)	302
Katterhenry v. Williamson (190 P. 404)	221
Kelley v. Hamilton (189 P. 535)	179
Kimberlin v. Board of Com'rs of Garvin County (189 P. 361)	143
Klufa's Estate, In re (188 P. 329)	13
Levy v. Tradesmen's State Bank (188 P. 1077)	118
Lonsdale Grain Co. v. Johnston (189 P. 359)	174
Ludeman v. English (189 P. 531)	177
Lusk v. Henson (189 P. 191)	147
McCray v. Miller (184 P. 781; 186 P. 1089)	16
McCrory v. Worley (188 P. 1066)	65
McDonald v. Strawn (190 P. 558)	271
McGuire v. McGuire (189 P. 193)	164
McIntosh v. Lynch (188 P. 1079)	85
Me-hun-kah's Will, In re (189 P. 867)	214
Midland Valley R. Co. v. Clark (189 P. 184)	121
Missouri, K. & T. R. Co. v. Ellis (189 P. 363)	150
Missouri, K. & T. R. Co. v. Stanton (189 P. 753)	167

Digitized by Google

78 OKL.—Continued. Page

Mitchell v. Wadsworth (188 P. 1078)..... 125
Mobley v. Lusk (189 P. 353)..... 176

Oil Fields & S. F. R. Co. v. Treese Cotton Co. (187 P. 201)..... 25
Oklahoma Natural Gas Co. v. State (188 P. 338)..... 5
Olatmanns v. Glenn (188 P. 886)..... 70

Parker v. Tomm (188 P. 1074)..... 103
Patterson v. Treese (189 P. 189)..... 149
Peaden v. Marler (189 P. 741)..... 200
Pelham Petroleum Co. v. North (188 P. 1069)..... 39
Peters v. Bledsoe (190 P. 407)..... 256
Pettis v. Johnston (190 P. 681)..... 277
Pioneer Telephone & Telegraph Co. v. Moore (188 P. 107)..... 38
Pioneer Telephone & Telegraph Co. v. State (188 P. 107)..... 38

Quapaw Mining Co. v. Cogburn (190 P. 416)..... 227

Referendum Petition No. 35, State Question No. 101, on House Bill No. 509 of 1919 Legislature, In re (186 P. 485).... 47
Rennie v. Red Star Oil Co. (190 P. 391).. 208
Robinson v. Potterff (189 P. 744)..... 202
Rock v. Craig & Osborne (190 P. 388).... 254
Rose v. Stalcup (190 P. 396)..... 268
Rourke v. Culbertson (189 P. 533)..... 185

St. Louis & S. F. R. Co. v. Jones (190 P. 385)..... 204
St. Louis & S. F. R. Co. v. Manley (189 P. 177)..... 59
Salmon v. Johnson (189 P. 537)..... 182

Page

Scott v. Ryal (186 P. 206)..... 12
Shawver v. Williamson-Halsell-Frazier Co. (189 P. 188)..... 198
Simon v. Hine (190 P. 264)..... 224
Sims v. Ward (188 P. 884)..... 72
Smith v. Williams (190 P. 555)..... 297
Son-se-gra's Will, In re (189 P. 865).... 213
Southwestern Surety Ins. Co. v. Marlow (190 P. 672)..... 313
Starr v. Starr (188 P. 1067)..... 119
State ex rel. Dale v. Johnson (188 P. 1053)..... 58
State ex rel. Gulager v. Moore (189 P. 511)..... 164
Stevens v. Oklahoma Automobile Co. (188 P. 1075)..... 126
Stocker v. Dempsey (189 P. 743)..... 200
Strange v. Hicks (188 P. 347)..... 1
Stuart v. Coleman (188 P. 1063)..... 81
Swan v. Duncan (190 P. 678)..... 305

Tiger v. Nolen (190 P. 263)..... 250
Tobin v. Gantt (189 P. 170)..... 73
Town of Watonga v. Morrison (189 P. 737)..... 74

Union Sav. Ass'n v. Cummins (190 P. 869)..... 265

Vose v. Penny (190 P. 97)..... 238

Watkins Medical Co. v. Lizar (190 P. 552) 302
Watonga, Town of, v. Morrison (189 P. 737)..... 74
Willett v. Kesselring (189 P. 752)..... 199
Willis v. State Industrial Commission (190 P. 92)..... 216

WEST PUBLISHING CO., PRINTERS, ST. PAUL, MINN.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

CALIFORNIA CASES IN THIS VOLUME

(190 PACIFIC REPORTER).

SUPREME COURT

	Page
Bancroft v. Woodward (Cal.)	445
Brown v. Anderson-Cottonwood Irr. Dist. (Cal.)	797
California Nat. Supply Co. v. Flack (Cal.)	634
Chipman v. Swasey (Cal.)	17
Citizens' Sav. Bank v. Bennett (Cal.)	44
Conner v. Bank of Bakersfield, two cases (Cal.)	801
Downing v. Cutting Packing Co. (Cal.)	455
Ellison v. Henion (Cal.)	793
Gilbert, Appeal of (Cal.)	804
Guaranty Loan Co. v. Fontanel (Cal.)	177
Hall's Estate, In re (Cal.)	364
Hatfield v. Jordan (Cal.)	1030
Hutchison v. Barr (Cal.)	799
Johnson v. Monson (Cal.)	635
Jones v. California Growers & Shippers (Cal.)	172
Kipp v. Reed (Cal.)	363
Knapp v. Knapp (Cal.)	362
Lang v. Lang (Cal.)	181
Lyon & Hoag v. Railroad Commission (Cal.)	795
McGrew, In re (Cal.)	804
Massachusetts Bonding & Insurance Co. v. Los Angeles R. Corporation (Cal.)	161
Moro's Estate, In re (Cal.)	168
Munson v. Fishburn (Cal.)	808
Murphy's Estate, In re (Cal.)	46
Newell-Murdoch Realty Co. v. Wickham (Cal.)	359
Newman v. E. E. Overholtzer Sons' Co. (Cal.)	175
O'Brien, Appeal of (Cal.)	364
People v. Lake County Water Dist. (Cal.)	630
People v. Niino (Cal.)	626
People v. Wolff (Cal.)	22
Phelps' Estate, In re (Cal.)	17
Saunders v. Simms (Cal.)	806
Schroeder v. Swasey (Cal.)	17
Seaman v. Superior Court of Marin County (Cal.)	441
Simonton v. Leiter (Cal.)	442
Simonton's Estate, In re (Cal.)	442
South San Francisco Packing & Provision Co. v. Jacobsen (Cal.)	628
Starr v. Grimes (Cal.)	625
Starr's Estate, In re (Cal.)	625
Thompson v. Modern School of Business and Correspondence (Cal.)	451
Tipps v. Landers (Cal.)	173
Title Insurance & Trust Co. v. Miller & Lux, two cases (Cal.)	433
Western Indemnity Co. v. Industrial Accident Commission (Cal.)	37
Williams, Ex parte (Cal.)	163
Wilson v. Traveler's Ins. Co. (Cal.)	366
Woodward v. Bancroft (Cal.)	445
Young v. Southern Pac. Co. (Cal.)	36

COURT OF APPEALS

American Bond & Mortgage Co. v. Lindsay (Cal. App.)	192
Arnold v. La Belle Oil Co. (Cal. App.)	815
Bar Due v. Cox (Cal. App.)	1056
Barlin v. E. B. & A. L. Stone Co. (Cal. App.)	188
Barr Lumber Co. v. Joy Const. Co. (Cal. App.)	844
Bayles, Ex parte (Cal. App.)	1034
Bayless v. Reed (Cal. App.)	211
Bennett v. First Nat. Bank (Cal. App.)	831
Bhumgara v. Gazvini (Cal. App.)	854
Bledsoe v. Stuckey (Cal. App.)	217
Boland v. Smith (Cal. App.)	825
Borgmeyer v. Solomon (Cal. App.)	1043
Brush v. Southern Pac. Co. (Cal. App.)	216
Buschman v. Turlock Irr. Dist. (Cal. App.)	491
Cohn v. Thompson (Cal. App.)	381
Conrad v. La Plante (Cal. App.)	1073
Continental Casualty Co. v. Industrial Accident Commission (Cal. App.)	849
Corey v. Matot (Cal. App.)	378
Cowell Lime & Cement Co. v. J. I. Metrovich Bldg. Co. (Cal. App.)	208
Craig v. Gomes (Cal. App.)	1060
Credit Guide Co. v. Fidelity Storage & Moving Co. (Cal. App.)	827
Cruickshank, In re (Cal. App.)	1038
Darter v. Schuyler (Cal. App.)	827
De Bairos v. Barlin (Cal. App.)	188
De Martini, Ex parte (Cal. App.)	468
Dibble v. San Joaquin Light & Power Corporation (Cal. App.)	198
Dolan v. Superior Court of California in and for City and County of San Francisco (Cal. App.)	469
Drew v. Superior Court of California in and for Mendocino County (Cal. App.)	374
Dunning Bros. Co. v. Johnson (Cal. App.)	829
Dunton v. Tanigoshi (Cal. App.)	467
Edge v. Bryan (Cal. App.)	476
Edwards v. Guaranty Trust & Savings Bank (Cal. App.)	57
Ennis-Brown Co. v. Richvale Land Co. (Cal. App.)	1064

Digitized by Google

	Page
Erickson v. Erickson (Cal. App.)	464
Espinosa v. Gould (Cal. App.)	481
Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co. (Cal. App.)	194
Furlow Pressed Brick Co. v. Balboa Land & Water Co. (Cal. App.)	1061
George v. Stensland (Cal. App.)	1069
Gillett, Ex parte (Cal. App.)	209
Gillons v. Turner Oil Co. (Cal. App.)	183
Gillons v. Turner Oil Co. (Cal. App.)	185
Gottschalk, Ex parte (Cal. App.)	649
Greer-Robbins Co. v. Insurance Co. of State of Pennsylvania (Cal. App.)	187
Grover v. Morrison (Cal. App)	1078
Guy v. Leech (Cal. App.)	1067
Harris v. Burt (Cal. App.)	1058
Heath v. Judson Freight Forwarding Co. (Cal. App.)	839
Henry Cowell Lime & Cement Co. v. J. I. Metrovich Bldg. Co. (Cal. App.)	208
Hill v. Moore (Cal. App.)	651
Hincksman v. Delacour (Cal. App.)	832
Hogue-Kellogg Co. v. Baker (Cal. App.)	493
Hubbard v. Jurian (Cal. App.)	1052
Hughes v. Scott (Cal. App.)	643
Humphry v. Farmers' Union & Milling Co. (Cal. App.)	489
Hutchison v. Holland (Cal. App.)	1072
Hynes v. White (Cal. App.)	836
Imperial Valley Auto Co. v. Toney (Cal. App.)	1043
James, Ex parte (Cal. App.)	466
Johnson, Ex parte (Cal. App.)	852
Judnick v. Judnick (Cal. App.)	480
Kelley v. Goldschmidt (Cal. App.)	55
Kinderman v. Shipley (Cal. App.)	472
Kinney v. King (Cal. App.)	834
Lawson v. Turlock Union High School Dist. (Cal. App.)	1055
Leaver v. Smith (Cal. App.)	1050
Los Angeles Trust & Savings Bank v. Bortenstein (Cal. App.)	850
McCahan v. McCahan (Cal. App.)	458
McCahan v. McCahan (Cal. App.)	460
McConnell v. Gaut's Estate (Cal. App.)	843
Mayr v. Reynolds (Cal. App.)	383
Michels v. Burkhard (Cal. App.)	370
Mortgage Securities Co. of California v. Pfaffman (Cal. App.)	641
Mutch v. Long Beach Imp. Co. (Cal. App.)	638
Oakdale Irr. Dist. v. Beard (Cal. App.)	224
Oakland St. Imp. Bond Co. v. Fitzmaurice (Cal. App.)	499
Olds v. Thorington (Cal. App.)	496
Palvutzian v. Terkanian (Cal. App.)	503
Patterson v. Patterson (Cal. App.)	483
People v. Bickerstaff (Cal. App.)	656
People v. Bliss (Cal. App.)	1036
People v. Cota (Cal. App.)	473
People v. Gilman (Cal. App.)	205
People v. Gutierrez (Cal. App.)	200
People v. Majors (Cal. App.)	636
People v. Nunes (Cal. App.)	486
People v. Riccomini (Cal. App.)	1045
People v. San Bernardino (Cal. App.)	482
People v. T. Wah Hing (Cal. App.)	662
People v. White (Cal. App.)	821
People v. Won Lee Wing (Cal. App.)	643
Pidgeon v. San Diego Consol. Brewing Co. (Cal. App.)	1048
Pioneer Fruit Co. v. Southern Pac. Co. (Cal. App.)	50
Pioneer Truck Co. v. Hawley (Cal. App.)	1037
Pratt v. Harrold (Cal. App.)	372
Raisch v. Helfrich (Cal. App.)	848
Ramish v. Reichenbach (Cal. App.)	824
Robinson v. Clemons (Cal. App.)	203
Rumetsch v. Davie (Cal. App.)	1075
Sanders, Ex parte (Cal. App.)	647
Schilling v. Industrial Accident Commission of California (Cal. App.)	373
Schmidt v. Pursell (Cal. App.)	846
Schwarz v. Bohle (Cal. App.)	819
Seaboard Nat. Bank v. Belden (Cal. App.)	1045
Searcy v. Kay (Cal. App.)	49
Searcy v. Superior Court of Humboldt County (Cal. App.)	202
Sheehan v. Board of Police Com'rs (Cal. App.)	51
Sheehan v. Board of Police Com'rs (Cal. App.)	55
Sherman v. Sherman (Cal. App.)	464
Smyth v. Fitch (Cal. App.)	1049
Stern v. McDonald (Cal. App.)	221
Stern v. Sunset Road Oil Co. (Cal. App.)	651
Stone v. Porter-Burnham Co. (Cal. App.)	836
Stoner v. Security Trust Co. (Cal. App.)	500
Stott v. Southern Sierras Power Co. (Cal. App.)	478
Straus v. Eaton (Cal. App.)	1033
Sugar Loaf Orange Growers' Ass'n v. Skewes (Cal. App.)	1076
Sumner v. Mohn (Cal. App.)	368
Sunset Lumber Co. v. J. I. Metrovich Bldg. Co. (Cal. App.)	208
Tennant v. Cline (Cal. App.)	1065
Tulare County v. Fenn (Cal. App.)	855
Tyler v. J. I. Metrovich Bldg. Co. (Cal. App.)	208
Universal Film Mfg. Co. v. Kerrigan (Cal. App.)	475
Uplinger v. Yonkin (Cal. App.)	822
Vaughn v. Fey (Cal. App.)	1041
Wilkinson v. Rohrer (Cal. App.)	650
Williams v. A. R. G. Bus Co. (Cal. App.)	1036
Williamson v. Hardy (Cal. App.)	646
Willits v. Helmer (Cal. App.)	645
Wilmot v. Moody (Cal. App.)	639
Woodstone Marble & Tile Co. v. Dunsmore Canyon Water Co. (Cal. App.)	213
Wright v. Baldwin (Cal. App.)	377
Zartarian v. Zartarian (Cal. App.)	196

Digitized by Google